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THE
CIVIL COURT MANUAL
(IMPERIAL ACTS)

[BROUGHT UP TO END OF MARCH 1942]

SEVENTH EDITION
[REVISED AND ENLARGED]

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

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ALPHABETICAL LIST
OF
ACTS INCORPORATED IN THIS VOLUME

	Page
Decrees and Orders Validating Act (V of 1936)	2223
Delhi Laws Act (XIII of 1912)	2224
„ (VII of 1915)	2236
Delhi Restriction of Use of Land Act (XII of 1941)	2239
Destruction of Records Act (V of 1917)	2245
Dissolution of Muslim Marriages Act (VIII of 1939)	2246
Divorce Act (IV of 1869)	2248
Dower Act (XXIX of 1839)	2290
Easements Act (V of 1882)	2294
Electricity Act (IX of 1910)	2354
Employers' Liability Act (XXIV of 1938)	2394
Employment of Children Act (XXVI of 1938)	2395
Evidence Act (I of 1872)	2397
Excess Profits Tax Act (XV of 1940)	2569
Factories Act (XXV of 1934)	2596
Factories (Madras Amendment) Act (VI of 1941)	2637
Fatal Accidents Act (XIII of 1855)	2638
Federal Court Act (XXV of 1937)	2641
„ (XXI of 1941)	2642
Federal Court Judges Act (5 & 6 Geo. VI, Ch. 7)	3069
Finance Act (XV of 1930)	2643
„ (1931)	2644
Finance (Supplementary and Extending) Act, 1931	2646
„ (IV of 1932)	2649
„ (VII of 1933)	2649
„ (IX of 1934)	2652
„ (1935)	2654
„ (1936)	2657
„ (1937)	2659
„ (1938)	2661
„ (1939)	2662
„ (1940)	2665
„ (1941)	2667
„ (1942)	2670
Foreigners Act (1864)	2675
„ (II of 1940)	2682
Foreign Marriage Act (XIV of 1903)	2686
Foreign Relations Act (XII of 1932)	2688
Forest Act (XVI of 1927)	2689
General Clauses Act (X of 1897)	2717
Geneva Convention Implementing Act (XIV of 1936)	2739
Government Buildings Act (IV of 1899)	2740
Government Management of Private Estates Act (X of 1892)	2742
Government of India Act, 1919	2744
Government of India Act (1935) (Portion)	2745
Government of India (Amendment) Act 2 & 3 Geo. 6, Ch. 66	2803
Government of India and Burma (Miscellaneous Amendments) Act, 1940	2804
Government Savings Banks Act (V of 1873)	2806
Government Seals Act (III of 1862)	2809
Government Securities Act (X of 1920)—*See* Securities Act	2810
Government Trading Taxation Act (III of 1926)	2810
Guardians and Wards Act (VIII of 1890)	2812
Hindu Disposition of Property Act (XV of 1916)	2854
Hindu Gains of Learning Act (XXX of 1930)	2856
Hindu Inheritance (Removal of Disabilities) Act (XII of 1928)	2857
Hindu Law of Inheritance (Amendment) Act (II of 1929)	2857
Hindu Widows' Re-marriage Act (XV of 1856)	2861
Hindu Women's Rights to Property Act (XVIII of 1937)	2866

PAGE

Illusory Appointments and Infants Property Act (XXIV of 1841) 2868
Immigration into India Act (III of 1924) 2872
Imperial Bank of India Act (XLVII of 1920) 2873
Income-tax Act (XI of 1922) 2894
,, (XXIII of 1941) 3069
Indemnity Act (XXVII of 1919) 3072
Indian and Colonial Divorce Jurisdiction Act (1926) 3072
Indian Federal Court Judges Act, 5 & 6 Geo. VI, Ch. 7 3069
Indian Securities Act—*See* Securities Act 3072
Industrial Statistics Act (XIX of 1942) 3070
Inheritance Act (XXX of 1839) 3073
Insolvency Rules Act (X of 1898) 3076
Insurance Act (IV of 1938) 3077
Insurance Deposits (Temporary Reduction) Act (I of 1941) 3166
Interest Act (XXXII of 1839) 3168
Judicial Officers Protection Act (XVIII of 1850) 3174
Kazi's Act (XII of 1880) 3177
Khaddar (Name Protection) Act (VIII of 1934) 3179
Land Acquisition Act (I of 1894) 3180
Land Acquisition (Mines) Act (XVIII of 1885) 3226
Land Customs Act (XIX of 1924) 3232
Landholders' Public Charges and Duties Act (II of 1853) 3238
Land Improvement Loans Act (XIX of 1883) 3239
Law Reports Act (XVIII of 1875) 3245
Laws Local Extent Act (XV of 1874) 3245
Legal Practitioners Act (I of 1846) 3257
,, ,, (XX of 1853) 3259
,, ,, (XVIII of 1879) 3260
Legal Practitioners (Women) Act (XXIII of 1923) 3301
Legal Practitioners (Fees) Act (XXI of 1926) 3302
Legal Representatives' Suits Act (XII of 1855) 3304
Legislative Assembly (Deputy President's Salary) Act (II of 1921) 3305
Legislative Members Exemption Act (XIII of 1925) 3306
Letters Patent (Allahabad) 3306
,, (Bombay, Madras and Calcutta) 3317
,, (Lahore) 3346
,, (Nagpur) 3356
,, (Patna) 3365
Life Assurance Companies Act—*See* Insurance Act 3378
Limitation Act (IX of 1908) 3378
Local Authorities Loans Act (IX of 1914) 3605
Local Authorities Pensions and Gratuities Act (I of 1919) 3609
Lunacy Act (IV of 1912) 3610
Maintenance Orders Enforcement Act (XVIII of 1921) 3645
Majority Act (IX of 1875) 3651
Marriage Validation Act (II of 1892) 3654
Married Women's Property Act (III of 1874) 3655
Measures of Length Act (II of 1889) 3661
Medical Council Act (XXVII of 1933) 3663
Medical Degrees Act (VII of 1916) 3670
Medical Diplomas Act (XXVIII of 1939) 3672
Merchandise Marks Act (IV of 1889) 3673
Mesne Profits and Improvements Act (XI of 1855) 3682
Metal Tokens Act (I of 1889) 3683
Mines' Maternity Benefit Act (XIX of 1941) 3686
Mortgaged Estates Administration Act (XXIII of 1855) 3689
Motor Vehicles Act (VIII of 1914) 3690
Multi Unit Co-operative Societies Act (VI of 1942) 3690
Municipal Taxation Act (XI of 1881) 3692
Muslim Marriage Dissolution Act (VIII of 1939) 3694
Muslim Personal Law (Shariat) Application Act (XXVI of 1937) 3694
Mussalman Wakf Validating Act (VI of 1913) 3696
,, ,, ,, (XXXII of 1930) 3701
Mussalman Wakf Act (XLII of 1923) 3702

CHRONOLOGICAL LIST

OF

ACTS INCORPORATED IN THIS VOLUME

		PAGE
XXIX of 1839	... Dower Act ...	2290
XXX of 1839	... Inheritance Act ...	3073
XXXII of 1839	... Interest Act ...	3168
XXIV of 1841	... Illusory Appointments and Infants Property Act ...	2868
I of 1846	... Legal Practitioners Act ...	3257
XVIII of 1850	... Judicial Officers Protection Act ...	3174
II of 1853	... Landholders Public Charges and Duties Act ...	3238
XX of 1853	... Legal Practitioners Act ...	3259
XI of 1855	... Mesne Profits and Improvements Act ...	3682
XII of 1855	... Legal Representatives' Suits Act ...	3304
XIII of 1855	... Fatal Accidents Act ...	2638
XXIII of 1855	... Mortgaged Estates Administration Act ...	3689
XV of 1856	... Hindu Widows' Re-marriage Act ...	2861
III of 1862	... Government Seals Act ...	2809
1864	... Foreigners Act ...	2675
IV of 1869	... Divorce Act ...	2248
I of 1872	... Evidence Act ...	2397
V of 1873	... Government Savings Banks Act ...	2806
III of 1874	... Married Women's Property Act ...	3655
XV of 1874	... Laws Local Extent Act ...	3245
IX of 1875	... Majority Act ...	3651
XVIII of 1875	... Law Reports Act ...	3245
XVIII of 1879	... Legal Practitioners Act ...	3260
XII of 1880	... Kazi's Act ...	3177
XI of 1881	... Municipal Taxation Act ...	3692
V of 1882	... Easements Act ...	2294
XIX of 1883	... Land Improvement Loans Act ...	3239
XVIII of 1885	... Land Acquisition (Mines) Act ...	3226
I of 1889	... Metal Tokens Act ...	3683
II of 1889	... Measures of Length Act ...	3661
IV of 1889	... Merchandise Marks Act ...	3673
VIII of 1890	... Guardians and Wards Act ...	2812
II of 1892	... Marriage Validation Act ...	3654
X of 1892	... Government Management of Private Estates Act ...	2742
I of 1894	... Land Acquisition Act ...	3180
X of 1897	... General Clauses Act ...	2717
X of 1898	... Insolvency Rules Act ...	3076
IV of 1899	... Government Buildings Act ...	2740
XIV of 1903	... Foreign Marriage Act ...	2686
IX of 1908	... Limitation Act ...	3378
IX of 1910	... Electricity Act ...	2354
IV of 1912	... Lunacy Act ...	3610
XIII of 1912	... Delhi Laws Act ...	2224
VI of 1913	... Mussalman Wakf Validating Act ...	3696
VIII of 1914	... Motor Vehicles Act ...	3690
IX of 1914	... Local Authorities Loans Act ...	3605
VII of 1915	... Delhi Laws Act ...	2236
VII of 1916	... Medical Degrees Act ...	3670
XV of 1916	... Hindu Disposition of Property Act ...	2854
V of 1917	... Destruction of Records Act ...	2245
1919	... Government of India Act ...	2744
I of 1919	... Local Authorities Pensions and Gratuities Act ...	3609
XXVII of 1919	... Indemnity Act ...	3072
X of 1920	... Government Securities Act ...	2810
XLVII of 1920	... Imperial Bank of India Act ...	2873
II of 1921	... Legislative Assembly (Deputy President's Salary) Act ...	3305
XVIII of 1921	... Maintenance Orders Enforcement Act ...	3645
XI of 1922	... Income-tax Act ...	2894

		Page
XXIII of 1923	Legal Practitioners (Women) Act	3301
XLII of 1923	Mussalman Wakf Act	3702
III of 1924	Immigration into India Act	2872
XIX of 1924	Land Customs Act	3232
XXIII of 1925	Legislative Members Exemption Act	3306
1926	Indian and Colonial Divorce Jurisdiction Act	3072
III of 1926	Government Trading Taxation Act	2810
XXI of 1926	Legal Practitioners (Fees) Act	3302
XVI of 1927	Forest Act	2689
XII of 1928	Hindu Inheritance (Removal of Disabilities) Act	2857
II of 1929	Hindu Law of Inheritance (Amendment) Act	2857
XV of 1930	Finance Act	2643
XXX of 1930	Hindu Gains of Learning Act	2856
XXXII of 1930	Mussalman Wakf Validating Act	3701
1931	Finance Act	2644
1931	Finance (Supplementary and Extending) Act	2646
IV of 1932	Finance Act	2649
XII of 1932	Foreign Relations Act	2688
VII of 1933	Finance Act	2649
XXVII of 1933	Medical Council Act	3663
VIII of 1934	Khaddar (Name Protection) Act	3179
IX of 1934	Finance Act	2652
XXV of 1934	Factories Act	2596
1935	Finance Act	2654
1935	Government of India Act (Portion)	2745
1936	Finance Act	2657
V of 1936	Decrees and Orders Validating Act	2223
XIV of 1936	Geneva Convention Implementing Act	2739
1937	Finance Act	2659
XVIII of 1937	Hindu Women's Rights to Property Act	2866
XXV of 1937	Federal Court Act	2641
XXVI of 1937	Muslim Personal Law (Shariat) Application Act	3694
1938	Finance Act	2661
IV of 1938	Insurance Act	3077
XVI of 1938	Employment of Children Act	2395
XXIV of 1938	Employer's Liability Act	2394
1939	Finance Act	2662
1939	Government of India (Amendment) Act 2 & 3 Geo. VI, Ch. 66	2803
VIII of 1939	Dissolution of Muslim Marriages Act	2246
XXVIII of 1939	Medical Diplomas Act	3672
1940	Finance Act	2665
1940	India and Burma (Miscellaneous Amendments) Act	2804
II of 1940	Foreigners Act	2682
XV of 1940	Excess Profits Tax Act	2569
1941	Finance Act	2667
I of 1941	Insurance Deposits (Temporary Reduction) Act	3166
VI of 1941	Factories (Madras Amendment) Act	2637
XII of 1941	Delhi Restriction of Use of Land Act	2239
XIX of 1941	Mines' Maternity Benefit Act	3686
XX of 1941	Federal Courts (Amendment) Act	2642
XXIII of 1941	Income-tax (Amendment) Act	3069
1942	Federal Court Judges Act, 5 & 6 Geo. VI, Ch. 7	3069
1942	Finance Act	2670
VI of 1942	Multi Unit Co-operative Societies Act	3690
XIX of 1942	Industrial Statistics Act	3070
	Letters Patent (Allahabad)	3306
	,, (Bombay, Calcutta and Madras)	3317
	,, (Lahore)	3346
	,, (Nagpur)	3356
	,, (Patna)	3365

THE
CIVIL COURT MANUAL
(IMPERIAL ACTS)

[VOLUME II]

THE DECREES AND ORDERS VALIDATING ACT (V OF 1936).

[*26th April,* 1936.

An Act to remove certain doubts and to establish the validity of certain proceedings in High Courts of Judicature in British India.

WHEREAS doubts have arisen as to the validity of certain proceedings in High Courts of Judicature in British India under the Letters Patent erecting and establishing those Courts;

AND WHEREAS it is expedient to terminate those doubts and to establish the validity of those proceedings;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE DECREES AND ORDERS VALIDATING ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Certain decrees and orders not to be called in question.

2. No decree passed or order made by the High Court of Judicature at Fort William in Bengal, the High Court of Judicature at Madras or the High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction under clause 12 of its Letters Patent, or by the High Court of Judicature at Rangoon, in the exercise of its original civil jurisdiction under clause 10 of its Letters Patent, shall be called in question in any proceedings before any other Court on the ground that the High Court passing the decree or making the order had no jurisdiction to pass or make the decree or order.

Restoration of proceedings.

3. Where in any proceedings concluded on or after the 26th day of August, 1935, any such decree or order has been found to be invalid on such ground by any Court, such finding shall be void and of no effect; and the

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NOTES.

Sec. 2.—S. 2 makes provision not only for the sanctity of the decrees passed by the Presidency High Court but has declared that orders passed by those Courts will also be sacrosanct. Hence decrees passed by the High Court of Bombay and orders in execution thereof cannot be declared by the High Court of Allahabad to be *ultra vires* or without jurisdiction. 1941 A.L.J. 511= 1941 All. 358.

Court shall, notwithstanding anything to the contrary in the Indian Limitation Act, 1908, or any other law for the time being in force, on application made within six months from the commencement of this Act by any person prejudicially affected by such finding, restore the proceedings at and continue the proceedings from the stage reached immediately before the order embodying or based on such finding was made.

THE DELHI LAWS ACT (XIII OF 1912).

Supplemented and Amended Act (*VII of* 1915).

Year.	No.	Short title.	Amendment.
1912	XIII	The Delhi Laws Act, 1912	Supplemented and amended, Act VII of 1915.

CONTENTS.

SECTIONS.
1. Short title and commencement.
2. Saving of territorial application of enactments.
3. Construction of certain enactments in force in the territories mentioned in Schedule A.
4. Powers of Courts and Local Government for purposes of facilitating application of enactments.

SECTIONS.
5. Vesting of powers of separate Officers in single Officer.
6. Pending Proceedings.
7. Power to extend enactments in force in other parts of British India with modifications and restrictions.

SCHEDULE A.
SCHEDULE B.

[18*th September*, 1912.

An Act to provide for the application of the law in force in the Province of Delhi and for the extension of other enactments thereto.

WHEREAS by Proclamation published in Notification No. 911, dated the seventeenth day of September, 1912, the Central Government, with the sanction and approbation of the Secretary of State for India, has been pleased to take under its immediate authority and management the territory mentioned in Schedule A, which was formerly included within the Province of the Punjab, and to provide for the administration thereof by a Chief Commissioner as a separate Province to be known as the Province of Delhi;

AND WHEREAS it is expedient to provide for the application of the law in force in the said territory, and for the extension of other enactments thereto; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE DELHI LAWS ACT, 1912; and

(2) It shall come into force on the first day of October, 1912.

Saving of territorial application of enactments.

2. The Proclamation referred to in the preamble shall not be deemed to have effected any change in the territorial application of any enactment notwithstanding that such enactment may be expressed to apply or extend to the territories for the time being under any particular administration.

Construction of certain enactments in force in the territories mentioned in Schedule A.

3. All enactments made by any authority in British India and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments which immediately before the commencement of this Act were in force in, or prescribed for, any of the territory mentioned in Schedule A, shall in their

application to that territory, be construed as if references therein to the authorities, or gazette mentioned in column 1 of Schedule B were references to the authorities, or gazette respectively mentioned or referred to opposite thereto in column 2 of that Schedule:

[1][* * * *]

Powers of Courts and Provincial Government for purposes of facilitating application of enactments.

4. For the purpose of facilitating the application to the territory mentioned in Schedule A or any part thereof of any enactment passed before the commencement of this Act or of any notification, order, scheme, rule, form or by-law issued, made or prescribed under any such enactment—

(1) Any Court may, subject to the other provisions of this Act, construe the enactment, notification, order, scheme, rule, form or by-law with such alterations not affecting the substance as may be necessary or proper to adapt it to the matter before the Court, and

(2) the Provincial Government may, subject to the other provisions of this Act by notification in the *Official Gazette,* direct by what Officer any power or duty shall be exercised or discharged, and any such notification shall have effect as if it enacted in this Act.

Vesting of powers of separate Officers in single Officer.

5. (1) A notification issued under S. 4, sub-section (2), may direct that any powers or duties vested in separate Officers may be consolidated and vested in, and discharged by, a single Officer.

(2) Where by such a notification appellate powers are consolidated and vested in a single Officer, the period of limitation for the consolidated appeal shall be the longest period provided in the case of an appeal to any of the Officers whose powers are so consolidated.

Pending proceedings.

6. Nothing in this Act shall affect any proceeding which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule A, and every such proceeding shall be continued as if this Act had not been passed:

Provided that all proceedings which at the commencement of this Act are pending before the Commissioner of the Division or any other authority within the territory mentioned in Schedule A shall be transferred to, and disposed of by, such authorities in the Province of Delhi as the Provincial Government may, by notification in the *Official Gazette,* direct.

Power to extend enactments in force in other parts of British India with modifications and restrictions.

7. The [2][Provincial Government] may, by notification in the *Official Gazette,* extend with such restrictions and modifications as [2][it] think fit to [3][the Province of Delhi] or any part thereof, any enactment which is in force in any part of British India at the date of such notification.

SCHEDULE A.

(See *section* 3.)

THE PROVINCE OF DELHI.

That portion of the District of Delhi comprising the Tahsil of Delhi and the police station of Mahrauli.

J. N. Das

Advocate High Court
Jammu & Kashmir
Srinagar.

LEG. REF.

[1] Proviso omitted by A.O., 1937.

[2] Substituted by *ibid*.

[3] The words "the Province of Delhi" were substituted for the words "The territory mentioned in Schedule A" by Act VII of 1915, S. 7.

SCHEDULE B.

(See *section* 3.)

1	2
Reference.	Construction.
1. [1][* * *]	The Provincial Government of Delhi.
2. The Provincial Government of the Punjab	
3. [1][* * *]	
4. [1][* * *]	
5. The Chief Customs Authority	
6. The Financial Commissioner	
7. The Commissioner of Revenue	
8. The Commissioner of the Division	
9. The Commissioner	
10. The Chief Secretary to Government	
11. A Secretary to Government or to the Provincial Government.	
12. All officers and official bodies not mentioned in the foregoing clauses except the Treasurer of Charitable Endowments whose authority extended immediately betore the commencement of this Act over the territory mentioned in Schedule A.	Such officials or official bodies respectively as the Provincial Government may, by notification in the *Official Gazette* direct.
13. [2][* * *]	

NOTIFICATIONS UNDER DELHI LAWS ACT, 1912.

HOME DEPARTMENT.

[30*th May*, 1939.

No. 189/38.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), and in supersession of all previous notifications under that section extending Punjab Acts to the Province of Delhi or any part thereof, except the notification of the Government of India in the Department of Education, Health and Lands, No. F 117/32-L. & O., dated the 26th January, 1933, the Central Government is pleased to extend to the Province of Delhi or such part thereof as is specified in the second column of the Schedule annexed hereto, the enactments specified in the corresponding entry in the first column thereof, subject to the restrictions and modifications, if any, specified in the corresponding entry in the third column, and to the following provisions namely :—

(*i*) references in the first column of the said schedule to an Act shall be deemed to be references to that Act as in force in the Punjab on the date of this notification, and

(*ii*) references in the said enactments to the Provincial Government shall be construed as references to the Chief Commissioner of Delhi, and references to the Punjab shall be construed as references to the Province of Delhi.

Provided that all notifications, orders, byelaws, rules and regulations made or issued under any of the enactments extended to the Province of Delhi or any part thereof by the notifications hereby superseded, shall continue to be in force as if made or issued under the corresponding enactment extended by this notification ; and all proceedings taken under any of the enactments extended by the superseded notifications shall be continued as if taken under the corresponding enactment extended by this notification.

SCHEDULE.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
1. The Punjab Pre-emption Act, 1913 (Punjab Act I of 1913).	That part of the province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
2. The Redemption of mortgages (Punjab) Act, 1913 (Punjab Act II of 1913.)	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.

LEG. REF.

[1] Items 1, 3 & 4 were repealed by A.O., 1937.

[2] Item 13 was repealed by *ibid.*

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
3. The Punjab Excise Act, 1914 (Punjab Act I of 1914.)	The Province of Delhi.	(1) Throughout the Act for the words "Financial Commissioner" wherever they occur, the words "Chief Commissioner" shall be substituted. (2) Clauses (4), (7) and (11) of section 3, sections 9, 13 and 33-A, sub-section (3) of section 35 and clause (*b*) of sub-section (2) of section 58 shall be omitted. (3) For section 8 the following section shall be substituted, namely:—"8. (*a*) The general superintendence and administration of all matters, relating to excise shall vest in the Chief Commissioner. (*b*) Subject to the control of the Chief Commissioner and unless the Chief Commissioner shall by notification otherwise direct, the Collector shall control all the excise officers in the Province of Delhi." (4) In clause (*a*) of section 10 the word "other" shall be omitted. (5) For section 12 the following section shall be substituted, namely :— "12. The Jurisdiction of the Collector and other excise officers, shall, unless the Chief Commissioner otherwise directs, extend to the whole of the Province of Delhi." (6) In clause (*b*) of section 15 for the words "A Commissioner or Collector" the words "The Collector" shall be substituted. (7) In sections 21 and 22 for the words "as the Provincial Government may impose" the words "as he thinks fit" shall be substituted.
4. The Punjab Military Transport Act 1916 (Punjab Act I of 1916.)	The Province of Delhi.	Throughout the Act for the the words "Central Government" wherever they occur, the words "Chief Commissioner" shall be substituted.
5. The Punjab Courts Act, 1918 (Punjab Act VI of 1918.)	The Province of Delhi.	In section 20, for the words "Provincial Government" the words "Central Government" shall be substituted.[1]
6. The Punjab Village and Small Towns Patrol Act, 1918 (Punjab Act VIII of 1918.)	The Province of Delhi.	...
7. The Punjab District Boards Amendment Act, 1919 (Punjab Act V of 1919).	The Province of Delhi.	...
8. The Punjab Primary Education Act, 1919 (Punjab Act VII of 1919).	The Province of Delhi.	(1) Sub-section (2) of section 1 shall be omitted. (2) In section 10— (*i*) in clause (*a*) after the word "education" the words "conducted in his vernacular" shall be inserted ; and

---

[1] Added by notification No. 13-6-1939 dated 22nd August, 1939.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		(*ii*) to clause (*c*) the following proviso shall be added, namely :— “ provided that in the case of boys over ten years of age attendance at a night school conducted on lines approved by the Superintendent of Education shall be deemed to satisfy this condition.” (3) In section 11 for the words “ Director of Public Instruction ” the words “ Superintendent of Education ” shall be substituted.
9. The Punjab Limitation (Custom) Act, 1920 (Punjab Act I of 1920).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
10. The Punjab Custom (Power to Contest) Act, 1920 (Punjab Act II of 1920).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
11. The Punjab Municipal Amendment Act, 1921 (Punjab Act I of 1922).	The Province of Delhi.	Sub-section (2) of section 1 and section 5 shall be omitted.
12. The Punjab Village Panchayat Act 1921 (Punjab Act III of 1922).	The Province of Delhi.	(1) In the Second proviso to section 4 for the words and figures “ estate as defined by the Land Revenue Act, 1887,” the words and figures “ Estate as defined by the Punjab Land Revenue Act, 1887, or of a mahal as defined by the United Provinces Land Revenue Act, 1901 ” shall be substituted. (2) In the proviso to section 26, after the figures “ 1887 ” the words and figures “ or the Agra Tenancy Act, 1901, as the case may be ” shall be inserted. (3) In section 26-A, the words and figures “ or the Punjab Loans Limitation Act, 1904 ” shall be omitted.
13. The Court-fees (Punjab Amendment) Act, 1922 (Punjab Act VII of 1922).	The Province of Delhi.	Sub-section (3) of section 1 shall be omitted.
14. The Indian Stamp (Punjab Amendment) Act, 1922 (Punjab Act VIII of 1922.)	The Province of Delhi.	Sub-section (3) of section 1 shall be omitted.
15. The Punjab District Boards (Amendment) Act, 1922 (Punjab Act XI of 1922).	The Province of Delhi.	...
16. The Punjab Municipal (Amendment) Act, 1923 (Punjab Act II of 1923).	The Province of Delhi.	[1]In section 16, in the substituted section 61, after the words “ until provision to the contrary is made by the Central Legislature ” the following shall be inserted namely :— “ and, with the previous sanction of the Provincial Government, may, from time to time,— (*i*) vary the limits fixed under clause (*g*) of section 188 for the collection of any terminal tax, and

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LEG. REF.

[1] Notification No. 174/39 dated 9th November, 1939.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		(*ii*) vary the schedule of animals or articles subject to such tax and enhance, reduce or modify the rates thereof".
17. The Punjab Opium Smoking Act 1923 (Punjab Act VI of 1923).	The Delhi Municipality.	Sub-section (2) and (3) of section 1 shall be omitted.
18. The Punjab Motor Vehicles Taxation Act, 1924 (Punjab Act IV of 1924.)	The Province of Delhi.	(1) Sub-sections (2) and (3) of section 1 shall be omitted. (2) In section 4, in sub-section (1) the words and figures "before the 30th day of April, 1925, or if such person commences to keep the motor vehicles for use after the 10th day of April 1925 then," and the proviso to sub-section (2) shall be omitted. (3) In sections 11 and 12 for the word "Collector" wherever it occurs, the words "Additional District Magistrate" shall be substituted. (4) In section 12 for the word "Commissioner," wherever it occurs, the words "Deputy Commissioner" shall be substituted.
19. The Punjab Municipal (Amendment) Act, 1925 (Punjab Act I of 1925.)	The Province of Delhi.	...
20. The Opium (Punjab Amendment) Act, 1925 (Punjab Act III of 1925.)	The Province of Delhi.	...
21. The Punjab District Boards (Amendment) Act, 1925 (Punjab Act VI of 1925.)	The Province of Delhi.	Clause (*i*) of section 2 shall be omitted.
22. The Punjab Vaccination Law Amendment Act, 1925 (Punjab Act IX of 1925).	The Province of Delhi.	...
23. The Punjab Court-fees (Second Amendment) Act, 1926 (Punjab Act VI of 1926).	The Province of Delhi.	Sub-section (2) of section 1 shall be omitted.
24. The Prisons (Punjab Amendment) Act, 1926 (Punjab Act IX of 1926).	The Province of Delhi.	...
25. The Good Conduct Prisoners' Probational Release Act, 1926 (Punjab Act X of 1926).	The Province of Delhi.	...
26. The Punjab Borstal Act, 1926 (Punjab Act XI of 1926).	The Province of Delhi.	(1) For section 3 the following section shall be substituted, namely :— "3. The Borstal Institution in which orders of detention passed under this Act are to be served shall be the Borstal Institution at Lahore." (2) Section 4, sections 15 to 34 and section 36 shall be omitted.
27. The Punjab Municipal (Amendment) Act, 1926 (Punjab Act XV of 1926).	The Province of Delhi.	Section 2, clause (*i*) of section 5 and sections 6 and 8 shall be omitted.
28. The Punjab Tenancy (Amendment) Act, 1927 (Punjab Act II of 1927).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	...
29. The Punjab Land Revenue (Amendment) Act, 1928	That part of the province of Delhi which is described	(1) All references to the Financial Commissioner or the Com-

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
(Punjab Act III of 1928).	in Schedule A to the Delhi Laws Act, 1912.	missioner shall be read as references to the Chief Commissioner of Delhi ; (2) In section 4, in the proviso to the new section 48-B, for the words, brackets and figures “ at the time of the commencement of the Punjab Land Revenue (Amendment) Act, 1928,” the words and figures “ on the 30th May, 1939 ” shall be substituted ; (3) In clause (*ii*) of section 6, the words “ through the Financial Commissioner ” shall be omitted ; (4) In clause (*iii*) of section 7, the words and figures “ or of an area declared to be a small town under the provisions of the Punjab Small Towns Act, 1921 ” shall be omitted ; (5) In section 13, for the words, figures and letter, “ subject to the provisions of section 60-A ” the words “ subject to the condition of previous publication ” shall be substituted ; (6) In section 14, the new sections 60-A and 60-B, and in new section 60-C, the words “ or the Financial Commissioner with the approval of the Provincial Government ” shall be omitted.
30. The Public Gambling (Punjab Amendment) Act, 1929 (Punjab Act I of 1929).	The Province of Delhi.	Sub-sections (2) and (3) of section 1 shall be omitted.
31. The Punjab Vaccination Law Amendment Act, 1929 (Punjab Act II of 1929).	The Province of Delhi.	...
32. The Punjab Municipal and Small Towns Amending Act, 1929 (Punjab Act IV of 1929).	The Province of Delhi.	Clause (*ii*) of section 2 and section 3 shall be omitted.
33. The Punjab Tenancy (Amendment) Act, 1929 (Punjab Act V of 1929).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	...
34. The Punjab Pure Food Act, 1929 (Punjab Act VIII of 1929).	The Province of Delhi.	(1) In section 6, the words “ The Director of Public Health may and ” in sub-section (1) and sub-sections (2) and (4) shall be omitted. (2) In section 19 the words “ of the Director of Public Health or ” and the words “ as the case may be ” shall be omitted. (3) Sub-section (5) of section 22 shall be omitted. (4) In the Schedule after the words and figures “ Punjab Pure Food Act, 1929 ” wherever they occur, the words “ as extended to the Province of Delhi ” shall be inserted.
[1]“ 34-A. The Punjab Regulation of Accounts Act, 1930 (Punjab Act I of 1930).	The Province of Delhi.	(1) In clause (*iii*) of sub-section (7) of section 2, for the words “ the Central or any Provincial

LEG. REF.

[1] Notification No. 194/1939, dated 11th Sep., 1940.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		Government" wherever they occur, the words " any Government in British India " shall be substituted. (2) In section 6 :— (*a*) in sub-section (1) after the word " may " the words " subject to the condition of previous publication " shall be inserted ; and (*b*) the proviso to sub-section (2) shall be omitted."
35. The Punjab Alienation of Land (Amendment) Act, 1931 (Punjab Act I of 1931).	The Province of Delhi.	...
36. The Punjab Nurses Registration Act, 1932 (Punjab Act I of 1932).	The Province of Delhi.	Only sections 2, 17, 19, 23 and 24 shall be in force subject to the following modifications, namely :— (1) For section 2 the following section shall be substituted :— " 2. In this Act,— (*a*) "registered person" means— (*i*) a person registered under a law which is in force in any part of British India and which has been recognised by a notification of the Chief Commissioner, or (*ii*) a person who is certified by the Chief Health Officer, Delhi, to have been employed, or to have been practising as a nurse, health-visitor, midwife, nurse-*dai*, trained-*dai*, or *dai* in the Delhi Province on the 10th July 1935 ; Provided that no such certificate shall be granted to any person unless it is applied for on or before the 10th July, 1940 ; and (*b*) " unregistered person " means any person other than a " registered person." 2. In sub-section (2) of section 17 and section 19, for the words " Provincial Government," the words " Chief Commissioner " shall be substituted. 3. In sub-section (1) of section 19, for the words and figures " sections 17 and 18 " the word and figure " section 17 " shall be substituted. 4. In section 23, for the words " from the beginning to the end of clause (*c*)" the following words shall be substituted namely :— " Any person who dishonestly makes use of any certificate of registration issued to him or to any other person under a law in force in any part of British India which has been recognised by the Chief Commissioner in pursuance of sub-clause (*i*) of clause (*a*) of section 2 of this Act, or of any certificate issued to him or to

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		any other person by the Chief Health Officer, Delhi, in pursuance of sub-clause (*ii*) thereof."
37. The Punjab Wild Birds and Wild Animals Protection Act, 1933 (Punjab Act II of 1933).	The Province of Delhi.	...
38. The Punjab Municipal (Amendment) Act, 1933 (Punjab Act III of 1933).	The Province of Delhi.	(1) Sub-section (2) of section 1 and section 2 shall be omitted. (2) In clause (*v*) of section 3 for the words " District Medical Officer of Health " the words " Chief Health Officer " shall be substituted. (3) In section 9 for the words " Secretary, Transferred Departments," the words " Deputy Commissioner " shall be substituted. (4) In section 15, in clause (*b*) of sub-section (1) of the substituted section 33, the figures " 146," " 155," " 156," and " 157 " shall be omitted. (5) In section 30, sub-sections (4) and (5) of the substituted section 62, shall be omitted. [1](6) In section 31, in the substituted section 78-A,— (*i*) in sub-section (1) after the words " has agreed with " the words " a committee of another municipality or " shall be inserted; (*ii*) In sub-section (2) after the words " joint area of the municipality and " the words " the other Municipality or the " and (*b*) after the words " subject to the control of " the words " the Committeee of the other Municipality or " shall be inserted.
39. The Punjab Municipal (Amendment) Act, 1934 (Punjab Act I of 1934).	The Province of Delhi.	(1) Sub-section (2) of section 1 shall be omitted. (2) For section 13 the following section shall be substituted, namely:— " 13. In clause (*c*) of sub-section (1) of section 192 of the said Act, for the words " the Municipal area " the words " such unbuilt area " shall be substituted
40. The Punjab Land Revenue (Amendment) Act, 1934 (Punjab Act VI of 1934).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	...
41. The Punjab Relief of Indebtedness Act, 1934 (Punjab Act VII of 1934).	The Province of Delhi.	...
42. The Punjab Criminal Law (Amendment) Act, 1935 (Punjab Act II of 1935).	The Province of Delhi.	...
43. The Punjab Municipal (Amendment) Act, 1935 (Punjab Act III of 1935).	The Province of Delhi.	...

LEG. REF.

[1] Notification No. 174/39, dated 9th November, 1939.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
[1]43-A. The Punjab Debtor's Protection Act, 1936 (Punjab Act II of 1936).	The Province of Delhi.	In section 6, for the word "Commissioner" the words "Chief Commissioner" shall be substituted."
[2]43-B. The Punjab Entertainments Duty Act, 1936 (Punjab Act III of 1936).	The Province of Delhi.	(1) In clause (*b*) of section 2, after the words and figures "Punjab Excise Act, 1914," the words "as extended to the Province of Delhi" shall be inserted. (2) In section 3— (*i*) in sub-section (1), for the words "Government of the Punjab" and "Provincial Government", the words "Central Government" shall be substituted; (*ii*) in sub-section (2) the words "it shall also be laid before the Punjab Legislative Assembly, and shall only take effect after it has been passed with such amendments, if any, as the assembly may make therein" shall be omitted; (*iii*) sub-section (3) shall be omitted. (3) In sub-section (1) of section 5, for the words "Provincial Government", the words "Central Government" shall be substituted. (4) For the entries in the schedule, the following entries shall be substituted:— "(1) The Municipality of Delhi. (2) The Municipality of New Delhi. (3) The Notified area of the Civil Station, Delhi. (4) The Notified area of the Delhi Fort."
44. The Punjab Copying Fees Act, 1936 (Punjab Act V of 1936).	The Province of Delhi.	...
45. The Punjab Alienation of Land (Amendment) Act, 1936 (Punjab Act VII of 1936).	The Province of Delhi.	...
46. The Suits Valuation (Punjab Amendment) Act, 1938 (Punjab Act I of 1938).	The Province of Delhi.	...
[3]47. The Court-Fees (Punjab Amendment) Act, 1939 (Punjab Act IV of 1939).	The Province of Delhi.	...
[4]47-A. The Punjab Alienation of Land (Amendment) Act, 1938 (Punjab Act II of 1938).	The Province of Delhi.	...
[4]48. The Punjab Registration of Money-lenders Act, 1938 (Punjab Act III of 1938).	The Province of Delhi.	(1) In section 2,— (*a*) clause (3) shall be omitted. (*b*) in sub-clause (*iv*) of clause (8), for the words "the Central or any Provincial Government"

LEG. REF.

[1] Notification No. 194/1939, dated 11th September, 1940.

[2] Notification No. 173/1939, dated 9th November, 1939

[3] Notification No. 132/39, dated 31st July 1939.

[4] Items 47-A to 55 added by Notification No. 194/39, dated 11th September, 1940.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		wherever they occur, the words "any Government in British India" shall be substituted. (2) in sub-clause (*iii*) of clause (*b*) of section 3, for the words "a commissioner", the words "the Chief Commissioner" shall be substituted. (3) in sections 7 and 11, for the word "Commissioner" wherever it occurs, the words "Chief Commissioner" shall be substituted.
[1]49. The Punjab Alienation of Land (Third Amendment) Act, 1938 (Punjab Act V of 1938).	The Province of Delhi.	In sub-clause (*iv*) of clause (4) of the Explanation below the section inserted by section 3, for the words "the Central or any Provincial Government" wherever they occur the words "any Government in British India" shall be substituted.
[1]50. The Punjab Alienation of Land (Fourth Amendment) Act, 1938 (Punjab Act VIII of 1938).	The Province of Delhi.	...
[1]51. The Provincial Insolvency (Punjab Amendment) Act, 1939 (Punjab Act III of 1939).	The Province of Delhi.	...
[1]53. The Punjab Excise (Amendment) Act, 1940 (Punjab Act I of 1940).	The Province of Delhi.	...
[1]54. The Punjab Motor Vehicles Taxation (Amendment) Act, 1940 (Punjab Act II of 1940).	The Province of Delhi.	Sections 7, 8, 9 and 10 shall be omitted.
[1]55. The Code of Criminal Procedure (Punjab Amendment) Act, 1940 (Punjab Act XI of 1940).	The Province of Delhi.	...
[2]56. The Punjab Criminal Law (Second Amendment) Act, 1940 (Punjab Act XIII of 1940).	The Province of Delhi.	...
[3]57. The Punjab Entertainments Duty (Amendment) Act, 1941 (Punjab Act III of 1941).	The Province of Delhi.	
[6]57-A. The Punjab Suppression of Indecent Advertisements Act, 1941 (Punjab Act VII of 1941).	The Province of Delhi.	

No. 189/38-I.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to cancel the following notifications of the Government of India, extending certain enactments to the Province of Delhi, namely :—

(*i*) No. 460, dated the 13th March, 1914,

(*ii*) No. 5987-G., dated the 2nd June 1917, and

(*iii*) No. F. 844/36, dated the 15th January, 1937.

LEG. REF.

[1] Items 47 to 55 inserted by notification No. 194/39, dated 11th September, 1940.

[2] Notification No. 194/39, dated 30th November, 1940.

[3] Notification No. 104 /41, dated 11th September, 1941.

[4] Notification No. 78/1941, dated 3rd May, 1941.

No. 189/38-II.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to direct that the following amendment shall be made in the notification of the Government of India in the Home Department, No. F. 32/3/37, dated the 10th November, 1937, namely :—

"In modification 1, for the words 'local' at both places where it occurs, the word 'Provincial' shall be substituted."

No. 173/38 : dated 26th November, 1938.—In exercise of the power conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to extend to the Province of Delhi the provisions of the Punjab Suppression of Immoral Traffic Act, 1935 (Punjab Act IV of 1935), with the following modifications, namely :—

(*i*) For the words "Provincial Government" wherever they occur the words Chief Commissioner" shall be substituted.

(*ii*) In section 2 for the word "Punjab" the words "Delhi Province" shall be substituted.

(*iii*) In section 17 (1), for the words "may make rules" the words "may, subject to the condition of previous publication, make rules" shall be substituted ; and (*ii*) the proviso shall be omitted.

No. F. 23-12/38-H : (Dated 15th February, 1939).—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912) and in supersession of the notifications of the Government of India, in the Department of Education, Health and Lands. No. F. 24-15/36-H., dated the 3rd June, 1936 and No. F. 24-15/36-H., dated the 26th January, 1937, the Central Government is pleased to extend to the Province of Delhi the enactments specified in the first column of the Schedule hereto annexed, with such restrictions and modifications, if any, as are specified in the corresponding entry in the second column of the said schedule.

SCHEDULE.

Name of Act. 1	Restrictions and Modifications. 2
1. The Punjab Municipal (Amendment) Act, 1933 (Punjab Act III of 1933).	(1) Sub-section (2) of section 1, and section 2 shall be omitted. (2) In clause (*v*) of section 3, for the words "District Medical Officer of Health" the words "Chief Health Officer" shall be substituted. (3) In section 9, for the words "Secretary, Transferred Departments," the words "Deputy Commissioner" shall be substituted. (4) In section 15, in clause (*b*) of sub-section (1) of substituted section 33, the figures "146" and "155, 156, 157" shall be omitted.
2. The Punjab Municipal (Amendment) Act, 1934 (Punjab Act I of 1934).	(1) Sub-section (2) of section 1 shall be omitted. (2) For section 13, the following section shall be substituted, namely :— "3. In clause (*c*) of sub-section (1) of section 192 of the said Act, for the words 'the Municipal area' the words 'such unbuilt area' shall be substituted.
3. The Punjab Municipal (Amendment) Act, 1935 (Punjab Act III of 1935).	

Notification No. 174/39 and 173/39 dated 9th November 1939.—The following amendments shall be made in the Notification No. 189/38 dated 30th March, 1939 and the Schedule annexed thereto namely,—

1. For clause (*i*) in the said notification the following clause shall be substituted :—

"(*i*) references in the first column of the said Schedule to an Act shall be deemed to be references—

(*a*) in the case of an amending Act, to that Act as modified by the inclusion therein of the adaptations and modifications, if any, made in the amendments effected thereby in the Act which it amended, by the Government of India (Adaptation of Indian Laws) Order, 1937 and

(*b*) in the case of an Act other than an amending Act, to that Act as in force in the Punjab on the date of this notification, and".

No. A—801 dated 19th March, 1941.—In exercise of the powers conferred by section 7 o the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to extend to the Province of Delhi the Bombay Lifts Act, 1939 (Bombay Act X of 1939), subject to the following modifications, namely :—

(*i*) References wherever they occur to the Provincial Government shall be construed as references to the Chief Commissioner.

(*ii*) In sub-section (1) of section 2, for the word "Bombay" the word "Delhi" shall be substituted ; and to the said sub-section, the following porviso shall be added, namely :—

"Provided that except in so far as the Chief Commissioner may otherwise direct, nothing in this Act shall apply to any lift in any building maintained by the Public Works Department or the Military Engineer Services;"

(*iii*) In sub-section (1) of section 9, the words "in the City of Bombay to the Commissioner of Police and elswhere" shall be omitted.

No. F. 28-13 (5)/41-F. & L. (C.)/19th May 1941.—In exercise of the powers conferred by section 7 of the Delhi Laws Act 1912, (XIII of 1912), the Central Government is pleased to extend to the province of Delhi, the United Provinces Town Improvement (Appeals) Act, 1920 (III of 1920), with the following modification, namely :—

In section 2 of the said Act, for clause (1) the following clause shall be substituted, namely:—

"(1) 'High Court' means the High Court of Judicature at Lahore ; and".

No. 189/38-III.—In exercise of the powers conferred by the fourth paragraph of section 1 of the Transfer of Property Act, 1882 (IV of 1882), the Central Government is pleased to extend sections 54, 107 and 123 of the said Act to the following areas in the Province of Delhi, namely :—

(*a*) Area within the jurisdiction of the Delhi Municipal Committee,

(*b*) Area within the jurisdiction of the New Delhi Municipal Committee,

(*c*) Area within the jurisdiction of the Notified Area Committee, Civil Lines, and

(*d*) Area within the jurisdiction of the Notified Area Committee, Fort.

THE DELHI LAWS ACT (VII OF 1915).

Year.	No.	Short title.	Amendment.
1915	VII	The Delhi Laws Act, 1915.	Am., Act XVIII of 1919. Rep. in pt., Act X of 1927.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill.—

"Owing to the issue of the proclamation cited in the preamble, adding certain territory, previously included in the United Provinces of Agra and Oudh, to the Province of Delhi, it has become necessary to take steps to declare the law in force in the territory so added.

Save in respect of a few enactments which are referred to below, the law in force in the Province of Delhi is declared to be in force in the territory now added to that province.

The enactments in force in the province of Delhi which are declared not to be in force in this territory are set forth in Schedule II.

In place of them the enactments specified in Schedule III, which are already in force in this area, are continued in force there. It is clearly undesirable to make any change in these laws, which mainly relate to land, if such a course can be avoided".—*Fort St. George Gazette,* Part III, 1st March, 1915.

CONTENTS.

SECTIONS.
1. Short title and commencement.
2. Application to added area of law in force in existing Provinces of Delhi.
3. Continuance in added area of certain laws now in force in the United Provinces.
4. Provision for facilitating application of certain enactments.
5. Exclusion of certain enactments from the added area.
6. Pending proceedings.
7. Amendment of section 7 of Act XIII of 1912. [*Repealed.*]
8. Construction.

SCHEDULE I.
SCHEDULE II.
SCHEDULE III.

[*22nd March,* 1915.

An Act to declare the law in force in certain territory added to the Province of Delhi.

WHEREAS by Proclamation published in Notification No. 984-C, dated 22nd day of February, 1915, the Governor-General in Council, with the sanction and approbation of the Secretary of State for India, has been pleased to take under his immediate authority and management the territory mentioned in Schedule

I, which was formerly included within the United Provinces of Agra and Oudh, and to include the said territory in the Province of Delhi with effect from the 1st April, 1915;

And whereas it is expedient to declare the law in force in the said territory;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE DELHI LAWS ACT, 1915.

(2) It shall come into force on the first day of April, 1915.

Application to added area of law in force in existing Province of Delhi.

2. All enactments (except the enactments specified in Schedule II) for the time being in force in the territory specified in Schedule A to the Delhi Laws Act, 1912, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments shall be deemed to be in force in the territory specified in Schedule I in the same manner and subject to the same modifications as they are for the time being in the territory specified in the said Schedule to the said Act.

Continuance in added area of certain laws now in force in the United Provinces.

3. The enactments specified in Schedule III, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under those enactments shall continue to be in force in the territory specified in Schedule I:

Provided that in the enactments so continued and in all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed thereunder, reference to a Provincial Government, the Provincial Government of the United Provinces of Agra and Oudh, or the Board of Revenue for the United Provinces shall be read as referring to the [1][Provincial Government] of Delhi; references to a High Court or the High Court of Judicature of the North-Western Provinces as referring to the [2][High Court of Judicature at Lahore,] and references to the Official Gazette for the United Provinces as referring to the Official Gazette.

Provision for facilitating application of certain enactments.

4. For the purpose of facilitating the application to the territory mentioned in Schedule I of the enactments referred to in section 3, the powers conferred by sections 4 and 5 of the Delhi Laws Act, 1912, shall be exercisable in respect thereof.

Exclusion of certain enactments from the added area.

5. Save as provided in sections 2 and 3 no enactment which is in force in the United Provinces of Agra and Oudh or any part thereof shall continue to be in force in the territory specified in Schedule I.

Pending proceedings.

6. Nothing in this Act shall affect any proceeding which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule I or of anything arising in such territory and every such proceeding shall be continued as if this Act had not been passed:

Provided that the Provincial Government may, by notification in the Official Gazette, direct that any proceeding, criminal, civil or revenue, other than a proceeding pending before the High Court of Judicature for the North-

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LEG. REF.

[1] Substituted by A. O., for "Chief Commissioner," 1937.

[2] The words "High Court of Judicature at Lahore" were substituted for the words "Chief Court of the Punjab" by Act XVIII of 1919.

NOTES.

Sec. 1.—The Transfer of Property Act has no application to Delhi. 1930 L. 920= 129 I.C. 21.

Western Provinces, shall be transferred to, and disposed of, by the corresponding authority of the Delhi Province.

7. *Amendment of S. 7 of Act XIII of* 1912. [*Repealed by the Repealing Act* 1938 (*I of* 1938), *S.* 2 and *Sch.*]

Construction. 8. This Act shall be construed with and deemed to be part of, the Delhi Laws Act, 1912.

SCHEDULE I.

TERRITORY ADDED TO THE PROVINCE OF DELHI.

(See *section* 2.)

Revenue estates of—

1. Subehpur.
2. Jagatpur.
3. Baqiabad.
4. Beharipur.
5. Saadatpur Mahal Gujran.
6. Saadatpur Musalmanan.
7. Saadatpur Amad Delhi.
8. Wazirabad.
9. Khajuari Paramad.
10. Khajuri Khas.
11. Garhi Mendu.
12. Timarpur.
13. Chandrawal.
14. Usmanpur.
15. Ghonda patti Gujran Khadar.
16. Ghonda patti Chauhan Khadar.
17. Andhavli.
18. Kaithwara.
19. Silampur Amad Delhi.
20. Ghondi Khadar.
21. Jatwara Khurd.
22. Mubarakpur Reti.
23. Shakarpur Khadar.
24. Nagla Manchi.
25. Shamspur.
26. Gharaunda Nimka Khadar.
27. Nagli Razapur.
28. Chilla Sarauda Khadar.
29. Qarawalnagar *urf* Dharauti Kalan.
30. Jivanpur Johripur.
31. Mustafabad.
32. Mirpur Turk.
33. Ziauddinpur.
34. Khanpur Dhani.
35. Maujpur.
36. Ghonda patti Gujran Bangar.
37. Ghonda patti Chauhan Bangar.
38. Jafrabad.
39. Uldanpur.
40. Babarpur.
41. Siqdarpur.
42. Gokalpur.
43. Sabauli.
44. Mandauli.
45. Taharpur.
46. Jhilmila.
47. Chandavli *urf* Shadara.
48. Silampur Bangar.
49. Silampur Khadar.
50. Ghondli Bangar.
51. Kakarduman.
52. Khureji Khas.
53. Khureji Baramad.
54. Shakarpur Khas Bangar.
55. Mandavli Fazilpur.
56. Hasanpur Bhuapur.
57. Ghazipur.
58. Khichripur.
59. Gharaunda Nimka Bangar (Patparganj).
60. Shakarpur Baramad.
61. Kotla.
62. Chilla Sarauda Bangar.
63. Dalupura.
64. Kondli.
65. Gharauli.

SCHEDULE II.

ENACTMENTS IN FORCE IN THE DELHI PROVINCE WHICH WILL NOT BE IN FORCE IN THE TERRITORY ADDED TO THAT PROVINCE.

(See *section* 2.)

Year.	No.	Short title.	Remarks.
1	2	3	4
		Acts of the Governor-General of India in Council.	
1887	XVI	The Punjab Tenancy Act, 1887	....
,,	XVII	The Punjab Land Revenue Act, 1887	....
[1][*	*	* *	*]

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[1] The entry relating to the Punjab Alienation of Land Act (XIII of 1900) was repealed by Act X of 1927.

Year,	No.	Short title.	Remarks.
1	2	3	4
		Punjab Acts.	
1900	II	The Punjab Land Preservation (*Chos*) Act, 1900.	....
1912	V	The Colonization of Government Lands (Punjab) Act, 1912.	....
1913	I	The Punjab Pre-emption Act, 1913	....
,,	II	The Redemption of Mortgages (Punjab) Act, 1913.	....

SCHEDULE III.

ENACTMENTS IN FORCE IN THE UNITED PROVINCES OF AGRA AND OUDH WHICH WILL CONTINUE TO BE IN FORCE IN THE TERRITORY ADDED TO THE DELHI PROVINCE.

(See *section* 3.)

Year.	No.	Short title.	Remarks.
1	2	3	4
		Act of the Governor-General of India in Council.	
1,882	IV	The Transfer of Property Act, 1882	....
,,	V	The Indian Easements Act, 1882	....
1891	VIII	An Act to extend the Indian Easements Act, 1882. to certain areas, in which that Act is not in force.	....
		United Provinces Acts.	
1901	II	The Agra Tenancy Act, 1901	....
,,	III	The United Provinces Land Revenue Act, 1901.	....
1904	I	The United Provinces General Clauses Act, 1904.	In so far as it applies to the Agra Tenancy Act, 1901, and the United Provinces Land Revenue Act, 1901.

THE DELHI RESTRICTION OF USES OF LAND ACT (XII OF 1941).

[8*th April*, 1941.

An Act to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes.

WHEREAS it is expedient to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the DELHI RESTRICTION OF USES OF LAND ACT, 1941.

(2) It extends to the Province of Delhi.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "agriculture" includes horticulture and the planting and upkeep of orchards;

(2) "building" has the same meaning as in clause (2) of section 3 of the Punjab Municipal Act, 1911;

(3) "Chief Commissioner" means the Chief Commissioner of Delhi;

(4) "Deputy Commissioner" means the Deputy Commissioner of Delhi and includes any authority, not being an officer employed by the Delhi Improvement Trust, appointed by the Chief Commissioner, by notification in the official Gazette, to perform all or any of the functions of the Deputy Commissioner under this Act;

(5) "place of worship" includes an *imambara, dargah, karbala* or *takya*;

(6) "prescribed" means prescribed by rules made under this Act;

(7) "road" means a metalled road maintained by the Central Government or by a local authority; and

(8) the expression "to erect or re-erect" in relation to any building has the same meaning as in clause (5) of section 3 of the Punjab Municipal Act, 1911.

Declaration of controlled area.

3. (1) The Chief Commissioner may, with the previous sanction of the Central Government, by notification in the official Gazette, declare any land adjacent to and within a distince of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(2) Not less than three months before making a declaration under sub-section (1) the Chief Commissioner shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that he proposes, with the previous sanction of the Central Government, to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made, and copies of every such notification or of the substance thereof shall be published by the Deputy Commissioner in such manner as he thinks fit at his office and in every revenue estate of which any part is included within the said boundaries.

(3) Any person interested in any land included within the said boundaries may, at any time before the expiration of thirty days from the last date on which a copy of such notification is published by the Deputy Commissioner, object to the making of the declaration or to the inclusion of his land or any part of it within the said boundaries.

(4) Every objection under sub-section (3) shall be made to the Deputy Commissioner in writing, and the Deputy Commissioner shall give to every person so objecting an opportunity of being heard either in person or by pleader, and shall after all such objections have been heard and after such further enquiry, if any, as he thinks necessary, forward to the Chief Commissioner the record of the proceedings held by him together with a report setting forth his recommendations on the objections.

(5) If before the expiration of the time allowed by sub-section (3) for the filing of objections no objection has been made, the Chief Commissioner may proceed at once to the making of a declaration under sub-section (1). If any such objections have been made, the Chief Commissioner shall consider the record and the report referred to in sub-section (4) and shall hear any parties applying to be heard and may either—

(*a*) abandon the proposal to make a declaration under sub-section (1), or

(*b*) make such a declaration in respect of either the whole or a part or parts of the land included within the boundaries specified in the notification under sub-section (2).

(6) For the purposes of sub-section (3) a person shall be deemed to be interested in land if he is a "person interested" as defined in clause (*b*) of section 3 of the Land Acquisition Act, 1894, for the purposes of that Act or, where the land is land occupied by or for the purposes of a mosque, *inambara, dargah, karbala, takya* or *Muslim* graveyard, if he is a Muslim.

(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

Plans of controlled areas to be deposited at certain offices.

4. (1) The Deputy Commissioner shall deposit at his office and at the office of the Municipal Committee, New Delhi, and at such other places as he considers necessary, plans showing all lands declared to be controlled areas for the purposes of this Act, and setting forth the nature of the restrictions applicable to the land in any such controlled area.

(2) The plans so deposited shall be available for inspection by the public free of charge at all reasonable times.

Restrictions on building, etc., in a controlled area.

5. No person shall erect or re-erect any building, or make or extend any excavation, or lay out any means of access to a road in a controlled area except with the previous permission of the Deputy Commissioner in writing.

Application for permission to build, etc., and the grant or refusal of such permission.

6. (1) Every person desiring to obtain the permission referred to in section 5 shall make an application in writing to the Deputy Commissioner in such form and containing such information in respect of the building, excavation or means of access to which the application relates as may be prescribed.

(2) On receipt of such application the Deputy Commissioner, after making such enquiry as he considers necessary, shall, by order in writing, either—

(*a*) grant the permission, subject to such conditions, if any, as may be specified in the order; or

(*b*) refuse to grant such permission.

(3) When the Deputy Commissioner grants permission subject to conditions under clause (*a*) of sub-section (2) or refuses to grant permission under clause (*b*) of sub-section (2), the conditions imposed or the grounds of refusal shall be such as are reasonable having regard to the circumstances of each case.

(4) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building, not being a dwelling house, if such building is required for purposes subservient to agriculture, nor shall the permission to erect or re-erect any such building be made subject to any conditions other than those which may be necessary to ensure that the building will be used solely for the purposes specified in the application for permission.

(5) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building which was in existence on the date on which the declaration under sub-section (1) of section 3 was made, nor shall he impose any conditions in respect of such erection or re-erection unless it involves the addition of one or more storeys to the building or the extension of the plinth area of the building by more than one-eighth of the original plinth area, or there is a probability that the building will be used for the purpose other than that for which it was used on the date on which the said declaration was made.

(6) If at the expiration of a period of three months after an application under sub-section (1) has been made to the Deputy Commissioner no order in writing has been passed by the Deputy Commissioner permission shall be deemed to have been given without the imposition of any conditions.

(7) The Deputy Commissioner shall maintain a register with sufficient particulars of all permissions given by him under this section and the register shall be available for inspection without charge by all persons interested and such persons shall be entitled to take extracts therefrom.

Right of appeal.

7. (1) Any person aggrieved by an order of the Deputy Commissioner under sub-section (2) of section 6 granting permission subject to conditions or refusing permission may within thirty days from the date of such order prefer an appeal to the Chief Commissioner.

(2) The order of the Chief Commissioner on appeal shall be final.

Compensation.

8. (1) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by an order—

(*a*) refusing permission to make or extend an excavation, or granting such permission but imposing conditions on the grant, or

(*b*) refusing permission to lay out a means of access to a road, or granting such permission but imposing conditions on the grant, or

(*c*) granting permission to erect or re-erect a building but imposing conditions on the grant.

(2) When an order has been made refusing permission to erect or re-erect a building any person who has exercised the right of appeal given by sub-section (1) of section 7 may, within three months of the date of the order of the Chief Commissioner, make to the Chief Commissioner a claim for compensation on the ground that his interest in the land concerned is injuriously affected by the said order:

Provided that no claim for compensation may be made under this sub-section in respect of any land situated in a controlled area adjoining a road which has been constructed after the commencement of this Act or which was not at the commencement of this Act a road within the meaning of clause (4) of section 2.

(3) On receipt of a claim under sub-section (2) the Chief Commissioner shall either proceed to acquire the land concerned under the Land Acquisition Act, 1894, or transfer the claim for disposal to an officer exercising the powers of a Collector under the said Act:

Provided that in case the Chief Commissioner decides to acquire the land, the claimant shall be entitled to be repaid by the acquiring authority the amount of expense which he may have properly incurred in connection with the preparation and submission of his claim for compensation under this section, and in default of agreement such amount shall be determined by the authority deciding the value of the land in the proceedings under the Land Acquisition Act, 1894.

(4) Nothing in this section shall be deemed to preclude the settlement of a claim by mutual agreement.

Compulsory acquisition.

9. If the Chief Commissioner decides to acquire the land under the Land Acquisition Act, 1894, then, notwithstanding anything contained in that Act,—

(*i*) proceedings under section 5-A of that Act shall not be required;

(*ii*) the notification under section 6 of that Act shall be published within six months from the date of institution of the claim, failing which the claim shall be transferred for disposal to an officer exercising the powers of a Collector under that Act;

(*iii*) the market value of the land shall be assessed as though no declaration under section 3 (1) had been made in respect of the area in which it is situated and no restrictions upon its use and development had been imposed, any compensation already paid to the claimant or to any of his predecessors in interest for injurious affection being deducted from the market value as so assessed.

Amount of compensation how determined.

10. (1) When a claim is transferred for disposal under section 8 or section 9 to an officer exercising the powers of a Collector under the Land Acquisition Act, 1894, such officer shall make an award determining the amount of compensation, if any, payable to the claimant.

(2) The amount of compensation awarded unded sub-section (1) shall in no case exceed—

(*a*) the amount that would have been payable if the land had been acquired under section 9 or

(*b*) the difference between the market value of the land in its existing condition having regard to the restrictions actually imposed upon its use and development by the order refusing permission to erect or re-erect a building thereon, and its market value immediately before the publication under sub-section (2) of section 3 of the notification in pursuance of which the area in which it is situated was declared to be a controlled area,

and no compensation shall be awarded under sub-section (1)—

(*i*) unless the claimant satisfies the officer making the award that proposals for the development of the land which at the date of the application under sub-section (1) of section 6 are immediately practicable, or would have been so, if this Act had not been passed, are prevented or injuriously affected by the restrictions imposed under this Act, or

(*ii*) if and in so far as the land is subject to substantially similar restrictions in force under some other enactment which were so in force at the date when the restrictions were imposed under this Act; or

(*iii*) if compensation in respect of the same restrictions in force under this Act or of substantially similar restrictions in force under some other enactment has already been paid in respect of the land to the claimant or to any predecessor in interest of the claimant.

(3) The provisions of Parts III, IV, V and VIII of the Land Acquisition Act, 1894, shall so far as may be apply to an award made under sub-section (1) as though it were an award made under that Act.

Saving for other enactments.

11. Nothing in this Act shall affect the power of any authority to acquire land or to impose restrictions upon the use and development of land under any other enactment for the time being in force.

Prohibition of use of any land as a brick-field, etc., without a licence.

12. (1) No land within a controlled area shall be used for the purposes of a charcoal-kiln, pottery-kiln or lime-kiln and no land either within or outside a controlled area shall be used for the purposes of a brick-field or brick-kiln except under, and in accordance with the conditions of, a licence from the Chief Commissioner which shall be renewable annually.

(2) The Chief Commissioner may charge such fees for the grant and renewal of such licences and may impose such conditions in respect thereof as may be prescribed.

(3) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by the refusal of a licence under sub-section (1).

Offences and penalties.

13. (1) Any person who—

(*a*) erects or re-erects any building or makes or extends any excavation or lays out any means of access to a road in contravention of the provisions of section 5 or in contravention of any conditions imposed by an order under section 6 or section 7, or

(*b*) uses any land in contravention of the provisions of sub-section (1) of section 12,

shall be punishable with fine which may extend to five hundred rupees and, in the case of a continuing contravention, with a further fine which may extend to fifty rupees for every day after the date of the first conviction during which he is proved to have persisted in the contravention.

(2) Without prejudice to the provisions of sub-section (1), the Deputy Commissioner may order any person who has committed a breach of the provisions of the said sub-section to restore to its original state or to bring into conformity with the conditions which have been violated, as the case may be, any building or land in respect of which a contravention such as is described in the said sub-section has been committed, and if such person fails to do so within three months of the order may himself take such measures as may appear to him to be necessary to give effect to the order, and the cost of such measures shall be recoverable from such person as an arrear of land-revenue.

Trial of offences.

14. No Court inferior to that of a Magistrate of the first class shall try any offence punishable under this Act.

Protection of persons acting under this Act.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Savings.

16. Nothing in this Act shall apply to—

(*a*) the erection or re-erection of buildings upon land included in the inhabited site of any village as defined in the revenue records;

(*b*) the erection or re-erection of a place of worship or a tomb or cenotaph or of a wall enclosing a graveyard, place of worship, cenotaph or *samadhi* on land which is at the time a notification under sub-section (2) of section 3 is published by the Chief Commissioner occupied by or for the purposes of such place of worship, tomb, *samadhi*, cenotaph or graveyard;

(*c*) excavations (including wells) made in the ordinary course of agricultural operations;

(*d*) the construction of an unmetalled road intended to give access to land solely for agricultural purposes.

Power to make rules.

17. (1) The Chief Commissioner may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(*a*) the form in which applications under sub-section (1) of section 6 shall be made and the information to be furnished in such applications;

(*b*) the regulation of the laying out of means of access to roads;

(*c*) the fees to be charged for the grant and renewal of licences under section 12 and the conditions governing such licences.

(3) All rules made under this section shall be subject to the condition of previous publication, which publication shall be made in the official Gazette and in at least two newspapers printed in a language other than English; and the date to be specified under clause (3) of section 23 of the General Clauses Act,

1897, shall not be less than two months from the date on which the draft of the proposed rules was published.

THE DESTRUCTION OF RECORDS ACT (V OF 1917).

Year.	No.	Short title.	Amendment.
1917	V	The Destruction of Records Act, 1917	Repealed in part, XII of 1927.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—

"In present conditions documents are required to be placed in the custody of Government officers under a large number of enactments. In many of these Acts no provision exists for the destruction of such of them as have become valueless. For example, there is no provision for the destruction of documents lodged with the Registrar of Joint Stock Companies under the Registration of Societies Act (XXI of 1860), the Provident Insurance Societies Act (V of 1912) the Indian Life Assurance Companies Act (VI of 1912), and the Indian Companies Act (VII of 1913); nor could such papers be dealt with under the Destruction of Records Act (III of 1879), as it stands. It is accordingly proposed to repeal and re-enact the Act of 1879 so as to make it conform to modern requirements. The principal feature of the draft Bill is that it empowers certain authorities to frame rules for the disposal by destruction or otherwise of documents which they may consider not of sufficient public value to justify preservation, and provides for the delegation to subordinate officers of the rule-making powers vested in the Local Government. The rule-making powers already vested in the High Courts and the Chief Controlling Revenue authorities by Act III of 1879 will not be affected by this Bill. To avoid overlapping, it is proposed to repeal the provisions of the enactments mentioned in this Schedule."—(*Fort St. George Gazette*, Part III, 20th February, 1917, p. 2.)

CONTENTS.

SECTIONS.
1. Short-title.
2. Definitions. [*Repealed.*]
3. Power to certain authorities to make rules for disposal of documents.
4. Validation of former rules for disposal of documents.
5. Saving of certain documents.
6. Repeals. [*Repealed.*]
SCHEDULE. [*Repealed.*]

[28*th February*, 1917.

An Act to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers.

WHEREAS it is expedient to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE DESTRUCTION OF RECORDS ACT, 1917.

2. [1][* * * *].

Power to certain authorities to make rules for disposal of documents.

3. (1) The authorities hereinafter specified may, from time to time, make rules for the disposal, by destruction or otherwise, of such documents as are, in the opinion of the authority making the rules, not of sufficient public value to justify their preservation.

(2) The authorities shall be—

(*a*) in the case of documents in the possession or custody of a High

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LEG. REF.

[1] Omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

Accession No.

Court or of the Courts of Civil or Criminal jurisdiction subordinate thereto,—the High Court;

(*b*) in the case of documents in the possession or custody of Revenue Courts and officers,—the Chief Controlling Revenue Authority; and

(*c*) in the case of documents in the possession or custody of any other public officer,—

[1][(i) if the documents relate to purposes of a province, the Provincial Government or any officer specially authorised in that behalf by that Government;

(ii) in any other case, the Central Government or an officer specially authorised in that behalf by that Government].

(3) [1][Rules made under this section by any High Court or by a Chief Controlling Revenue Authority or by an officer specially authorised in that behalf by any Provincial Government shall be subject to the previous approval of the Provincial Government; and rules made by an officer specially authorised in that behalf by the Central Government shall be subject to the previous approval of the Central Government.]

Validation of former rules for disposal of documents.

4. All rules and orders directing or authorising the destruction or other disposal of documents in the possession or custody of any public officer, heretofore made by a Provincial Government, or with the approval of the Provincial Government, by any authority not empowered to make such rules under the Destruction of Records Act, 1879, shall be deemed to have had the force of law from the date on which they were made, and all such rules and orders now in force shall continue to have the force of law until they are superseded by rules made under this Act.

Saving of certain documents.

5. Nothing in this Act shall be deemed to authorise the destruction of any document which, under the provisions of any law for the time being in force is to be kept and maintained.

6. [2][* * * * * * *].

THE SCHEDULE.

REPEAL OF ENACTMENTS.[2]

THE DISSOLUTION OF MUSLIM MAARIAGES ACT
(VIII OF 1939).

[17*th March*, 1939.

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim women on her marriage tie; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

(2) It extends to the whole of British India.

LEG. REF.

[1] Substituted by the A.O., 1937.

[2] Repealed by the Repealing Act (XII of 1927).

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(*i*) that the whereabouts of the husband have not been known for a period of four years;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(*v*) that the husband was impotent at the time of the marriage and continues to be so;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(*viii*) that the husband treats her with cruelty, that is to say,—

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(*ix*) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final;

(*b*) a decree passed on ground (*i*) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

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NOTES.

Sec. 2 (ii): RETROSPECTIVE EFFECT.—When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should be applied even though this may involve giving retrospective effect to some of its provisions. Consequently, S. 2 (*ii*) must be taken as intended to apply with retrospective effect. 194 I.C. 567=1941 Lah. 167.

FAILURE TO MAINTAIN—IF MUST BE WILFUL.—There is nothing in the wording of S. 2 (*ii*) to suggest that the failure to maintain the wife must be wilful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever. 194 I.C. 567=1941 Lah. 167.

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Notice to be served on heirs of the husband when the husband's whereabouts are not known.

3. In a suit to which clause (*i*) of section 2 applies—

(*a*) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(*b*) notice of the suit shall be served on such persons, and

(*c*) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

Effect of conversion to another faith.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Rights to dower to be affected.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Repeal of section 5 of Act XXVI of 1937.

6. Section 5 of the Muslim Personal Law (*Shariat*) Application Act, 1937, is hereby repealed.

THE DIVORCE ACT (IV OF 1869).

Year.	No.	Short title.	Amendment.
1869	IV	The Indian Divorce Act 1869.	Repealed in part, VII of 1870; XII of 1873; IV of 1901, S. 8. Amended, VI of 1909; X of 1912, XVIII or 1919; XI of 1923; XXXII of 1925; XXV of 1926; XXXIV of 1926; XV of 1927; XXX of 1927; Act VIII of 1935; Supplem. Temporarily in Sind Bom. Act VIII of 1930.

PREFATORY NOTE.—This Act is framed on the corresponding English Statute Law.

This Act extends to India the principal provisions of the Matrimonial Causes Act, 1857 (20 and 21 Vic., C. 85) as amended by the Matrimonial Causes Act, 1859 (22 and 23 Vic., C. 61), and the Matrimonial Causes Act, 1860 (23 and 24 Vic., C. 144) and the Matrimonial Causes Act 1866 (29 and 30 Vic., C. 32) It also embodies many rulings of Sir Cresswell and Lord Penzance.

(*See* Statement of Objects and Reasons.) Mr. Maine in moving that the Report of the Select Committee on the Bill to amend that law relating to Divorce and Matrimonial Causes in India be taken into consideration, said:—"This measure is obviously one of great social importance; . . . . . It is substantially a consolidation measure. It puts together the English Statute Law on the subject in a more orderly form and in clearer language, and it incorporates the recent decisions of the Divorce Court. But, in the main, its principles are those of the statute regulating the jurisdiction of the English Court of Divorce and Matrimonial Causes."—[26th March, 1869—*Fort St. George Gazette* (Supplement), March, 1869, p. 44.]

The object of the Act was to give effect to the policy embodied in the High Courts Act passed in 1861 (24 & 25 Vic., c. 104), and the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act seemed to have been, not so much to create new branches of jurisdiction, as to constitute and redistribute the power which already existed. The 9th clause gave power to Her Majesty to confer on the High Court such matrimonial jurisdiction as she thought fit; but Her Majesty did not attempt to confer on the High Court such a jurisdiction as was exercised by the Divorce Court in England. The Secretary of State, therefore, requested the Governor-General to introduce a measure, conferring a jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London. Hence the Act. (*See* the remarks of Mr. Maine in moving for leave to introduce that Bill.)

Thus, it would be seen that the object of the Divorce Act was to place the Matrimonial Law administered by the High Courts, in the exercise of their original jurisdiction, on the same footing as the Matrimonial Law administered by the Court for Divorce and Matrimonial Causes in England.

The 9th section of the Act of Parliament for establishment of High Courts of Judicature in India (24 & 25 Vic., c. 104) provided that the High Courts shall exercise such matrimonial jurisdiction as Her Majesty by Letters Patent shall grant and direct. Under the authority thus conferred by Parliament, the 35th section of the Letters Patent constituting the High Courts of Judicature provided as follows :—

"And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction: provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof."

In the Despatch of the Secretary of State transmitting the Letters Patent, 33rd and 34th paragraphs are to the following effect:—

"Her Majesty's Government are desirous of placing the Christian subjects of the Crown, within the Presidency, in the same position under the High Court, as to matters matrimonial, in general, as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established, in virtue of the Act, Sess. 20 & 21 Vic., c. 85 and in regard to which further provisions were made by Sess. 22 & 23 Vic., c. 61 and 23 & 24 Vic., c. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage and those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian Legislation, and I request that you immediately take the subject into your consideration and introduce into your Council a bill for conferring upon the High Court, the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

"The object of the provision at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the High Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Court within the Division of the Presidency not established by Royal Charter, any jurisdiction which they might have in matters matrimonial, as for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere."

In addition to the Act of Parliament mentioned by the Secretary of State as regulating the jurisdiction of the English Divorce Court, the Statute 25 & 26 Vic., c. 81, had been passed in the year (1862). The object of this statute was to render perpetual 23 & 24 Vic., c. 144, the duration of which had been originally limited to two years.

The draft of a bill had been prepared to give effect to the Secretary of State's instructions, but some variations from the English Statutes in respect of procedure had to be adopted.

With a view to uniformity in practice in the several branches of jurisdiction the Bill provided that the procedure of the Code of Civil Procedure shall be followed, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England; and it also omitted the provision in 20 & 21 Vic., c. 85 respecting the occasional trial of questions of fact by juries.

There were also some other variations of a minor and verbal character.

The Bill was then introduced into the Council, and after several amendments, was passed into Act IV of 1869. (*See* Statement of Objects and Reasons to the Indian Divorce Act, 1869.)

LEGISLATIVE CHANGES.—Rep. in Pt., Act VII of 1870; Rep. in Pt., Act XII of 1873; Rep. in Pt. (in Punjab), Act XVIII of 1884; Rep. in Pt. (in the Central Provinces and the District of Sambalpur) Act IV of 1901, S. 8.

S. 7 am., Act X of 1912.

S. 30 ins., Act VI of 1909.

Am. (in Lower Burma), Act XI of 1889, S. 97 (Rep. by Act VI of 1900), and Act VI of 1900, S. 47 am., Act XVIII of 1919; Act XI of 1923; Act XXXII of 1925; and XXV of 1926, S. 2. Further amended by Act XV of 1927; XXX of 1927; VIII of 1935; Sup. Temp. in Sind Bom. Act VIII of 1930.

Declared in force—

in the Santhal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3;
in the Angul District, Reg. III of 1913, S. 3;
in the Upper Burma (except the Shan States), Act XIII of 1898, S. 4;
in the British Baluchistan, Reg. II of 1913, S. 3.

THE DIVORCE ACT (IV OF 1869).

CONTENTS.

PREAMBLE.

I.—PRELIMINARY.

SECTIONS.
1. Short title.
Commencement of Act.
2. Extent of Act.
Extent of power to grant relief generally and to make decrees of dissolution and nullity.
3. Interpretation clause.

II.—JURISDICTION.

4. Matrimonial jurisdiction of High Courts to be exercised subject to Act.
Exception.
5. Enforcement of decrees or orders made heretofore by Supreme or High Court.
6. Pending suits.
7. Court to act on principles of English Divorce Court.
8. Extraordinary jurisdiction of High Court
Power to transfer suits.
9. Reference to High Court.

III.—DISSOLUTION OF MARRIAGE.

10. When husband may petition for dissolution.
When wife may petition for dissolution.
Contents of petition.
11. Adulterer to be co-respondent.
12. Court to be satisfied of absence of collusion.
13. Dismissal of petition.
14. Power to Court to pronounce decree for dissolving marriage.
Condonation.
15. Relief in case of opposition on certain grounds.
16. Decrees for dissolution to be *nisi*.
Collusion.
17. Confirmation of decree for dissolution by District Judge.
17-A. Appointment of officer to exercise duties of King's Proctor.

IV.—NULLITY OF MARRIAGE.

18. Petition for decree of nullity.
19. Grounds of decree.
20. Confirmation of District Judge's decree.
21. Children of annulled marriage.

V.—JUDICIAL SEPARATION.

22. Bar to decree for divorce *a mensa et toro*; but judicial separation obtainable by husband or wife.
23. Application for separation made by petition.
24. Separated wife deemed spinster with respect to after-acquired property.
25. Separated wife deemed spinster for purposes of contract and suing.

REVERSAL OF DECREE OF SEPARATION.

26. Decrees of separation obtained during absence of husband or wife may be reversed.

VI.—PROTECTION ORDERS.

27. Deserted wife may apply to Court for protection.
28. Court may grant protection order.
29. Discharge or variation of orders.
30. Liability of husband seizing wife's property after notice of order.
31. Wife's legal position during continuance of order.

VII.—RESTITUTION OF CONJUGAL RIGHTS.

32. Petition for restitution of conjugal rights.
33. Answer to petition.

VIII.—DAMAGES AND COSTS.

34. Husband may claim damages from adulterer.
35. Power to order adulterer to pay costs.
Power to order litigious intervenor to pay costs.

IX.—ALIMONY.

36. Alimony *pendente lite*.
37. Power to order permanent alimony.
Power to order monthly or weekly payments.
38. Court may direct payment of alimony to wife or to her trustee.

X.—SETTLEMENTS

39. Power to order settlement of wife's property for benefit of husband and children.
Settlement of damages.
40. Inquiry into existence of ante-nuptial or post-nuptial settlements.

SECTIONS.

XI.—CUSTODY OF CHILDREN.

41. Power to make orders as to custody of children in suit for separation.
42. Power to make such orders after decree.
43. Power to make orders as to custody of children in suits for dissolution or nullity.
44. Power to make such orders after decree or confirmation.

XII.—PROCEDURE.

45. Code of Civil Procedure to apply.
46. Forms of petitions and statements.
47. Stamp on petition.
Petition to state absence of collusion.
Statements to be verified.
48. Suits on behalf of lunatics.
49. Suits by minors.
50. Service of petition.
51. Mode of taking evidence.
52. Competence of husband and wife to give evidence as to cruelty or desertion.
53. Power to close doors.
54. Power to adjourn.
55. Enforcement of, and appeals from, orders and decrees.
No appeal as to costs.
56. Appeal to Queen in Council.

XIII.—RE-MARRIAGE.

57. Liberty to parties to marry again.
58. English clergyman not compelled to solemnize marriages of persons divorced for adultery.
59. English minister refusing to perform ceremony to permit use of his church.

SECTIONS.

XIV.—MISCELLANEOUS.

60. Decree for separation or protection order valid as to persons dealing with wife before reversal.
Indemnity of persons making payment to wife without notice of reversal of decree or protection order.
61. Bar of suit for criminal conversation.
62. Power to make rules.

SCHEDULE OF FORMS.

Nos.
1. Petition by husband for a dissolution of marriage with damages against co-respondent by reason of adultery.
2. Respondent's statement in answer to No. 1.
3. Co-respondent's statement in answer to No. 1.
4. Petition for decree of nullity of marriage.
5. Petition by wife for judicial separation on the ground of her husband's adultery.
6. Statement in answer to No. 5.
7. Statement in reply to No. 6.
8. Petition for a judicial separation by reason of cruelty.
9. Statement in answer to No. 8.
10. Petition for reversal of decree of separation.
11. Petition for protection order.
12. Petition for alimony pending the suit.
13. Statement in answer to No. 12.
14. Undertaking by minor's next friend to be answerable for respondent's costs.

THE DIVORCE ACT (IV OF 1869).[1]

[*26th February, 1869.*

An Act to amend the law relating to Divorce and Matrimonial Causes in India.

Preamble.

WHEREAS it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; It is hereby enacted as follows:—

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Calcutta Gazette, 1863, p. 173; for Report of Select Committee, *see* Gazette of India, 1869, p. 192; for Proceedings in Council, see *Calcutta Gazette*, 1862, Supplement, p. 463; *ibid.*, 1863, Supplement, p. 43, and *Gazette of India*, 1869, Supplement, p. 291.

It has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1) and Sch. I; in the Arakan Hill District, *see* Schedule to the Arakan Hill District Laws Regulation (IX of 1874); in Angul and the Khondmals, Schedule to the Angul District Regulation (I of 1894); in the Sonthal Parganas by S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), *ibid.*; in British Baluchistan by the Baluchistan Laws Regulation (I of 1890).

It has been declared by notification under S. 3 (*a*) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, see *Gazette of India*, 1881, Pt. I, p. 504.

(The District of Lohardaga included that time the present district of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44.)

The Scheduled Districts in Ganjam and Vizagapatam, see *Fort St. George Gazette*, 1898, Pt. I, p. 666.

It has been extended by notification under S. 5 of the same Act to the North-Western Provinces Tarai, see *Gazette of India*, 1876, Pt. I, p. 505.

THE LIMITATION ACT does not apply to suits under this Act, *see* the Indian Limitation Act (IX of 1908), S. 29 (2).

I.—PRELIMINARY.

Short title. Commencement of Act.

1. This Act may be called THE INDIAN DIVORCE ACT, and shall come into operation on the first day of April, 1869.

NOTES.

Sec. 1.—Jurisdiction in matrimonial causes was not based on a so-called matrimonial domicile when the Indian Councils Act was passed in 1861. 47 B. 843=25 Bom.L.R. 945=1923 B. 321. *See also* 143 I.C. 618=1933 Sind 70; 1933 A.L.J. 8=1933 A. 39. Act does not confer jurisdiction on the Court to dissolve the marriages of non-domiciled parties. 47 B. 843. Relief not involving the status of the parties may be granted under the Act if the conditions of residence are satisfied. 47 B. 843. Municipal Law of a country may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. 47 B. 843. Whether Act applies to British subjects in Native States, *see* 10 B. 422. Relief under the Act cannot be granted to Jews. 34 C.W.N. 319=57 C. 1089=1930 C. 558. On this section, *see also* 38 B. 125; 8 Bom.L.R. 856; 17 M. 235. As to the jurisdiction of Indian Courts under the Indian and Colonial Divorce Jurisdiction Act, 16 & 17 Geo. V, ch. 40, S. 3. *See* 10 L. 64=1928 L. 557. *Courts in Native State* (Mysore) have no jurisdiction to make decrees for judicial separation of Christian British subjects. 9 Mys. L. J. 269. (3 Mys.C.C. R. 78, Foll.)

POWERS OF LEGISLATURE.—Divorce Act is and always has been, within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861. 47 B. 843. There is a definite established practice in the Court for divorce and matrimonial causes in England that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. This salutary rule will be followed in India. 1935 O.W.N. 103=1935 Oudh 133. Wild rumours and baseless suspicions cannot take the place of legal testimony which is required to substantiate an allegation of unchastity or immorality. Vague and indefinite evidence is insufficient for the purpose. A.L.R. 1935 L. 112.

DUTY OF COURT IN EX PARTE PROCEEDINGS.—When in an application for divorce neither the respondent nor the co-respondent seek to resist the petition, the duty of special circumspection is thrown upon the Court. The Court has discretion in certain specified events either to pronounce a decree for divorce or to dismiss the petition. The exercise of that discretion must be regular and systematic. For this purpose the Judge should make free use of his power to look into all the necessary circumstances even though his attention is not called to them by the party. The danger of collusion between the parties must always be borne in mind especially when there has been a long delay in applying to the Court for relief. *See also* 143 I.C. 618=1933 S. 70; 26 S.L.R. 423=1933 S. 27. Undefended divorce action—Trial of—Necessity for hearing in open Court—Trial held in breach of rule of publicity—Effect on decree—Principles—Setting aside—Time for. 40 C.W.N. 488=70 M.L.J. 385 (P.C.).

EFFECT OF AMENDING ACT OF 1926—By the Amending Act the jurisdiction of the Indian Courts under S. 2 of the Act, has been taken away only in respect of making decrees of dissolution of marriage between parties who are not domiciled in India. The other reliefs under the Act and the power to make decrees of nullity of marriage remain unaffected, the only requirements in the latter case being that the parties profess the Christian religion, the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition. 130 I.C. 524=1931 L. 215. *Defect in the Act pointed out* and amendment of the Act suggested. *See* 62 C. 82=39 C.W.N. 95. As a result of the amendment in 1926 of S. 2 of the Act, Courts in India are permitted to make decrees of nullity of marriage even though the parties presenting the petition are not domiciled in India. I.L.R. (1937) 1 Cal. 417=41 C.W.N. 268. The effect of S. 2 of the Act is that so far as a suit for dissolution of marriage is concerned a domiciled British subject resident beyond British India, *i.e.*, in Mysore can invoke the jurisdiction of the Madras High Court, but as regards a suit for nullity of marriage, any person resident in India who has been married in India can bring such a suit in the High Court. 59 M. 509 and 518=1936 M. 324=70 M.L.J. 321 (F.B.).

JURISDICTION.—To grant relief under the Act, it must be proved that the conditions of S. 2 are strictly complied with. *See* 29 C.W.N. 350=52 C. 379=1925 C. 585 (F.B.). *See also* 52 C. 566=89 I. C. 611=1925 C. 874. Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction. 1923 R. 223. The provisions of S. 2 as to the residence, apply to cases when the parties are domiciled in India but where the parties are domiciled in England, they cannot override the express provisions in S. 7. (*Ibid.*) *See also* 143 I. C. 618=1933 Sind 70. But as a result of the amendment of 1926, Courts in India are permitted to make decrees of nullity of marriage even though the parties preventing the petition are not domiciled in India. 169 I.C. 918=41 C.W N. 268=I. L. R. (1937) 1 C. 417. Per *Stone and Mockett, JJ.* (*Wadsworth, J., dissenting.*)—The proper form of a decree to be passed in the first instance in a suit on the original side of the High Court for declaration of nullity of a marriage is that of a decree *nisi* and not a decree absolute. 59 M. 509 and 518=1936 M. 324=70 M.L.J. 321 (F. B.). Court should enquire and set out in the judgment facts relied on as conferring jurisdiction. 32 A. 293=5 I.C. 871=7 A L.J. 193.

DOMICILE.—In a case of divorce, it is important to consider the question of domicile from the outset, because it goes to the very

NOTES.

root of jurisdiction. 58 C. 1332=135 I. C. 445=1932 C. 161. *See also* 138 I. C. 611=1932 L. 468 (S.B.). It is necessary to see that there is proper proof of Indian domicile before giving a decree under the Act. The fact that the petitioner is shown to have been born in India and residing there is not sufficient to prove Indian domicile. 60 C. 601=144 I C. 827=37 C.W.N. 255 (S.B.). Domicile in India at the time of the presentation of the petition for divorce is an absolute necessary condition of jurisdiction so far as regards divorce. The domicile of the parties means in practice the domicile of the husband. The burden of proving that a person has changed the domicile is on the person who alleges it. Where the petitioner was shown to have come to India to earn a living and intended to remain there so long as an opportunity to obtain a livelihood was open to him but he had formed no intention to settle in any one place. *Held*, that there being no intention to reside, and establish himself in India for the rest of his days it could not be said that the petitioner was domiciled in India. 56 C. 530=1929 C. 599. The question of domicile should be treated with care, for unless the parties to the marriage are domiciled in India at the time when the petition is presented there is no jurisdiction in a District Court to dissolve the marriage. Residence alone, for however long a period, is by no means the test, and a safer guide is to enquire where the person, whose domicile is in question, intends to end his days. Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence but not otherwise. To these may be added the further propositions that the presumption of law is against a change of domicile, which must be proved by the person alleging it, and that a wife's domicile is the domicile of her husband. Where a European claims to be domiciled in India, it will be pertinent to enquire where his father lived and died or resides, as the case may be, where he and his father were born, the circumstances in which he came to and resides in India, which will assist in ascertaining whether there exists an *animus revertendi* or an *animus manendi*, his object in residing in India, and generally as to the conditions under which he lives and his habits of life. 58 C. 259=1931 C. 383 (S.B.).

Domicile must be decided on the facts as they exist and not on future possibilities. Every person must have a domicile and until the petitioner abandons his present domicile in India and becomes domiciled in some other country, he will remain within the jurisdiction of the Indian Courts. 1931 O. 126=8 O.W.N. 177. Where the petitioner alleged that he had been in India for 15 years and that he had no intention of returning to England and the respondent also stated that she intended to settle in India and it was proved that they had lived in India since the date of their marriage. *Held*, that their statements that they had made India their domicile could be accepted and the petition for divorce be entertained. 7 R. 313=119 I. C. 220=1929 R. 216 (S. B.). The mere statement of the petitioner, who is 42 years old and is in this country, because he is in the service of the Railway that he intends to continue to reside here is not proof of his domicile in India. 174 I.C. 992=1938 Lah. 293. Domicile is of two kinds : domicile of origin and domicile of choice. The domicile of origin is irrevocably ascertained at the parties nativity. A domicile of choice, he can indeed acquire; but the domicile of origin remains in abeyance and is at any moment ready to revive. Every presumption is to be made in favour of the original domicile. It is for the party who relies on a change of domicile to prove a double intention : the intention of abandoning his domicile of origin and the intention of adopting the domicile of choice. A domicile of choice is not established by mere assertion. The petitioner left his native land under orders and not of his own free will. He came to India in obedience to other authority and not in the exercise of any choice of his own. Being thus transplanted he did not strike root. The petitioner, moreover, was neither a house-holder, nor any member of any club in India, nor was he permanently employed. *Held*, that the petitioner was not domiciled in India. 1933 Sind 70=143 I. C. 618. If the domicile of the parties be English the Courts in India have no jurisdiction to dissolve their marriage notwithstanding that it was solemnized in India and that the adultery was committed in India. 1933 S. 70=143 I.C. 618. It is necessary to see that in cases of divorce there is proper proof of Indian domicile before giving a decree under the Act. The fact that the petitioner is shown to have been born in India and residing there is not sufficient to prove Indian domicile. 60 C. 601=144 I.C. 827=37 C.W.N. 255=1933 C. 524.

RESIDENCE.—Residence in India is sufficient to give the Court jurisdiction under the Act, though the party retains a foreign domicile. 40 C. 215=17 C.W.N. 491; 53 C. 282=1926 C. 871. *See also* 5 L. 147 (161) (F. B.). Intention has nothing whatever to do with the question of residence. Whether or not a person resides in a particular district is a question of fact and depends in each case upon the evidence. Mere casual or temporary visits do not constitute "residence." within the meaning of the Act. *C*, a Railway employee, had official quarters provided for him by the Railway Company at Gondia, in the C.P. He had a bungalow there, and in the same compound an office. *C* had himself furnished the bungalow allotted to him. His position as inspector entailed a good deal of travelling over the Railway line, and in every month he used to be for several days away from Gondia. But when in Gondia he lived at the quarters assigned to him. Shortly before the petition was filed, *C* came to Allahabad for two days and thereafter every month for the same period, and on each occasion he saw his counsel in connection with his case. It was also alleged that he busied himself in trying to discover some portion of land which might be suitable for carrying on farming operations when he would retire from the Railway and set up business as a farmer and as a breeder of dogs. *Held*, that *C* had failed to establish that he was residing in Allahabad and his residence within the meaning

Extent of Act.

2. This Act shall extend to the whole of British India, and so far only as regards British subjects within the [1][territories hereinafter mentioned], to the [2][Indian States].

Extent of power to grant relief generally,

[3][Nothing hereinafter contained shall authorize any Court to grant any relief under this Act, except where the petitioner [4][or respondent] professes the Christian religion,

and to make decrees of dissolution,

or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

or of nullity.

or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.]

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

"High Court."

[5][(1) 'High Court' means with reference to any area—

LEG. REF.

[1] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

[2] Substituted by *ibid.*

[3] This and the succeeding three paras. were substituted for the 2nd, 3rd and 4th paras. by Act XXV of 1926, S. 2.

[*See also* under S. 7.]

[4] Inserted by Act XXX of 1927.

[5] Sub-Ss. (1) and (2) substituted by Government of India (Adaptation of Indian Laws), Order, 1937.

NOTES.

of S. 3 (1) was in Gondia. 1933 A. 385=1933 A.L.J. 579; 144 I.C. 136=1933 A.L.J. 8=1933 A. 39. *See also* 37 Bom.L.R. 55=1935 B. 121; 1942 Cal. 42. There will be a valid divorce in India though the marriage may be valid in the country of the domicile of origin. 40 C. 215=17 C.W.N. 491. Residence of the petitioner must be *bona fide* and not casual or as a traveller. 38 B. 125=15 Bom.L.R. 593. *See also* 32 A. 293. The High Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within Presidency. 38 B. 125=15 Bom.L.R. 593. In a divorce case before a final decree is passed the Court must definitely come to a finding on the question whether the marriage was solemnized in India and on what date. 57 I.C. 43=31 C.L.J. 340. Where in a petition for dissolution of marriage, the petitioner stated that her husband went to and fro from India and cohabited with her at various places and the last place of cohabitation was at some definite place in India. *Held* that at the time of cohabitation both parties were domiciled in India and thus it conferred jurisdiction on Courts in India to hear the petition. 167 I.C. 743=1937 P. 82=18 Pat.L.T. 686.

RIGHT TO INTERVENE.—In a suit for divorce under this Act by a wife against husband on the ground of adultery with a named woman, the latter has no right to intervene, whereas in a similar suit under the Indian and Colonial Divorce Jurisdiction Act she can so intervene. This defect in the Indian Act has to be removed by legislation. 62 C. 82=1935 C. 456.

PROFESSION OF CHRISTIANITY.—Relief under the Act can be granted only to Christians and not to non-Christians as Jews. 57 C. 1089=34 C.W.N. 319. Words 'or respondent'—Effect—One of the parties being Christian and other Parsi—Petition for restitution of conjugal rights—Maintainability. *See* 32 Bom.L.R. 1046=54 B. 877=1930 B. 385. A person does not cease to profess Christianity within the meaning of S. 2 merely because she has been ex-communicated by the sect or the Church to which she belongs. 46 M. 839=45 M.L.J. 208=1924 M. 18. The question of profession of Christianity is a question of the party's own action and not of the action of the Church. (*Ibid.*) The conversion to Christianity of one of two married Hindus does not dissolve the marriage. (*Ibid.*)

Sec. 3 (1): JURISDICTION—RESIDENCE.—As to jurisdiction of Chief Court (now High Court) Punjab, *see* 10 I.C. 487=47 P.R. 1911. As to residence conferring jurisdiction, *see* 36 C. 964=4 I.C. 419. *See also* 53 C. 282; 59 B. 570=37 Bom.L.R. 55=1935 Bom. 121; 39 Bom.L.R. 1182. To constitute residence it is not essential that the persons should have a house of their own. It is sufficient to find the place where both parties lived together. 29 Bom.L.R. 308=100 I.C. 388=1927 B. 230. Per *Marten, C.J.*—The word 'reside' in S. 3 does not mean sexual intercourse; the word 'together' in that section does not govern the word 'reside' but only the words 'last resided.' (*Ibid.*) Intention has nothing whatever to do with the question of residence. Whether or not a person resides in a particular district is a question of fact and depends in each (*a*) in Bengal, Assam and the Andaman and Nicobar Islands, the High Court at Calcutta ;

(*b*) in the Provinces of Madras and Coorg, the High Court at Madras ;

(*c*) in the Province of Bombay and in Panth Piploda, the High Court at Bombay ;

(*d*) in Agra and Ajmer-Merwara, the High Court at Allahabad ;

(*e*) in Oudh, the Chief Court of Oudh ;

(*f*) in the Punjab, the North-West Frontier Province, British Baluchistan and Delhi, the High Court at Lahore ;

(*g*) in Bihar and Orissa, the High Court at Patna ;

(*h*) in the Central Provinces and Berar, the High Court at Nagpur ;

(*i*) in Sind, the Court of the Judicial Commissioner in Sind ; and

(*j*) in any Indian State, the Court which is a High Court for the purposes of the Government of India Act, 1935, and exercises original criminal jurisdiction in respect of European British subjects in that area.

In the case of any petition under this Act, " High Court " means the High Court for the area where the husband and wife reside or last resided together.]

"District Judge."

(2) " District Judge " means—

(*a*) in a Province, a Judge of a Principal Civil Court of original jurisdiction, however designated ; and

(*b*) in any area in an Indian State, such officer as the Central Government shall from time to time appoint in his behalf by notification in the Official Gazette, and, in the absence of such an officer, the High Court for the area].

" District Court."

(3) " District Court " means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together:

NOTES.

case upon the evidence. Mere casual or temporary visits do not constitute "residence" within the meaning of the Act. 1933 A.L.J. 8=1933 A. 39=144 I.C. 126. *See also* 154 I.C. 900=37 Bom.L.R. 55=1935 B. 121.

ILLUSTRATIVE CASES.—Where a husband and wife had no permanent residence but they last lived together in a Hotel in Bombay for the greater portion of the month the husband then being on leave from active service in Mesopotamia, it was held the Bombay Court had jurisdiction. 45 B. 547=22 Bom.L.R. 1077. *See also* 38 C.W.N. 347=1934 C. 570=152 I.C. 32. Though both parties to a petition for divorce are residing separately from each other, the Court has jurisdiction if they lived within the jurisdiction of the Court at the time of the presentation of the petition. 44 B. 924=59 I.C. 931=22 Bom.L.R. 361; but not otherwise; *see* 76 P.R. 1916=36 I.C. 367=139 P.L.R. 1916. The word "together" in S. 3 (1) must be read with "last resided" only. 47 P.R. 1911=10 I.C. 487. Petition by the wife for judicial separation. The husband was a railway employee. He had no permanent place of residence. Shortly before the petition, he went to Calcutta and lived with his wife and her parents for five days and then separated. *Held*, that the High Court had jurisdiction to entertain the petition for judicial separation. 152 I.C. 32=38 C.W.N. 347=1934 C. 570. *See also* 3 O.W.N. 306=1926 O. 319. As to the necessity for residence of husband and wife in order to confer jurisdiction on District Court or Divisional Court, *see* 7 L.B.R. 5=20 I.C. 399. The Resident at Aden is not a District Judge. 37 B. 57=17 I.C. 215=14 Bom.L.R. 872; 130 I.C. 240=1931 C. 121. Judges of Divisional Courts throughout Burma are District Judges under the Act. No appeal, however, lies to the Chief Court from their decision. 6 Bur. L.T. 10=19 I.C. 53 (F.B.).

Sec. 3 (2) (a) and (1) (d).—Under the Divorce Act, S. 3 (2) (*a*), 'District Judge' means a Judge of a principal Civil Court of original jurisdiction. The Court of the Judicial Commissioner, Ajmer-Merwara, has no original civil jurisdiction and the principal Civil Court of original jurisdiction is therefore the Court of the District Judge. The High Court for Ajmer is the High Court of Allahabad according to S. 3 (1) (*d*). Hence it follows that a petition under S. 32 of the Divorce Act cannot be entertained by the Court of the Judicial Commissioner, Ajmer, as it has no jurisdiction. 1940 A.M.L J. 1.

Sec. 3 (3).—The word "together" in the definition only qualifies the words "last resided" and not the word "reside" (44 B. 924, Foll.) 130 I.C. 240=1931 C. 121. *See also* 47 P.R. 1911=10 I. C. 487; 1926 O. 319=94 I. C. 952 ; 1941 A.L J. 710. A person who was a resident of Delhi for about six years and was a Government servant liable to transfer and who came only for the purposes of prosecuting a criminal proceeding in Calcutta and put up at his brothers who also was liable to transfer was held not to "reside" within the jurisdiction of the Calcutta High Court. 1931 C. 121=130 I.C. 240. A person cannot be said to reside at a place where he spends only a day or two when he has got a

"Court."

(4) "Court" means the High Court or the District Court, as the case may be :

"Minor children."

(5) "minor children" means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of native fathers, girls who have not completed the age of thirteen years ; in other cases, it means unmarried children who have not completed the age of eighteen years :

"Incestuous adultery."

(6) "incestuous adultery" means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity:

"Bigamy with adultery."

(7) "bigamy with adultery" means adultery with the same woman with whom the bigamy was committed :

"Marriage with another woman."

(8) "marriage with another woman" means marriage of any person, being married to any other person, during the life of the former wife whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere ;

"Desertion."

(9) "desertion" implies an abandonment against the wish of the person charging it ; and

"Property."

(10) "property" includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion or as a trustee, executrix or administratrix; and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.

II.—JURISDICTION.

Matrimonial jurisdiction of High Courts to be exercised subject to Act. Exception.

4. The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise : except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

5. Any decree or order of the late Supreme Court of Judicature at Calcutta,

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NOTES.

fixed place of residence elsewhere; but where a person has no fixed place of residence the place where he actually lives must be taken to be the place where he resides. The parties, husband and wife, belonged to Mangalore in South Kanara, were married in Mangalore, and were living there on more than one occasion. They last resided together at Mangalore until the husband left for Rangoon where he was employed, but he had no fixed place of residence in Rangoon. *Held*, that the husband must be deemed to be residing in the place where he actually lived, *i.e.*, in Mangalore, and the District Court of South Kanara had therefore jurisdiction to entertain an application presented by the wife under Ss. 7, 18 and 19 of the Divorce Act for a declaration that the marriage was null and void and for maintenance. 1940 Mad. 584=(1940) 1 M.L.J. 651.

Sec. 3 (5).—As to the necessity for amendment of this section so as to give greater powe to Courts to promote for the maintenance and custody of minor children, *see* 58 M.L.J. 29=31 L.W. 97=1930 M. 154 cited under S. 42.

Sec. 4.—[*See also* under S. 7.] The jurisdiction of the Patna High Court in matters matrimonial is only such jurisdiction as is comprised within the provision of the Divorce Act. 72 I.C. 657=1923 P. 301. A suit for a mere declaration that the plaintiff's marriage with her deceased husband's brother is valid and legal is not sustainable on the matrimonial side of the Patna High Court. (*Ibid.*) As to jurisdiction of High Court, prior to passing of this Act, *see* 38 B. 125=20 I.C. 492=15 Bom.L.R. 593. As to jurisdiction of Oudh Chief Court, *see* 94 I.C. 952=1926 O. 319. S. 4 does not preclude the Court from considering whether a marriage was duly solemnized and from declaring a marriage null and void on grounds other than those contained in S. 18. 47 I.C. 544=11 Bur.L.T. 69.

Accession No....76203

Enforcement of decrees or orders made heretofore by Supreme or High Court.

Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

Pending suits.

6. All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

Court to act on principles of English Divorce Court.

7. Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

NOTES.

Sec. 7.—[*See also* notes under Ss. 4, 17, 18 and 19.]

SCOPE OF SECTION.—S. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. 47 B. 843=25 Bom.L.R. 945=77 I.C. 654. The expression "rules and principles" points rather to the rules and principles on which the Courts deal with matrimonial cases in requiring a certain degree of evidence and other cognate matters. (*Ibid.*) The words "rules and principles" in S. 7 have reference to rules that are quasi-substantive rather than mere adjective law. 7 Bur.L.T. 121=23 I.C. 242. A marriage to be recognized as such by the Courts of a Christian country must be a voluntary union for life of one man with one woman to the exclusion of all others, although it need not necessarily have been celebrated in accordance with Christian rites or ceremonies. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy is not a marriage as understood in England and the Court for Divorce and Matrimonial Causes under S. 7 will not recognize such a marriage as valid. Therefore a marriage contracted between parties according to Buddhist law which recognizes polygamy, is not such a marriage as entitles the parties to relief under the Divorce Act although they may have become Christians subsequently to the marriage. 1940 Rang.L.R. 417=1940 Rang. 67 (S.B.). *See also* I.L.R. (1939) 2 C. 60=1940 C. 75 (Marriage between Mahomedan husband and Roman Catholic wife—Consent of wife obtained by fraud).

CONSTRUCTION OF SECTION.—Though an Indian Act should not ordinarily be construed in the light of statutes enacted by another legislature, yet S. 7 of the Act makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Court in England then acted and gave relief. It is therefore not irrelevant to enquire into the English practice with a view to the resolution of any question arising under the Act. 54 M. 774=35 C.W.N. 1185=1931 P.C. 234=61 M.L.J. 367 (P.C.).

APPLICABILITY.—S. 7 applies not only to the grant of relief but also to questions of procedure. 55 I.C. 269=12 Bur.L.T. 199. *See also* 52 C. 566=1925 C. 874; 53 C. 282=1926 C. 871. The words "principles and rules" in S. 7 of the Act mean principles and rules of law of evidence, of interpretation of practices and procedure but not statutory provisions or rules. The principles and rules to be applied are subject to the provisions of the Act and they consequently cannot run counter to it. They can neither cut down the provision of the Act nor supply any form of relief not provided by it. It is impossible to hold that 'rules' in the section means the statutory rules in force for the time being in England. *See* on appeal. 31 L.W. 97=1930 M. 154=58 M.L.J. 29. *See also* 13 P. 129=1934 P. 475; 57 A. 884=1936 A. 488. Under S. 7, the provisions of which must be strictly complied with, Courts in India are required to give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial cases in England for the time being, acts and gives relief. One of these principles is that a decree for dissolution cannot be made merely on admission and without recording evidence. Even if the Court is satisfied that the petitioner has established his case by evidence, it is necessary for it to go further and find whether there has been collusion; and whether the petitioner has been in any manner accessory to or conniving at the adultery or has condoned the same. Having found on these questions, in favour of the petitioner, the Court is not bound to give a decree if it finds that the petitioner has been guilty of adultery or has been guilty of unreasonable delay in presenting the petition or of having wilfully separated himself from the other party before the adultery complained of.

[1][Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.]

LEG. REF.

[1] Proviso was added to this section by Act X of 1912.

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130 I.C. 401=31 P.L.R. 1008=1931 L. 2 (S.B.).

AGE OF CONSENT.—There is nothing either in the Divorce Act or in the Christian Marriage Act as regards the age of consent for a Christian marriage. Under S. 7, the Indian High Courts have to act according to the principles and rules of English Courts. Therefore in India the age of consent for a Christian marriage will be determined according to the law in England at the time of the marriage. 55 A. 243=1933 A.L.J. 168=1933 A. 135.

DOMICILE.—*See* notes under Ss. 1 and 3, *supra*.

ENGLISH LAW.—There is the possibility of reading into S. 7 an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but that is a forced and unnatural construction. 47 B. 843=25 Bom.L.R. 945=1926 B. 321. *See also* 48 C. 636 under S. 57; 42 M.L.J. 562=1922 M. 350 (F.B.); 38 B. 125=20 I.C. 492; 32 C. W.N. 179. The rule of law in England, that the non-publication of the banns is only a ground of declaring the marriage void if the lack of due publication is within the knowledge of both the parties to the marriage is no guide to an Indian Court. 55 A. 185=144 I. C. 906. In considering, in a divorce suit in India, the question whether a previous marriage of one of the parties is or is not still subsisting, the Court must apply the law in India applicable to that marriage at the time. 36 Bom.L. R. 1021 ; 1933 A. 122.

DISCRETION OF COURT, EXERCISE OF.—In exercising the discretion with which Courts in India have been entrusted, they should be guided by the principles and rules upon which the Divorce Division of the High Court in England acts and gives relief. The discretion is unfettered; though it should be exercised not capriciously but cautiously and carefully not only in regard to the parties themselves but also with reference to the interest of public morality and of decent society. 10 R. 299=139 I.C. 479 =1932 R. 172.

PRACTICE AND PROCEDURE—EVIDENCE.—In all divorce cases the petitioner must come into the witness-box, must be sworn, and he must prove his case because among other things, the Judge has to satisfy himself whether there is any collusion between the parties and as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court would set aside the decree *nisi*. 44 A. 728 =1923 A. 43 (F.B.). It is almost impossible to administer the law on principles and rules laid down by the Divorce Court in England if the parties do not conform to the rules of procedure both under the Civil Procedure Code which applies to cases under the Divorce Act and to the principles and rules upon which the Court in England acts. The rules must be complied with. A petition which does not comply with the rules and which does not contain all the particulars ought not to be admitted. In divorce cases the parties must first establish the fact of marriage. The Divorce Court in England does not act upon the evidence of the petitioner only to prove the factum of marriage, but it is necessary to produce a statutory certificate of marriage. But the practice, though universal, is not necessarily a rule of law, and if the circumstances warrant it, the Court may still hold the marriage proved even in the absence of a certificate. 13 P. 129=15 Pat.L.T. 353=1934 P. 475. A decree for a dissolution cannot be made merely on admissions and without recording evidence. (17 B. 624, Ref.) 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.). *See also* 13 P. 129=1934 P. 475; (1940) 1 M.L.J. 210. As to admission of additional evidence after decision, where advocate omits to call evidence, *see* 11 I.C. 779=4 Bur.L.T. 161. Admissions as to cruelty and adultery are not conclusive proofs. 38 C. 907=13 I.C. 491. In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. 43 M.L.J. 441=45 M. 982=68 I.C. 931 (F. B.). *See also* 42 M.L.J. 562=1922 M. 350=70 I.C. 43. Procedure as to service of petition. *See* 55 I.C. 269=12 Bur. L.T. 199. Attachment before judgment not to be made in a divorce suit. 7 I.C. 792=37 C. 693.

CO-RESPONDENT.—Where charges of adultery are made against a person, he ought to be made a co-respondent unless the Judge should otherwise direct. 45 M. 982=43 M.L.J. 441=1923 M. 9 (F.B.). Claim for damages against co-respondent—Points to be considered in assessing damages. 3 O.W.N. 296. *See also* 38 M. 466= 25 M.L.J. 594; 47 I.C. 510=45 C. 525. Proceedings by wife for divorce—Joinder of adulteress as a party, not proper. 10 R. 115=137 I.C. 426=1932 R. 73.

COSTS.—Even although a wife's defence fails or her counter charges break down or she has been proved guilty of adultery the husband has to pay her costs. 1922 A. 243. On the question of costs, *see also* 57 C. 1350=130 I.C. 246=1931 C. 206. Petitioner's costs have to be given priority in respect of amounts deposited by the co-respondent into Court over the rights of an attaching creditor. 57 C. 1350=130 I.C. 246= 1931 C. 206. An order of the trial Court against the husband for security for the wife's costs in prosecuting her suit for divorce does not bind the hands of the appellate Court when it comes to make an order as to whether the wife should be given her costs of the appeal. 130 I.C. 246=57 C. 1350=1931 C. 206. There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. 60 C. 318=37 C.W.N. 249 =1933 C. 388.

Extraordinary jurisdiction of High Court.

8. The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

Power to transfer suits.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

Reference to High Court.

9. When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

III.—DISSOLUTION OF MARRIAGE.

When husband may petition for dissolution.

10. Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

NOTES.

Sec. 8.—The husband filed a divorce petition in the District Court. The wife applied to the High Court for the transfer of the case to its own file as the parties were both serving in Calcutta and it was convenient for them both, if the case was tried at Calcutta, and moreover, the wife stated that in case the divorce proceedings were tried in the District Court, she might lose her employment is often required to go there. It was found that on the transfer of the case to the High Court, the costs payable by the husband were very excessive so much so that he would have to go in insolvency for them. *Held*, that though there was convenience to both parties if the case was tried in the High Court, it was an expensive task for the husband which might make him apply in insolvency and the application for transfer should, therefore, be refused. 1937 C. 303=171 I.C. 930. The expression "High Court" as used in S. 8 of the Divorce Act does not mean either the original or the appellate side of the High Court, but means the High Court as one whole. But the litigant, when he wants to have an order under that section, would have to approach that particular department of the High Court which is empowered to deal with this matter by its rules framed under S. 13 of Act 24 and 25 Vict., Chap. 104, which is substantially repeated in S. 108 of the Government of India Act, 1919 and S. 223 of the Government of India Act, 1935. I.L.R. (1941) 2 Cal. 373=45 C.W.N. 916.

Sec. 10: SCOPE—GROUNDS OF DIVORCE.—S. 10 of the Divorce Act sets out the grounds on which marriage may be dissolved by the Court. If the legislature had intended that other grounds and other methods should be available to the parties, one would expect a proviso saving the operation of the personal law. 36 Bom.L.R. 1021. That the marriage had been induced by some sort of fraud is no ground for divorce under the Indian Divorce Act. 152 I.C. 1007=1934 P. 670 (F.B.). Where a Hindu after marrying a Christian wife and while that Christian wife is living, marries a Hindu wife in Hindu form, though the second marriage does not amount to bigamy it amounts to a second marriage and if that marriage is consummated the consummation *vis a vis* the first wife amounts to adultery and forms a ground for divorce on the petition of the first wife. I.L.R. (1941) Nag. 260=1940 N.L.J. 391=1940 Nag. 195 (S.B.).

JURISDICTION.—In a case under the Divorce Act it is the duty of a Court, apart from the objections taken by one or other of the parties, to enquire into and set out in judgment facts, which show clearly that it possesses jurisdiction to pronounce a decree for dissolution of marriage. 12 L. 214=1930 L. 916. Under S. 16, Bombay Civil Courts Act, the District Judge cannot transfer to the Assistant Judge a suit under the Divorce Act and the Assistant Judge cannot try the suit. 39 B. 136=26 I.C. 599=16 Bom.L.R. 754. Irish woman and Englishman married in Ireland living in India—Husband temporarily serving in British regiment—Court has got power to grant divorce. 106 I.C. 481=5 O.W.N. 163. Scope of the Indian and Colonial Divorce Act pointed out. (*Ibid.*) As

When wife may petition for dissolution.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman ;

NOTES.

to jurisdiction of Oudh Chief Court, *see* 1926 O. 319=94 I.C. 952=3 O.W.N. 406.

DOMICILE.—Before granting a decree for divorce under S. 10, a clear finding as to domicile of parties should be arrived at, and where the petitioner has claimed divorce on the ground that her husband committed an unnatural offence upon her, there should be some evidence and a finding as to the unnatural offence alleged. 138 I.C. 611=1932 L. 468 (1) (S.B.).

"RESIDE"—MEANING.—A person who has an abode elsewhere, but who comes to a place for a short period and with a fixed purpose for being within the jurisdiction of a Court cannot be said to "reside" there. 12 L. 214=1930 L. 916. In this section the word "together" governs only the words "last resided" and not the word "reside". The Act therefore gives the petitioning spouse the choice of selecting his forum either as (1) the district where the parties had last resided together or (2) the district within the local limits of which, both the husband and the wife, though living separately "reside" at the date of the presentation of the petition. 1930 L. 916=12 L. 214.

CHANGE OF RELIGION.—Under this section change of religion by the husband and his subsequent re-marriage entitles his first wife to dissolution of the marriage. 14 I.C. 192.

ADULTERY.—In a suit for dissolution of marriage the Court may presume adultery if it is satisfied that guilty attachment subsisted between the parties and that they had opportunities to have guilty intercourse. 62 I.C. 782. *See also* 55 A. 597=1933 A. 427. The direct fact of adultery need not be proved. In a divorce case, the correspondence between the respondent and the co-respondent is very important evidence. 62 I.C. 782. *See also* 31 N.L.R. 184=156 I.C. 1008=1935 N. 49 (S.B.). It is a fundamental rule that it is not necessary to prove the direct fact of the adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. But the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. 55 A. 597=1933 A.L.J. 1108=1933 A. 427; 8 O.W.N. 168=132 I.C. 773=1931 O. 259. *See also* 1935 N. 49 (S.B.). Admission in a letter from the husband of adultery is not a sufficient proof of adultery. 31 I.C. 264 (F.B.). *See also* 49 B. 368=27 Bom.L.R. 251; 51 B. 1026 (1030, 1032) (Wife's admission of adultery—Caution to be exercised). If a husband or wife contracts a venereal disease during the marriage but fails to show that the origin of the disease was innocent, adultery is established if it is proved that the wife or husband was free from that disease and could not possibly have communicated the same to him or her. 12 L. 95=1930 L. 828. *See also* 1933 L. 507. In India, in proceedings for divorce instituted by a wife, a Court has no power to allow the alleged adulteress to be made a party. 10 R. 115=1932 R. 73. In a divorce suit filed by the husband on the ground of adultery the *miscarriage* took place long after the filing of the petition, and the evidence of non-access was offered by the husband. *Held*, that the *evidence of the husband* of non-access was admissible against his wife. 150 I.C. 445=1934 A. 618 (S.B.). A husband praying for the dissolution of his marriage on the ground that his wife had been guilty of adultery, is entitled to rely upon adultery committed by her outside India. 45 C.W.N. 249.

DELAY IN APPLYING FOR DIVORCE.—When a charge of adultery is proved the first thing to which a Court directs its attention is the delay which has occurred since the husband became aware of the fact. Delay is not by itself a bar to the suit but it is a most material matter, which unexplained, would lead the Court to conclusions fatal to the petitioner's relief. 26 S.L.R. 423=1933 S. 27.

"BIGAMY WITH ADULTERY" AND "MARRIAGE WITH ANOTHER WOMAN WITH ADULTERY".—Bigamy with adultery is specifically defined in the Act as meaning adultery with the same woman with whom the bigamy was committed, but marriage with another woman with adultery is not defined. The definition contained in S. 3 (8) merely deals with marriage with another woman which is defined as meaning marriage of any person being married to any other person during the life of the former wife, whether the second marriage shall have taken place within the Dominions of His Majesty or elsewhere. Therefore, if a man after such second marriage cohabits with such woman, the first wife is entitled to apply for dissolution of marriage, just as she would have been entitled to apply if the husband would have been guilty of "bigamy" with adultery. 136 I.C. 262=1932 L. 116.

CRUELTY.—Though cruelty in its popular sense is undoubtedly a ground for divorce, yet that is not the only kind of cruelty which will be a ground for divorce. There may be a case of cruelty in which either bodily injury has occurred or there may be cases in which the evidence is such as to lead to an inference of a reasonable apprehension that bodily injury would result; and in case of cruelty it is necessary that the evidence of the petitioner should be corroborated. 13 P. 129=15 Pat.L.T. 353=1934 P. 475. Repeated acts of cruelty by a husband taken together, entitles the wife to a decree for divorce, though each act by itself may not be sufficient ground, and no formal complaint o threat of divorce proceedings was made as regards each of them. 36 I.C. 982=10 Bur.

NOTES.

L.T. 228. Cruelty is conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. In order to establish a case of cruelty against her husband, a wife must prove more than isolated acts of violence. No doubt the decree of violence varies in accordance with the status of the parties. 107 I.C. 184=1928 O. 114. *See* 139 I.C. 618=1932 O. 231. The cruelty must be dangerous to life, limb or health, bodily or mental or a reasonable apprehension of it. 36 I.C. 381=10 Bur.L.T. 182; 139 I.C. 618=1932 O. 231. Isolated assaults that arise on the spur of the moment on some real or fancied provocation do not constitute cruelty. 1928 O. 114=107 I.C. 184. To constitute legal cruelty, there must be danger to life, limb or health, bodily or mental or a reasonable apprehension of it. In order to establish cruelty against the husband, the wife must prove more than isolated acts of violence. (1928 O. 114, Rel. on.) 1933 L. 728. A single severe assault resulting from a dispute as to jewellery would not amount to such cruelty but adultery of the husband affords ground for judicial separation. 107 I.C. 184. Threat of physical force to a pregnant wife amounts to legal cruelty. 47 A. 50=83 I.C. 167=1925 A. 237. *See also* 1933 L. 728; 53 C. 436. Subsequent cruelty may operate to revive condoned adultery. *See* 39 C. 395=15 I.C. 886; 47 A. 50=83 I.C. 167; 53 C. 436=96 I.C. 932=1926 C. 864. As to the amount of cruelty to be proved, *see* 11 I.C. 784, *supra*. Where a husband who has a loathsome disease and knowing that, he compels his wife to sexual intercourse with him against her will even though the forcible intercourse might not result in communicating the disease, cruelty must be held to be proved. 1930 L. 828=12 L. 95=126 I.C. 527. *See also* 1933 L. 507.

Desertion.—To constitute desertion there must be a cessation of co-habitation and an intention on the part of the guilty party to desert the other. Where a husband brings a concubine into the house where his wife is living and the wife has to leave the house in consequence, the husband, under the circumstances, is guilty of deserting the wife, so as to constitute a good ground for divorce at her instance. 155 I.C. 553=41 L.W. 534=68 M.L.J. 606. Desertion implies an abandonment against the wish of the person charging it. 5 Bur. L.T. 85=15 I.C. 353. There is no abandonment against the wish of the wife where she herself left owing to intemporate habits of her husband. 31 I. C. 264=8 L.B.R. 106 (F.B.). A wife who seeks to prove desertion must give evidence of conduct on the part of the husband showing unmistakably that such desertion was against her wish actively expressed. The husband must be proved to have wilfully absented himself from her in spite of her wish. Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. 31 I.C. 264. No decree can be passed on a petition for divorce made before the two years' period of desertion is over, as it is premature and without a cause of action. 6 Bur.L.T. 177=21 I.C. 250. The desertion required to be proved under S. 10 of the Act must be desertion within the meaning of S. 3 (9) of that Act, *viz.*, a wilful abstention by the husband against the wish of the wife. 165 I.C. 392=1936 O.W.N. 938. When there has been desertion by the husband of his wife for a long time, a subsequent association between the parties, during which the parties, though living under the same roof live as strangers, cannot amount to a break in the desertion. Desertion is not broken unless the husband offers to the wife a home on terms on which a self-respecting wife can accept. 177 I.C. 940=40 Bom.L.R. 900=1938 Bom. 425.

Adultery and Cruelty.—In order that a wife can have a marriage dissolved, it is necessary that there should be proof of adultery and cruelty on the part of the husband. 1933 L. 728. In a suit for dissolution of marriage, it was proved that the husband had contracted gonorrhoea and had communicated it to the wife and that the husband was guilty of cruelty. *Held*, that the husband was guilty of adultery and that with the charge of cruelty was sufficient for the wife to obtain a decree *nisi* for the dissolution of the marriage. 1933 L. 507. *See also* 12 L. 95. A wife who has obtained a judicial separation on the ground of her husband's adultery is entitled to a dissolution of the marriage on proof that her husband has been guilty of adultery after the separation and that he has been guilty of cruelty to her after separation. 45 I.C. 914=11 Bur.L.T. 227. *See also* 1927 O. 34=98 I.C. 1019.

Adultery and Desertion.—For a decree for divorce, adultery of the husband together with desertion without reasonable cause for two years or upwards or with such cruelty as without adultery would entitle the wife to a divorce, must be proved. 36 I.C. 381=10 Bur. L.T. 182. As to condonation of adultery, *see* 1928 O. 114=107 I.C. 184. *Marriage with another woman and adultery. See* 33 P.L.R. 339=1932 Lah. 116.

Discretion of Court.—Court has a discretion to grant dissolution on a petition by the wife even though the petitioner had been, subsequent to desertion by the husband, leading a life of prostitution for some time, if the Court comes to the conclusion that such prostitution was necessitated by destitution and that her conduct was otherwise free from blame. 57 C. 891=1930 C. 729. *Condonation* in part of matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse. If thereafter the offences are repeated the right to make the condoned offences a ground for divorce revives. To constitute such revival the same offence need not be repeated, and misconduct is sufficient. Where the husband condoned the wife's adultery and subsequently the latter was guilty of desertion, *held*, that the husband's right to claim divorce revived. 7 R. 313=1929 R. 216 (S.B.). *See also* 60 C. 318=37 C.W.N. 249=1933 C. 388.

Joinder of Parties.—In proceedings by wife for divorce, the alleged adulteress is not a proper party. 10 R. 115=1932 R. 73.

Pleadings and Proof.—*Evidence in divorce proceedings* to prove the case of the petitioner or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition.

Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

NOTES.

must be confined to the pleas set out in the petition. Consequently it is essential, as laid in S. 10 to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded. 193 I.C. 301=1941 Rang. 110. Before the Court can grant a decree for dissolution of marriage it must be satisfied that the marriage did take place and the marriage is a valid one. A bare statement of the petitioner that he was married is not sufficient evidence of marriage and he must produce the marriage certificate. (1933 R. 93, Rel. on.) 164 I.C. 712=1936 R. 398. Unless the marriage is proved which is sought to be dissolved, no relief could be given to the applicant for dissolution. I.L.R. (1940) All. 99=1940 A.L.J. 228=1940 All. 308 (F.B.). As divorce affects the status of the parties it is of importance that the necessary conditions to justify a decree for dissolution of marriage should be complied with. It is specifically laid down that certain facts must be averred and proved before a Court has jurisdiction to pass a decree for dissolution of marriage. Where there was no averment or direct evidence that the parties to the marriage were domiciled in India at the time when the petition was presented. *Held*, that the omission would justify the Court in returning the petition. 11 R. 68=1934 R. 93. Divorce suits when undefended are peculiarly difficult because the Court is under the obligation of detecting for itself deficiencies which there is no interested party to point out. That obligation is however inoperative. Decrees for dissolution of marriage are not made without strict proof, and the fact that both parties are equally anxious to be divorced is in itself a reason why the Judge should be strict as to proof. 1933 S. 70=143 I.C. 618. It is no doubt extremely difficult, if not impossible, to prove the actual fact of adultery, but no sensible man familiar with the common course of human conduct would ever persuade himself that when a man turns away his wife and lives with another woman in the same room for days and months that their relations could be altogether innocent. Where therefore a woman shares a room with a stranger and her undue familiarity with him leads to the latter's wife being turned out of doors and the woman behaves indifferently towards her own husband, the circumstances throw a sinster light on her relations with the stranger, and any man of common sense would irresistibly come to the conclusion that she was living in adultery with him. 1935 N. 49 (S.B.). *See also* 26 S.L.R. 423. Adultery requires direct proof either by that of eye-witnesses or irresistible inference and direct proof is required of the identity of persons charged with adultery. Where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child, since the separation of the husband and the wife, the evidence should be directed to the maternity of the mother in relation to the child and the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily sufficient to establish that that child is her child. 11 P. 627=1932 P. 345 (S.B.). The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty. 1933 A.L.J. 14=1933 A. 56=55 A. 134. Where in a petition for dissolution by a wife, the petitioner stated that the person with whom her husband committed adultery was unknown to her, but in evidence she and her witnesses identified a particular woman with whom her husband committed adultery. *Held*, even though no amendment in the petition was made as to the name, the identification by the petitioner and her witness was sufficient to grant a decree *nisi* for dissolution. 167 I.C. 743=1937 P. 82=18 Pat.L.T. 686.

Secs. 10, 11 and 12: PETITION FOR DISSOLUTION—FACTS TO BE PROVED—DUTY OF COURT.—In a petition for dissolution petitioner has to allege and prove that he professes Christian religion, that marriage was solemnised in India, that the parties to marriage were domiciled in India when the petition was presented, and that husband and wife reside or last resided together within local limits of ordinary jurisdiction of Court of the District Judge, to whom the petition was presented. These must be proved by evidence, and petitioner is not excused from proving them merely because respondent admits them. A divorce Court has always to bear in mind the possibility of collusion and must insist on strict proof of all the facts alleged. The Judge should come to a distinct finding as to whether the marriage has been solemnised in India and upon what date. A certificate of marriage is not the only way of proving marriage but it is usually the best way. 31 N.L.R. (Supp.) 174=1936 N. 26 (S.B.).

Secs. 10 and 14—Where the petitioner the husband had also been guilty of adultery, it is for the Court to consider whether it should refuse to give him a decree or

11. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court :—

Adulterer to be co-respondent.

(1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;

(2) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it ;

(3) that the alleged adulterer is dead.

12. Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

Court to be satisfied of absence of collusion.

NOTES.

should exercise its discretion in his favour. The discretion should no doubt be exercised with due care and strictness. Where there was nothing to suggest that the petitioner was a man of loose and profligate character and where the parties were living apart and the respondent had given birth to an illegitimate child and there was no collusion or connivance between them, in such a case, it was *held* that a decree for dissolution of marriage should not be refused upon the ground of the petitioner's misconduct. I.L.R. (1939) All. 573=1939 A.L.J. 478=1939 All. 522.

Secs. 10 and 22.—If on a petition by the wife for dissolution of her marriage, a case for judicial separation alone is made out and not for dissolution, the Court can grant a decree for judicial separation. If it dismisses the petition without considering the question of judicial separation, a review application is competent. 41 P.L.R. 337=1939 Lah. 404. Petition for dissolution by wife—Charge of adultery not proved—Cruelty proved—Right to decree for judicial separation. 165 I.C. 12=1936 O.W.N. 918.

Sec. 11.—Court should not lightly excuse a party from making any enquiry which he can reasonably be expected to make as to the adulterer. *See* 49 B. 368=27 Bom.L.R. 251=1925 B. 231. Indian Courts do not have the same discretion to dispense with the name of a co-respondent as English Courts have. Three grounds stated in S. 11 are the only ones on which leave can be so granted to proceed with the petition for dissolution. The fact that the petitioner had well grounded suspicions against two men is no sufficient reason. 107 I.C. 667 =1928 N. 117. Where the husband did not name the co-respondent living in a distant place and it appeared that he did not know the name and that he could not find it out. *Held*, that the Court could excuse him under S. 11. 7 R. 313=1929 R. 216 (S.B.). In a petition for divorce by the husband the petitioner has to make the alleged adulterer or adulterers a co-respondent or co-respondents to the petition unless he is excused from doing so by the Court on certain grounds. The father and mother of the wife cannot be made parties to such a petition. 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.).

Secs. 12 to 14 : CONNIVANCE.—It is obligatory on a Court entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in Ss. 12 and 14 and that obligation is not extinguished by the mere fact that the case is an undefended one. 195 I.C. 325=1941 Rang. 193 (S.B.). The proceedings under the Act are not a civil suit which can be compromised and under S. 12 it is for the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not petitioner has been in any manner accessory to or conniving at adultery or has condoned same and Court has to enquire into any counter-charge which may be made against petitioner. 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.). A mere refusal by husband without reasonable cause of matrimonial bed, does not constitute desertion or such wilful neglect or misconduct as conduces to wife's adultery, and is not a sufficient ground for dissolution. 44 C. 1091=41 I.C. 447=21 C.W.N. 717. A decree for dissolution cannot be legally granted merely on the ground that respondent does not oppose petition. Court must satisfy itself that there was good reason for delay in suing, and that connivance or condonation is absent. 25 P.R. 1919 =51 I.C. 235 (F.B.). Husband's conduct, partly cause of wife's adultery, can be considered against husband. 54 C. 80=30 C.W.N. 820=1926 C. 1014. A wife petitioning for dissolution of marriage is not in the absence of a fresh matrimonial offence, entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. The Courts cannot possibly countenance a petitioner who had material for dissolution, refraining from claiming it in his or her petition and obtaining only a decree for judicial separation, and then later on when he or she thought it convenient to come to the Court to repeat the same evidence all over again and asking for a decree for dissolution. But where in a case there is, besides the decree for judicial separation, entirely fresh evidence of adultery, the wife would be entitled to a decree *nisi* for dissolution on such evidence

13. In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

Dismissal of petition.

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

When a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court.

NOTES.

without adducing fresh evidence of cruelty which had already been proved in the previous case. I.L.R. (1940) Mad. 319=1940 Mad. 510 =(1940) 1 M.L.J. 210.

COLLUSION.—Collusion is an illicit secret understanding by which parties who are jointly furthering a common purpose assume semblance of hostility. 1933 S. 70=143 I.C. 618. Collusion under S. 13 exists where initiation of proceedings for dissolution is procured or its conduct provided for by agreement between spouses or their agents. 44 C. 1091=41 I.C. 447=21 C.W.N. 717. If Court is satisfied that there is no collusion between parties, it may act on an uncorroborated confession of adultery by a party to the proceedings. 49 I.C. 305=11 Bur. L.T. 197. *See also* 9 L. 116.

ADMISSION OF ADULTERY—IF CAN BE ACTED ON BY COURT— CORROBORATION — NECESSITY. — Confession or admission by one of the parties in a matrimonial suit has to be taken with great caution. It may be accepted as evidence of adultery without corroboration only in most exceptional cases ; usually the Court must demand corroboration of such an admission or confession. But if Court is satisfied that there is no collusion, there is nothing to prevent Court in law from acting on what in substance is a confession by one of the parties. 13 P. 129=15 Pat.L.T. 353=1934 P. 475.

CONDONATION.—Resumption or continuance of co-habitation with complete knowledge of wife's adultery amounts to condonation. 57 I. C. 216=31 C.L.J. 435. Condonation is a question of fact and not of law. *See* 41 B. 36= 36 I.C. 800=18 Bom.L.R. 818. Condonation is forgiveness of a conjugal offence with full knowledge of all circumstances and is purely a question of fact. It is a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before commission of offence. 44 C. 1091=21 C.W.N. 717. *See also* 60 C. 318=37 C.W.N. 249=1933 C. 388 ; 7 R. 313=1929 R. 216 (S. B.). Mere forgiveness is not condonation ; condonation means completely restoring offending party and must be followed by co-habitation. 57 I.C. 216=31 C.L.J. 435=47 C. 1068 ; 44 C. 1091. Condonation of past matrimonial offences is however impliedly conditioned upon future good behaviour of offending spouse, and it follows that, if after condonation, offences are repeated, right to make condoned offences a ground for divorce revives. 57 I.C. 216=31 C. L.J. 435=47 C. 1068. If adultery is condoned, but subsequently wife commits an offence less than adultery with another person, it does not revive offence of adultery which has already been condoned ; but if subsequent offence committed is adultery itself, forgiveness is cancelled and old cause of complaint is revived even if offence be *ejusdem generis* with original offence. 1928 O. 114=107 I.C. 184 ; 51 B. 1026=29 Bom.L.R. 1336=105 I.C. 871.

DELAY.—Unreasonable delay in instituting proceedings will generally be excused if it is really due to poverty. 57 I.C. 216=31 C.L.J. 435. But delay may also be a ground for dismissal of petition for dissolution. 1921 L. 320=107 I.C. 273 (2). Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying the presenting of a petition. 31 I.C. 264=8 L.B.R. 106 (F.B.). *See also* 31 N.L.R. 184=1935 N. 849 (S.B.).

PRACTICE AND PROCEDURE. — High Court should not make a decree *nisi* absolute without a motion made to that effect. 31 A. 511=3 I.C. 969=6 A.L.J. 793, following 10 A. 559. A decree for divorce may be obtained even if the petitioner be guilty of adultery during marriage under very peculiar circumstances, adultery by the petitioner is no bar to a decree. But the Court is bound by the rules binding English Courts under the English Divorce Act. 70 P. R. 1911=12 I.C. 960. Misconduct of wife before confirmation of decree *nisi* on her application—Court's discretion. *See* 88 I.C. 1009= 1925 R. 257. Wife's adultery—Husband's adultery proved—Application may be dismissed. 41 B. 36=36 I.C. 800=18 Bom.L.R. 818. Points to be considered in assessing damages against co-respondent. *See* 1927 O. 34.

Sec. 13.—If a petition for divorce by a wife is unopposed, the evidence that the husband committed adultery and had been cruel to his wife, is by itself not sufficient basis for a decree *nisi*. It is essential to prove want of connivance on part of the wife at the alleged adultery and if there is delay in filing petition, delay must be explained. It is also essential that necessary facts should be stated and recorded with precision. 1930 A. 322=124 I.C. 465 (S.B.).

Power to Court to pronounce decree for dissolving marriage.

14. In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

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NOTES.

Sec. 14.—In a suit under the Act provisions of Act must be strictly complied with and particularly a decree for dissolution cannot be made on admissions alone, without recording evidence. 1931 L. 1=12 L. 266 (S.B.).

ADULTERY OF WIFE—HUSBAND'S CONDUCT REPREHENSIBLE.—Husband of the petitioner had ill-treated her and subsequently deserted her with no means to provide for herself and her child. For providing of the education of the child, she was obliged to resort to a life of prostitution for some time and subsequently she gave up that life. It was found the husband was leading a life of adultery. The wife applied for dissolution. *Held*, that having regard to the fact that the petitioner did not make any attempt to keep material fact from the Court and that she has been maintaining her child in a very satisfactory manner, the discretion under S. 14 ought to be exercised in favour of the petitioner, and decree *nisi* for dissolution made. 57 C. 891=1930 C. 729. In dealing with divorce cases it should ever be remembered that the woman is the weaker vessel, that her habits of thought and feminine weakness are different from those of the man and that what may perhaps be excusable in the case of woman would not be excusable in the case of man. Where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the Court should make allowance in treating her case with leniency. Where there is sufficient evidence to prove cruelty and adultery on the part of the husband who deserts his wife without making any provision for maintenance of his wife and the wife who was living in her father's house after her desertion by the husband cohabits with a person living as a guest in the father's house, the conduct of the husband in deserting his wife and making no provision for her conduces greatly to wife's adultery and it is a fit case in which Court should exercise its discretion by granting to the wife a decree *nisi* under S. 14. 136 I.C. 764=1932 S. 18. *See also* 1939 A.L.J. 478=1939 All. 522=I.L.R. (1939) All. 573. Where proceedings for the dissolution of marriage on the ground of adultery are instituted promptly on the discovery and there is no collusion or connivance between the parties, a decree for dissolution of the marriage should be pronounced. 34 P.L.R. 893=145 I.C. 974=1933 L. 255. Where it is proved that the wife's adultery with the respondent was with the connivance of her husband, her adultery with him does not revive her previous adultery with another person. 165 I.C. 392=1936 O.W.N. 938. In a divorce case four points require consideration. They are: (1) Is the petitioner resident in India within the meaning of the Act? (2) Has the petition been presented or prosecuted in collusion with either of the respondents? (3) Has the petitioner been guilty of any such wilful neglect towards his wife as has conduced to the adultery? and (4) Has there been adultery between respondent and co-respondent? 1933 S. 70=143 I.C. 618. *See also* I.L.R. (1939) All. 573=1939 A.L.J. 478 =1939 All. 522. Under the provisions of S. 14, the Court has to be satisfied on evidence that the case of the petitioner has been proved and a decree for dissolution of marriage cannot be made merely on admissions without recording evidence. There should also be evidence of domicile without which a District Judge cannot proceed to hear the petition for dissolution. 143 I.C. 122=1933 L. 356. Where a woman who has been treated with gross cruelty and has heen deserted by a husband guilty of habitual adultery under the most aggravating circumstances and who, after her husband had left the place where he had in fact long deserted her, married a Mahomedan husband according to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would *ipso facto* be dissolved, it cannnot be said, merely because she was wrongly advised as to the law, that exercising discretion in her favour and granting her decree *nisi* would encourage immorality. Hence, discretion under S. 14 should be exercised in her favour. 177 I.C. 167=A.I.R. 1938 Sind 162.

CONDONATION.—Condonation of matrimonial offences means the complete forgiveness of all such offences as are known to, or believed by, the offended spouse so as to restore between the spouses the *status quo ante.* Mere forgiveness is not condonation. Forgiveness is condonation when it results in completely restoring the offending party and is accompanied by cohabitation. 1935 N. 49 (S.B.). Condonation is not absolute, but is only conditional and if there is a subsequent matrimonial offence, then the condonation goes and the original offence is revived. 1935 N. 49 (S.B.) ; 156 I.C. 247=29 S.L.R. 83. A deed of separation between a husband and wife contained the following clause: "No proceedings shall be taken by or on behalf of . . . . in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against the other is hereby condoned." The wife having filed a petition for dissolution of marriage grounded on allegation of adultery by the husband subsequent to the separation deed coupled with allegation of cruelty charged to have taken place prior to the execution of that deed, *held*, that the clause in the deed operated as an absolute release and not by way of conditional condonation and that cruelty antecedent to the deed could not be relied on. 60 C. 318= 37 C.W.N. 249=1933 C. 388. Upon the commission of a subsequent matrimonial offence the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not necessarily be *ejusdem generis* as the original offence. Subsequent cruely would, therefore, revive previously condoned adultery. 1939 Rang.L.R. 267=1939 Rang. 352.

DELAY IN PRESENTING PETITION—DUTY OF COURT TO CONSIDER.—Although the provisions and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections 16 and 17 made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

Condonation.

No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.

NOTES.

of the Limitation Act do not apply to suits or proceedings under the Divorce Act one of the first things which Court should look to when a charge of adultery is preferred is whether there has been such delay as to lead to the conclusion that petitioner has either connived at the adultery or was wholly indifferent to it. Poverty is almost always a sufficient excuse for delay, subject of course to delay not being inordinate. 1935 Sind 112 (F.B.); 156 I.C. 247=29 S.L.R. 83. Where delay is accounted for by the honest efforts made by petitioner to prevail on his spouse to abandon her evil ways, it would not be an unreasonable delay so as to deprive the petitioner of his legal right to secure a divorce. 1935 N. 49 (S.B.); 31 N.L.R. (Supp.) 174=161 I.C. 409=1936 N. 26 (S.B.). Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. 193 I.C. 301=1941 Rang. 110 (F.B.). In a petition for divorce by the wife on the ground of her husband's adultery and cruelty, when she makes out her case, but admits herself having been guilty of adultery, the respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which, however, the respondent was himself in a serious degree responsible, and when it is found that it was the conduct of the husband (respondent) in forcing the wife to leave the home that has conduced to the adultery which she confesses, the respondent should not be allowed to take advantage of that; *held further*, on the facts that a *delay of three years* was not, under the circumstances, unreasonable and should be condoned by the Court; and that discretion should be exercised in the wife's favour by granting the divorce, notwithstanding the delay and her admitted adultery. 13 P. 129=15 Pat.L.J. 353=1934 P. 474. Courts in Burma, like the High Court in England, are entitled to pronounce a decree based on *adultery committed by the respondent after the presentation of a petition for dissolution* of marriage. But the petitioner desiring the Court to do so should, with the leave of the Court, file a duly verified supplemental petition supported by an affidavit setting out the facts, testifying to non-collusion and non-connivance, and should also serve such petition on the respondent and on all persons affected by it. This is the English practice which applies equally in Burma. 1939 Rang. L.R. 267=1939 Rang. 352.

PRACTICE.—There are no rigid rules as to the exercise of the discretion of Court to grant a petition for divorce. All relevant facts are to be considered as well as the welfare of the parties themselves and the principles of morality. If the wife's adultery has been condoned by the conduct of her husband, she is entitled to ask the Court to exercise its discretion in her favour and to grant her a divorce; in the event of deliberate suppression by a petitioner the Court will be disinclined to give him or her the assistance that it might have given, had full disclosure been made at the outset. Subject to these guiding principles, the Court will naturally take a large and merciful view, considering the interests of possible children who might otherwise be born out of lawful wedlock, and the probability of one party to the proceedings marrying the third party involved if enabled to do so by being accorded freedom from the marriage tie. 165 I.C. 392=12 Luck. 697=1937 O. 116. Before passing a decree *nisi* what the Court has got to see is not that the petitioner has given *prima facie* proof of his case but that the justice of the case demands that the decree should be pronounced. The facts on which the exercise of the discretionary power is sought should be set out in the petition. The Court should also consider that delay in filing petition is a point against him. 1934 P. 38=146 I.C. 798 (F.B.). In

o Relief in case of opposition
n certain grounds.

15. In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground in case of such a suit instituted by a husband, of his adultery, cruelty or desertion without reasonable excuse, or, in case of such a suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion.

Decrees for dissolution to be *nisi*.

16. Every decree for a dissolution of marriage made by a High Court, not being a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

NOTES.

petitions for dissolution there is nothing in the Act as regards the exercise of the discretion of Court, and in this matter the practice in English Courts must be followed. There is no doubt that discretion of Court in these matters ought to be used with care. The main consideration is interest of the community at large. There is one ground however on which the discretion of the Court is invariably exercised and that is where the wilful neglect or misconduct of the respondent husband caused or conduced to his wife's adultery. Further there must be complete candour and disclosure on the part of the petitioner who wishes the Court to exercise its discretion in his or her favour. 151 I.C. 827=1934 A. 782.

Sec. 15.—Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of divorce. 47 B. 657=25 Bom.L.R. 289 =1923 B. 284. Desertion to justify judicial separation must be a wilful absentation by the husband against the wish of the wife. 47 B. 657. Where a wife sues her husband for divorce on the ground of his adultery it is open to the husband in his written statement to counter-petition for a divorce on the ground of wife's adultery. It is not necessary that the husband should take an independent proceeding. 47 B. 657. Where a husband alleges adultery on the part of the wife with a foreigner the Court has jurisdiction to add such foreigner as a co-respondent to the proceeding. (*Ibid.*) *See also* 46 M. 133 under S. 37.

Sec. 16.—A High Court alone is competent to pronounce a decree *nisi* under S. 16. 43 I. C. 519. A decree for dissolution of marriage, made by the High Court under the Divorce Act whether in its appellate or in its original jurisdiction, should be a decree *nisi* and not a decree subject to the confirmation by the High Court under S. 17. 175 I.C. 408=1938 Rang. 204 (F.B.) In *ex parte* cases the proper course, if there is no cross-examining pleader, is for the Judge to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner seeks relief. 29 Bom.L.R. 308=1927 B. 230. If in a matrimonial suit the husband being ordered to give security for the wife's costs and having failed to give it then, where the husband is the petitioner, his petition should be stayed and not dismissed. 47 B. 664 =25 Bom. L.R. 339. Where wife is petitioner, husband's defence should not be struck out, but he should be proceeded against for contempt if he is proved to be able to pay, but contumaciously refuses to do so. 47 B. 664. Where, in a divorce case, the decree is referred to the High Court for confirmation, the said Court has jurisdiction for the purpose, and it is not necessary for the said purpose that petitioner himself should be present personally before the High Court. 29 M.L.J. 269=29 I. C. 178 (F.B.). A witness in a divorce case is not precluded from showing cause why decree *nisi* should not be made absolute. 103 I.C. 512=1927 O. 310. As to effect of resumption of marital relations after decree *nisi* and before decree absolute, *see* 34 M. 339=21 M.L.J. 528. On this section, *see also* 84 I.C. 71=1924 B. 132

"DURING THAT PERIOD" means period from the date of decree *nisi* to the date of decree absolute. 103 I.C. 512=1927 O. 310. Where a decree for dissolution of marriage has been made absolute, it is not open to a third party to seek the aid of the Court under S. 151, C. P. Code, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem.* Nor is there any *provision in the Divorce Act to set aside a decree absolute in the manner in which a decree* nisi *could be attacked.* 15 Luck. 350=1939 O.W.N. 139=1940 O. 279.

INTERVENOR.—In India, any person, with the exception of the respondent and the co-respondent and any person acting at the instance of either of these persons, may proceed by way of intervention proceedings. The mere fact of relationship of intervenor to respondent is not sufficient to disentitle intervention. 10 R. 115=137 I.C. 426=1932 R. 73; 103 I.C. 512= 1927 O. 310. The words "not being brought before the Court" in S. 16 means, "not being brought before the Court at any time up to the date of intervention." 103 I.C. 512=1927 O. 310. It is the duty of every petitioner to place the facts of his or her case before the Court, and on intervention a decree *nisi* may be rescinded if there is a failure to deal with the Court, with the utmost good faith. 10 R. 115

Collusion.

During that period any person shall be at liberty in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi* or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of counsel and witnesses, and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever, a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

Confirmation of decree for dissolution by District Judge.

17. Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

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=137 I.C. 426=1932 R. 73. There can be no collusion in mere prosecution as distinct from initiation of a true case. But it is very necessary to be careful before imputing collusion between parties from ordinary acts which a solicitor would naturally regard as inoffensive and unobjectionable. The mere fact that the wife's attorney had furnished certain documents to the petitioner's attorneys or that they had subpoenaed co-respondent is a very narrow ground for supposing that any collusion had taken place. 56 C. 530=1929 C. 599. Where after the passing of a decree *nisi*, a third party intervened alleging collusion and though notices and warrants were issued to the parties service was deliberately avoided. *Held* that the only course open to the Court was to dismiss the application for the dissolution of the marriage, to set aside the decree *nisi*, and direct that a complaint be instituted against the husband under S. 193, Penal Code. 145 I.C. 253=1933 L. 98.

MOTIVE OF INTERVENOR NOT MATERIAL.—That the motive of the intervenor was not to expose the conduct of the petitioner but only to obtain custody of the child is immaterial; if the charges or guilty conduct on the part of the petitioner are made out, the Court can refuse to make the decree absolute, irrespective of the motive prompting the intervention. 10 R. 115 =137 I.C. 426=1932 R. 73.

Secs. 16 and 17.—Owing to the adultery, cruelty and desertion on the part of the husband, the wife was compelled to leave his house. Subsequently she committed adultery with another man whom she wanted to marry and filed a petition for divorce. The Judge viewed the case leniently and even though she was guilty of adultery granted a decree *nisi*. *Held*, that the discretion exercised was proper and that the decree should be made absolute. 27 S.L.R. 322=1933 S. 38.

Secs. 16 and 17-A.—Decree *nisi*—Right of respondent to intervene—Duties of Government Advocate as King's Proctor. S. 16 does not give the right to the respondent to object to a decree *nisi* being made absolute. The words "any person" do not apply to parties to the proceedings, and, therefore, cannot include the respondent. The right of the petitioner to have the decree *nisi* made absolute can only be challenged by a third party, or by the Government Advocate who is placed in the position of King's Proctor by a notification of the Governor-General in Council issued in pursuance of the powers conferred on him by S. 17-A. The Government Advocate cannot leave the matter in the hands of the respondent, and the correct course is for him to consider the respondent's allegations and what may be placed before him in connection therewith and then decide whether he should intervene. If he does not consider that the evidence is sufficient to justify his intervention, there is an end of the matter so far as he is concerned. If he does consider that the evidence does justify him in intervening, it is his duty to intervene. 14 R. 322=1936 R. 499.

Sec. 17: GENERAL.—The obvious intention of the legislature as expressed in S. 17 is that the High Court, upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for dissolution are or are not established by that evidence. 1922 A. 504=44 A. 745=79 I.C. 133. Case where dissolution was refused for want of evidence of misconduct. *See* 1930 L. 360 (S.B.). *See also* 40 B. 109=17 Bom.L.R. 948 under S. 37; 91 I. C. 99=1926 S. 58 (F.B.). Only the innocent party can move the High Court for a decree absolute under S. 17. The Court will not entertain application to that effect from guilty party. 150 I.C. 543 (1)=1934 A. 634 (1) (S.B.). Where husband himself had been living for a number of years in a state of adultery with another woman that fact in itself is sufficient justification for High Court not to exercise its discretion in the matter of confirmation of the decree *nisi* passed for dissolution specially when circumstances on which he relies in proof of his wife's misconduct, are highly improbable and fall considerably short of the high standard of proof required under the law. 149 I.C. 1009=36 P.L.R. 66=1934 L. 334 (S.B.).

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference, the opinion of the senior Judge shall prevail.

NOTES.

JURISDICTION.—In order that the Court may have jurisdiction to grant a decree for dissolution, the parties must profess the Christian religion, and they must also be domiciled in India at the date of the presentation of the petition. The domicile of the wife is the same as that of the husband, and it is his domicile which has to be considered. The domicile of origin remains until it is changed and a domicile of choice is acquired, and the burden of proving a change of domicile is upon the person who asserts it. Where the domicile of origin of the husband is Indian, the only question is whether there is any evidence that domicile has been changed. But where the domicile of origin is not Indian, then it is necessary to ascertain whether there is any evidence that that domicile had been changed in favour of an Indian domicile at the date of the presentation of the petition. Domicile depends on two things, the fact of residence and the intention to reside permanently. 36 Bom.L.R. 492=58 B. 502=1934 B. 230 (S.B.). S. 20 does not make the proviso to S. 17 applicable to the confirmation by the High Court of a decree of nullity made by a District Judge. Such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Apart from this the scheme of the Act generally shows that it makes a *distinction between decrees for dissolution and decrees annulling marriage.* 151 I.C. 471=36 P.L.R. 137=1934 L. 636 (S.B.).

NOTICE.—No notice to the respondent is necessary in proceedings for confirmation of a decree for dissolution of marriage. 10 P.L.R. 1921=59 I.C. 89. The High Court will not confirm a decree for the dissolution if it is not satisfied that the respondent was in fact served with a petition for divorce. 42 M.L.J. 562=1922 M. 350 (F.B.). Whether relationship of husband and wife subsists after decree *nisi*, and before it is confirmed. *See* 41 C. 714=18 C.W.N. 484. A petition was made for judicial separation. But the petitioner in her evidence asked for a decree for dissolution of marriage. There was no evidence on record disclosing whether the petitioner was a Christian at the time of marriage, nor was there any evidence with regard to the religion of the respondent. Then there was no proof that the pastor who purported to solemnize the marriage was a person authorised under S. 5, Christian Marriage Act, to do so, and lastly no marriage certificate was filed. But a decree for dissolution was granted. *Held*, that the decree granting the dissolution of marriage could not be confirmed in such state of record and the record should be returned to the District Court for the amendment of the petition and for proof that a valid marriage had taken place. 164 I.C. 974=1936 R. 429 (S.B.).

PRACTICE AND PROCEDURE.—Where in divorce proceedings the petitioner charged his wife with adultery but did not mention the adulterer's name and the Judge added his name as co-respondent on his initiative, the Judge was in error in adding his name without amending the petition accordingly. 38 M. 466=25 M.L.J. 594. *See also* 29 I.C. 178=29 M.L.J. 269 (F.B.). Where, after the passing of a decree *nisi*, a third party intervened alleging collusion and though notices and warrants were issued to the parties, service was deliberately avoided, *held*, that the only course open to the Court was to dismiss the application for the dissolution of the marriage, to set aside the decree *nisi*, and direct that a complaint be instituted against the husband under S. 193, Penal Code. 145 I.C. 253=1933 L. 98. The decree of the District Court cannot be confirmed by the High Court unless the co-respondent who had been impleaded in the District Court is also impleaded in the High Court. 12 L. 266=1931 L. 1 (S.B.) In a suit for dissolution brought by the husband on the ground of adultery by his wife an *ex parte* decree was granted, but the High Court returned the case for enquiry to the District Judge. He found that the act of adultery, though first condoned, was revived by subsequent matrimonial offence. The wife raised the counter-allegation of petitioner's alleged adultery with another woman subsequent to the decree. *Held*, that it was a matter which the wife could not raise; it could only be examined upon the intervention of a third party or of a King's Proctor. (14 R. 322; 1936 Rang. 499. Rel. on.) 167 I. C. 735=1937 R. 79 (S.B.) Where a divorce decree obtained by the wife comes before the High Court for its confirmation, the husband cannot object to the confirmation of the decree on the ground that the wife has married since the passing of the decree by the District Judge. 170 I.C. 200=1937 Rang. 333 (F.B.) For a husband to live in open adultery in the same house with another is certainly cruelty. In a petition for confirmation of divorce it was established that the husband had an illicit connexion with the widow of his brother. He turned his wife out of the house, when she was pregnant, after beating her. His wife was away for more than two years and he took no steps to secure her return, nor did he take any steps to defend the petition for divorce though he was properly served. *Held*, that the decree dissolving marriage should be confirmed. 175 I.C. 21=1938 Lah. 301 (S.B.).

REOPENING OF CLOSED PROCEEDINGS NOT ALLOWED.—Under S. 17 the High Court has full power to confirm or not to confirm the decree *nisi* and an order not confirming it would amount to an order dismissing the suit. The petitioner sued in the District Court for dissolution of his marriage with his wife. He was

The High Court, if it thinks further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit :

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During the progress of the suit in the Court of the District Judge, any person, suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court, shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section 16 shall apply to every suit so removed ; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

Appointment of officer to exercise duties of King's Proctor.

[1] 17-A. [The Provincial Government of any Province within which any High Court established by Letters Patent exercises jurisdiction, may appoint an officer who shall, within the jurisdiction of the High Court in that Province have the like right of showing cause why a decree for the dissolution of a marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor ; and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right.

In relation to the jurisdiction of any such High Court as aforesaid in an

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[1] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the old section 17-A which had been inserted by Act XV of 1927.

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granted a decree and he then applied to the High Court for confirmation of the decree. Later on he applied to the effect that his wife had agreed to come back to him and he accordingly prayed that the case should be consigned to the record room. The order passed was that the parties had settled their differences and the application for confirmation was withdrawn. On a later date the petitioner applied once again for confirmation of the decree *nisi*. *Held*, that though the order on the prior occasion merely stayed further proceedings, the parties meant thereby to have the matter finally disposed of and that the proceedings could not be reopened at petitioner's instance. 13 L. 47=1932 L. 279.

EVIDENCE.—It is contrary to the principles and rules on which the Divorce Court acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. 42 M.L.J. 562=1922 M. 350 (F.B.). Under S. 7 the Courts in this country should follow the same rule. (*Ibid.*) Where the wife has made allegations before the District Judge that her husband was committing adultery by keeping a mistress, the decree against her ought not to be made absolute without further inquiry. And where the allegations made by the wife are denied by the husband, and the wife though given an opportunity to prove the truth of her allegations, declines to cite witnesses and there is in fact no evidence to support her allegations the decree may be made absolute. 196 I.C. 412=1941 Rang. 249 (S.B.) Admission of an adultery by a husband may form the ground for granting a divorce even though it is not corroborated by other evidence. 1927 L. 491=9 L. 116. Condoned adultery may be revived by a subsequent matrimonial offence. 53 C. 436=96 I.C. 932=1926 C. 864. In proceedings for divorce taken out by the husband the onus of proof of the marriage is on the husband and unless such proof of the marriage is forthcoming in strict form the Court has no jurisdiction to enter into the matter. 146 I.C. 798 (F.B.).

Secs. 17 and 55.—A decree for dissolution of a marriage was passed and the co-respondent was ordered to pay damages to the petitioner and respondent. The co-respondent did not appeal from the order regarding damages but when the petition for confirmation of the decree was filed in the High Court, he sought to attack the order regarding damages. *Held*, that he was entitled to do so even though he had not appealed against the order. (20 Bom. 362 (F.B.) (Foll.) 39 P.L.R. 666=1937 Lah. 417 (S.B.).

Sec. 17-A.—*See* 14 R. 322=1936 R. 499.

Indian State this section shall have effect as if the reference to the Provincial Government was a reference to the Central Government.]

IV.—NULLITY OF MARRIAGE.

Petition for decree of nullity.

18. Any husband or wife may present a petition to the District or to the High Court, praying that his or her marriage may be declared null and void.

Grounds of decrees.

19. Such decree may be made on any of the following grounds :

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Secs. 18 and 19.—The word "solemnized" in S. 5 of the Christian Marriage Act means "celebrated" and deals with the ceremony only; and the words "rules, rites, ceremonies, and customs of the church" mean only the rules, etc., as to the capacity of the parties. 47 I.C. 544=11 Bur.L.T. 69. Suit for declaration of nullity of marriage—Questions to be considered by Court. (*Ibid.*) "Fraud" means fraud practised upon the other party to the marriage and does not include fraud upon a third party. (*Ibid.*) *See also* I.L.R. (1939) 2 C. 60=1940 C. 65. No decree of deception can avail to set aside a *mortgage* knowingly made unless the party imposed upon has been deceived as to the person, and thus has given no consent at all. (*Ibid.*) A ceremony of marriage ordinarily constituting a binding marriage between the parties subsists unless and until it is set aside on one or other of the grounds which justify annulling or setting aside a marriage. Before a valid marriage can be celebrated both parties to such marriage must be either single or divorced or a widow or a widower and then only are they competent to enter into a valid marriage. If at the time of celebration of the marriage ceremony one or other of the parties had a spouse living, the earlier marriage not having been set aside, the later marriage is void *ab initio* ; in other words it is no marriage at all. The law in England that a party to a marriage of which the other party is incompetent to join in the celebration of a valid ceremony because of the existence of a previous husband or wife, is entitled without any recourse to any Court to marry any one else because that particular marriage is not in law a marriage at all applies equally well to marriages between Christians in India inasmuch as no Christian can marry another person in the lifetime of an earlier spouse unless the previous marriage has been set aside. This position cannot be interfered with in regard to a marriage celebrated in India as provided by S. 88, Christian Marriage Act. Unless therefore the marriage is a valid marriage it cannot be a marriage which is in full force within the meaning of S. 19. 46 L.W. 602=1937 M. 565. A decree of nullity must be passed when the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party where the former husband or wife is living at the time of the latter. 29 P.R. 1913=19 I.C. 778. *See also* 38 I.C. 413=38 M. 452. Hereditary syphilis—Impotency—Consent obtained by fraud—*Held,* marriage should be annulled. 67 I.C. 949=25 C.W.N. 706. In the absence of an express allegation and strict proof that the party was impotent, *i.e.,* physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, a suit for declaration of nullity on the ground of impotency is not maintainable. 30 I.C. 565=29 M.L.J. 183. In a petition under S. 18 a prayer for custody of children may also be inserted. 27 A.L.J. 65=1928 A. 677.

Sec. 19.—Where there is a wilful refusal of sexual intercourse due to incapacity arising from nervousness or hysteria or from an inherent repugnance to act of consummation thus making consummation practically impossible, Court can declare marriage null and void on the ground of *impotence.* 1931 A.L.J. 267=1931 A. 207. Incapacity in wife of consummating marriage; consisting of a nervous and psychic disorder and of invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner husband is concerned, which renders her incapable of submitting to sexual intercourse with him, is sufficient to satisfy the requirements of S. 19, as it constitutes a permanent physical disability. The burden of proving his allegation is on the petitioner and he must remove all reasonable doubts. If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are much increased. But the fact that difficulties are increased, does not make them insuperable nor is the Court relieved from the duty of weighing evidence merely because the parties tell different stories. The delay on the part of the petitioner increases the burden of proof and is an important factor in deciding whether his story is true. The law requires sincerity in the complainer, *i.e.,* real sense of grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, requires all reasonable promptitude to be exhibited by complainer in seeking legal redress. Delay in itself is not an absolute bar to success in a suit of such nature unless the respondent has suffered in any way by reason of it; but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. The one guiding principle is that great delay in the institution of a suit of this description by the husband is an objection to be accounted for. 1938 C. 684. Where the wife was suffering from some curable form of venereal disease and it appeared that the only mistake was that the husband was under the impression that girl was not diseased at the time of marriage, *held,* that the lady was not impotent, that there was no fraud and that it was not a proper case to pass a decree of nullity. Per *Curiam.*—It would be proper to hold that incurable syphilis is equivalent to impotence. 6 O.W.N. 244=117 I.C.

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of the marriage;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

NOTES.

450=1929 O. 238. The existence of venereal disease in a woman does not constitute impotence within the meaning of S. 19 of the Act. Per *Hasan, J.*—Whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well-founded apprehension of infection in case he has sexual intercourse with such a wife, in such circumstances the Court would be justified to record a finding that the wife was impotent. 5 Luck. 484=7 O.W.N. 17=1930 O. 83.

IDIOCY.—The term "idiot" in S. 19 must be read as a word used in its ordinary significance and means a person deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct. The petitioner who has a license to hold a gun for shooting, who goes about shooting, who rides a horse, who sometimes goes about fishing, who can compose a letter for himself and write it in a tolerably good hand, who reads books to pass time, who is invited to tea parties, who knows the nature of the transaction of marriage in which he entered with the opposite party and indeed who arranged for it with the Bishop cannot be called an idiot in the ordinary acceptance of the word. 56 A. 428. Per *Sulaiman, C.J.*—In order to find that a person is an idiot, it is not sufficient to find that he is a mere imbecile. One cannot be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence. 56 A. 428. Any state of mind which falls short of lunacy or idiocy cannot be allowed to be a ground for annulment. Persons differ from one another in the degree of intelligence possessed by them. It would be a dire calamity if it could be said as a matter of law that a marriage, entered into by a person who is neither a lunatic nor an idiot, is void, simply because one of the parties lacks in intelligence, although he is able to understand the nature of the bonds of matrimony into which he is entering. Want of consent as such does not find place in S. 19 as one of the grounds for declaring a marriage null and void. 1934 A.L.J. 1127 =56 A. 428=1934 A. 273. The Judge has to satisfy himself regarding the *idiocy* of a person. Doctor's opinion in such matters is not conclusive. It is at the most a guide. The mere fact that the person is feeble-minded and that he has the intelligence of a child of about eight or nine years of age is not sufficient to declare that person an idiot within the meaning of S. 19 (3) which classes lunatics and idiots together. An idiot in law means something more than this. 1933 A. 122= 55 A. 185.

MISREPRESENTATION. — Inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who though 54 years old, is found by the Court to be very feeble-minded and to have the mentality of a child of nine years of age is incapable of giving his consent. 1933 A. 122=55 A. 185. The various grounds on which the Court can give a decree of nullity under the Divorce Act refer to cases where there has been a marriage validly performed. Questions arise under Ss. 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a *decree of nullity* of a valid marriage and a *declaration that the marriage itself is illegal and void.* There can therefore be no doubt that there is jurisdiction in the High Court to hear and decide questions under the Christian Marriage Act. 55 A. 185.

CONSENT TO MARRIAGE—QUESTION OF FACT.—In a suit for declaration of marriage null and void on ground of want of free consent, among other grounds, the question of consent is one of fact and not of law. Hence an issue and evidence for it is necessary for decision. 56 A. 428.

BURDEN OF PROOF.—Where a petition to declare a marriage null and void is made under S. 19 (4), the burden of proof lies upon the petitioner that the previous marriage of the opposite party was in full force and effect and was not set aside at the time when his marriage took place with the opposite party. 169 I.C, 516=1937 Mad. 565.

Secs. 19 and 20.—The policy of the Divorce Act does not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous. Where prior to and also at the time of their marriage, the husband who was a Mahomedan represented to the wife that he was a Roman Catholic, and the wife, who was a Roman Catholic would not have married him if she had known that he was a Mahomedan, the marriage is void, the wife's consent to it having been obtained by fraud. The High Court has accordingly power

Confirmation of District Judge's decree.

20. Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4, shall *mutatis mutandis* apply to such decrees.

Children of annulled marriage.

21. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

V.—JUDICIAL SEPARATION.

Bar to decree for divorce *a mensa et toro*; but Judicial separation obtainable by husband or wife.

22. No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

NOTES.

to annul that marriage on the ground of fraud under S. 19 of the Act. I.L.R. (1939) 2 Cal. 60=1940 Cal. 75.

Sec. 20.—S. 20 does not make the proviso to S. 17 applicable to the confirmation by the High Court of a decree of a nullity of marriage made by a District Judge. Such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Apart from this the scheme of the Act generally shows that it makes a distinction between decrees for dissolution of marriage and decrees annulling a marriage. 36 P.L.R. 137=1934 L. 636 (S.B.).

Sec. 22.—The mere fact that the husband and wife cannot agree is not a sufficient ground for judicial separation. 1932 O. 231=9 O.W N. 447. Desertion under the Divorce Act implies an abandonment against the wish of the person charging it, but it is not a universal rule that the abandonment must be against expressed wish of that person. 8 Bur.L.T. 32=27 I.C. 604. As to what constitutes "cruelty", "adultery", "desertion", *see* note under S. 10, *supra*. To constitute 'cruelty' there must be danger to life, limb and health, bodily or mental, or a reasonable apprehension of it. 1932 O. 231=9 O.W.N. 447. A decree for judicial separation and payment of alimony to the wife is annulled by subsequent resumption of cohabitation by the parties and the wife cannot claim any rights under the decree even if the husband had executed an agreement that the decree ordering payment should remain in force and that she should have the right to live separate if she had any fresh grievance against him. 137 I.C. 737 =1932 O. 142 (8 Q.B.D. 778 and 2 R. 163 Foll.).

CRUELTY—IMPUTATION OF MISCONDUCT TO WIFE—IF AMOUNTS TO.—A false imputation of misconduct made by the husband in the course of an acrimonious correspondence between himself and his wife is not sufficient to make out a case of cruelty justifying a decree for judicial separation, especially when there is no evidence that he made any such imputation against his wife to any third person and it is not even suggested that the wife has suffered any mental injury or injury to health by reason of such imputation. 1935 O.W.N. 103=1935 O. 133. Where the husband has been guilty of beating his wife on several occasions and on one of them her hands were tied with a chain and her feet with a rope and she was kept hanging in a door way until another person came to her rescue, the acts of the husband amount to legal cruelty sufficient to justify the Court to pass a decree for judicial separation under S. 22 of the Act. 165 I.C. 12=12 Luck. 526=1937 O. 52. As to jurisdiction *see* 1941 A.L.J. 710.

DESERTION.—A false imputation of misconduct made by the husband in a letter written by him to his wife during the period of desertion by her when his feelings were greatly exasperated on account of the attitude adopted by his wife, does not constitute "reasonable cause" for her deserting him, especially when, during that period, the husband wrote to her several times asking her to return to him and offering to take her back without any conditions on either side but the wife persisted in her desertion. The husband, in such circumstances, is entitled to a decree for judicial separation on the ground of desertion by his wife without reasonable cause. 1935 O.W.N. 103=1935 O. 133. Where in a petition by the wife praying for the dissolution of her marriage with her husband on the ground of her husband's adultery, the wife fails to prove the charge of adultery but succeeds in proving cruelty by the husband towards her, the Court can pass a decree for judicial separation under S. 22 although she has not specifically prayed for such a decree either in her original petition or in her memorandum of appeal. 165 I.C. 12 =12 Luck. 526=1937 O. 52. In an application for judicial separation under S. 22, where adultery is alleged, it is difficult to produce

Application for separation made by petition.

23. Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

Separated wife deemed spinster with respect to after-acquired property.

24. In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead:

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

Separated wife deemed spinster for purposes of contract and suing.

25. In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation:

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use:

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

REVERSAL OF DECREE OF SEPARATION.

Decree of separation obtained during absence of husband or wife may be reversed.

26. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts or acts of the wife incurred,

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NOTES.

evidence of witnesses who may have seen the guilty party *in flagrante delicto* and at most circumstantial evidence can be led from which a reasonable inference may be drawn of the guilty party having committed adultery. 39 P. L R. 556=1937 Lah. 395.

Sec. 23.—Adultery on the part of the applicant is sufficient legal ground for rejecting an application for judicial separation, though otherwise it is a fit case. 33 A. 500=9 I.C. 796=8 A.L.J. 318. Petition by wife—Marriage and residence in Bombay—Subsequent residence outside—Last residence in Bombay—Petitioner also residing in Bombay at the time of presentation of petition—Jurisdiction of High Court. 37 Bom.L.R. 55=1935 B. 121. *See also* 1941 A.L.J. 710=1941 A.W.R. (H.C.) 387 (Residence in a portion of G. State occupied by G. I. P. Ry. as conferring jurisdiction on all High Court).

Sec. 24.—On this section, *see* 4 C. 140 and 1 C. 412.

entered into or done between the times of the sentence of separation and of the reversal thereof.

VI.—PROTECTION ORDERS.

Deserted wife may apply to Court for protection.

27. Any wife to whom section 4 of the Indian Succession Act, 1865[1] does not apply, may, when deserted by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

Court may grant protection order.

28. The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

Discharge or variation of orders.

29. The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it thinks fit so to do, may discharge or vary the order accordingly.

Liability of husband seizing wife's property after notice of order.

30. If the husband, or any creditor of, or person claiming under, the husband, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

Wife's legal position during continuance of order.

31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

VII.—RESTITUTION OF CONJUGAL RIGHTS.

Petition for restitution of conjugal rights.

32. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

LEG. REF.

[1] *See* now the Indian Succession Act (XXXIX of 1925).

NOTES.

Sec. 31.—Delay to be culpable must be somewhat in the nature of connivance or acquiescence. "Delay" must be the sort of delay that would show the petitioner to have been insensible to the loss of the husband or wife as the case may be. 27 I.C. 604=8 L.B.R. 256; *see also* 107 I.C. 273.

Sec. 32.—In a suit by a Christian brought in an ordinary way on the original side of the High Court, and not under the Matrimonial jurisdiction, praying for a declaration that the marriage between the parties to the suit was valid and for restitution of conjugal rights, the judge has jurisdiction while making the declaration to pass an order for restitution of conjugal rights. 32 Bom.L.R. 17=1930 B. 105. In a petition for restitution of conjugal rights it is sufficient if one of the parties professes the Christian religion. *Held*, that the Bombay High Court has jurisdiction to entertain a petition instituted by a Russian lady who is a Russian and a Christian against her husband who is a

Answer to petition.

33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

VIII.—DAMAGES AND COSTS.

Husband may claim damages from adulterer.

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

Power to order adulterer to pay costs.

35. Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the cost of the proceedings:

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

NOTES.

Parsi, the marriage itself having been celebrated under the French Law. Effect of words "or respondent" inserted in S. 2 of the Act by Act XXX of 1927 considered. 32 Bom.L.R. 1046=1930 B. 385 (F,B.).

Sec. 33.—*See* 38 B. 125=20 I.C. 492=15 Bom.L.R. 593.

Sec. 34.—Principle in awarding damages against a co-respondent in divorce proceedings is to ascertain what loss the husband has suffered; the object is not to punish. The means of the co-respondent are not a relevant factor. 52 C. 379=29 C.W.N. 350=1925 C. 585 (F.B.); 9 O.W.N. 362=7 Luck. 683; 98 I. C. 1019=1937 O. 34. *See also* 39 P.L.R. 666=1937 Lah. 417 (F.B.). Damages are awarded for the injury done to the husband in alienating his wife's affections. A husband who is himself responsible for his wife's misconduct or who condones his wife's adultery with the co-respondent cannot claim damages from the latter. 165 I.C. 392=1936 O.W.N. 938. Amount spent over marriage is the tangible source for determining damages. A successful petitioner is entitled to much more irrespective of the capacity of co-respondent to pay. 1935 N. 49 (S.B.); 31 N.L.R. 184=156 I.C. 1008. The object of passing a decree for damages is to give the husband compensation for the loss which he has sustained. In order to determine what loss the petitioner has sustained by his wife's adultery it is necessary to consider the circumstances of their married life from the beginning. When it appeared that from the very beginning of their life in India the petitioner had thought time and again of means by which he might rid himself of his wife and it was further found that he had himself committed adultery with the woman and engineered her divorce from her first husband. *Held*, that this was not a case in which damages could be awarded to the petitioner against the co-respondent, but that the co-respondent might be directed to pay the costs of the petitioner. 1931 O. 259=8 O.W. N. 168. Per *Marten, C. J.*—"In every divorce case one principal element is that the marriage should be proved strictly and in general a certificate of marriage should be produced . . . Indian Courts have no jurisdiction to dissolve the marriage of persons who are not domiciled in India or persons who are not Christians. . . In such cases it is desirable that independent corroborative evidence should be obtained to show that the respondent was living in adultery with the co-respondent. 51 B. 1026=105 I.C. 871=1927 B. 594. The causes of action against the co-respondent for damages and against the wife for divorce are different and distinct although upon the true construction of the Divorce Act, the same defences are open to these claims. It is not right to say that because the Court has no jurisdiction to grant a decree for divorce, it cannot treat a petition as one for damages and give relief. It is clear, however, that the damages suffered by the petitioner will be different according as he is getting a decree for divorce or is not to get a decree for divorce. 56 C. 530=1929 C. 599. Where the District Judge has found that the petitioner was only entitled to a certain sum as damages his order directing the payment of an additional amount into Court in the event of the co-respondent not marrying the respondent within a certain time is bad in law. 11 L. 303=1930 L. 321 (1) (S.B.). Where a decree was passed for the dissolution of marriage and the Court found that a sum of Rs. 1,500 directed to be paid by the co-respondent would be sufficient compensation to the plaintiff it was decreed further that a sum of Rs. 12,000 should be paid

(1) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

Power to order litigious intervenor to pay costs.

Whenever any application is made under section 17, the Court, if it thinks that the applicant had no grounds or no sufficient ground for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

IX.—ALIMONY.

Alimony *pendente lite.*

36. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

Power to order permanent alimony.

37. The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

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NOTES.

into Court in the event of the co-respondent failing to marry the respondent within six months of the confirmation of the decree *held*, that the further direction regarding Rs. 12,000 was in contravention of S. 34 of the Divorce Act and that the same should be disallowed. 11 L. 303.

Sec. 36.—A Court has discretion to give alimony *pendente lite* if it thinks it reasonable and just, especially where the wife avers that she had been forced to prostitution by her husband. 49 I.C. 203=12 S.L.R. 89. As to quantum of alimony, *see* 132 I.C. 771=1931 O. 365. Where a petition by the wife for the dissolution of her marriage has been dismissed, Appellate Court has power to continue the order of alimony on the presentation of an appeal by her till the disposal of the appeal and till such time as the Court directs, unless the appellate Court considers that the conduct of the wife has been such as to disentitle her to an order of maintenance. 40 I.C. 503=1933 L. 5. On this section, *see also* 36 C. 1018=4 I.C. 699. Where a petition for the dissolution of marriage on the ground of adultery is made and is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel, as is reasonable under the circumstances. 44 A. 745=1922 A. 504 (F.B.). A husband, may, in a proper case on the wife's application, be ordered by the appellate Court to provide for the costs of the wife's appeal against a decree *nisi* for divorce, but such a procedure should be adopted only after careful scrutiny and should be refused when facts do not justify it. 44 C. 35=37 I.C. 216=21 C.W.N. 711. Where a husband seeks dissolution of the marriage on the ground of the wife's adultery the latter should ordinarily be allowed costs from her husband to enable her to defend herself upon the charge, unless there are special reasons to the contrary. When an order for such payment is made, but the amount is not paid, the petition should be made to stand out till such costs are paid. 1940 All. 93=1940 A.L.J. 737=1940 O. A. 1058=I.L.R. (1940) All. 802=1940 A.W.R. (H.C.) 568. Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. Net income does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance. 1939 Cal. 753.

Sec. 37.—S. 37 gives the Court discretion to give an order for permanent alimony on any decree of judicial separation obtained by the wife, but it does not strictly negative the power of the Court to make similar provision for a wife against whom a decree of judicial separation has been passed at the instance of the husband. A decree of judicial separation does not dissolve the tie of marriage, and while the parties remain husband and wife, it is only fair and equitable order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable :

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

NOTES.

that the husband should ordinarily contribute to the support of the wife. 1935 O.W.N. 103=1935 O. 133. It is the District Court whose order for dissolution of marriage was confirmed by the High Court, that has got jurisdiction in a petition for alimony. 40 B. 100=31 I.C. 331=17 Bom.L.R. 948. As to the quantum of alimony to be awarded, *see* 132 I.C. 771=1931 O. 365. A decree *nisi* for divorce for adultery having been obtained against a wife, it is left to the discretion of the Court to grant alimony to her under the particular circumstances of the case. 38 A. 688=37 I.C. 143=14 A.L.J. 786. A wife, who was held to be innocent at the time of divorce, is not disentitled to alimony by her alleged misconduct after the divorce. There is no rule that in granting maintenance to a wife who has obtained a divorce the "*dum sola et casta*" clause should invariably be inserted. 25 S.L.R. 458=1931 S. 112. The *dum sola et casta* clause must be inserted in an order granting alimony ; it will never be inferred. If there is no such clause in the order granting alimony to the wife, the order could not be varied or discharged on the ground of subsequent unchastity. 1939 A.L.J. 572=I.L.R. (1939) All. 819=1939 All. 696, Under S. 37 the Court has power to make an order for payment of a lump sum for maintenance. 39 B. 182=27 I.C. 494=17 Bom.L.R. 56. The words "for any time not exceeding her own life" qualify "annual sum" and not "gross sum." The word "secure" would ordinarily include "pay" (*Ibid.*) Under S. 37 the power to make any order on the husband to secure a gross sum or annual income for the wife can only be exercised on the passing of the decree. An order directing the husband to furnish security made four years after the decree for judicial separation is, therefore, without jurisdiction. If such an order is not drawn up and filed, the Court has power to vacate it without an application for review being made to it. I.L.R. (1938) 2 Cal. 22=42 C.W.N. 317=1938 Cal. 321. Under S. 37 the Court has power to make an order on the husband to secure a gross sum or annual income for the wife. In addition it has also the power to order him to pay to the wife such monthly or weekly sums for her maintenance and support as it may think reasonable. There is however no power given by the section which enables the Court to compel the husband to secure such monthly or weekly payments. I.L.R. (1938) 2 Cal. 22=42 C.W.N. 317=1938 Cal. 321. *See also* 1938 Oudh 171=1938 O.W.N. 513. Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay. 44 M. 987=41 M.L.J. 269. The words "on any decree" in S. 37 should be construed as meaning " at the same time as or after reasonable time after the passing of the decree". Circumstances of each case will determine what is reasonable time. (*Ibid.*) If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, the Court cannot as part of the decree in the suit grant permanent alimony to the wife. 46 M. 133=43 M.L.J. 763=1923 M. 211. Where the husband is gaining his income by his own personal exertions, the Court as a general rule will not give the wife more than one-third of his income as alimony, no matter how gross the misconduct of the husband has been. As a general rule half of the husband's income is only allotted in those cases where a wife has on marriage brought the husband a considerable sum of money or other property. 1931 O. 365=8 O.W.N. 851. Where the income of the husband was proved to be something over Rs. 1,000 a month, *held*, that it was reasonable to fix the alimony of the separated wife at Rs. 260 a month. 58 M.L.J. 29=1930 M. 154. Where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthy or weekly sum by way of permanent alimony, the Court has power to make a subsequent order increasing the amount of such alimony if the circumstances are such as to justify an increase. 54 M. 774=35 C.W.N. 1185=1931 P.C. 234=61 M.L.J. 367 (P.C.) It is difficult to apply any definite principle for the purpose of fixing the gross amount payable to a wife. Considerations as to the existence of debts and increase of illegitimate family are quite irrelevant for such a purpose. 174 I.C. 901=1938 O.W.N. 513=1938 O. 171.

ARREARS OF ALIMONY AND COSTS—ORDER FOR PAYMENT IN INSTALMENTS—PROPRIETY.—Although the arrears of alimony and costs are ordinarily payable at once, the Court may, having regard

Court may direct payment of alimony to wife or to her trustee.

38. In all cases in which the Court makes any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

X.—SETTLEMENTS.

Power to order settlement of wife's property for benefit of husband and children.

39. Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Any instrument executed pursuant to any order of the Court as the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Settlement of damages.

The Court may direct that the whole or any part of the damages recovered under section 34 shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

Inquiry into existence of ante-nuptial or post-nuptial settlements.

40. The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

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NOTES.

to the poverty of the parties, make them payable in monthly instalments. 41 P.L.R. 337=1939 Lah. 404.

Sec. 37, paras. 3 and 4: SCOPE OF—POWER TO SUBSTITUTE ORDER UNDER PARA. 3 FOR PRIOR ORDER UNDER PARA. 4.—The provisions of paras. 3 and 4 of S. 37 are alternatives at the discretion of the Court. They are merely alternative methods of protecting the successful petitioner, the wife. The proviso to the section in terms relates only to the provisions in para. 4 for monthly and weekly payments, and it does not in terms provide for any increase in the amount of the payments. Though a prior order has been made under para. 4, a Court has power on a fresh application to pass an order under para. 3. The correct interpretation of the third para. of S. 37 is that the husband is to secure to the wife a gross sum of money which is to be at her disposal in the same way as the annual sum of money. The section does give power to direct a money payment. 1938 O.W.N. 513=1938 Oudh 171. *See also* 1938 Cal. 321.

Sec. 37, Proviso: DISCRETION—EXERCISE OF—DELAY.—The power given to the Court under the proviso to S. 37 to discharge, modify or suspend an order for alimony is discretionary, and should not be exercised by the Court in favour of applicant who has unreasonably delayed his application. I.L.R. (1938) All. 213=1937 A.L.J. 1363=1938 All. 121. Under the proviso to S. 37 the Court has jurisdiction only to discharge, modify or suspend an order for alimony in so far as it concerns future payments, that is, as to payments which are to become due in future. The Court has no power to remit arrears and has no jurisdiction to declare that the husband should not be liable to make good sums of alimony which have already accrued due under the decree in execution proceedings or otherwise. I.L.R. (1938) All. 213=1937 A.L.J. 1363=1938 All. 121.

Sec. 38.—Alimony should usually be allowed from the date of service of summons upon the respondent; but where no summons has been served it should be from the time the latter entered appearance. Income-tax and insurance premia can be deducted, but not the expenses of a son's education in calculating the net income of a person for granting alimony to his wife. 11 I.C. 813=4 Bur.L.T. 176. *See also* 14 M. 89.

Sec. 39.—There is no power under the Divorce Act to make any provision for the maintenance of children who are no longer minors under the Act. 58 M.L.J. 29=1930 M. 154.

Sec. 40.—The power given to the Court under S. 40 is a discretionary one, the discretion must be exercised judicially. It is of course open to a guilty party to make an application under S. 40, but such an application should not be readily acceded to; unless special circumstances exist which make it just and proper to make an order upon the application of a guilty party varying a settlement, the *status quo* should may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit :

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

XI.—CUSTODY OF CHILDREN.

41. In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, mainteance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

Power to make orders as to custody of children in suit for separation.

42. The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

Power to make such orders after decree.

43. In any suit for obtaining a dissolution of marriage or a decree or nullity of marriage instituted in, or removed to a High Court, the Court may from time to time before making its decree absolute or its decree (as the case may be) make such interim orders, and may make such provision in the decree absolute or decree.

Power to make orders as to custody of children in suits for dissolution or nullity.

NOTES.

remain undisturbed. The Court should not ordinarily deprive an innocent party of any interest which he or she takes under a settlement, even though it be for the benefit of the children of the marriage. I.L.R. (1938) All. 95 =1937 A.L.J. 1368=1938 All. 126.

Sec. 41.—Appeal lies from order of Court fixing amount of maintenance under S. 41. 1937 Lah. 862.

Secs. 41 and 43.—The order passed by the District Judge about maintenance under S. 41, terminates when a final order is passed under S. 43, and S. 41 gives the Court a very wide discretion to fix such maintenance as it thinks fit. High Court will not therefore ordinarily interfere with an order fixing the amount of maintenance unless it appears to have been passed in disregard of the evidence and is clearly unreasonable. 1937 Lah. 862.

Sec. 42—DECREE OF JUDICIAL SEPARATION.—CUSTODY OF CHILDREN—CONSIDERATION.—It cannot be contended that in cases of judicial separation, the custody of daughters as a rule should be given to the mother in preference to the father. No hard and fast rule can be laid down in this matter. The paramount consideration must always be the welfare of the children. Where the father is held entitled to a decree of judicial separation and he has not been found guilty of any conduct which could disentitle him from the custody of his children and he holds a respectable position in life and is in a better position to give them a decent education and to provide and look to their upbringing and the mother's past conduct shows that if the children are left with her, she is sure to alienate their affections from the father, the Court would exercise a wise discretion in allowing the father who is in law natural guardian of his minor children to have their custody. 1935 O.W.N. 103=1935 O. 133. Per *Phillips, J.*—It seems to me most improper that a Court of Matrimonial jurisdiction should not have power to pass orders as to the custody and maintenance of unmarried girls above the age of 13 or of boys over 16. Since 1869 great strides have been made on education and it cannot now be said that education always ceases in the case of girls at 13 and in the case of boys at 16, nor are they usually in a position to find for themselves at that age. In my opinion the definition of minor children in S. 3 (5) requires amendment. 58 M.L.J. 29=1930 M. 154.

Sec. 43.—It is no doubt true that *prima facie* the innocent party is entitled to the custody of the children of the marriage. But there is no hard and fast rule on the subject. The matrimonial offence which justified the divorce is not always sufficient to disentitle the mother to the custody of her daughter. The paramount consideration is the interest of the children.

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation,

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit;

and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the Court.

Power to make such orders after decree or confirmation.

44. The High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court.

NOTES.

Where the child of tender years has been living with her mother all along, the mother was extremely devoted to her, it would be a great shock for the child to be separated from the mother, the father was practically a stranger to the child, and the child could be better maintained by the mother than by father. *Held*, that the mother was entitled to custody of her daughter in preference to the father, though the former was the 'guilty' party. 9 O.W.N. 362=1932 O. 182. In cases coming under the Indian and Colonial Divorce Jurisdiction Act when an order is made for the custody of a minor child, the order is not to be expressly limited in point of time to any particular period. 1940 Rang.L.R. 674=1940 Rang. 303. The power of Court to make any order for the custody of a minor child, the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child only so long as that child remains a minor child within the meaning of the Divorce Act. The proper practice to be followed in Burma is to limit the order for custody to the age which is fixed by S. 3 (5) of the Act and also to direct that the person to whom is given the custody should not remove the child outside the jurisdiction of the Court without its sanction. 1939 Rang.L.R. 267=1939 Rang. 352. An order under S. 43 regarding the custody and maintenance of children, is an *ad interim* order liable to terminate upon the confirmation of decree by the High Court, and hence such an order should not form part of the decree *nisi* by District Judge for dissolution of marriage. 54 I.C. 943=142 P.R. 1919 (S.B.) As to the circumstances to be considered, *see* 27 A.L.J. 65=111 I.C. 627=1928 A. 677. *See also* 1937 Lah. 862.

Secs. 43 and 44.—Where a person had obtained a decree *nisi* for dissolution of marriage and custody of the children and dies before its confirmation by the High Court the Court has no jurisdiction to confirm the decree for dissolution of the marriage or to make any order as regards the custody of the children. 50 C. 153=1923 C. 426.

The C. P. Code, by S. 45, Divorce Act, applies to petitions under the Divorce Act and under the C. P. Code, a next friend is not required over the age of 18. Therefore a girl over 19 is not a minor within the meaning of S. 49 and can file a petition under S. 49, Divorce Act. 55 A. 243=1933 A.L.J. 168=1933 A. 135 (2). The Divorce Act provides that the question of damages shall be ascertained by the Court and under S. 45 the procedure subject to the provisions of the Divorce Act is to be regulated by the C. P. Code. It is therefore incumbent on the Court in a suit for dissolution of marriage to frame issues and among those issues there should be an issue for damages. The Court should also state its grounds for assessing the damages at a particular figure. 1933 S. 134 (1)=143 I.C. 829. A party should not be lightly excused from effecting personal service of the petition. *See* 49 B. 368=27 Bom.L.R. 251=1925 B. 231. *See* same case as to when service by registered post is proper. In India, in divorce proceedings instituted by a wife, the Court has no power to allow the alleged adulteress to be made a party, and so to cross-examine the witnesses for petitioner, give evidence and call witnesses herself. But in intervention proceedings the person with whom the petitioner is said to have committed adultery may be called as a witness. 10 R. 115=1932 R. 73. Petition for divorce—Co-respondent as a necessary party—Notice, service of—Beat of drum and affixture in Court-house—Notice when can be dispensed with. *See* 56 C. 276=1929 C. 276.

WIFE'S COSTS.—*See* I.L.R. (1940) All. 802=1940 A.L.J. 737=1940 All. 93.

COSTS OF UNSUCCESSFUL APPEAL BY WIFE.—There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. 60 C. 318=37 C.W.N. 249=1933 C. 388.

Sec. 44.—Where a decree for dissolution of marriage granted by a District Judge is confirmed by the High Court, the jurisdiction to entertain an application for the custody of the child or for arrears of maintenance lies with as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

XII.—PROCEDURE.

Code of Civil Procedure to apply.

45. Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.[1]

Forms of petitions and statements.

46. The forms set forth in the Schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

Stamp on petition.

Petition to state absence of collusion.

47. Every petition[2] under this Act for a decree of dissolution of marriage or of nullity of marriage, or of judicial separation [3][* * * * *] shall [3][* * *] state that there is not any collusion or connivance between the petitioner and the other party to the marriage;

Statements to be verified.

the statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints, and may at the hearing be referred to as evidence.

Suits on behalf of lunatics.

48. When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

Suits by minors.

49. Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking [4][* * *] shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

50. Every petition under this Act shall be served on the party to be affect-

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LEG. REF.

[1] *See* now the Code of Civil Procedure (Act V of 1908).

[2] For Court-fee, *see* Court-Fees Act (VII of 1870), Sch. II, No. 20.

[3] The words "or of reversal of judicial separation, or for restitution of conjugal rights, or for damages, shall bear a stamp of five rupees, and", and the words "in the first, second, and third cases mentioned in this section," were repealed by the Court-Fees Act (VII of 1870). For Court-fee, *see* Art. 7 of Sch. II to that Act.

[4] The words "shall bear a stamp of eight annas and" were repealed by *ibid.*

NOTES.

the District Judge. The High Court has in such a case no jurisdiction to hear the application. 187 I.C. 272=1940 Lah. 82 (S.B.).

Sec. 45.—It is clearly in the interests of justice that a party who is named in a divorce plaint as being one of the persons with whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been levelled against her. There is very grave doubt as to whether the person so named has the right under the law as it stands at present, to claim to be added as a party to the divorce proceedings. Hence amendment of Divorce Act suggested. 57 A. 884=163 I.C. 802=1936 A. 488. *See also* 1935 C. 456.

Secs. 45 and 51 : EVIDENCE BY AFFIDAVIT—COURTS POWER TO ALLOW.—In proceedings for divorce, the Court has power to allow evidence to be given by the petitioner and her witness by affidavit, by virtue of S. 45 of the Divorce Act, which makes the provisions of the Code of Civil Procedure applicable and also by virtue of S. 51 of the Act. 38 C.W.N. 969.

Sec. 49.—A girl over 19 is not a minor within the meaning of S. 49 and can file a petition for divorce under this section. 55 A. 243=1933 A.L.J. 168=1933 A. 135.

Sec. 50.—*Held*, that in a petition for divorce the co-respondent is a necessary party, that sufficient steps should be taken to serve notice on the respondent and co-respondent before an *ex parte* decree is passed and that an order should be announced in the village by beat of drum and that the proper notice should be put up at the Court-house. The Commissioner has a discretion under S. 50, Divorce Act, to dispense

Service of petition.

ed thereby, either within or without British India, in, such manner as the High Court by general or special order from time to time directs :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

Mode of taking evidence.

51. The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness :

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

Competence of husband and wife to give evidence as to cruelty or desertion.

52. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Power to close doors.

53. The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

Power to adjourn.

54. The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

Enforcement of and appeal from orders and decrees.

55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed[1] from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force :

LEG. REF.

[1] For Court-fee on memorandum of appeal, *see* Art. 7 of Sch. II to the Court-Fees Act (VII of 1870).

NOTES.

with notice but it ought not to be exercised when a proper case has not been made out by the petitioner. 56 C. 29=1929 C. 276.

Secs. 50 and 51.—Under S. 50 the manner in which service of petition is to be effected is to be regulated not by the C. P. Code, but by general or special orders of the High Court. 55 I.C. 269=12 Bur. L.T. 199. In the absence of general orders on the subject the proper course when service cannot be effected on the respondent is to apply to the Court for a special order as to how it is to be effected. The Court will act on the principles laid down by the English decisions. 55 I.C. 269.

Sec. 51.—*See* 38 C.W.N. 969, cited under S. 45, *supra*. On a petition by a wife for dissolution of marriage filed in India, evidence of all the witnesses including the petitioner was taken on commission in England, though, in fact, she ought to have given evidence in the Court itself. *Held*, that, as the petitioner was the wife and completely at the mercy of her husband so far as her means were concerned and necessarily with regard to her opportunity of travel to India, the evidence though taken on commission could be accepted in view of the law as to evidence on commission in England. 167 I.C. 743=18 Pat. L. T. 686=1937 Pat. 82.

Sec. 55.—The language of S. 55 provides expressly for an appeal from all orders passed by the District Judge. It is one of the sections dealing with 'procedure' and must apply only to the procedure to be followed and the Court to which appeals lie. An appeal lies from an order of the Court fixing amount of maintenance under S. 41. 1937 Lah. 862. *See also* 1937 Lah. 417, cited under S. 17, *supra*. During the proceedings under the Divorce Act, Court passed an order after hearing the arguments of parties. Party affected by order appealed. The opposite party contended that

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage : nor from the order of the High Court confirming or refusing to confirm such decree :

No appeals as to costs.

Provided also that there shall be no appeal on the subject of costs only.

Appeal to Queen in Council.

56. Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

XIII.—RE-MARRIAGE.

Liberty to parties to marry again.

57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

English clergyman not compelled to solemnize marriages of persons divorced for adultery.

58. No clergyman in Holy Orders of the [1][*   *] Church of England [2][*   *] shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

59. When any minister of any church or chapel of the said [1][*   *] Church

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LEG. REF.

[1] The word "United" was repealed by the Repealing Act (XII of 1873).

[2] The words "and Ireland" were repealed by *ibid.*

NOTES.

appeal was not competent. *Held*, that an appeal lay from such order under S. 55. 39 P.L.R. 262=1937 L. 176. Order for payment of alimony is to be executed as a decree, and contempt proceedings are not the proper remedy. 32 C.W.N. 179. *See* 19 I.C. 53=6 Bur. L.T. 10.

Sec. 56.—Leave to appeal to Privy Council—High Court enhancing rate of alimony for wife without her preferring appeal—Question of law—Leave conditional of husband placing the wife in funds for contesting the appeal. *See* 1930 M. 159=58 M.L.J. 54.

Sec. 57.—This section prohibits a re-marriage within six months after the decree absolute. 30 I.C. 413=38 M. 452. *See also* 29 P.R. 1913=19 I.C. 778=22 P.L.R. 1913. A second marriage by the successful petitioner in a suit for dissolution of marriage within six months of the date of the decree for dissolution is null and void. 48 C. 636=64 I.C. 924=25 C. W. N. 710 (F. B.). *See also* 34 A. 203=9 A.L.J. 108. *Held*, also that the reputed wife was not entitled to any permanent alimony. 48 C. 636=25 C.W.N. 710.

English minister refusing to perform ceremony to permit use of his church.

refuses to perform such marriage service between any persons who, but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in Holy Orders of the said Church entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

XIV.—MISCELLANEOUS.

Decree for separation or protection order valid as to persons dealing with wife before reversal.

60. Every decree for judicial separation or order to protect property obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal, discharge or variation thereof.

Indemnity of persons making payment to wife without notice of reversal of decree or protection order.

All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued,

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

Bar of suit for criminal conversation.

61. After this Act comes into operation, no person competent to present a petition under sections 2 and 10 shall maintain a suit for criminal conversation with his wife.

Power to make rules.

62. The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same:[1]

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.[2]

All such rules, alterations and additions shall be published in the Official Gazette.

SCHEDULE OF FORMS.

No. 1.—PETITION BY HUSBAND FOR A DISSOLUTION OF MARRIAGE WITH DAMAGES AGAINST CO-RESPONDENT, BY REASON OF ADULTERY.

(See *sections* 10 *and* 34.)

In the (High) Court of
To the Hon'ble Mr. Justice [*or* To the Judge of].

LEG. REF.

[1] For rule in force in Bombay as to confirmation of decrees for dissolution of marriage. *See* Bom. R. & O.

[2] *See* now the Code of Civil Procedure (Act V of 1908).

NOTES.

Sec. 61.—Section does not forbid the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. Code, when moved to do so by an injured husband. 1928 L. 50=108 I.C. 381. *See also* 158 I.C. 6=1935 O. W. N. 1015=1935 O. 506.

Sec. 62.—*See* 29 I.C. 178=29 M.L.J. 269.

The day of 186 .
The petition of *A.B.*, of

SHEWETH,

1. That your petitioner was on the day of , one thousand eight hundred and , lawfully married to *C.B.*, then *C.D.*, spinster, at .[1]

2. That from his said marriage, your petitioner lived and cohabited with his said wife at and at , in , and lastly at , and that your petitioner and his said wife have had issue of their said marriage, *five* children, of whom *two* sons only survive, aged respectively *twelve* and *fourteen* years.

3. That during the *three* years immediately preceding the day of one thousand eight hundred and , *X.Y.* was constantly, with few exceptions, residing in the house of your petitioner at aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said *C. B.* in your petitioner's said house committed adultery with the said *X.Y.*

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage, and that the said *X.Y.*, do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed) *A.B.*[2]

Form of Verification.

I, *A.B.*, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

No. 2.—RESPONDENT'S STATEMENT IN ANSWER TO No. 1.

In the Court of the day of
Between *A.B.*, petitioner,
C.B., respondent and
X.Y., co-respondent.

C.B., the respondent, by *D.E.*, her attorney [*or* vakil], in answer to the petition of *A.B.*, says that she denies that she has on divers or any occasions committed adultery with *X.Y.*, as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) *C.B.*

No. 3.—CO-RESPONDENT'S STATEMENT IN ANSWER TO No. 1.

In the (High) Court of
The day of
Between *A.B.*, petitioner,
C.B., respondent, and
X.Y., co-respondent.

X.Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said *C. B.* as alleged in the said petition.

Wherefore the said *X.Y.* prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed) *X.Y.*

No. 4.—PETITION FOR DECREE OF NULLITY OF MARRIAGE.
(See *section* 18.)

In the (High) Court of
To the Hon'ble Mr. Justice [*or* to the Judge of].
The day of 186 .
The petition of *A.B.*, falsely called *A.D.*,

SHEWETH,

1. That on the day of , one thousand eight hundred and , your petitioner then a spinster, eighteen years of age, was married in fact though not in law, to *C.D.*, then a bachelor of about thirty years of age, at [*some place in India*].

2. That from the said day of , one thousand eight hundred and until the month of , one thousand eight hundred and , your petitioner lived and cohabited with the said *C.D.*, at divers places, and particularly at aforesaid.

3. That the said *C.D.*, has never consummated the said pretended marriage by carnal copulation.

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[1] If the marriage was solemnized out of India, the adultery must be shown to have been committed in India.

[2] The petition must be signed by the petitioner.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said *C. D.* was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said *C.D.*, with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) *A.B.*

Form of Verification : *see* No. 1.

No. 5.—PETITION BY WIFE FOR JUDICIAL SEPARATION ON THE GROUND OF HER HUSBAND'S ADULTERY.

(See *section* 22.)

In the (High) Court of
To the Hon'ble Mr. Justice [*or* To the Judge of].
The day of 186 .
The petition of *C.B.*, of , the wife of *A.B.*

SHEWETH,

1. That on the day of , one thousand eight hundred and *sixty* , your petitioner, then *C.D.*, was lawfully married to *A.B.* at the Church of in the .

2. That after her said marriage, your petitioner cohabited with the said *A. B.* at and at , , and that your petitioner and her said husband have issue living of their said marriage, *three* children, to wit, *etc., etc.*[1]

3. That on divers occasions in or about the months of *August, September* and *October*, one thousand eight hundred and *sixty* , the said *A.B.*, *at* aforesaid, committed adultery with *E.F.*, who was then living in the service of the said *A.B.* and your petitioner at their said residence aforesaid.

4. That on divers occasions in the months of *October, November* and *December*, one thousand eight hundred and *sixty* , the said *A.B.*, at aforesaid, committed adultery with *G.H.*, who was then living in the service of the said *A. B.* and your petitioner at their said residence aforesaid.

5. That no collusion or connivance exists between your petitioner and the said *A. B.* with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

[Signed] *C.B.*[2]

Form of Verification.—See No. 1.

No. 6.—STATEMENT IN ANSWER TO No. 5.

In the (High) Court of

B against *B*.

The day of .

The respondent, *A.B.*, by *W.Y.*, his attorney [*or* vakil], saith,—

1. That he denies that he committed adultery with *E.F.*, as in the third paragraph of the petition alleged.

2. That petitioner condoned the said adultery with *E.F.*, if any.

3. That he denies that he committed adultery with *G.H.*, as in the fourth paragraph of the petition alleged.

4. That the petitioner condoned the said adultery with *G.H.*, if any.

Wherefore this respondent prays that this (Hon'ble) Court will reject the prayer of the said petition.

(Signed) *A.B.*

No. 7.—STATEMENT IN REPLY TO No. 6.

In the (High) Court of

B against *B*.

The day of

The petitioner, *C.B.*, by her attorney [*or* vakil], says,—

1. That she denies that she condoned the said adultery of the respondent with *E.F.*, as in the second paragraph of the statement in answer alleged.

2. That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with *G...H.*, as set forth in the fourth paragraph of the petition.

(Signed) *C.B.*,

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[1] State the respective ages of the children.

[2] The petition must be signed by the petitioner.

NO. 8.—PETITION FOR A JUDICIAL SEPARATION BY REASON OF CRUELTY.

(See *section* 22.)

In the (High Court) of
To the Hon'ble Mr. Justice [*or* To the Judge of].
The day of , 186
The petition of *A.B.* (wife of *C.B.*) of

SHEWETH,

1. That on the day of one thousand eight hundred and your petitioner, then *A.D.*, spinster, was lawfully married to *C.B.*, at .

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of , one thousand eight hundred and , when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage the said *C.B.*, habitually, conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of one thousand eight hundred and , the said *C.B.*, in the highway and opposite to the house in which your petitioner and the said *C.B.*, were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F.D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C.B.*, in his said house at aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night in the month of , one thousand eight hundred and , the said *C.B.* in , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand eight hundred and , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at , that from and after the said day of , one thousand eight hundred and , your petitioner hath lived separate and apart from her said husband and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C.B.*, and also order that the said *C. B.* do pay the costs of and incident to these proceedings.

(Signed) *A.B.*

Form of Verification.—See No. 1.

NO. 9.—STATEMENT IN ANSWER TO NO. 8.

In the (High) Court of
The day of .
Between *A.B.*, petitioner, and *C.B.*, respondent.

C.B., the respondent, in answer to the petition filed in this cause, by *W. J.*, his attorney [*or* vakil], saith that he denies that he has been guilty of cruelty towards the said *A.B.*, as alleged in the said petition.

(Signed) *C.B.*

NO. 10.—PETITION FOR REVERSAL OF DECREE OF SEPARATION.

(See *section* 24.)

In the (High) Court of
To the Hon'ble Mr. Justice [*or* To the Judge of].
The day of , 186 .
The petition of *A.B.*, of .

SHEWETH,

1. That your petitioner was on the day of , lawfully married to .

2. That on the day of , this (Hon'ble) Court, at the petition of , pronounced a decree affecting the petitioner to the effect following, to wit,—

[*Here set out the decree.*]

3. That such decree was obtained in the absence of your petitioner, who was then residing at

[*State facts tending to show that the petitioner did not know of the proceedings; and, further, that had he known he might have offered a sufficient defence,*]

or

That there was reasonable ground for your petitioner leaving his said wife or that his said wife

[*Here state any legal grounds justifying the petitioner's separation from his wife.*]

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) *A.B.*

Form of Verification.—See No. 1.

NO. 11.—PETITION FOR PROTECTION-ORDER.

(See *section* 27.)

In the (High) Court of

To the Hon'ble Mr. Justice [*or* To the Judge of].

The day of , 186 .

The petition of *C.B.*, of , the wife of *A.B.*

SHEWETH,

That on the day of she was lawfully married to *A.B.* at .

That she lived and cohabited with the said *A.B.* for years at and also at , and had had children, issue of her said marriage, of whom are now living with the applicant, and wholly dependent upon her earnings.

That on or about , the said *A.B.*, without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [*or* on her own property, *as the case may be*] and hath thereby and otherwise acquired certain property consisting of [*here state generally the nature of the property*].

Wherefore she prays an order for the protection of her earnings and property acquired since the said day of , from the said *A.B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

NO. 12.—PETITION FOR ALIMONY PENDING THE SUIT.

(See *section* 36.)

In the (High) Court of

B against *B*

To the Hon'ble Mr. Justice [*or* To the Judge of].

The day of , 186 .

The petition of *C.B.*, the lawful wife of *A.B.*

SHEWETH,

1. That the said *A.B.* has for some years carried on the business of , at , and from such business derives the net annual income of from Rs. 4,000 to 5,000.

2. That the said *A. B.* is possessed of plate, furniture, linen and other effects at his said house aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said *A.B.* is entitled, under the will of his father, subject to the life-interest of his mother therein, to property of the value of Rs. 5,000 or some other considerable amount.[1]

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet.

(Signed) *C.B.*

Form of Verification.—See No. 1.

NO. 13.—STATEMENT IN ANSWER TO NO. 12.

In the (High) Court of

B against *B.*

A. B., of , the above-named respondent, in answer to the petition for alimony, pending the suit of *C.B.*, says:—

1. In answer to the first paragraph of the said petition, I say that I have for the last *three* years carried on the business of , at , and that, from such business, I have derived a nett annual income of Rs. 900, but less than Rs. 1,000.

---

[1] The petitioner should state her husband's income as accurately as possible.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels and effects at my said house aforesaid, of the value of Rs. 7,000, but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own moneys. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall have to pay to my father's executors the sum of Rs. 2,000, the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me which she did on the day of last, has been considerably diminished, and that such dimunition is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition, I say that, when my wife left my dwelling house on the day of last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs. 800 at the least; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs. , and that she has ever since withheld and still withholds from me the same sum.

(Signed) *A.B.*

No. 14.—UNDERTAKING BY MINOR'S NEXT FRIEND TO BE ANSWERABLE FOR RESPONDENT'S COSTS.

(See *section* 49.)

In the (High) Court of

I, the undersigned, *A.B.*, of , being the next friend of *C.D.*, who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against *D. D.* of , hereby undertake to be responsible for the costs of the said *D.D.* in such suit, and that, if the said *C.D.* fail to pay to the said *D.D.* when and in such manner as the Court shall order all such costs of such suit as the Court shall direct him (*or* her) to pay to the said *D.D.*, I will forthwith pay the same to the proper officer of this Court.

Dated this day of , 186 .

(Signed) *A.B.*

THE DOWER ACT (XXIX OF 1839).

Year.	No.	Short title.	Amendments.
1839	XXIX	The Dower Act, 1839 ..	Repealed in part, VIII of 1868; XII of 1891; X of 1914.

PREFATORY NOTE.—Dower is one of the rights which the wife under the English Law has in her husband's property. Under the English law, at the present day, a life interest in a portion of the real estate of which the husband dies possessed and intestate and provided he had not excluded the wife therefrom is all that remains of the ancient dower, a right which the common law gave to the widow for the sustenance of herself and her children. (Co. Litt. 31-*a*.)

"Where a woman taketh a husband seised of such an estate in tenements, etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not" (Litt. S. 53). Three conditions were therefore necessary to entitle the wife to dower—(*i*) marriage; (*ii*) sole seisin of an estate of inheritance; (*iii*) death of the husband (Co. Litt. 21-*a*). It was not necessary that there should be issue in fact of the marriage

(Litt. S. 36) but it was necessary that there should be a possibility of issue who could inherit; and therefore if lands were limited to a man and his heirs by a certain marriage in tail, and his wife died, and he married again, his second wife would have no dower out of those lands (Litt. S. 53). Assuming these three conditions fulfilled, the widow was entitled to an estate for life in one-third of the lands of which her husband was solely seised for an estate of inheritance in possession at any time during the coverture. The husband must have been "seised," therefore the widow was not dowable out of his equitable estates (Co. Litt. 29-*a*), including a mere equity of redemption. *Lawson* v. *Bank of Whitehaven,* (1877) 6 Ch. D. 218.

All women, married after the 1st January, 1834, come under the provisions of the Dower Act, 3 & 4 Will. IV, c. 105. Under this Act a widow is dowable out of lands in which her husband's interest was equitable, or partly legal and partly equitable (S. 2), provided it was an estate of inheritance in possession, or equal to an estate of inheritance in possession [In re *Michell,* (1892) 2 Ch. 87], other than a joint-tenancy. If the husband's interest is a right of entry, that is sufficient, (S. 3), provided the claim to dower is enforced before the right of entry is barred. But she is not dowable out of any lands of which her husband actually disposed in his lifetime or by will (S. 4). A widow is not entitled to dower out of any land of her husband where, in the deed by which such land is conveyed, or by any deed executed, by him, it shall be declared that his widow shall not be entitled to dower out of such land (S. 6). Nor is she entitled to dower out of any land of which her husband dies wholly or partially intestate, when by his will he declares his intention that she shall not be entitled to a dower out of such land or out of any of his land (S. 7). Her right is subject to any conditions, restrictions, or directions declared by her husband's will (S. 8). Where a husband devises land out of which his widow would have been dowable if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, she is not dowable out of any of his land unless a contrary intention appears in his will (S. 9). A devise of real estate to trustees on trust to sell and to pay an annuity out of the proceeds is a devise of an interest in land [*Lacy* v. *Hill,* (1875) L.R. 19 Eq. 346; In re *Thomas,* (1886) 34 Ch.D. 166]. But no gift or bequest out of personal estate, or out of land not liable to dower, will defeat her right to dower unless a contrary intention is expressed in the husband's will (S. 10). The Court may enforce an agreement by the husband not to bar his wife's right to dower (S. 11). Formerly, if a legacy were given in satisfaction of dower, it was entitled to priority over simple legacies, for it was considered the price of the dower. By S. 12 nothing in the Act is to interfere with any rule of equity by which legacies, bequeathed in satisfaction of dower are entitled to priority over other legacies. But this rule only applies where, if she had not accepted the gift in satisfaction, the widow would have been entitled to dower [In re *Greenwood,* (1892) 2 Ch. 295]. By S. 5 dower is made subject to all partial estates and interests, and all charges which the husband may have created, and also to all debts, incumbrances, and contracts to which the land may be liable. The proportionate part of the widow's charge for £500 to be borne by the real estate of an intestate under the Intestates' Estates Act, 1890, has priority over her right to dower [In re *Charriere,* (1896) 1 Ch. 912]. (Encyclopædia of the Laws of England, 2nd Ed., Vol. VI. Title "Husband" and Wife".)

THE DOWER ACT (XXIX OF 1839).[1]

CONTENTS.

SECTIONS.
1. Preamble.
Interpretation.
2. Widows to be entitled to dower out of equitable estates.
3. Seisin shall not be necessary to give title to dower.
4. No dower out of estates disposed of.
5. Priority to partial estates, charges and specialty debts.
6. Dower may be barred by a declaration in a deed.
7. Or by a declaration in the husband's will.
8. Dower shall be subject to restrictions.

SECTIONS.
9. Devise of real estate to the widow shall bar her dower.
10. Bequest of personal estate to the widow shall not bar her dower.
11. Agreement not to bar dower may be enforced.
12. Legacies in bar of dower still entitled to preference.
13. *Repealed.*
14. Act not to take effect before the 1st July, 1840.
15. Saving of certain rights and jurisdiction.

LEG. REF.

[1] **Short title, "The Dower Act, 1839".** *See* the Indian Short Titles Act (XIV of 1897). The whole Act, except as to marriages

[16*th December,* 1839.

An Act for the Amendment of the Law relating to Dower.

Preamble.

1. WHEREAS it is expedient to extend the amendments in the English law of dower contained in the [1]Statute 3rd and 4th William IV, Chapter CV, to the territories of the East India Company in cases which, but for the passing of this Act, would be governed by the English law of dower as it existed previously to the passing of the aforesaid Statute;

Interpretation.

It is hereby enacted that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; [* * * * *][2]

Widows to be entitled to dower out of equitable estates.

2. [* * * *][3] When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land.

Seisin shall not be necessary to give title to dower.

3. [* * *][3] When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof: Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

No dower out of estates disposed of.

4. [* * *][3] No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial estates, charges and specialty debts.

5. [* * *][3] All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Dower may be barred by a declaration in a deed.

6. [* * *][3] A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

LEG. REF.

contracted before 1st January, 1866, was repealed by the Repealing Act (VIII of 1868).

As to dower when the marriage was contracted before the 1st January, 1886, the Act has been declared, by the Laws Local Extent Act (XV of 1874), S. 3, to be in force in the whole of British India, except as regards the Scheduled Districts.

[1] Short title, "The Dower Act, 1833." *See* the Short Titles Act, 1896 (59 and 60 Vict., c. 14).

[2] The words "and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing" were repealed by Act X of 1914.

[3] The words "And it is hereby further enacted, that" in Ss. 2 to 6 were repealed by the Amending Act (XII of 1891).

Or by a declaration in the husband's will.

7. [* * *][1] A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of free-hold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land.

Dower shall be subject to restrictions.

8. [* * *][1] The right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

9. [* * *][1] Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Bequest of personal estate to the widow shall not bar her dower.

10. [* * *][1] No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will:

Agreement not to bar dower may be enforced.

11. Provided always, [* * *][2] that nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them.

Legacies in bar of dower still entitled to preference.

12. [* *][1] Nothing in this Act contained shall interfere with any rule of equity or of any Ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

13. [*Certain dowers abolished.*] *Rep. by the Amending Act,* 1891 (*XII of* 1891).

Act not to take effect before the 1st July, 1840.

14. [* * *][1] This Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of July one thousand eight hundred and forty, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said first day of July one thousand eight hundred and forty the effect of defeating or prejudicing any right to dower.

Saving of certain rights and jurisdiction.

15. [* * *][3] This Act shall not be construed to affect any right of property in land otherwise than by modifying the law of dower in cases governed by the English law of dower, or to extend or alter the jurisdiction of any of Her Majesty's Courts of Justice.

LEG. REF.

[1] The words "And it is hereby further enacted, that in Ss. 7 to 10, 12 and 14 were repealed by the Amending Act (XII of 1891).

[2] The words "And it is hereby further enacted" were repealed by *ibid.*

[3] The words "And it is hereby provided that" were repealed by *ibid.*

THE EASEMENTS ACT (V OF 1882).

Year.	No.	Short title.	Amendments.
V	1882	The Indian Easements Act, 1882.	Application extended, VIII of 1891; Amended, XII of 1891; X of 1914. Continued in force (with modifications) in territory transferred to Delhi Province, Act VII of 1915, S.3, Sch. III.

PREFATORY NOTE.—Easements, in some form or other, were known to all the ancient nations, who had developed some form of legal rules and legal institutions.

Thus easements were familiar to Hindus and Mussalmans, and their law books are full of rules in regard to what are termed by Muhammadan lawyers as "neighbour's rights". (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882. *See also* 13 B.L.R.O.C. 18.)

It has sometimes been said that easements in an agricultural country like India, are not matters of sufficient importance to deserve the attention of legislature; that, to frame an Act in regard to them is to encumber the Indian Statute book unnecessarily. Such views are not countenanced by the Native community. In cities and towns, easements are regarded as rights of great pecuniary value and litigation often arises in regard to them. In the rural parts of the country the right to take fish or water from lakes and tanks often becomes the subject of litigation, and the final decision materially affects the value of the property in regard to which the easements are claimed. Nor are disputes in regard to easements confined to the most advanced parts in India. Probably they are more frequent in those parts of India which have come under British dominion comparatively lately. (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 10th February, 1882. *See also* 3 B.L.R.O.C. 18.)

"The origin of servitudes," says an eminent French writer, "is as ancient as that of property, of which they are a modification. By their natural disposition, the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the soil recognised the indispensable necessity of such subjections. When the extension of cultivation brought men nearer together and the want of a common defence formed the first society, public utility and safety led to the conviction, that it was necessary to restrict in certain cases rights legitimate in themselves, but the absolute exercise of which by individuals could not take place without rendering some properties almost valueless. In a short time, similar rights were stipulated for by private persons as matter of utility, or even pleasure. Thus, from the disposition of nature, the wants of society and the agreements of individuals have originated praedial servitudes". (*Fardessus, Traite des Servitudes,* Sec. 1 cited in Gale on Easements, 8th Ed., 1908, p. 27.)

"Probably the origin of praedial servitudes is to be found in the gradual introduction of the stricter notions of exclusive ownership. Without some modifications of these notions, neighbours could not have lived comfortably together. Hence in praedial servitudes, it is always assumed that the two praedia are not far apart. Hence also it was a rule that the right of a landowner over the land of his neighbour must not be advantageous to him, but advantageous to him *qua landowner,* or as it is sometimes put, advantageous to his land. So again it followed that, if the landowner who had the right sold the land for the benefit of which the right existed, he could not himself retain the right. It passed with the land to each successive owner of the land. Exactly in the same way if the land over which the right was exercised were sold, the land remained burdened with servitude, following out the idea that the servitude was attached to both lands, to one as a benefit, and to the other as a burden. The land or house to which the servitude was attached as a benefit was called *locus superior*; that to which it was attached as a burden was called the *locus inferior*". (Markby's Elements of Law, 5th Ed., 1896, pp. 207 and 208.)

It has been said that "the right of easement is a right as old as the day when the human race, first emerging from barbarism, adopted the custom of living together in towns, or living as each other's neighbours, or respecting each other's rights. The right of easement is the necessary consequence of the right of ownership of immovable property; and, as soon as mankind arrived at the determination that individuals were to be allowed exclusive ownership of property, the very next step was concurrence in the equitable principle, that the good of the public lay in enjoying one's property so as not to disturb the enjoyment by the neighbour of his own property. And this salutary principle appears to be the original foundation on which easements are based". (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

The Indian Easements Act was intended to systematically formulate those rules of law which previously governed the decision of disputes relating to easements. Those rules were such as our Courts were, even before the passing of this Act, in the habit of administering.

The object of this Act was to state, clearly and compactly, the rules relating to Easements, that is to say, the rights which a man sometimes has over one piece of immovable property by reason of his ownership of another. As to these rights then, existing statutory law was silent, except so far as regards the acquisition of easements by long and continued possession, the limitation of suits for disturbing them, and the granting of injunctions to prevent such disturbance; and three of the then most erperienced Judges in India—Sir Michael Westropp, Mr. Justice Jackson and Mr. Justice Innes—expressed their opinion that it was desirable to codify the law on the subject, which was then (to quote the Chief Justice of Bombay) "for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the Mufassil and to the Subordinate Judges". There was much litigation in the case of urban easements, and a Judge of the Punjab Chief Court asserted that it was largely due to the fact that neither the people themselves, nor the majority of the Courts understood the principles upon which such disputes had to be determined. (*See* Statement of Objects and Reasons. *See also* Whitely Stokes' Anglo-Indian Codes, Vol. I, p. 879.)

The Act was mainly based on the law of England, which being just, equitable, and almost free from local peculiarities, has in many cases, been held to regulate the subject in this country; but a few deviations have been made from that law, and rules as to some matters which had not till then come under the cognizance of the English and Indian Courts have been adopted from the writings of well-known jurists. (*See* Whitely Stokes' Anglo-Indian Codes, Vol. I, p. 879.)

Whenever any disputes regarding easements arose previous to the passing of the Act, the Courts had to decide these disputes on principles derived from reported English cases. Of course, there were customary rights in this country which were not usual in England, but that was not the difficulty. The difficulty was to know what gave a man a right to an easement so as to enable him to enforce it against a neighbour, and how he might acquire that right, and how he could enforce it. All these points were decided by the High Courts according to the English law, and therefore it was held that, in any attempt at codifying the existing law, the reproduction of the rules of English law was found to be inevitable. (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

In the early days of the British administration of this country, there was a wholesale and indiscriminate borrowing from the English law—the most copious system of express rules known to the world. "The Judge reads English Law-books; the young native lawyers read them; for law is the study into which the educated youth of the country are throwing themselves, and for which they may even be said to display something like genius. You may ask, what authority have these borrowed rules in India. Technically, they have none whatever. Yet, though they are taken (and not always correctly taken) from a law of entirely foreign origin, they are adopted as if they naturally commended themselves to the reason of mankind; and all that can be said of the process is that it is another example of the influence often felt in European legal history which express written law invariably exercises on unwritten customary law when they are found side by side." (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882; Maine's Ancient Law.)

On this subject the following remarks of Justice Field may also be noted:—"Doubts had been expressed as to whether a measure like this Bill is at present demanded by the requirements of this country. I have on many previous occasions expressed my own opinion that legislation in India ought not to anticipate future requirements, the nature and measure of which must in the present be uncertain, and that the real test of the advisability or utility of any proposed legislative measure is whether it is demanded by the actual present requirement of the country. If there is a considerable amount of actual present litigation to which any proposed measure will be immediately applicable, and for dealing with which it will supply ready and useful body of rules, it appears to me that this is a strong fact to show that such legislation is demanded by the requirement of the progress of the country. Applying this test to the Easements Bill, I think that it is a measure which may well be passed into law. As the result of my own personal experience, I have had before me within the last six months cases which directly involved the following easements:—(1) Right of way for foot passengers. (2) Right of way for boats. (3) Right of way for carts. (4) An easement of necessity. (5) *Destination du pere du famille*. (6) Flumen, or the right of discharging water in a continuous stream upon adjoining premises. (7)

Right of allowing water to drop from the eaves to the dominant tenement upon the servient tenement (*stillicidium*). (8) *Jus projiciendi,* or right to project a roof over the boundary line of a neighbour's land. Turning to the published reports of twenty years (previous to the passing of this Act) we find cases connected with easements in every presidency, and in every Court, from the Munsiff's Court in India up to Judicial Committee of the Privy Council. For the assistance of any who may desire to test the value of this argument, I give a few instances which may be verified by referring to the reports. The reference will be found most interesting." Mr. Field referred to 'the reports of over seventy Indian cases relating to easements, which might be tabulated as follows:—Right of way, 34 cases. Right of water, 8 cases. Right to stop or obstruct the natural flow of water, 7 cases. Fall of water from roof of house, 2 cases. Light and air, 9 cases. Profits *a prendre,* 2 cases. Other cases connected with easements, 11 cases. In this connection it must also be remembered that the number of reported cases on a given subject was only a small fraction of the number of unreported cases on that subject. (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

"This Act is a measure of which the country had long stood in need."

This Act, it was believed, would do material service in the Central Provinces in enabling the raiyats to maintain themselves in the enjoyment of those grazing and forest rights, which the Government had endeavoured to preserve to them, but of which a few of the more grasping landowners were seeking to deprive them. (*See* Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

THE EASEMENTS ACT (V OF 1882).

CONTENTS.

PREAMBLE.

PRELIMINARY.

SECTIONS.
1. Short title.
Local extent.
Commencement.
2. Savings.
3. Construction of certain references to Act XV of 1877 and Act IX of 1871.

CHAPTER I.

OF EASEMENTS GENERALLY.

4. "Easement" defined.
Dominant and servient heritages and owners.
5. Continuous and discontinuous, apparent and non-apparent, easements.
6. Easement for limited time or on condition.
7. Easements restrictive of certain rights.
(*a*) Exclusive right to enjoy.
(*b*) Rights to advantages arising from situation.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

8. Who may impose easements.
9. Servient owners.
10. Lessor and mortgagor.
11. Lessee.
12. Who may acquire easements.
13. Easements of necessity and *quasi*-easements.
14. Direction of way of necessity.
15. Acquisition by prescription.
16. Exclusion in favour of reversioner of servient heritage.
17. Rights which cannot be acquired by prescription.
18. Customary easements.
19. Transfer of dominant heritage passes easement.

CHAPTER III.

THE INCIDENTS OF EASEMENTS

20. Rules controlled by contract or title.
Incidents of customary easements.
21. Bar to use unconnected with enjoyment.

SECTIONS.
22. Exercise of easement.
Confinement of exercise of easement.
23. Right to alter mode of enjoyment.
24. Right to do acts to secure enjoyment.
Accessory rights.
25. Liability for expenses necessary for preservation of easement.
26. Liability for damage from want of repair.
27. Servient owner not bound to do anything.
28. Extent of easement.
Easement of necessity.
Other easements—
(*a*) right of way;
(*b*) right to light or air acquired by grant;
(*c*) prescriptive right to light or air;
(*d*) prescriptive right to pollute air or water;
(*e*) other prescriptive rights.
29. Increase of easement.
30. Partition of dominant heritage.
31. Obstruction in case of excessive user.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

32. Right to enjoyment without disturbance.
33. Suit for disturbance of easement.
34. When cause of action arises for removal of support.
35. Injunction to restrain disturbance.
36. Abatement of obstruction of easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

37. Extinction by dissolution of right of servient owner.
38. Extinction by release.
39. Extinction by revocation.
40. Extinction on expiration of limited period or happening of dissolving condition.
41. Extinction on termination of necessity.
42. Extinction of useless easement.
43. Extinction by permanent change in dominant heritage.
44. Extinction on permanent alteration of servient heritage by superior force.

SECTIONS.
45. Extinction by destruction of either heritage.
46. Extinction by unity of ownership.
47. Extinction by non-enjoyment.
48. Extinction of accessory rights.
49. Suspension of easement.
50. Servient owner not entitled to require continuance.
Compensation for damage caused by extinguishment or suspension.
51. Revival of easements.
CHAPTER VI.
LICENSES.
52. "License" defined.

SECTIONS.
53. Who may grant license.
54. Grant may be express or implied.
55. Accessory licenses annexed by law.
56. License when transferable.
57. Grantor's duty to disclose defects.
58. Grantor's duty not to render property unsafe.
59. Grantor's transferee not bound by license.
60. License when revocable.
61. Revocation express or implied.
62. License when deemed revoked.
63. Licensee's rights on revocation.
64. Licensee's rights on eviction.

[17*th February*, 1882.

An Act to define and amend the law relating to Easements and Licenses.

Preamble.

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

PRELIMINARY.

Short title.

1. This Act may be called "The INDIAN EASEMENTS ACT, 1882"[1]:

Local extent.

[2] It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg;

Commencement.

and it shall come into force on the first day of July, 1882.

Savings.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

LEG. REF.

[1] For Statement of Objects and Reasons of the Bill which became Act V of 1882, *see Gazette of India*, 1880, Pt. V, page 494; for Report of Select Committee, *see ibid*,, 1881, Pt. V, p. 1021; and for proceedings and debates in Council relating to the Bill, *see ibid.*, 1881, Supplement, pp. 687, 766 and *ibid.*, 1882, Supplement, p. 172.

The Act has been extended under S. 5 of the Scheduled Districts Act, XIV of 1874, General Acts, Vol. II, to the Scheduled District of Ajmer-Merwara, *see Gazette of India*, 1897, Pt. II, p. 1415.

[2] The Act was extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the N.-W.F.P. and Chief Commissioner of Oudh by Act VIII of 1891, printed Bombay Code, Ed. 1894, Vol. I.

NOTES.

Sec. 1.—Act is not retrospective. 14 A. 185 (F.B.); 1934 A.L.J. 728=1934 A. 336. Act is a complete Code and only in places where it is not in force, the Courts rely upon English sources for the law of easements and upon justice, equity and good conscience. 34 I.C. 450=20 C.W.N. 1158. *See also* 31 C. 503=31 I.A. 53=8 C.W.N. 425 (P.C.); 7 Bom.L.R. 825. The Limitation Act is remedial and gives a right where there is no other right at all, but it does not exclude or interfere with other titles and modes of enjoyment (as) easement. 29 M.L.J. 685=31 I.C. 528. Act not in force in Punjab. 85 P.R. 1902; 102 I.C. 447=1927 L. 492. Also not in force in Bengal. 22 C. 366. But its principles may be applied even in Provinces where the Act is not in force as such. 22 C. 366; 1941 Cal. 289; But *see* 102 I.C. 447=1927 L. 492; 91 I.C. 881=1926 C. 307. Principles of the Act applied to Berar. *See* 94 I.C. 923=1926 N. 376; 155 I.C. 966=1935 P. 188. Applicability to Burma. *See* 6 R. 667=114 I.C. 519=1929 R. 31; 13 R. 748. Although the Easements Act does not apply to Burma, the Court must have regard to that Act while deciding a question relating to an easement. 1940 Rang.L.R. 93=1939 Rang. 421. The Act is not retrospective in its effect and its provisions were extended to United Provinces of Agra and Oudh by Act VIII of 1891. Neither the Indian Easements Act of 1882 nor the Amending Act VIII of 1891 can affect the rights which were acquired before 1891. 1934 A.L.J. 728=1934 A. 336. Decisions of the Calcutta High Court on question of easement and licence are not to be relied upon as authorities in places where the provisions of the Easements Act are in force. 9 O.W.N. 986=1933 O. 69=8 Luck. 278.

(*a*) any right of the [1][Crown] to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation ;

LEG. REF.

[3] Substituted by A.O. for 'Government'.

NOTES.

Sec. 2 (a).—Where a part of the sources of irrigation for a ryotwari village is a Government tank, Mirasdars who have from time immemorial cultivated their wet lands with the tank water have a preferential right to irrigate from the tank over assignees of waste land from the Government. 51 I.C. 734. A ryotwari proprietor can claim a supply of water for irrigation of his lands from a Government channel. But it is for the Government to distribute water in any way it thinks fit. 34 M.L.J. 425=45 I.C. 80. No one has any right to interfere with the Government's exercise of its general power of distributing and limiting the supply of water for irrigation in ryotwari villages. But if the Government dams up water and prevents it from going to plaintiff's land there is a right of suit. 26 I.C. 18=1914 M.W.N. 788. Government is no doubt bound to supply water to wet fields, but the ryots have no vested interest in the maintenance of any particular channels for their supply. The ryots cannot claim as against Government any right to take water to their fields by any particular channel. 1930 M. 621=125 I.C. 74. A ryotwari tenant has no right of easement in respect of water-supply from any particular channel. 54 M. 793=1931 M. 284=61 M. L.J. 563. Where the evidence was to the effect that when the land is undulating only the lower lands were cultivated and the higher lands were regarded as catchment areas but it was not proved that the unoccupied waste lands from the higher levels had ceased to be Government property, *held,* that under those circumstances it should not be said that the cultivator of the lower lands had acquired an easement as against the Government for the surface water on the higher lands. 7 R. 487=1929 R. 300. The construction and control of works and sources of irrigation is the special function and duty of the Government in India. 24 M.L.J. 36=14 I.C. 261. *See also* 28 M. 72=15 M.L.J. 32; 1 M.LJ. 47; 16 M. 333; 7 B. 209; 28 B. 105. A ryot in respect of ryotwari lands is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet fields. The Government have got the right to regulate the method and manner of supply. But as an incident to the tenure there is a right in the ryot to receive the said water. Where the water of a natural stream which was until 1893 falling into Thangal and exclusively used by the ryots of a village, was diverted by them in 1893 into a tank and for over 30 years it has been the customary method to take the water of the stream to augment the supply of the tank without which it would be impossible to cultivate registered wet lands under the ayacut of the tank, the Government must be taken to have impliedly recognised this as the customary method of supply for the time being for the irrigation of the wet fields. The fact that the stream is not shown as the source of irrigation in the settlement register cannot curtail the rights of the ryots. If with the consent and approval of Government water had been diverted from 1893, and Government chose to permit wet cultivation on a large extent knowing full well that without the aid of such water it would not be possible for the ryots to do so, the ryots must be deemed to have a right conferred on them by Government, a right to the said water, and any interference of such right by any one is actionable. The ryots can sue for a declaration of their rights and for an injunction restraining interference with such rights by the ryots of another village. 46 L.W. 472 =1937 Mad. 957. Where the *Government as upper riparian owner seeks to use the waters of a public stream not for a riparian tenement, but for the purpose of filling a tank situate at a long distance,* by putting up a permanent dam across the river, the right to divert water to such a tank in such manner is in the *nature of easement and not a riparian right.* The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. If the Government claims the easement by prescription, it is for the Government to show the extent of the prescriptive right. The burden is not on the lower riparian owner in an action by him against the Government on the ground of excessive user, to prove that he has suffered damages as a result of any specific act of the Government. The suit cannot be regarded as one between two riparian proprietors. If it is proved that silt has accumulated over or near the dam in a way calculated to obstruct the natural flow of water over the dam, the plaintiff (lower riparian owner) is entitled to relief against the defendant (Government) unless the latter can show that the plaintiff's remedy is barred by limitation. The obstruction caused to the free flow of water in the river by such accumulation amounts to a "nuisance," and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an in-

(*b*) any customary or other right (not being a license in or over immoveable property) which the [1][Crown] the public or any person may possess irrespective of other immoveable property; or

(*c*) any right acquired, or arising out of a relation created before this Act comes into force.

Construction of certain reference to Act XV of 1877, and Act IX of 1871.

[2][3. All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1877,[3] or to sections 27 and 28 of Act No. IX of 1871[4] shall, in such territories, to which this Act extends be read as made to sections 15 and 16 of this Act.]

LEG. REF.

[1] Substituted by A.O., 1937 for 'Government'

[2] Substituted by the Repealing and Amending Act X of 1914, S. 2 and Sch. I.

[3] Repealed by Act IX of 1908.

[4] Repealed by Act XV of 1877.

NOTES.

junction and damages. The position is the same even when natural causes combine with the existence of the dam to bring about the obstruction. The fact that the Government has acquired a right by prescription to maintain the dam would not give the Government any immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. Nor can a plea of limitation be raised in respect of the removal of such obstruction. The injury caused to the lower riparian owner by such obstructions is in the nature of a "continuing wrong" within the meaning of S. 23, Limitation Act, and the lower riparian owner would have a cause of action accruing *de die in diem* until the opposing party acquires a prescriptive right to maintain the obstruction. It is also very doubtful whether a prescriptive right could be acquired at all in respect of a shifting or changing mass like silt accumulation. The acquisition by the Government of a prescriptive right to maintain the dam will not of itself entitle them to all the waters intercepted by the dam, but only to such water as they have been accustomed to take. If they are entitled to draw water through a channel with certain dimensions, they cannot enlarge the dimensions of that channel. 174 I.C. 229=46 L.W. 862=1938 Mad. 180. Customary right, proof of. *See* 90 I.C. 976=1926 A. 130. *See also* 37 C.W.N. 18 =1933 C. 539=146 I.C. 427.

Sec. 2 (b): CUSTOMARY RIGHT.—A custom in order to be valid must be ancient, invariable, reasonable and certain, whereas an easement need not be reasonable. 29 N. L.R. 85=142 I.C. 153=1933 N. 74. When it is found that the inhabitants of a village have certain legal rights arising out of immemorial user of certain land as a village *gopat*, which they have never surrendered, the Courts are bound to defend and enforce such rights. 60 C.L.J. 213=1935 C. 201. Customary rights—Right of pasturage by long user—Villagers' right to graze cattle over lands of adjacent village—Owner not their landlord—Enforceability of such rights. *See* 63 C. 851. Customary right and prescriptive right—Distinction. 71 M. L.J. 268; 66 C.L.J. 270. The customary right referred to in S. 2 (*b*) of the Easements Act must be one which is possessed irrespective of immovable property. The right for drainage, that is for the water, which is on or comes on to the land of a person to flow over certain other ground, is a right which is connected with the immovable property owned by him. Such a right, therefore, does not amount to a customary right, but amounts to an easement under S. 4 of the Easements Act. 1936 A.L.J. 1160=1936 A. 879. Use of building as a mosque with consent of zamindar—If licence—Nature of right. 156 I.C. 942= 1935 A.L.J. 1269=1935 A. 891.

A CLAIM TO PROFITS *a prendre* over the soil of another such as a right to fish without stint and for commercial purposes which might lead to the destruction of the subject-matter is a claim of right unknown to law and a custom alleged in its support is bad and unreasonable. Though this principle is not, perhaps, applicable to the case of a right in gross (fishery) vested in the inhabitants of a particular village, the fact that the fish is to be taken for commercial purposes and the fact that under the custom alleged, any of the persons has the right to bring in as many others as he chooses on payment of a nominal fee are factors which stamp the custom with considerable uncertainty as regards the persons entitled to exercise the right and unreasonableness that stand in the way of its being pleaded as having created a right. Further, though the payment of a reasonable fee is not real objection to the validity of a custom if one such existed, the fact that the fee was paid per head of persons fishing was antagonistic to the idea of a right enjoyed without leave and licence. 37 C.W.N. 18=1933 C. 539. *See also* 61 C. 45=151 I.C. 813=1934 C. 461.

CUSTOMARY EASEMENT AND CUSTOMARY RIGHT, DISTINCTION BETWEEN.—A customary easement remains an easement and can exist only for the beneficial enjoyment of other land. It is merely appurtenant to the dominant heritage and cannot exist in gross. A right over property that exists in gross and not for the beneficial enjoyment of other

CHAPTER I.

OF EASEMENTS GENERALLY.

“Easement” defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

NOTES.

property is not an easement, though it may be a customary right. Such rights exist independently of the Easements Act and are expressly excluded from its operation by S. 2 (*b*). Merely because the villagers have a right to graze in the *C* class forest land, they cannot be said to be occupiers of it, nor the claim to go through a particular field in order to reach the *C* class forest is a claim for the beneficial enjoyment of their houses in the abadi. A right of passage by the villagers through a particular field for going to the Government forest with their cattle is not an easement but a customary right. 29 N.L.R. 85=1933 N. 74. *See also* 71 M.L.J. 268.

Sec. 4.—*See* 1937 A.L.J. 249=1937 A. 428=I.L.R. 1937 A. 511.

OVER WHAT PROPERTY AND HOW CAN EASEMENTS BE ACQUIRED.—Easements can be acquired over artificial structures such as flat masonry, or roofs of shops. 45 I.C. 585=21 O.C. 78. It is not inconsistent with a claim to property, or in the alternative an easement over the same. 41 C.L.J. 379=1925 C. 788. The claim in respect of an easement is not incompatible with a claim of ownership. 1938 Nag. 415. *See also* 1939 Nag. 197; 1939 Sind 110; 1933 Bom. 122; 1939 Bom. 149. In order that a plaintiff should prove the right to an easement, he must show the exercise of that right with the necessary *animus* throughout the statutory period. The question of *animus* is a question of fact to be proved by evidence. Though a plaintiff in a case to establish right of easement may in his pleadings raise inconsistent pleas; yet if in the witness box he leads evidence to show that he is the owner of the land over the statutory period or some part of it, he clearly destroys his case which is dependent upon his showing that he is not the owner of the land over the statutory period and has not claimed the rights of owner but the exercise of the rights over the land of another. In such a case the plaintiff must necessarily fail on both the grounds as one plea is fatal to the other. I.L.R. (1939) Kar. 307=1939 Sind 110. Neither writing nor registration is necessary for the creation of easement. 96 I.C. 276, following 31 A. 612. The right of easement necessarily implies both the dominant and servient tenements belonging to different persons. No easement could be acquired in favour of one property as against another both owned by the same man. 24 S.L.R. 208=1930 S. 34; 1940 Rang.L.R. 93=1939 Rang. 421; 1937 Cal. 572=I.L.R. (1937) 1 Cal. 569. For the acquisition of an easement along with other things it is essential that the dominant owner must be a fixed or ascertained person or body of persons capable of acquiring the right. Where the evidence shows that Sindhis in general had been making use of the land in question, *held,* that this could not establish a right of easement as Sindhis in general are a variable body of persons who in law are incapable of acquiring any right. 1940 Mar.L.R. 122 (Civ.). A suit to enforce an easement can be brought not only by the owner of the land but also by the occupier. 123 I.C. 230=1930 S. 152. The right of person to go and take water from a well standing on a neighbouring land is a right of easement and the Court can grant an injunction restraining a stranger from interfering with the plaintiff's right. It is not necessary for the plaintiff to prove that the servient tenement is the tenement of the particular defendant who has interfered with his right. 27 A.L.J. 1120=1929 A. 779. Private persons who merely happen to reside in houses in a public lane cannot sue for alleged encroachments in that lane, for no right of easement can be acquired over a public lane. 118 I.C. 520=1929 A. 504.

ILLUSTRATIVE CASES—(1) WHAT ARE EASEMENTS.—The definition of easement applies to a projection of eaves in a dry country as well to a country having abundant rainfall, the purposes of the eaves being only to discharge rain water. 38 B. 1=21 I.C. 352=15 Bom.L.R. 876. *See also* 38 Bom.L.R. 264=1936 B. 219.

PRIVACY, RIGHT OF.—The law does not recognise the right of privacy unless it depends upon prescription, grant or local usage. 10 P. 280=133 I.C. 163=1931 P. 212; 159 I.C. 683=1935 A. 1062. *See also* 40 P. L.R. 483; 28 I.C. 674; 1934 All. 527; 22 Bom.L.R. 226; 1929 All. 809; 1935 A.L.J. 432 cited under S. 18 *infra*.

EASEMENT OR LICENCE—DIFFERENCE.—*See* 29 Bom.L.R. 312. Easement necessarily connotes the existence of a dominant tenement and a servient tenement. Hence a concession given to villagers personally to enjoy the shamilat of another village is not a right of easement but a licence. 152 I.C. 141=1934 Pesh. 96. The possession of a *punkh* or *eaves* overhanging another's land is an easement and is no occupation of property. 37 B. 491=15 Bom.L.R. 551. *See also* 38 Bom.L.R. 264=1936 B. 219. Right of way for the use of the sweeper, who is

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

NOTES.

also a Municipal servant can be acquired as an easement. 28 Bom.L.R. 601=95 I.C. 170=1926 B. 282.

QUASI EASEMENTS.—*See* 176 I.C. 966=1938 Sind 145, cited under S. 18, *infra*.

WHAT ARE NOT EASEMENTS.—Right to bury in another's land does not fall within the general definition of "easement." It cannot be deemed a right. 66 I.C. 640=34 C.L.J. 319. The right to bury or cremate the dead on land belonging to other persons cannot be acquired by prescriptions. 138 I.C. 325=33 P.L.R. 157=1932 L. 256. The right to cremate dead bodies cannot be acquired as an easement by prescription. But such a right can be acquired by dedication or by prescription as a mode of acquisition or extinction of substantive or primary rights by lapse of time, described as acquisitive prescription. 60 C.L.J. 566=39 C.W.N. 387=1935 C. 357. Private rights of way, not appurtenant to a dominant tenement, like public rights of way, are not easements. They are rights in gross and can be enforced as such. 59 I.C. 319. A right of passage over a public road is not an easement. 48 A. 560=1926 A. 538. A right to go on to a neighbour's land to gather the fruits therefrom a portion of a tree alleged to belong to the plaintiff is not an easement. Such a right cannot be acquired by prescription. 43 M.L.J. 152=1922 M. 398 [(1895 A.C. 1, Foll.]. A general right of easement to use a roof as a place of setting or drying clothes or for other purposes can be acquired under the Act. User may be either by the dominant owner or by his tenants beyond the statutory period. User without permission is user as of right. 45 I.C. 585=21 O.C. 78. A person has no right to cut off the overhanging branches and the penetrating roots of a tree belonging to his neighbour when the tree is growing partly on his land and partly on his neighbour's land for many years past. 22 Bom.L.R. 790=44 B. 705. But *see also* 114 I.C. 512. Where a soapnut bush which had taken root exclusively on the plaintiff's land was shown to have spread over largely on a tamarind tree on the land of the defendant and it was shown that the plaintiff alone had been enjoying the produce, *held*, that the adjoining owner was not entitled to claim the produce or prevent the owner from collecting the same. *Quaere*, whether when the fruits have fallen on the land of the adjoining owner from the overhanging branches the owner of the tree can go over the adjoining land without committing trespass to collect such fruits. 8 Mys.L.J. 136.

WHO CAN ACQUIRE EASEMENTS.—S. 4 of the Act shows that not merely the "owner" but even an "occupier" may acquire an easement and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner" if there is no interruption in his user. 1934 M. 575=67 M.L.J. 262. *See also* 20 N.L.J. 99; I.L.R. (1937) All. 511=1937 A.L.J. 249=1937 All. 428. Where the easement of a right of way in respect of a stair case existed for the benefit of the dominant tenement, the upper storey of certain shops, and later on a right of way in respect of the same staircase but for the benefit of a different dominant tenement altogether, namely a mosque, built in a different place, is claimed, it was *held* that the owner of a right of way was not entitled to transfer the right in such a manner. 1938 A.L.J. 1238=1939 All. 194. Suit to establish easement can be maintained by the occupier of dominant tenement. 52 L.W. 610=(1940) 2 M.L.J. 655.

NO RECIPROCAL EASEMENTS.—It is not possible to acquire a reciprocal easement for the benefit of the servient tenement by the exercise of an easement by the dominant owner. 22 I.C. 514=19 C.L.J. 45.

PROFIT A PRENDRE.—The right to hunt in a jungle and to appropriate the game is a right known in English law as a right to profit *a prendre* in gross. 2 P.L.J. 323=39 I.C. 868. A right *in gross* or profit *a prendre* may be established by the same sort of evidence as is used to establish either a profit *a prendre* appurtenant or an easement in the ordinary sense of the word. (5 C. 945; 19 C. 544 and 14 C.L.J. 572, Ref.) 61 C. 45=151 I.C. 813=1934 C. 461. The *right which involves the total exclusion of* the owner of the soil from its enjoyment, such exclusion not being physically for user by person claiming it cannot be claimed as an easement. 130 I.C. 546=1931 S. 1=25 S.L.R. 257. *See also* 37 C.W.N. 18=146 I.C. 427=1933 C. 539. There is no easement known to law which gives exclusive and unrestricted use of a piece of land. Hence there can be no easement which would prevent the owner of the servient tenement from making ordinary use of his land, and if the easement demanded would entirely oust the owner of a holding, such an easement cannot be claimed. 154 I.C. 468=1935 R. 56. The *right* of *"lagan"* attached to the ownership of the front part of the "ghat" to use the back part under certain conditions is a right of easement and is enforceable against a purchaser even if he had no notice of the right claimed. 1931 A.L.J. 267=1931 A. 207. The ordinary *right of ryotwari, land-holders against Government to water* sufficient to irrigate their

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth: the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(*a*) *A*, as the owner of a certain house, has a right of way thither over his neighbour *B's* land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b*) *A*, as the owner of a certain house, has the right to go on his neighbour *B's* land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c*) *A*, as the owner of a certain house, has the right to conduct water from *B's* stream to supply the fountains in the garden attached to the house. This is an easement.

(*d*) *A*, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on *B's* field, or to take, for the purpose of being used in the house, by himself, his family guests, lodgers and servants, water or fish out of *C's* tank, or timber out of *D's* wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on *E's* land. These are easements.

(*e*) *A* dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(*f*) *A* is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of *B*, a lower riparian owner. This is not an easement.

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(*a*) A right annexed to *B's* house to receive light by the windows without obstruction by his neighbour *A*. This is a continuous easement.

NOTES.

fields is not an easement within the meaning of S. 4. It is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. 54 M. 793=1931 M. 284=61 M.L.J. 563.

PERMISSIVE USER.—No question of easement could arise where the user of the defendant's land was permissive. 21 A.L.J. 436=1924 A. 50.

PARTY WALL.—Where a co-owner raises the height of a party wall with the consent or acquiescence of the other owner, the wall so raised is also joint unless the other co-owner has consented to the exclusive user of the wall by the party raising it. 1932 L. 48=32 P.L.R. 755. Where one of the joint owners of a party wall had made a hole therein and enjoyed light through the hole for more than 20 years, *held,* that he had acquired an easement and the other owner could not close the hole. 33 P.L.R. 930=1933 L. 28.

Sec. 4: (Expl.).—A lessee of land who has taken it for building purposes cannot acquire a right of way by easement over other lands owned by his lessor. Such a lessee by reason of his being the owner of the materials of the house, would not become an owner within the meaning of S. 4 of the Easements Act, by virtue of the Explanation that 'land' includes also things permanently attached to the earth. I.L.R. (1938) All. 538=1938 A.L.J. 436=1938 All. 293 (F.B.).

Sec. 5.—The right to use a staircase is not a continuous easement as defined in S. 5 of the Act. 117 I.C. 381=1929 L. 848. Artificial water-courses or openings for taking water from a tank or bund are apparent and continuous easements. (34 M. 487; 2 M. 46 and 1924 M. 108, Ref.) 1930 P. 7 =11 P.L.T. 637=124 I.C. 385. Right of repair being a discontinuous easement is not lost even though not enjoyed within 2 years next preceding suit. 1941 N. L. J. 655.

COURT FEE.—Claim to injunction by person in occupation of property—Maintainability—Enquiry into title of plaintiff in property—If arises. Court-fee. (1940) 2 M. L.J. 655.

(*b*) A right of way annexed to *A's* house over *B's* land. This is a discontinuous easement.

(*c*) Rights annexed to *A's* land to lead water thither across *B's* land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d*) A right annexed to *A's* house to prevent *B* from building on his own land. This is a non-apparent easement.

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

NOTES.

Sec. 7: GENERAL—NATURAL RIGHTS AND EASEMENTS.—The right incident to the ownership of land, in the nature of easement but not a right of easement as such, is called a natural right and is distinct from the right of easement. Where one is claimed, the other does not arise. 54 I.C. 504. As to water-course, the water of which is largely increased in volume by percolation's *see* 64 I.C. 158. The ownership of free natural elements, such as air and water and of all wild animals living therein is obtained by occupancy or appropriation. 3 P.L.T. 53=64 I.C. 346. An occupier of abutting lands cannot be restrained in the exercise of his natural rights simply because he becomes a lessee of other lands not abutting. 24 I.C. 685=1914 M.W.N. 481. Where the water of a streaam has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution is caused. 24 I.C. 685. The actual and not a mere threatened use of a stream has been used for irrigating only stream to irrigate lands other than those abutting on the stream gives a right to sue. 24 I.C. 685. A ryotwari tenant has no right of easement in respect of the water-supply from a particular channel. 54 M. 793=1931 M. 284=61 M.L.J. 563.

ILLUSTRATIVE CASES.—No one has power for the safety of his own property, to direct or interfere with a natural stream running a natural outlet, and if he does so, he will be liable in damages to any one who is injured by his act. 19 A.L.J. 736=43 A. 688. Where the rain water falling on plaintiff's land which is on a higher level, flows across defendant's land which is on a lower level, the plaintiff's right is a natural right not acquired by prescription, and it cannot be interfered with by the defendant. 24 I.C. 91=12 A.L.J. 685. *See also* 27 I.C. 268=19 C.W.N. 54. There is no easement of prospect or of privacy. 36 C.L.J. 406=1923 C. 256 (But *see also* cases under S. 18, *infra.*) Every one may build upon or otherwise utilise his own land regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. 1923 C. 256. If windows are opened the neighbour may, by building on his own land, obstruct the light which would otherwise reach them. 1923 C. 256. Same principle has been applied to partition of joint properties. 36 C.L.J. 406=1923 C. 256. On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. 1923 C. 256. Every person has a right to do anything on his own land with regard to the diversion, storage or the uses of water in any way he chooses provided that he does not allow or cause that water to go upon his neighbour's land so as to affect it in some other way than the way in which it had been affected before. 41 I.C. 47. Every one is entitled, in the absence of controlling rights of easement or servitude regarding his premises, to protect his premises against the flow of water from adjacent lands or houses. 248 P.L.R. 1912=16 I.C. 797 (29 M. 539 Rel.). The fact that the water discharged from a dominant tenement flows over the servient tenement without a definite channel, cannot prevent the acquisition of an easement. 40 C. 458=17 C.W.N. 306 (F.B.). (8 C.W.N. 244, Over.) Even the rights of the riparian owners may be acquired by easement. 1923 L. 594. A person has no right to obstruct the water of a stream except to the extent to which he has had prescriptive use. 41 I.C. 47.

NOTES.

Meaning of Words.—"*Owner*" does not necessarily mean absolute owner. 42 M. 567 =37 M.L.J. 28=50 I.C. 291. It includes limited owner such as lessees or persons having derivative interest in the property. 42 M. 567. An occupier of zemindari lands is an "owner" within the meaning of illustration (*j*) to the section. 24 I.C. 685=1914 M.W.N. 481. The term "*natural* right" to drain covers only the right to allow rain water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water could find its way on the neighbouring land. The right to drain off water brought according to the custom and usages of the country along irrigation channels upon the land may also be said to be a natural right. 44 I.C. 500=1918 M. W.N. 167. Each upper owner in a system of connected tanks in different villages supplied with water by or through a permanent or artificial channel, is entitled in the flood season, to fill his tank, which is of sufficient storage capacity for Ayakut and they must, subject to this, allow the water to flow freely on to the lower tank till the last of them is supplied. 41 I.C. 24=6 L.W. 572. Whatever may be the means adopted to let out the surplus, the owner of the tank in such cases, cannot increase the storage capacity of his tank beyond its capacity at the beginning which, in many cases, can only be proved by the customary flow of water. 41 I.C. 24. An easement right to keep a latrine on another man's land is unknown to law and cannot be acquired by prescription. 29 I.C. 865 =19 C.W.N. 864.

Riparian Rights.—The lower proprietor owes a natural servitude without claim to compensation to the higher, in respect of water naturally flowing upon it; but the higher land owner cannot exceed his natural right by sending water not going there naturally. Short of this the upper owner may interfere with the flow of water. 36 M. 149 =25 M.L.J. 276. A riparian proprietor is entitled to use the water of the stream for irrigation of his lands without causing injury to other riparian proprietors. 18 I.C. 284= 37 M. 369 (note). Natural stream—Interception of flow of water by upper riparian owner—Stream and feeding channels flowing in well defined courses—Lower owner is entitled to sue for mandatory injunction. I.L.R. (1937) Mad. 510=(1937) 1 M.L. J. 216=1937 Mad. 310=45 L.W. 188. Riparian right is a natural right and is not lost by non-user. Until some other person acquires a right of easement to substantially diminish the water available to the owner, the riparian right cannot be affected or lost. 104 I.C. 781=1927 M. 1167. It is a right incidental to the ownership of the land upon which the air or the water lies, just as much as is the right to make the silt deposited by rivers or the lava thrown up by a volcano or rain or snow falling from the sky. 3 P. L.T. 53=64 I.C. 316. Erecting a dam across the bed of the river is a common method of using the water of a stream by a riparian proprietor. 64 I.C. 316. Water of stream —Diversion of, for purposes of irrigation— Permanent masonry structures—Diversion by putting up—Claim to right of—Evidence disproving but disclosing right to diversion by erection of temporary structures—Decree proper in case of. 34 C.W.N. 512=1930 P.C. 42=58 M.L.J. 285 (P.C.). A riparian proprietor should not take more water than he was taking before, but he can use the water to raise wet crop in lands in which it was customary to raise only dry crops. 18 I.C. 294=37 M. 369. An easement exists for the benefit of the dominant tenement alone and the servient owner cannot insist on its continuance by the dominant owner or claim damages for abandonment. 65 I.C. 84. If however water running through an artificial channel on a neighbour's land has all along been flowing to the plaintiff's land it is open to the plaintiff to insist on its continuance on the footing of a lost grant or old arrangement. 65 I.C. 84.

Percolating Water.—Though according to the theory of decisions about percolating water, no one, not even the owner of the soil under which it flows, has any property in such water till it reaches a defined channel, and though there is therefore no infringement of any right of property by appropriating such percolating water yet it is possible for an owner to be guilty of a breach of contract, if by appropriating underground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain. *Per Krishnan Pandalai, J.*, in 54 M. 793=1931 M. 284=61 M.L.J. 563. The doctrine of percolating water flowing underground in undefined channels as settled by English decisions should not be applied to the water carried in sandy bed of an Indian river in dry months between monsoon to monsoon. Necessary modifications must be made in the English law of flowing water to make it applicable to the tropical countries. 54 M. 793. As between owners of land no one has a right of property in water flowing underground in undefined and unknown channels by percolation. As a consequence of this, one owner has no right of action against another, who by sinking wells or by other works on his own land, draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him and this even when it is done from an improper motive or maliciously. But that other owner cannot go on his neighbour's land, dig there and take the underground water found there and justify his action because the water was running in undefined channels, as that would be trespass and be an actionable wrong. These things should

Rights to advantages arising from situation.

(*b*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the Rights above referred to.

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land, that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure ; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

NOTES.

be done on one's own property. 54 M. 793. The right to take from an irrigation channel such water as may be reasonably required for the cultivation of a second crop of the customary character upon the suit land and for this purpose to construct, whenever necessary, a *chappakatu* or temporary groyne of the required length in the bed of the irrigation channel is not of too indefinite a character to be incapable of acquisition by prescription. 58 I.A. 195=54 M. 427=61 M. L.J. 1 (P.C.).

Sec. 7 (b).—The owner of higher lands is entitled to discharge surface water over adjacent lower land. 41 I.C. 863=22 C.W. N. 666. Where owing to the silting up of a stream into which the water thus discharged ultimately flowed, the level of the bed of the stream became higher than the adjacent lower land to the inconvenience thereof, *held*, that dominant owners were still entitled to exercise their rights. 22 C.W.N. 666. A plaintiff cannot claim damages for injury caused to the crops on his land by the shade caused by trees standing on his neighbour's land. 19 N.L.R. 191=1924 N. 69. It cannot be said that every owner of a field has the right to have the sun's rays fall on it from every possible direction. 1924 N. 69. There cannot be such a right, for if it were allowed, the use and enjoyment of the adjoining fields by their owners would be very largely restricted. 1924 N. 69. Every owner has got the *right to open apertures in his own wall* and unless by doing so he invades the privacy of any other pre-existing and well established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. 1933 L. 847.

Sec. 7, Illus. (e).—Where the defendant, who was the owner of the land adjoining that of the plaintiff, dug a drain at a distance of about 2 feet 2 inches from the plaintiff's wall to a depth which went below the foundation of the plaintiff's wall and the plaintiff's wall collapsed as a result of it and the plaintiff brought in a suit for damages, *held* that, as there was artificial pressure upon the building of the plaintiff and that artificial pressure had produced a greater stress than the stress which the soil was able to bear when deprived of the support of the subjacent soil of the defendant, the plaintiff could not succeed unless he proved the right of easement for 20 years. 1930 A.L.J. 340 =1929 A. 885. The right of support of land in its natural condition by adjacent land is a natural right and incidental to the ownership of property. Any change in the land supported which converts its natural character into an artificial character such as would be caused by placing buildings upon it or excavating it would obviously impose a changed or increased burden on the adjoining land the effects of which would not alter or increase the previous obligation unless the existence of an easement could be proved. 1929 A. 885. The right to the support of land in its natural state vertically by the subjacent strata and laterally by the adjacent soil is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support. 11 R. 47=143 I.C. 292=1933 R. 18. *See also* 1930 A.L.J. 340; 59 C. 363 =131 I.C. 667=1932 C. 542.

Illus. (g).—Indian Courts should be liberal in recognising irrigation rights as (*h*) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(*i*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

NOTES.

natural rights of as strong a character as any other, provided the lower riparian owners are not injured and the quality and the wide participation of the benefits of the natural stream are not interfered with. 34 M.L.J. 223=43 I.C. 113. In India a riparian owner must be confined to the land which is on the bank of the stream or which extends from that bank to a reasonable depth in land. 34 M.L.J. 223. A depth of more than half a furlong would usually be unreasonable. 34 M.L.J. 223. The right of a riparian owner is not restricted to lifting up of water from a natural stream and carrying it at once to the land but extends to the temporary storage of water in wells before carrying it on to the irrigated lands. 34 M.L.J. 223. Every land owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. 4 P.L.T. 81=2 P. 110. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. 2 P. 110. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. 2 P. 110. If he should acquire such an easement the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the surface water, that is, water not passing through a defined channel. 2 P. 110. But *see also* 65 I.C. 84.

Sec. 7, Illus. (h), (i) and (j).—No riparian owner is entitled to obstruct a public river. 21 Cr.L.J. 55=54 I.C. 407. Riparian owner has a right to the usufruct of the river or stream which passed through his land. This is not an absolute or exclusive right to the flow of the water but to the reasonable enjoyment of the same. 10 I.C. 181. The right which an upper owner has to allow rain water on his land to flow out to the adjacent tenement is a natural right under the Easements Act. 125 I.C. 529=1930 M. 676. *See also* 1938 A.L.J. 486=1938 All. 363. A riparian owner is not entitled to impound the water flowing in defined and natural channels, but is entitled only to use it as it passes. The rights of a riparian owner are subject to the right of a lower riparian owner to have the water of the channels or streams flow in the customary manner down to him. Interference with such flow is an actionable wrong especially where the flow is totally cut-off. 1937 M. 310=(1937) 1 M.L.J. 216 (F. B.); I.L.R. (1937) Mad. 510=45 L.W. 188. There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels. This principle is embodied in Ill. (*i*) to S. 7 of the Easements Act. But the right of the superior proprietor is not quite absolute. It would not for instance be within his right to introduce water which was foreign to the land. Further there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands. When land is so located that water naturally or in the course of ordinary agricultural operations descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. The upper proprietor may drain his land and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alteration in the mode of drainage cause the drainage water to flow his neighbour's land in an injurious manner. The upper owner further, is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there. The upper proprietor has no doubt the right to collect the water falling from the higher ground in one body in the course of draining the land. But that right is again not absolute. That can only be done without hurting the inferior tenement. **47 L. W. 564=1938 Mad. 649=(1938) 2 M.L.J. 108.**

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See also 18 Pat.L.T. 806=1938 Pat. 71; 1938 Pat. 73=174 I.C. 710. It is now well settled that the right of an upper land-owner to throw his surface water on to land at a lower level is a natural right, and not in the strict sense of the word 'an easement'. In other words, it is a right which is not acquired, but is an incident of property owing its origin to the disposition and arrangements of nature. It is incapable, therefore, of being lost by non-user or extinguished permanently, and the maxim *"tantaum prescriptum quantum possessium"* has no application. But these natural rights and liabilities may be altered by contract or grant, express or implied, as well as by enjoyment of an adverse easement obstructing the flow of the water from the higher to the lower ground. It follows, therefore, that if any artificial alteration is made in the configuration or disposition of the lands or any conditions are otherwise created affecting the exercise by the upper owner of his natural right to discharge his surface water to the lower level such as by excavating a khal or channel between the two tenements then this fact alone will not be sufficient to determine whether the natural right is thereby merely suspended for the time being or finally extinguished. The purposes for which, and the circumstances in which the altered conditions are brought into existence as well as the subsequent mode of user or enjoyment will all have to be looked into. 74 C.L.J. 95. An owner of a piece of land has a natural right to drain off the rain water that collects on his land into the adjoining lands belonging to another lower down. In India the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations, is a customary right and not a natural right. (Dictum of *Sadasiva Aiyar, J.*, to the contrary in 1918 M.W.N. 167 not approved.) Every landowner has a natural right to deal with his surface drainage water as he pleases; he can collect it and use it on his own land or he can let it find its way by gravitation to his neighbour's land if that is at a lower level than his own land; but the owner of the lower land may acquire by prescription, as an easement restricting this natural right, the right to throw water back to the land at a higher level. Hence where the owner of the lower land has acquired an easement to restrict the natural flow to such an extent as it may be restricted by a bund which has been in existence for over 25 years, the owner of the higher land cannot claim to breach the bund at a particular point to let out the water unless he has acquired such a right as an easement. (*Wright* v. *Howard,* 24 R.R. 169; 1 M. 335 and 24 C. 865, Rel. on.) 14 R. 544=163 I.C. 453=1936 R. 282. *See also* 17 Mys.L.J. 123=44 Mys.H.C.R. 105. The owner can exercise this right to drain off the water that collects on his land or that is brought into his land, by opening vents in the bund which he has put up along the boundary between his land and the adjoining land lower down, so long as no damage is caused to the owner of the adjoining land. 52 M. 426=1929 M. 337=56 M. L.J. 311. The right of a riparian owner to use the water of a stream either for irrigation or manufacture is an extraordinary use of water and is subject to the condition that the use of the water by other proprietors should not be affected. 51 I.C. 949. Natural stream—Riparian owners—Rights of—Interception of flow of water by upper riparian owner—Stream and feeding tributaries flowing in well-defined channels—Right of lower owner to sue for mandatory injunction. 168 I.C. 337=1937 M. 310=(1937) 1 M.L.J. 216. It is not rightful to a higher riparian owner to use the water for irrigation in such a way as to interfere with an easement acquired by prescription by a lower riparian owner. 44 I.C. 19. Where through his own fault flood-water accumulates on a man's land, his neighbour is entitled to put up bunds to protect his land. The former cannot claim a right of natural drainage and restrain the latter from putting up the bund. 1 R. 427=1924 R. 86. Natural right of drainage—Extent of right. 107 I.C. 203; 24 N.L.R. 122=1928 N. 184. Where a stream, having a continuous flow at the beginning, subsequently diverts itself, it is a natural stream and the owners of the land below cannot put a dam across it to the damage and injury of upper owners. 28 M. L.J. 98=26 I.C. 800. Where there is a competition between the rights of the owner of land on a higher level to allow water to pass in its natural flow without obstruction and the rights of the owner of the lower land to use it as he pleases, the latter's right must give way to the former. In such a case, the owner of the lower land cannot erect a bund to obstruct the flow of water. 52 I.C. 128. An owner of land through which a river or other natural channel flows is not bound to clean it though he is bound within certain limits as between himself and other riparian owners not to do anything which will obstruct the flow of water or materially interfere with their rights. 33 A. 619=8 A.L.J. 640. A riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is allowed to descend. 52 I.C. 276=20 Cr. L.J. 612. Under certain circumstances, and provided the flow of water in the stream is not materially prejudiced and interfered with, an upper riparian owner may have a right to divert water for the purposes of irrigation even by the putting up of a bund. 1934 M. 583=40 L.W. 373=67 M.L.J. 373. The quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

NOTES.

the water bears to entire value. 52 I.C. 276. Riparian proprietors can permanently divert water for agricultural purposes and irrigation. The question is whether the use was reasonable having regard to the custom of the adjoining country. 43 I.C. 235=3 Pat.L.J. 51. Where a riparian owner has made a diversion for the irrigation of his own tenement, the surplus water which would otherwise be wasted may be taken in a channel by another riparian owner to irrigate his land. 43 I.C. 235. The policy of law should be to encourage and protect all beneficial use of the water. 43 I.C. 235. As to limitation for suit, *see ibid.* Natural lake or maduga belonging to Government bounded by Zamindari villages—Riparian rights—Right of Zamindar to use lake water for irrigation of lands abutting on the lake free of charge—Right of Government to levy water cess. 163 I.C. 87 =1936 M. 550.

RIGHT TO PUT A DAM.—Plaintiffs as lower riparian proprietors sued the upper riparian proprietors complaining that the putting up of a dam by the defendants higher up interfered with the flow of water in the stream and claimed a declaration that the defendants had no right to use the water for irrigation, a direction for the demolition of the dam put by the defendants and for a permanent injunction prohibiting the defendants from ever putting up a dam across the river. The defendants in their written statement claimed that what they did was in the exercise of their riparian rights as upper owners and did not plead any special rights founded on contract, custom or prescription. The lower appellate Court framed the injunction in the form, that the defendants be prohibited from putting up such a dam as will cause diminution to the flow of water to which plaintiffs would be entitled. *Held*, that in the light of the rights declared by ills. (*h*) and (*j*) of S. 7 of the Easements Act, the proper decree to be passed was to declare that the defendants are entitled to such rights in the stream as belong to an upper riparian owner and that they are not entitled to put up the dam complained of in the plaint, and to restrain them, their agents and servants by an injunction from interfering with the stream in such a way as to diminish materially the flow of the stream. 1934 M. 583=67 M.L.J. 373.

PRECARIOUS SUPPLY OF WATER—NO RIGHT OF EASEMENT.—Where there has been no continuous and consistent use of the water by the owner of lands lower down, by the aid of which he could raise his crops and which could be deemed beneficial, in some years the water was insufficient and in some years it was excessive, he cannot be held to have obtained any prescriptive right to the supply of water in sufficient quantity. 56 M. 696=1933 M. 646=65 M.L.J. 179.

PRIVACY, RIGHT OF.—There is no inherent right to privacy, and such a right, if it can arise at all, can arise only by prescription, grant or local usage. 10 P. 280=133 I.C. 163=1931 P. 212. *See* notes under S. 18, *infra*.

Sec. 8.—An easement right can be conferred by the owner of the servient tenement for cash consideration and whether it takes the shape of a sum paid in cash once for all or paid from time to time cannot make any difference in the legal nature of the right conferred on the owner of the dominant tenement. 27 I.C. 920=2 L.W. 27. Uninterrupted enjoyment to raise a presumption of right, must have been acquiesced in, by the owner of the servient tenement where from continued user the Court is asked to presume a grant of a right of way. 54 I.C. 936. Knowledge of such user on the part of the servient owner is an essential condition to the acquisition of an easement. 54 I.C. 936. The presumption of lost grant is allowed only when the enjoyment of easement cannot be otherwise accounted for. 50 I.C. 933; 1927 C. 363. A right of way can be created by a verbal agreement. 9 Bur.L.T. 222=34 I.C. 95. Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear, in order to determine the intent the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter. 36 C.L.J. 406=1923 C. 256. Right to *lagan* in a river ghat can be acquired as an easement by prescription. 1931 A.L.J. 267=1931 A. 207. Where a zamindar has been using the water of a channel for irrigating his lands from the time of the permanent settlement, the Court may presume from the long possession and enjoyment a right to use the water free of charge. Though an actual grant of an easement is not discovered or proved it will be presumed. 45 I.A. 302 =37 M.L.J. 724=24 C.W.N. 446 (P.C.). A tenant can acquire an easement against the property held by another tenant of the same landlord. 118 I.C. 225=1929 A. 862. A tenant can acquire a right of easement to take water from a well standing in the adjoining land held by another tenant under the same landlord. 118 I.C. 225=1929 A.

Illustrations.

(*a*) *A* is a tenant of *B's* land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. *A* may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(*b*) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B's* consent, impose an easement thereon which will continue after the determination of his life-interest.

(*c*) *A, B* and *C* are co-owners of certain land. *A* cannot without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(*d*) *A* and *B* are lessees of the same lessor, *A* of the field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A's* interest under his lease is transferable; *B's* is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A's* lease.

Servient owners.

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(*a*) *A* has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon of the water of *B's* stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset: provided that *A's* supply is not thereby diminished.

(*b*) *A* has, in respect of his house, a right of way over *B's* land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that *A's* right of way is not thereby obstructed.

Lessor and mortgagor.

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

NOTES.

862. The nature of a permanent tenure is such that it permits of the creation of easements by its holder. 115 I.C. 884=1929 P. 124. The public, as such, cannot acquire the ownership of immovable property or an easement on such property by prescription. But the user by the public may be evidence of a dedication. 44 M.L.J. 638=47 M. 116=1923 M. 624. A dedication to be valid must be to the public at large and not to any section of it. 47 M. 116. As to construction of deeds granting easement, *see* 19 B. 799; 60 P.R. 1888. Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purpose for which the access would be required at the time of the grant. Where by an award the defendants were given a right of way to their house (without any qualification) over a courtyard belonging to the plaintiffs and subsequently built a new privy in their house, the right of way granted to them includes a right of passage for the privy cleaner. 34 Bom.L.R. 1150=1932 B. 574. The mere finding that a *parnala* is old is no finding in law that easement has been established with respect thereto. 66 I.C. 922 =3 L.L.J. 58.

PARTIES.—In a suit relating to easements, all servient owners are necessary parties. 14 C.W.N. 15.

Sec. 9.—Application of section to customary rights. *See* 6 A. 497.

Sec. 10: MORTGAGOR—RIGHT TO CREATE EASEMENT IN MORTGAGED LAND.—Mortgagor has no right to create any easement over the mortgaged land, to the detriment of the mortgagees without their consent. (85 P.R. 1902, Rel. on.) 149 I.C. 949 (2)=1934 L. 199.

Sec. 11.—Although a tenant cannot acquire a prescriptive right of easement in

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or, on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and *quasi* easements.

13. Where one person transfers or bequeaths immovable property to another,—

NOTES.

land belonging to his lessor, he may claim a right of easement based on immemorial user. 36 C.L.J. 161=50 C. 356=1923 C. 8. Where the enjoyment of a right to take water from the landlord's tank was continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin and the Court should presume a grant or an agreement. 50 C. 356. A tenant can establish his right to irrigate his field from his landlord's tank by proof of open and continuous user from time immemorial. 50 C. 356.If the user of the easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of the intervention of such tenancy should not be sufficient to defeat the right acquired by the lapse of time unless, indeed it is further shown that the landlord, up to the time he granted the lease was in ignorance that any such right was claimed. 36 C.L.J. 161=50 C. 356.

Sec. 12.—Tenants in the dominant tenement enjoying an easement as of right, acquire it for the landlord. 31 I.C. 549=19 C.W.N. 1211. *See also* 1938 A.L.J. 436=1938 All. 293 (F.B.). He cannot acquire it as against the landlord. 29 C. 363=9 C.W.N. 856; 14 A. 185 (F.B.). *See also* 1 C.W.N. 151. Where a person is in possession of the property on behalf of the owner and enjoys the easement, he can claim easement under S. 12. 151 I.C. 141=1934 A. 527. A tenant can acquire by prescription the right to irrigate his field from the landlord's tank by open and continuous user. 18 I.C. 597. A tenant of land having even a permanent tenancy cannot acquire an easement by prescription in other lands of his lessor. 38 M.L.J. 28=54 I.C. 948. Where a common third person is a tenant of both the plaintiff's and defendant's shops and the plaintiff through his shop claims a right of way over the land of the defendant, it is not open to the defendant to contend that the period during which the said third person was a tenant of the defendant and the plaintiff should be excluded from the period of 20 years during which the plaintiff claims to have enjoyed the right of way. 1939 A.L.J. 68=1939 All. 339.

Secs. 12 and 15.—According to S. 12, it is the owner of the immoveable property who alone can acquire an endorsement. A right of way or other easement mentioned in S. 15 must have been enjoyed in the manner laid down therein by the owner or occupier of the dominant heritage. As such, the user of a particular pathway by the visitors to the dominant heritage could not confer a right of way in respect of it on the owner of the dominant heritage. 1939 A. 90=1938 A.L.J. 1142. The lessee is not in the position of an owner of immovable property under S. 12 for the purpose of a right of way. Though he may be an owner of immovable property for purpose of acquiring easements under the first and second paragraphs of S. 15, when a case of right of way arises, he comes under the third paragraph of S. 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire for the benefit of the owner of the site. I.L.R. 1938 All. 538=1938 A.L.J. 436=1938 All. 293 (F. B.) *See also* 19 C.W.N. 1211=31 I.C. 549. In the case of a lessee of a site, who is also the owner of the house which he has built thereon, so far as the use of light or air or support for his buildings is concerned, he is an owner of the building and may, under the first two paragraphs of S. 15, acquire such easements, and he would not acquire them for any one except himself under S. 12. But when the question arises of a right of way or a right to flow of water he comes under paragraph 3 of S. 15 and anything which he would acquire, would be as the person in possession of the land which is his site, and he would acquire on behalf and for the benefit of the owner of the site. 179 I.C. 884=1930 Sind 39.

Sec. 13: WHAT ARE EASEMENTS, OF NECESSITY.—Easement of necessity means an easement absolutely necessary for the use of the dominant tenement and not merely one necessary for the more convenient enjoyment. 38 A. 467=9 I.C. 628; 17 A.L.J. 672=50 I.C. 646; 48 I.C. 670; 30 I.C. 756. *See also* 167 I.C. 414=1937 O.W.N. 252=1937 O. 263; 1937 Pat. 589; 154 I.C. 468=1935 R. 56; 90 I.C. 900=

NOTES.

1925 M. 680. An easement of necessity is one which the law creates according to the doctrine of implied grant in a particular case. 60 I.C. 504. It is one without which the dominant tenement cannot be used at all. (*Ibid.*) 1923 O. 250 (15 A. 270; 33 A. 467; 19 B. 79; 28 M. 495, Ref. to). The scheme of S. 13, is perfectly clear. It provides for six different situations which may arise where one person transfers or bequeaths immovable property. Cls. (*c*) and (*d*) deal with the effect on the transferor's rights. The dominant heritage is only entitled to the quasi-easements if they are apparent and continuous; where property was originally in the ownership of two brothers and after partition one of the brothers sells certain of his plots to another and the latter obstructs the irrigation of the transferor's lands from the lands transferred, the transferor can claim such a right even though the deed of transfer is silent on the point. The easement claimed is an apparent and continuous easement and it must be deemed to have been reserved by the transferor when he parted with the other fields. 1941 N.L.J. 415=1941 Nag. 287. If for the enjoyment of the agricultural plots, the possession of which has been transferred by the Zemindar to the tenant, it is necessary for the tenant to enjoy for agricultural purposes certain easements in the land of the village site which belongs to the Zemindar, under S. 13 of the Act, the tenant is entitled to those easements. 1934 A.L.J. 662=150 I.C. 1117=1934 A. 802. An easement of necessity means an easement without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property. 1930 P. 7; 1923 O. 250. It is a question of fact from the circumstances of each case as to whether an easement of a claim is an easement of necessity or not. There can be an easement of necessity to take water from other's land. 103 I.C. 862=1927 M. 963; 17 I.C. 966=16 C.L.J. 417. *See also* 1941 Nag. 287. A right of way of necessity ceases if the dominant owner can approach the place through his own land. 60 I.C. 504. *See also* 1923 O. 250. An easement of necessity cannot arise in any other way than by severance of tenements. 46 I.C. 327=4 L.B.R. 246. *See also* 14 B. 452; 26 C. 510=3 C.W.N. 409=24 M.L.J. 552. There is ordinarily no reservation by implication of easement in favour of the grantor except in the case of an easement of necessity. 17 I.C. 966=16 C.L.J. 417. As a right of easement of necessity arising out of a severance by partition arises from a presumed grant, no grant can be presumed where the rights of parties have been definitely settled in a partition suit. 59 I.C. 89. As to *quasi*-easements, *see* 1928 L. 497=115 I.C. 758; 96 I.C. 913=1926 L. 473. The doctrine of implied grant does not confer any title to any easement which is not non-apparent. 1930 P. 7=11 P.L.T. 637=124 I.C. 385.

ILLUSTRATIVE CASES.—Where the owner of one of two tenements originally held by a common owner, claims a right of way over the other tenement, it was held, that having regard to the enjoyment of the right of way for twenty years, there was a grant of the right to the plaintiff at the time of the severance of the tenements. 49 I.C. 798=29 C.L.J. 51. There is a presumption of easement of necessity both in respect of the portion granted as well as the portion retained by the grantor. 65 I.C. 22=34 C.L.J. 518; 31 I.C. 541=19 C.W.N. 1211. The mere fact that it is absolutely necessary for a person to use a way does not constitute an easement of necessity. 26 I.C. 485. Plaintiff and defendant owned a common courtyard. Before partition of the courtyard, plaintiff had the right to pass his water through the drainage which existed in the yard. The onus lay on the defendant to show that the right which plaintiff possessed prior to the partition had been extinguished by some agreement or rule of law. 53 I.C. 584=101 P.R. 1919. The mere fact that plaintiff had acquired another tenement through which he could pass his water did not deprive the easement in questions of the character of an easement of necessity. 53 I.C. 584. *Quasi*-easement—Property on slope—Partition—Person holding dominant position possesses easement to drain water through the lower portion. *See* 115 I.C. 758. Where two houses situated on opposite sides of a land were connected by a bridge which had been destroyed and which plaintiff wanted to re-build but the defendant objected and the Municipality also refused permission, the re-building of the bridge could not be allowed as the houses had passed to different persons. 9 P.L.R. 1911=9 I.C. 402. A person who builds on the extreme limit of the boundaries of his land has no legal right to compel his neighbour to allow him or his workmen to pass through his courtyard or to carry on building operations from there without his permission, unless he has acquired an easement by 20 years' uninterrupted user. No easement of necessity could possibly be acquired by him, if the two tenements were never owned by one person. 39 P.L.R. 66=1937 L. 320.

RIGHT OF PASSAGE FOR SWEEPER.—No easement of necessity can be granted unless the easement is necessary for the enjoyment of the property. *Sweepers passing through residential houses* would give rise to such a state of inconvenience as to make the houses for all practical purposes uninhabitable for people of ordinary decency and cleanly habits. Where plaintiff's houses were solely dwelling-houses and the locality was one in which respectable people dwelt and the part over which the right of sweepers (*a*) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement ; or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator the transferor or the legal representative of the testator shall be entitled to such easement ; or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took

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NOTES.

to carry buckets after cleaning plaintiff's latrine was claimed, was already being used by the sweepers who carried buckets from the defendant's latrine. *Held,* that to compel the plaintiff to have his night soil buckets carried out through the houses would destroy as residential dwellings the houses which were the properties sold by the original owner of the whole plot of land as dwelling-houses and as such it was an easement of necessity. *Held, further,* that the hardship inflicted on the owner of the servient tenement was not very great, because the sweepers who served the plaintiff's latrines would only pass along the path already used to a great extent by the sweepers who cleaned defendant's latrine, and they would walk along the path with two buckets instead of only one. 1935 R. 127.

Sec. 13 (a).—The words "If an easement is necessary" in S. 13 (*a*) imply an absolute necessity and not a mere convenience. It is not enough to show that, in the absence of an easement, there would be inconvenience felt, but it should be shown that there is an absolute necessity of the easement for the enjoyment of the property. 160 I.C. 955=1936 M. 142; *see also* 1938 Lah. 800=40 P.L.R. 787; I.L.R. (1937) Nag. 204=1937 Nag. 179; 178 I.C. 803=1939 Pat. 164; I.L.R. (1939) Nag. 580=1939 Nag. 197=1939 N.L.J. 297. Under S. 13 (*a*) a person is entitled to get a way for enjoying his *barwarchi khana.* He is entitled to a way up to the public road. 194 I.C. 859=1941 Oudh 585. Where a purchaser can otherwise provide for a passage, he has no easement of necessity of passage over the property of his transferor. 1930 A.L.J. 1070=123 I.C. 762=1930 A. 560. *See also* 1923 O. 250; 72 I.C. 199; 50 I.C. 756. But *see* 1924 C. 363 (alternative route extremely inconvenient). A house-owner in order to repair his wall on his neighbour's side of the premises can go to the other side of the wall on the land of his neighbour. 16 I.C. 893. *See also* 28 Bom.L.R. 403=94 I.C. 673=1926 B. 328. But the easement does not extend to going over the neighbour's roof for that purpose. 16 I.C. 893. A person is also entitled to enter his neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I.C. 893. A *pankh* or projection of a roof of a house over the neighbouring land is an easement and not a trespass or occupation of property giving rise to any rights to the property covered by the projection by adverse possession. Such a right has to be acquired like any other easement by grant or prescription, and once it is acquired by prescription, it becomes absolute under S. 15 of the Easements Act. 163 I.C. 293=38 Bom.L.R. 264=1936 B. 219. On a severance of tenements, the transferee of plots sold for building purposes acquires as an easement under the provisions of S. 13 (*a*) of the Easements Act the right of lateral support for the building which is intended to be constructed on the plots sold, against the adjoining plots of the severed property. 164 I.C. 1025=1936 O.W.N. 865.

Sec. 13 (b).—In order to bring a case within S. 13 (*b*), it must be established *inter alia* that the easement claimed is apparent and continuous. 117 I.C. 381=1929 L. 848. Under S. 13 (*b*) the necessity need not be absolute. Even a qualified necessity such as has been described with reference to the previous enjoyment is quite enough. Rule applied to a claim for the flow of water from the roof through a spout. 7 O.W.N. 652=125 I.C. 840. The existence of vents through which adjoining lands were being irrigated is evidence of an apparent, continuous and necessary easement which passes to the transferee under S. 13 (*b*). 45 M.L.J. 724=1924 M. 108. An act done for the proper enjoyment of an easement such as closing the vents after irrigation or in the course of the enjoyment of an easement which is continuous would not render the easement a non-continuous easement. 45 M.L.J. 724.

Cls. (c) and (d).—Right to submerge adjacent lands cannot be claimed as an easement falling under Cls. (*c*) and (*d*) of S. 13. 1931 M. 561=60 M.L.J. 662.

Cl. (d).—*See.* 29 I.C. 695.

effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*) are called easements of necessity.

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Cls. (e) and (f).—Cls. (*e*) and (*f*) must not be confused. Under Cl. (*e*) plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition. Under Cl. (*f*) he has to prove that the easement was apparent, continuous, and necessary for enjoying his share as it was enjoyed when the partition took effect and that no different intention was expressed or necessarily implied in the partition. 25 O. C. 251=1923 O. 57. *See also* I.L.R. (1939) Nag. 580=1939 Nag. 197. Under S. 13 (*e*) there is no question of what was the practice at the time of partition, but what were the necessities of the case at the time of partition. So where a piece of land is partitioned into two contiguous plots *A* and *B* and before partition owner of *A* was using *B* land to pass over to a public road, but there was also another passage for the owner of *A* to do so without passing over *B* land, the owner of *A* cannot claim an easement of necessity against *B* under S. 13 (*e*). 165 I.C. 81=1936 N. 182. No right of way by easement can be acquired by a person who builds an *osara* on another man's land even though with his acquiescence. 9 I.C. 813. Where lands which were originally enjoyed in common were divided at a partition and the common well situate in one of the fields was the source of irrigation for all the lands and one of the persons sued for a right of easement to take the water from the well across the other person's lands, *held,* that S. 13 (*e*) of the Easements Act applied and that he was entitled to the declaration. 127 I.C. 520=1930 A. 313 (1). Where a well was in existence before the partition and the question was raised whether after partition the owner of the higher plot was entitled to let the well water flow on to the adjacent lower's plot. *Held,* that the right accrued to the owner of the higher plot as a *quasi*-easement and not easement of necessity. 1930 M. 676=125 I.C. 529. Right to use of water from well. *See* 22 Bom.L.R. 415 =45 B. 80; 100 I.C. 939=1927 L. 383. There cannot be such an easement of necessity in respect of a right of way, if there is an alternative route or way. But where the alternative route is extremely inconvenient there may exist an easement of necessity in respect of a more convenient pathway. 1924 C. 363=70 I.C. 173. Under S. 13 of the Easements Act in cases of partition if an easement is one of necessity, a person to whose share certain property falls is entitled to the easement apart from any question of its being apparent or continuous. An easement of necessity can however only arise when the property cannot be used at all without the easement and not where the easement is merely necessary for the reasonable or more convenient enjoyment of the property. Thus a right of way over a road cannot be claimed as an easement of necessity when there is another means of access to the property. 53 M. 449=1930 M. 609=59 M.L.J. 956. In considering questions of easement of necessity convenience is not the test but absolute necessity, and in this matter S. 13 (*e*) is the same as the law in England. A right of way of necessity only arises when there is no other possible legal mode of getting at the land and an easement of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the *quasi*-dominant tenement. Where he acquires by purchase the property through which he can reach the several portions of the dominant tenement the old easement ceases to exist. 127 I.C. 646=1930 M. 789. Right to light when easement of necessity. 1897 Bom.P.J. 471. Decree for room implies right of access thereto. 1887 Bom.P.J. 113. As to use of well and privy, *see* 1886 Bom.P.J. 128. Grant of right of way in general terms includes right of way for privy cleaner. 34 Bom.L.R. 1150=1932 B. 574.

CONTINUOUS EASEMENT.—Under Indian Law no express reservation is necessary for an existing easement to continue in favour of the grantor. 1931 M. 561=60 M.L.J. 662. Continuous easement—Agricultural land—Right to inundate land by storing water—Partition between co-owners—Rights *inter se*. 60 M.L.J. 662. Right to bury dead can be acquired by prescription. 95 I. C. 458 [78 P.L.R. 1908; 27 P.R. 1923 (P. C.); 26 B. 898, Foll.].

LANDS NOT BEING CONTIGUOUS—RIGHT OF DRAINAGE—PROOF.—The case of a plaintiff

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(*a*) *A* sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A's* adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A's* adjoining land to the field sold.

(*b*) *A*, the owner of two fields, sells one to *B*, and retains the other. The field retained was, at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B's* field to the field retained.

(*c*) *A* sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land.

(*d*) *A* sells *B* a house with windows overlooking *A's* land. The light passing over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A's* hands.

(*e*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A*, retaining the house, sells the land to *B*, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light.

(*g*) *A* the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) *A*, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B* and retains *Z*. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale took effect, and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale took effect.

(*i*) *A*, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled to a right to lateral support from *A's* building, and *A* is entitled to a right to lateral support from *B's* building.

(*j*) *A*, the owner of two adjoining buildings, sells one to *B*, and the other to *C*. *C* is entitled to lateral support from *B's* building, and *B* is entitled to lateral support from *C's* building.

(*k*) *A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A's* land as is necessary for the safety of the house.

(*l*) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of *B's* land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B's* adjoining land as is essential for the safety of the siding.

NOTES.

who has merely acquired the right to discharge his water on to the intervening land and the case of a plaintiff who has acquired the right of carrying it across that intervening land and discharging it upon the land further away are quite different. In the former case he is not entitled to sue the person who is on the other side of the intervening land whereas in the latter he may be entitled to do so. *Held,* that under the circumstances the plaintiff was entitled to carry his water by means of a syphon sluice under the Government channel up to the boundary of the defendant's land and there discharge it into a channel over that land. 40 L.W. 483=1934 M. 632.

Secs. 13, 24, 25 and 27.—A house was originally partitioned between two brothers, one of whom got the ground floor and the other the first floor. Subsequently the ground floor became vested in the defendant and the first floor in the plaintiff. The plaintiff claimed that as owner of the first floor he was entitled to the right of support from the ground floor and other attendant rights. *Held,* that the plaintiff was entitled to support to his first floor from the ground floor of the defendant, but that the defendant was not liable to keep the ground floor in repair in order to make this right of support effective but that the plaintiff could enter upon the ground floor for the purpose himself of doing the necessary repairs and the Court would grant an injunction to protect those rights. This right of support is an easement and not a natural right. There cannot be a natural right of support for something which itself has no natural existence. I.L.R. 1939 Bom. 375=41 Bom. L.R. 387=1939 Bom. 210.

(*m*) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of the portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B's* portion as is essential for the safety of the upper room.

(*n*) *A* lets a house and grounds to *B* for a particular business. *B* has no access to them other than by crossing *A's* land. *B* is entitled to a right of way over that land suitable to the business to be carried on by *B* in the house and grounds.

Direction of way of necessity.

14. When [2][a right] to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

Acquisition by prescription.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years,

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LEG. REF.

[1] Substituted for "right" by Act XII of 1891.

NOTES.

Sec. 15: NATURE OF PRESCRIPTIVE RIGHTS.—The law relating to the acquisition of easements under this Act appears to be the same as under the English Prescription Act. 35 I.C. 749=4 L.W. 128. *Section not exhaustive* and does not preclude other titles or modes of acquisition. 96 I.C. 317=1926 M. 788. *See also* 1929 M.W.N. 528; 56 B. 82=34 Bom.L.R. 92=1932 B. 130. The Easement Act does not exclude or interfere with other titles or modes of acquiring easements as, by grant, express or implied. 43 I.C. 962=14 N. L. R. 35. There is nothing to prevent a claim to title by lost grant being made under the Indian law apart from S. 15 of the Easements Act. The Act is remedial and is neither prohibitory nor exhaustive. 59 M. 979=1936 M. 682=71 M.L.J. 187. *See also* 1929 M.W. N. 528. Easements are not capable of being possessed and unless such rights have ripened into prescriptive rights recognized by law, mere enjoyment for anything less than the statutory period does not confer on the enjoyer a right to maintain an action against a trespasser interfering with his enjoyment. 1940 Oudh 111=1939 O.W.N. 992. One of the necessary conditions of a right of easement is that it must be certain. Thus, where only a right of way is claimed and allowed, the decree must state the limits of the pathway. 148 I.C. 431=1934 P. 420. Easements are not capable, in an exact sense, of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the expiry of twenty years. 29 I.C. 255=38 M. 280. When user is proved, the presumption is that it is of right. 86 I.C. 595 (2)=1925 L. 344. There is no reason why the expression "as of right" which appears both in S. 26, Limitation Act, and S. 15, Easements Act, should not receive the same interpretation as in English Law. 30 S.L.R. 32=163 I.C. 137 =1936 S. 61. Where a person makes a payment for the use of land, such user is by license and is not a user by right. 1933 A. L.J. 516=1933 A. 623. *Long continued user* would be ascribed to lawful origin. 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.). It is no doubt incumbent on the person claiming easement to establish that his user was as of right but the law presumes that it is as of right, that is to say it has a lawful origin, if he proves open and notorious user. On proof of the fact of enjoyment from time immemorial there must arise a presumption of a legal origin for the right claimed. Hence where a person had been exercising his right of way for himself, for his servants and for his carts from remote past as appurtenant to his shop and relations between the parties were not such as to indicate that the user was attributable to leave or license, it must be presumed that his user was as of right. I.L.R. 1939 Nag. 580=1939 Nag. 197. *See also* 1939 Sind 110. Ineffectual opposition to the exercise of what is claimed to be a right of easement is evidence rather in support of the right than of its non-existence. 58 I.A. 195. While the mere putting forward of a wider claim in legal proceeding is not conclusive against a right of easement, yet the question *que animo egerit,* to what purported character are the

NOTES.

acts of user to be described is one which the Court must answer. The question in each case is one of fact as to whether the acts of user are referable to a purported character of owner or to the claim to an easement. Even in the case of an enjoyment from time immemorial, it would be equally necessary for the plaintiff to prove a user as of right as an easement as distinguishable from a right of ownership. 1930 P. 7. The mere *claim of the higher right of ownership does not prevent a person from acquiring the lesser right of easement,* provided he could show that he asserted certain rights over the servient tenement for the benefit of the dominant tenement belonging to him. The right of the person depends upon the actual circumstances of the case established by evidence and not upon an unfounded assertion of a claim. 1930 P. 7. An easement is a restriction in favour of one owner or occupier of the immovable property of the rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. 23 N.L.R. 117=104 I.C. 431=1927 N. 334. Right of easement can be established not only by terms of the grant but also by circumstantial evidence and presumptions. 58 I.A. 195=54 M. 427=35 C.W.N. 605=61 M.L.J. 1 (P.C.). Where there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court, so far as it lawfully can, to clothe the fact with right. 148 I.C. 215=1934 Pat. 11. It is open to the Court to *infer a grant from immemorial user alone* when such user is open, as of right and without interruption. But a grant will not be inferred if the user may be explained in some other way than by a grant. 155 I.C. 719=60 C.L.J. 321=1935 C. 253. *See also* 30 S.L.R. 32=163 I.C. 137=1936 S. 61. *See also* 22 Pat.L.T. 699=1941 Pat. 260. User from time immemorial may no doubt give rise to a presumption of a lost grant or public dedication of a right of way. But user short of that may also be the foundation of such a presumption. For the purpose of presuming dedication, there can be no hard and fast rule as to the length of time for which the user must be proved. Whether or not dedication may be presumed, really depends upon the facts and circumstances of each case. The mere fact that user has not been proved for a long series of years may not always be a conclusive reason for shutting out such a presumption. 44 C.W.N. 1029. It is open to the Courts to recognise acquisition of the easement by the claimant if he could prove continuous enjoyment for the requisite period by himself or his immediate predecessor in occupation of the property. 168 I.C. 921=1937 Nag. 38. In order to establish a right of easement under S. 15 a plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say, that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption is, however, rebuttable, and the defendant may show that the facts are such that the user was not as of right, *e.g.,* he can show that the user was under license not amounting to a grant, or he can show fraud in the sense it is used in relation to this subject, or he can show force, or he can show secrecy. Those would show that it was not as of right. 20 N.L.J. 12=171 I.C. 121. Under S. 15 there are two requirements to be fulfilled: first the enjoyment must be up to within two years of the date of suit and secondly that up to that time it must have been enjoyed for 20 years and without interruption. The period of enjoyment up to within two years of the suit need not be a period of actual user up to the last moment, provided the absence of user does not amount to absence of enjoyment; whether it does or not is a question which depends on the facts of each case. The onus is on the person claiming the easement to prove the user. If there is not merely non-user but actual abandonment, then the person claiming the easement cannot succeed. 15 Luck. 509=1940 O.W.N. 267=1940 Oudh 197. This Act does not contemplate any acquisition of easement against an occupier of land and not against an owner. An easement is acquired in the land and not against one or more of the persons interested in the land. Under S. 15 the right acquired by prescription is absolute; it is not possible to hold that such a right exists only against the occupier and not against the owner. The right which is absolute is a right in the land itself and an absolute right against all persons connected with the land whether as owners or as occupiers. Where an easement of light and air is claimed on the ground of 30 years' user over land held by a Railway Company, but it is found that the land is the property of the Government, the claim must fail and cannot succeed when there is no allegation or proof of 60 years' user; the plaintiff cannot claim on the basis of 30 years' user, a right as against the Railway Company as occupier as distinct from the Government as owner. 1937 A. 428=1937 A.L.J. 249. *See also* 1937 N. 38; 1939 Sind 110. Land appurtenant to a residential house need not be actually adjoining the house. Where a tenant uses certain land opposite to his house but on the other side of a public way for the purposes of tethering his cattle, such land can be regarded as appurtenant to his house. 1936 O.W.N. 536=1936 O. 324. The user over a land purported to be exercised as owner cannot be made the basis of an easement. 104 I.C. 503. *See also* 1930 P. 7; 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. A person cannot acquire an easement unless he acts with the knowledge that it is a case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him. Where the defen-

NOTES.

dant has consistently claimed ownership in the land, he cannot claim to have acquired an easement as the user has not been with the animus of enjoying the easement as such in the land of another. The question of immemorial user has nothing to do with it. 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. S. 4 of the Easements Act shows that not merely the "owner" but even an "occupier" may acquire an easement and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner", if there is no interruption in his user. 152 I.C. 216=1934 M. 575=67 M. L.J. 262. *See also* 1937 A. 428=1937 A. L.J. 249. To support a claim to a prescriptive of right of way over a pathway, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. It is not necessary that it should be used every moment to constitute enjoyment. Cessation of user is not inconsistent with the continuance of the enjoyment of the right. Cessation of user for a time while the right is being acquired does not stand on a different basis from that where the right has already been acquired by 20 years' user. But an enjoyment physically incapable of interruption would not confer any right of easement by prescription. 60 C.L.J. 412=1935 C. 282. The *presumption of constructive enjoyment* can no more be made in favour of a person acquiring easement by prescription than the presumption of constructive possession made in favour of a trespasser acquiring prescriptive title. If there is a grant, it is construed against the grantor but in case of prescriptive right, its extent must be measured and determined by the accustomed user. It is on this principle that a servitude acquired for one purpose cannot lawfully be used for another. Hence where a person has by prescription acquired a right of way on other's land for himself, his servants and carts, the right of way cannot be presumed to include the passage for sweepers. Nor can such a presumption be based on the circumstances that the houses occupied by the parties had at one time belonged to a common owner unless the way was necessary for enjoying the tenement which was purchased by the person claiming easement. I.L.R. (1939) Nag. 580=1939 N.L.J. 297=1939 Nag. 197. *Beaumont, C.J.*—There is no reason why if the owner of a piece of land proves that for 20 years he has in fact exercised right of passing and re-passing over adjoining land *nec vi, nec clam, nec precario,* he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right he believed he had a right of ownership in the adjoining land which right he was unable to establish in a Court of law. 144 I.C. 998=35 Bom.L.R. 144=1933 B. 122. *See also* 41 Bom.L.R. 168=1939 Bom. 149=I.L.R. (1939) Bom. 140; 1939 Sind 110. A *customary right* differs from a *prescriptive right* in the sense that no fixed period for its enjoyment is necessary. 20 I.C. 467 (20 M. 389 and 2 Beng.L.R. 454 and 459, Rel.). *See also* 71 M.L.J. 268; 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.); 142 I.C. 153=1933 N. 74. A *prescriptive right* or easement is a right existing in a particular individual, while a *customary right* belongs to no particular individuals but attaches to a locality and is capable of being enjoyed by all who, for the time being, own land in the locality. 20 I.C. 467. A prescriptive right to light and air cannot be acquired as an easement for limited period, *e.g.*, when the servient heritage is in the occupancy of a tenant. 42 M. 567=37 M.L.J. 28. The word "imposition" of an easement does not necessarily mean imposition by some act, such as grant, but includes imposition by omission to prevent acquisition by prescription. 42 M. 567. *Government land* in the management of Municipal Board—Proof of user for 60 years essential—Land leased out to tenant whether makes any difference. 1928 O. 17=4 O.W.N. 1035. When a person prays the Court to presume a lost grant as against Government, it is reasonable to infer that such a grant cannot be presumed, unless there is evidence of a user which would be sufficient to establish a right by prescription and against Government, that is to say, unless there is evidence of sixty years' user. At any rate, it is impossible to infer a lost grant on the basis of immemorial user when the evidence shows positively that fifty years ago no such grant had been made. 162 I.C. 97=1936 M. 692. *See also* 71 M.L.J. 187=59 M. 979. If it is found that for a sufficiently long time, covering a period of over 30 years, all the water, both rain water as well as water brought on to the upper land by artificial means for agricultural purposes, is allowed to pass into the lower land without any interruption by the proprietor thereof, the Court will easily infer a custom and that the customary conditions of the locality require such user. The doctrine of lost grant can be invoked for the purpose of inferring such a custom. It is not necessary that the words "lost grant" or "customary user" should in so many words be pleaded. All that is necessary to be alleged in order to infer a doctrine of lost grant or a claim based on prescription is long, continual and peaceful possession. Where these incidents are found, the Court will presume a grant of the right. The fact that both the proprietors are ryotwari owners holding under the Government, a common landlord, is no bar to the acquisition of a title by prescription or lost grant, by one against another. The estate of the ryotwari proprietor is an estate in the soil and is heritable and alienable, and he has sufficient estate to support a grant of an easement. 59 M. 979=1936

NOTES.

M. 682=71 M.L.J. 187. The approval of any person's plans for building does not necessarily imply that the Municipality intended to grant an easement over an adjoining lane belonging to it. 160 I.C. 955=1936 M. 142. Where a compromise confers upon the defendant a right to construct a bundh on the plaintiff's land the defendant cannot set up adverse possession with regard to the land and can claim nothing more than a right of easement to maintain a bundh on the land. The right to repair the bundh must be presumed in defendant's favour, such right being incidental to the existence of the bundh. 22 Pat.L.T. 699=1941 Pat. 260.

WHAT RIGHTS CAN BE ACQUIRED.—A prescriptive right is acquired if plaintiff's *privies are cleaned by scavengers* passing over the land of the defendant for twenty years to the knowledge of the defendant without obstruction by defendant. 50 I.C. 34. All that a defendant whose *eaves project over plaintiff's* land can acquire after 20 years is an easement imposing the burden on the servient tenement of having that projection over it. 46 B. 827=24 Bom.L.R. 305. Where one of the *joint owners of a party wall* had made a hole therein and enjoyed light through that hole for more than twenty years, he acquires a right of easement of light and the other owner cannot close the whole. 33 P.L.R. 930. Removal of support of a wall before accrual of right of easement by prescription to neighbour is not actionable. *See* 1928 N. 91. *See also* 59 C. 363=138 I.C. 667=1932 C. 542; 11 R. 47=1933 R. 18. A suit for perpetual injunction restraining the defendant from removing the necessary *lateral support* to which the plaintiff's land is entitled is a suit in the nature of a *quia timet* action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore excavation and removal of the earth on his own land by a defendant, without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not *per se* constitute an actionable invasion of the latter's right; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. 11 R. 47=143 I.C. 292=1933 R. 18. *See also* 63 C. 441=62 C.L.J. 283=1936 C. 564. *Private rights of fishing* in public water may be acquired either by a grant from the Crown or by prescription from which a grant may be presumed. 39 C. 53=11 I.C. 180=15 C.W.N. 972. Whether exclusive rights can be acquired in a *tank or navigable river* by proof of mere enjoyment. 39 C. 53. *Right to ferry* though not an easement is in the nature of an easement and may be acquired by user. 9 I.C. 846. A prescriptive right to *dam up a stream* is acquired by the continued exercise of the right for twenty-five or thirty years. 26 M.L.J. 385=24 I.C. 547. In the case of *shrotriem* grant the right of Government over the *minerals* is not lost by limitation. 23 I.C. 144=15 M.L.T. 277. Mere *non-user for not less than two years* before suit independent of any adverse act on the part of the owner of the servient heritage does not amount to cessation or abandonment of the right of easement within the meaning of S. 15. Expl. II clearly relates not to the period after which the easement has ceased to be enjoyed but to any interval of non-user within the 20 years of enjoyment. 98 I.C. 886=1927 M. 238. The term *"interruption"* refers to an adverse obstruction and not a mere discontinuance of user. 60 C.L.J. 412=1935 C. 282.

WHAT RIGHT CANNOT BE ACQUIRED.—The *right to drive cattle* to the grazing ground through the jungle of another village is not a right which can be acquired as an easement though enjoyed for any length of time. 43 A. 345=19 A.L.J. 126. As to right of *way for agricultural purposes, see* 50 B. 635=28 Bom.L.R. 1158=1926 B. 537. *Right to store manure* by non-agriculturist, *see* 5 O.W.N. 296. A *right to bury or cremate the dead* on land belonging to another cannot be acquired by prescription. 138 I.C. 325=32 P.L.R. 157=1932 L. 256. *See also* 1934 A.L.J. 809=1934 A. 868. An easement of light and air through apertures or windows in a wall cannot be acquired by prescription, when the wall in question is a joint wall belonging to both the parties, because it is the essence of an easement that it should be a right over property not belonging to the claimant but to some one else. I.L.R. 1938 Bom. 53=40 Bom.L.R. 115=1938 Bom. 215. The principle that easement of light and air through windows opened in a joint wall cannot be acquired by prescription cannot apply where the whole wall to its full height is not proved to be joint. The party who wants the whole wall to be treated as a joint wall must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built, they cannot be blocked up unless there is an agreement to close them when the other house is raised and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already-acquired easement of light and air through the windows in the upper wall. I.L.R. (1940) Bom. 140=42 Bom.L.R. 186=1940 Bom. 153.

CUSTOMARY EASEMENT AND CUSTOMARY RIGHT, distinction between. *See* 142 I.C. 153=1933 N. 74 cited under S. 2, *supra*. Customary right and prescriptive right—Distinction between. 71 M.L.J. 268=1936 M. 923.

NOTES.

WATER RIGHTS.—Where the plaintiff had been *enjoying the water by means of channels* through which water passed to a tank, for a certain number of years, no prescriptive right was acquired to receive the water through the channels unobstructed so as to entitle the plaintiff to seek the removal of these obstructions caused by the defendants. 23 Bom.L.R. 1004=46 B. 115. *See also* 43 L.W. 330. A prescriptive right of *easement to discharge surplus water* on the defendant's land through a channel across the public road cannot be acquired. 19 C.L.J. 42=21 I.C. 857=18 C.W.N. 378. Where an underground channel had been in existence between the lands of the plaintiff and defendant across a public pathway, for over twenty years to the knowledge of the public authorities, and the plaintiff had been accustomed to discharge the water from his land through this channel on to the defendant's land, and it appeared that the channel was a pucca one constructed with brick and chunam covered over with stone, and the public authorities not only did not object to it for all these 20 years, but actually approved of it as a public convenience. *Held,* though an easement in the strict sense of the term may not have been acquired against the Secretary of State—the enjoyment having been short of 60 years—whether it is called an easement or licence or grant, the channel must be considered to have been used by the plaintiff in a lawful manner, and that the plaintiff was entitled to maintain an action against the defendant when the latter interfered with the plaintiff's user of the channel. 40 L.W. 281=1934 M. 543=67 M.L.J. 382. No easement or prescriptive right can be acquired by a ryotwari landholder in water in a Government channel irrigating the lands. 45 I.C. 80=34 M.L.J. 425. *See also* 71 M.L.J. 268; 43 L.W. 330. There can be no possessory rights in connection with incorporeal rights. (*Ibid.*) A right to irrigate his punja land through a channel in the adjoining nanja land of another ryot can be acquired by a ryot by prescription. If such right has been enjoyed for over 20 years, he can get a declaration of such right. It is not necessary that the plaintiff should establish a right to water against the government for this purpose. 1937 M.W.N. 920. Under S. 15 a right of fishing cannot be acquired by prescription, but from uninterrupted user, such a grant may be presumed. 43 I. C. 962=14 N.L.J. 35. *See also* 37 C. W. N. 18 (A *claim of fishery* without stint and for commercial purposes which might lead to the total distinction of the subject-matter is a right unknown to law and the custom alleged in its support is unreasonable). *See also* 46 L.W. 466=1937 Mad. 823=(1937) 2 M.L.J. 350 (Right to throw filthy water on another's land can be acquired by prescription).

OVERHANGING TREES.—An owner or occupier of land has no right to allow his trees to overhang his neighbour's land, and he cannot acquire such a right by prescription. 40 L.W. 639=67 M.L.J. 442. No right of easement can be acquired in respect of a tree which gradually projects over his neighbour's land insensibly and by slow degrees. The owner of tree has consequently no right to prevent a person lawfully in possession of land into which or over which its roots or branches have grown, from cutting away so much of them as project into or over his land. But it is a settled maxim that a grantor shall not derogate from his grant. Where an owner of two adjacent plots of land transfers or sells one of them together with a tree standing thereon, which is not a tiny plant or sapling, but an ancient tree of about 100 years old whose growth has practically ceased, it must be held that a right to project the existing boughs of the tree over the vendor's land is also transferred to the vendee. To allow the transferor to cut off the branches overhanging his land (which has not been transferred) would be to violate the maxim that the grantor shall not derogate from his grant. If he intends to reserve to himself the right to lop off the projecting branches, he should expressly reserve. It is not necessary that the vendee should be given under the sale deed an express right to project the branches, in order to entitle him to prevent the vendor from cutting off the branches. 47 L.W. 324=1938 Mad. 511=(1938) 1 M.L.J. 510. It is settled law that an owner of land can cut the branches of trees standing on his neighbour's land which overhang on his land. The fact that the two plots of land were once held in common ownership and the plot with the trees thereon with the branches overhanging on the other is transferred by partition or sale makes no difference so far as the application of the rule is concerned. To have the branches of a tree overhang on the land of another is not in the nature of a right of easement, and it cannot be acquired by prescription at common law or statute either under English law or Indian law. In other words, there is no right of easement or customary right to have the branches of a tree overhang on another man's land. To allow the branches of one's tree to overhang on another's land is to commit a nuisance which that another has a right to abate by cutting off the branches. 1936 M. 702=71 M.L.J. 296. A right to overhang the branches of one's trees over the land of his neighbour may, no doubt, by apt words be granted. But such a grant cannot be implied from a grant of the land with the trees on it, because the result of allowing the branches to overhang over an unlimited and indefinite area of the neighbour's land would subject that land to a burden which would virtually deprive him of his right to use his land as owner. But

NOTES.

so long as the branches are allowed to overhang, the owner of the trees will also be the owner of the branches and the produce thereon, and it may be that the adjoining owner will have to permit the owner of the trees to take the produce. 1936 M. 702=71 M.L.J. 296.

RIGHT OF WAY.—One of the necessary conditions of a right of easement is that it must be certain. Where a right of way is claimed and allowed, the decree should state definitely the limits of the pathway. When the two termini are known, the right to the way does not fail merely for want of a defined track between them and if the owner of the service tenement does not point out the line of such way, the dominant owner must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough and there are ruts in it and so forth. 148 I.C. 431=1934 P. 420. Where a passage has been found to have been used openly, uninterruptedly and peaceably for about 50 years, it can be presumed that the right had a legal origin and that those using it had a right to use it. 1939 A.L.J. 821=I.L.R. (1939) All. 754 =1939 All. 586. A person who is in enjoyment of an easement, such as a right of way, but who has not acquired a title to it by prescription or otherwise, cannot ordinarily maintain an action to prevent its obstruction by a stranger. An action can only be maintained in very exceptional cases where access to his land would otherwise be cut off altogether or if the obstruction to the user of the right of way will have the effect of substantially depriving a person of the enjoyment of his property. I.L.R. (1941) Mad. 367=53 L.W. 8=1941 Mad. 176=(1941) 1 M.L.J. 145 (F.B.). It is true than an owner can subject one part of his property by a quasi-easement in favour of another part and if afterwards he alienates a portion of his land, the purchaser takes the portion with all the convenience or quasi-easements which the proprietor has attached to it. But this applies only when the quasi-easements are continuous and apparent. There could be no implied grant where the easements are not continuous and non-apparent. A right of way is neither continuous, nor always an apparent easement, and hence would not ordinarily come under the above rule. Exception is no doubt made in certain cases where there is a "formed road" existing over one part of the tenement for the apparent use of another portion or there is "some permanence in the adaptation of the tenement" from which continuity may be inferred, but barring these exceptions an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement. Where, however, a deed of conveyance describes the property conveyed as bounded by a common passage, an implied grant of a right of passage may be presumed, and the extent of such right has got to be gathered from the language of the document, as well as from the surrounding circumstances of the case. Ordinarily such right of passage does not include the right to use it as a *methor* passage for the cleansing of a privy. 41 C.W.N. 1169=1937 Cal. 661. *See also* 1939 N.L.J. 297=1939 Nag. 197. Right of way, acquisition of. *See* 24 Bom.L.R. 298=1922 B. 79; 1924 C. 359; 9 I.C. 965=13 C.L.J. 316; 44 C.W.N. 1029; 45 M. 633=42 M.L.J. 417; 39 M.L.J. 74=60 I.C. 171; 1938 A. L.J. 1142 (User by visitors to dominant heritage); I.L.R. 1938 A. 538 (User by lessee of land for building purposes).

WHO CAN ACQUIRE.—A claim of higher right of ownership does not prevent another person from acquiring a right of easement, if he can show that he converts certain rights of enjoyment over the land in question for the benefit of another land of his own. 62 I.C. 633. A right once established by immemorial user, is not extinguished by non-user or interruption for more than two years. 62 I.C. 633. As to what is immemorial user, *see* 56 B. 82=34 Bom.L.R. 92=1932 B. 130. The terms "immemorial user" and "from time immemorial" had a connotation in English Law which obviously could not be applied to Indian society and circumstances. 56 B. 82=1932 B. 130. A right of way cannot be acquired by a tenant over the lands of the landlord within his tenancy except by grant. 34 I.C. 450=20 C.W.N. 1158. *See also* 1936 S. 61=30 S. L.R. 32. It is true that a lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming title thereto and of right within the meaning of the third clause of S. 15; in such a case the tenant's occupation is in the sight of the law that of his landlord. But where a lessee of land owns a building built upon land leased to him, he may, so far as the use of light and air or support for his building is concerned, acquire rights of easement in respect of such light, air or support under Cls. (1) and (2) of S. 15, and these rights cannot be objected to as being incapable of being acquired by him on behalf of his lessor as well as against him, for those rights are acquired by him for himself, and for none other than himself, as owner of the building. I.L.R. (1941) Kar. 381=1941 Sind 211. The mere grant of leave and licence of a right of way by the landlord to his tenant, will not invest the latter with a right of way enforceable in suit. 20 C. W. N. 1158. A prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. 31 I.C. 549=19 C. W.N. 1211. *See also* I.L.R. (1937) 1 Cal. 569=1937 Cal. 572 (mukarrari lease holder);

NOTES.

1939 Rang. 421: 148 I.C. 215=1934 P. 11; 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. Whether one permanent tenure-holder can acquire an easement against another permanent tenure-holder under the same landlord. 31 I.C. 549=19 C.W.N. 1211. A tenant in a zemindari cannot acquire the right to irrigate his land held by him as a tenant, with water from the tank belonging to the Zamindar. 56 I.C. 598=11 L. W. 600. Where the tenants of a zamindar have been using water from his tank for raising a second crop on their *manyam* lands for over 20 years openly and continuously and without interruption, their right to take water for a first crop being admitted by the zamindar, and it is found that at no time for considerably over 20 years has the zamindar claimed or recovered compensation for the water taken by the tenants for the second crop, a presumption arises in favour of the tenants that they have been using the water as of right; and when no attempt is made to show that they were doing so with the permission of the zamindar or to prove any facts to negative the claim as of right, it must be held that the tenants have acquired a prescriptive right to get an amount of water sufficient to irrigate their lands without any liability to pay for it. The fact that in some years there may not have been enough water to irrigate as large an area as in other years and that in some years there may have been an amount sufficient to irrigate a larger area than in other years will not make the right incapable of being prescribed for as being of a precarious nature. 1937 M.W.N. 895=46 L.W. 643=1937 Mad. 953. Where two persons hold adjoining plots of land under a temporary lease issued by the Government which is terminable at three months' notice and is transferable only with the sanction of the Government, one of them cannot acquire a right of way by user over the land which is in possession of the other as he cannot be said to have enjoyed the alleged easement as of right. 30 S.L.R. 32=163 I.C. 137=1936 S. 61. The joint user of the water from a tank for the joint cultivation of a plot does not affect the nature of the right of easement which is a right over the servient heritage acquired by virtue of the joint ownership of the plot. The right prescribed for, is not a right to irrigate jointly but a right as part owners of a dominant heritage. 35 I.C. 749=4 L.W. 128. The essential requisite of prescription is that it should be acquired against specific individuals; prescription against one person cannot be tacked on to that acquired against others. 24 I.C. 519=28 M.L.J. 669. A dominant owner who is also a part owner of the servient tenement cannot acquire an easement over that tenement. In order to acquire an easement by prescription, it is necessary that the right must be enjoyed in the character of an easement, and if a dominant owner is a part owner of the servient tenement, he would enjoy as of "right", not the easement but the soil itself. 41 C.W.N. 769=1937 Cal. 355. The principle that one trespasser cannot tack on to his own possession the possession of another trespasser is sound but cannot apply to the acquisition of a right of easement which must be distinguished from ownership. These rights cannot co-exist as they are mutually exclusive. The adverse possession spoken of in connexion with acquisition of ownership means total exclusion of the rightful owner; whereas the enjoyment and user necessary for the acquisition of easement is consistent with the possession as well as the enjoyment by the rightful owner. The adverse possession in reality extinguishes the title of the rightful owner, but the enjoyment by a person claiming the right of easement does not in the least affect either the possession or the title of the owner. The easement only restricts the owner's rights in some ways in regard to the enjoyment of his tenement. Moreover, the right of easement is annexed to the land or tenement and cannot be acquired in gross as a personal right. 1937 N. 38. *See also* 1937 A.L.J. 249=1937 A.W.R. 215. It is open to the Courts to recognise acquisition of the easement by the claimant if he could prove continuous enjoyment for the requisite period by himself or his immediate predecessor in occupation of the property. 1937 N. 38. A caste is a corporation with civil rights and can acquire by user, title to a right of way, even if the user be only of a few members of the caste provided it is exercised on behalf of and for the caste. 24 I.C. 467=28 M.L.J. 110. *See also* 24 I.C. 519=28 M.L.J. 669 (Suit by *Stanom-holder*).

EASEMENTS, HOW ACQUIRED.—A person, to acquire the right of fishery by prescription, must show that he had an *uninterrupted enjoyment of it openly, publicly and peacefully* for over the statutory period; but where such an enjoyment was in exercise of a common right which he shared with others, he should show that his user was in assertion of a higher right than the general right, in himself, and for his exclusive benefit. 39 C. 53=11 I.C. 180. *See also* 37 C.W.N. 18. The right to *establish and maintain a ferry* over the property of another is a right of easement for which twenty years' user is necessary. 5 P.L.J. 500=1 P.L.T. 395. A person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the river for the purpose of embarking and disembarking passengers. There is, however, no law in this country which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river.

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

NOTES.

In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant. 1935 A.L.J. 444=1935 A. 481. To establish a right under this section, twenty years of uninterrupted user must be shown. 25 I.C. 405=12 A.L.J. 693. As to presumption from long user, *see* 91 I.C. 987=1926 O. 237. As to the effect of unreasonable user, *see* 92 I.C. 465=1926 M. 625. The period of user must be twenty years or more ending within two years before the institution of the suit, wherein the claims to which such period relates is contested. 24 I.C. 126=12 A.L.J. 415. In a case of a claim to a right of easement, the period of twenty years should end within two years of the suit. It is immaterial whether there was or was not a period of twenty years' user at some period beyond two years before the date of plaint. A period of twenty years' user in the fifteenth century, for instance, cannot have any bearing on a claim to easement. 1933 A.L.J. 516=1933 A. 623. In a case not of prescriptive easement but of one arising from a grant, it is not necessary for the plaintiff to establish twenty years' exercise of the right of easement or its continuance till a time within two years before the institution of the suit. 150 I.C. 601=1934 A. 447. No minimum limit of time can be laid down to justify an inference of immemorial uses. The question whether such an user is established depends on the circumstances of each case. 45 B. 1027=62 I.C. 65. Peaceable enjoyment means one without interruption or opposition by the servient owner sufficient to defeat the enjoyment. 49 I.C. 963=21 Bom.L.R. 709. The obstruction must find expression in something done on the servient tenement itself. 45 B. 1027=23 Bom.L.R. 422. Mere protest does not amount to such obstruction. 45 B. 1027. The mere fact that the land is waste does not necessarily show that no right can be acquired over such land. If that were so, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land. 65 I.C. 509. In determining the question whether an user of way over waste land was as of right or not, the Court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place. 65 I.C. 509. *See also* 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. If an easement has been enjoyed for the statutory period peaceably and openly as of right without interruption, the right becomes absolute. 26 I.C. 781. A long and uninterrupted user for a long series of years leads to the inference that the user had been as of right and that the right had a lawful origin. 35 I.C. 749=4 L.W. 128. A prescriptive right can be acquired only if the enjoyment of the easement ended "before the beginning of the two years next" before the suit was instituted. 33 I.C. 503. *See also* 29 M.L.J. 685; 1923 O. 29. Enjoyment may be peaceable notwithstanding oral disputes regarding it. 29 M.L.J. 685=31 I.C. 528. The adverb 'peaceably' indicates the manner in which the dominant owner must conduct himself in his use of the servient tenement, *i.e.*, the person claiming a right of easement must not have deprived the servient owner of that right by use of force or secretly. 29 M.L.J. 685. *See also* 19 Mys. L.J. 339. A statutory prescriptive title to an easement is impossible to be acquired under S. 15 unless and until the claim thereto has been contested in a regular suit. 29 M.L.J. 685. *See also* 1923 O. 29; 17 I.C. 22=10 A.L.J. 227. Enjoyment for less than the prescriptive period if entitles the persons enjoying, to an injunction against trespasser. 30 I.C. 989=18 M.L.T. 515. The words "as an easement" do not mean that the enjoyment should be in the assertion of claim of an easement. Ill. (*b*) shows that the words were used in order to show that unity of title or possession makes the possession useless to create a right of easement. 38 M. 1=17 I.C. 112. *See also* 41 C.W.N. 769=1937 Cal. 355. Assertion of full ownership, which was however negatived by the evidence, may suffice to establish an easement, provided that the user was for the beneficial enjoyment of another land. 38 Mad. 1=17 I.C. 112. *See also* 49 M. 820=1926 M. 728 (F.B.); 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. Mere acquiescence does not create an easement. 16 I.C. 893. When two houses originally owned by one and the same person have backyards opening into a lane which separates them, in the absence of evidence as to when the gates were opened the presumption is that they were so opened before severance, and the enjoyment of a right of way for over twenty years peaceably and as of right ending within two years before suit creates a prescriptive

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

NOTES.

right. 9 M.L.T. 274=9 I.C. 764. User which is neither physically capable of prevention by the owner of the servient tenement nor actionable, cannot support an easement. This principle applies both to affirmative and negative easements. So long, therefore, as the two tenements were held in joint ownership there can be no acquisition of an easement by prescription in favour of one tenement against the other. (*Sturges* v. *Bridgman,* 11 C.D. 852; 28 Bom.L.R. 1000 and 19 C. 253, Foll.). 56 B. 427=34 Bom.L.R. 1015=1932 B. 513; 60 C.L.J. 412=1935 C. 282.

Sec. 15, Expl. 1.—Where, in the absence of a licence or agreement, the defendants were found to have been using a way over plaintiff's land openly, peaceably and as of right for over the statutory period, *held,* the defendants had acquired an easement in respect of that right. 9 I.C. 640=9 M.L.T. 350. Continuous and peaceable user of easement of light and air for more than twenty years may give rise to a presumption that it existed with the consent of the owner of the servient heritage. 71 I.C. 831=1923 N. 192. *See also* 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.). The right to receive light across another's land is not a natural incident of property but can only be acquired as an easement either by grant or prescription. Unless and until such a right has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. 46 C.W.N. 136. An easement of light and air need not be proved to have been enjoyed as of right. It is enough if there is enjoyment. 61 I.C. 569. An open user of road or path, without interruption, for a long time, not under permission or sufferance, is *prima facie* evidence of enjoyment as of right. 61 I.C. 569. Under S. 15 (5) plaintiff has to show a period of 20 years continuing up to some point within two years before the institution of the suit. 1923 O. 29. The fifth paragraph of S. 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title of an easement, unless and until the claim thereto has been contested in a suit. 1923 O. 29. The right to the lateral support to a wall from a neighbour's land, is acquired only by prescription. 68 I.C. 831=14 L.W. 728. *See also* 1929 M.W.N. 528. Where it was shown that the plaintiff's wall collapsed as a result of a deep drain cut close to the wall by the defendant, but it was not shown that any portion of the soil on the plaintiff's land had fallen into the drain and it was also not proved that the period of 20 years had expired before the alleged encroachment. *Held,* that S. 15 and not S. 7 applied to the facts of the case, and that the easement by prescription not having been established the plaintiff was not entitled to recover damages. 1930 A.L.J. 340. A *right of way* over one part may be acquired by grant, and over another, by prescription. 57 I.C. 852. Where a pathway has been used by all the residents of the village, and on both sides of it abut houses of the residents of the village, the presumption is that the passage has been kept for the common use of the residents of the village and is, therefore, a public pathway. Under such circumstances there must be a presumption of dedication of the land under the passage for public pathway. User for any number of years is not necessary to establish a right to pass over the public pathway. User, on the other hand, is merely an evidence of original dedication in such cases. 38 P.L.R. 500=1936 L. 797. A right of easement is claimable on the land of another by the owner of land. It is not a personal right, but it attaches to land and is exercisable over another's land. A public pathway, however, may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is the owner of some land. In other words, the existence of a dominant tenement is not necessary. 38 P.L.R. 500=1936 L. 797. The fact that a passage leading from a public place is not proved to terminate also at a public place is no reason for holding that it is not a public passage. Where it does not stop at the land of a private owner but proceeds further to a great distance, that is, an important factor in support of the claim of the public, especially when it is not shown that it has terminated in private grounds. 39 C.W.N. 303=60 C.L.J. 556. *See also* I.L.R. 1937 N. 21=1937 Nag. 322. When a public right of way is claimed over lands belonging to a private owner, it is not legitimate to presume from long user an intention to dedicate the lands for public use and then to examine the evidence adduced on behalf of the private owner to see if the presumption has been rebutted by him. The evidence must be examined as a whole and then the inference either in favour of or against the dedication must be drawn. It is wrong to deal with the evidence in compartments. 39 C.W.N. 303=60 C.L.J. 556. An easement exercised by the defendant was merely one of access from the road, over the strip

NOTES.

of land belonging to plaintiff, to the defendant's land for a limited and special purpose. A particular path left by the plaintiff for the exercise of the easement was blocked but another path was opened later on and had since been used; *held,* that the easement was a discontinuous, non-apparent, positive easement with nothing in its nature to limit it to a particular path and the creation of new path by the plaintiff did not constitute an interruption of the easement. 115 I.C. 884=1929 P. 124. The object of S. 15 of the Act in requiring that the user should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being so used and that he had acquiesced in it. Where the evidence did not show that the cattle by using the defendant's land had formed any path on the land which would put the owner on inquiry and it further appeared that the land was not being continuously used for the purpose throughout the year but only during the wet season and that no particular path was used but the cattle simply strayed on the land. *Held,* that under those circumstances no presumption as to constructive notice could arise and that the easement of the right of way for the cattle was not made out. 31 Bom.L.R. 120=1929 B. 144. Where the owner of a *makwa* tree complained of the construction of a wall by the defendant which prevented him from collecting the fruit of the tree, the branches of which overhang the wall, but it was found on the evidence that the wall was constructed three years before the suit was brought: *Held,* that assuming that the plaintiff had a right of easement, he could not enforce it because of S. 15 of the Easements Act. 114 I.C. 512.

MODE OF ENJOYMENT.—The *presumption of lost grant* should not be made merely upon establishment of user for a period of 20 years or more. What has to be found as raising the presumption of lost grant is user from time immemorial, although the period for which such user need be proved must depend on the facts and circumstances of each case. 57 C.L.J. 31. No presumption of a lost grant can be made in the case of the right of fishery where the use of the fishery was in harmony with the right of the public to fish by stakes which is acknowledged method of public fishing on the West Coast of India. 23 Bom.L.R. 939. Possession of the dar (space between two fishing stakes) for over sixty years does not perfect into an easement by way of prescriptive right. 23 Bom.L.R. 939. As to presumption of lost grant, *see also* 96 I.C. 317=1926 M. 788. A plaintiff is entitled to have his right of way declared if he establishes the terminous to and from which the way runs. And the right would be enjoyed in the way the servient owners point out as the tract. If no tract is pointed out, the plaintiff can enjoy the nearest route. 46 I.C. 374=22 C.W.N. 922. No use of property which would be legal if due to a proper motive, would become illegal, if prompted by an improper or even a malicious motive. 42 C. 164=20 C.L.J. 97=18 C.W.N. 1296. The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period. (*Ibid.*) It is not necessary to prove annual or continuous user, but only substantial enjoyment whenever the occasion required. The mere fact that the openings made were different in different years does not make the user indefinite when the channels through which the water was taken were the same. 15 C.W.N. 259=13 C.L.J. 670. The fact that the servient owner paid a certain sum for the repair of the embankment for his own benefit does not make the user permissive. 15 C.W.N. 259=13 C.L.J. 670. Period of twenty years to be completed prior to institution of suit—No right to protect inchoate right—Fact of servient owner of dominant owner suing in respect of easement immaterial. *See* 113 I.C. 525. As to *presumption of implied grant, see* 1937 Cal. 661=41 C.W.N. 1169.

EASEMENT AGAINST GOVERNMENT.—To claim 60 years' rule of easement, there must be Government ownership on the date when the easement is claimed and not at some antecedent period. 116 I.C. 806=1929 A. 382. *See also* 1936 M. 692. A plaintiff claiming a right of easement against Government must prove sixty years' peaceful and uninterrupted user and the rule of law that the burden of proof is shifted on to Government if the plaintiff proves possession for a sufficient number of years is not applicable if the plaintiff fails to prove the completion of even the prescriptive period necessary against a private individual. 26 I.C. 723=39 M. 304. *See also* 1928 O. 17 =4 O.W.N. 1035; 45 I.C. 80=34 M.L.J. 425 (Acquisition of right in water in Government channel). If the plaintiff proves 30 years' possession, the Government must prove that he had no possession within 60 years. 16 I.C. 626=12 M.L.T. 159. The words "belongs to the Government" in S. 15 refer not to the time of the suit but to the duration of enjoyment. 41 M. 622 =34 M.L.J. 395. When after 40 years' enjoyment against the Government, the latter transfers the land to a private person, the easement in order to become absolute must be enjoyed as against the transferee for a further period of 20 years. 41 M. 622. The period of 20 years must be computed from the time when the transfer was made to a private person. 41 M. 622.

GOVERNMENT LAND IN OCCUPATION OF PERSON WITH LIMITED RIGHT.—S. 15 of the Easements Act insists on a period of 60 years' user not merely when the easement is claimed as against the Government but over any property belonging to Government.

NOTES.

The word "belongs" in the section should not be restricted to cases where possession and ownership continue to remain with the Government and the clause applies to cases where any person with a limited right is in occupation of land belonging to Government. 40 L.W. 514=1934 M. 575=67 M.L.J. 262. *See also* 71 M.L.J. 268; 43 L.W. 330.

PROPERTY OVER WHICH PATHWAY LAY BELONGING TO GOVERNMENT—RIGHTS OF THIRD PARTIES.—The plaintiff as the owner of a certain survey number in a village sued to restrain defendants 1 and 2, who claimed to be trustees of a temple, from interfering with the plaintiff's use of a pathway across suit survey number and the Government also was impleaded as a party. The lower appellate Court found that the suit survey number belonged to the Government who had allowed its use in favour of the temple. On the contention that though for want of 60 years' user, the plaintiff had not acquired an easement as against the Government, he had by reason of 20 years' user acquired a limited right which was sufficient to prevail as against any interest which private persons like defendants 1 and 2 might possess in that property. *Held,* assuming the possibility of acquisition of an easement against the holder of a limited interest, the acquisition was possible only to the extent to which a grant might be possible within the terms of S. 8 of the Easements Act and as no such grant by the temple would be possible having regard to the nature of its interest in the property, the plaintiff would not by 20 years' user acquire prescriptive right as against property which belonged to Government even to the extent of preventing defendants 1 and 2 from interfering with his user of the way. *Held also,* that though it might be a question whether a mere stranger could obstruct another person in the exercise of even what might be called an inchoate right of easement, the position of the defendants 1 and 2 could not be compared to that of a mere stranger or a licensee. 1934 M. 575=67 M.L.J. 262.

BURDEN OF PROOF.—The onus of proving that a right of way has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for 20 years, lies upon the person asserting the right. 25 I.C. 499. *See also* 18 L.W. 404=1923 M. 674. The question in each case must be, what is the exact nature of the right which is shown by the evidence to have been acquired by the party? *See* 1923 M. 674, *supra*. S. 15 (1) applies both to continuous and discontinuous easements. 17 I.C. 22=10 A.L.J. 227. The question of *animus* is, in each case, a question of fact. Where enjoyment is proved, the person enjoying the right must be presumed to possess an *animus* which is manifestly to his advantage. 53 A. 16=1931 A. 877. Where it is a question of acquisition of an easement by prescription, the burden lies entirely on the plaintiff to prove 20 years' enjoyment, and not mere possession for 12 years and then say the onus is shifted on to the defendant. 33 I.C. 503.

DEFENCES.—When a right has begun to run under S. 15 and the servient holder sues to put an end to it, the defendant cannot plead in bar of it, Art. 32 of the Limitation Act. 33 I.C. 90. When the defendant has a right of support from the plaintiff's wall abutting on the defendant's property, for a roof of his adjoining house, it is an encroachment of that right if the defendant raises his wall and erects upon it another thatch resting on the plaintiff's wall. 33 I.C. 90. The limit of a party's right of support must be determined by his actual enjoyment up to the date of the encroachment complained of by the opposite party. 33 I.C. 90. As to right of support, *see also* 59 C. 363=1932 C. 542. If a man's ancient rights be interrupted, it is no answer to say that he can provide other sources of light for himself by making changes in his own tenement; nor that defendant is willing to provide fresh light for him in another way. 36 M. 11=21 M.L.J. 742. Where a party causes injury to another, he cannot object to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo the mischief. 36 M. 11. There is no difference in the application of the law as regards the interference with ancient lights to buildings in cities and elsewhere. 36 M. 11. In order to establish a right of easement under S. 15, a plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say, that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption is, however, rebuttable, and the defendant may show that, if he can, that the facts are such that the user was not as of right, *e.g.*, he can show that the user was under license not amounting to a grant, or he can show fraud in the sense it is used in relation to this subject, or he can show force, or he can show secrecy. Those would show that it was not as of right. 20 N.L.J. 12. *See also* 1936 S. 61.

NATURE OF OBSTRUCTION (EXPL. II).—To constitute an actionable obstruction there must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. 9 I.C. 417=21 M.L.J. 313. Where the owner of the building is in the course of acquiring a right of easement by prescription when his house is burnt down, and he begins immediately to re-build his house and place the windows exactly in the same position as the old ones, he can be regarded as enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. 46 B. 448=24 Bom.L.R. 83=

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

NOTES.

1922 B. 3. If, however, there is any delay in re-building, then that might be evidence of an intention not to resume the user. 46 B. 448. Knowledge of the fact of enjoyment on the part of servient owner is essential to the acquisition of an easement where the Court is asked to presume a grant. 54 I.C. 936=16 N.L.R. 76. Active obstruction on the part of such owner would negative any such presumption. 54 I.C. 936. To negative submission to an interruption, the party interrupted need not have brought a suit. 54 I.C. 936. The question whether there has been submission to, or acquiescence in, an obstruction, is a question of fact, the burden of negativing submission being on the party alleging that he did not submit. 54 I.C. 936. *See also* 116 I.C. 806=1929 A. 382. It is not enough, for supporting an action for obstruction of right, that there has been a diminution of light from what it was before. 49 I. C. 458=11 Bur.L.T. 109. The decrease in light should constitute a nuisance and make the house uncomfortable according to the ordinary standards or humanity or unfit for business. 49 I.C. 458.

Sec. 15, Expl. II.—Under Expl. II, S. 15, it is not sufficient to prove that there was obstruction for a period of one year, but it is also essential that such obstruction should be acquiesced in for the same period by the claimant. 116 I.C. 806=1929 A. 382. Where the plaintiff's father's vendor had used a particular courtyard for the purposes of his business, for a period of about 12 to 15 years and after his death his son had closed down the business and did not use the courtyard for a period of nearly 6 years for his business, and the plaintiff after purchase from the son had used it for a similar business of his own for a period of about 12 years, it could not be said that the plaintiff had acquired a right of easement for there had been an interruption, and an intention to cease to enjoy the right. I.L.R. 1938 All. 840=1938 A.L.J. 867=1938 All. 587.

PLEADINGS—PLEAS OF OWNERSHIP AND EASEMENT—PERMISSIBILITY.—No doubt as a rule, a plaintiff should not be allowed to put forward contradictory pleas, but the pleas of ownership and easement, though inconsistent, are not contradictory and can be put forward in the alternative. The important point to be considered in such a matter is the question *quo animo egerit* with reference to the user allowed by the plaintiff; in other words, if the plaintiff had used a way on an assertion of title of owner, he could not put forward such user in support of a right of easement. That view however does not prevent the putting forward of alternative pleas in a suit, though, at the trial of the suit, the character of the user and the question of *quo animo egerit* would have to be decided, and, if the user is proved, one plea would have to be affirmed and the other rejected. 29 N.L.R. 330=1933 N. 257. *See also* I.L.R. (1939) Nag. 580 =1939 N.L.J. 297=1939 Nag. 197; 1939 Nag. 415; 1925 Cal. 788. It is not the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him. A plaintiff may claim an easement and ownership in the alternative. If he shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, *prima facie,* he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. A right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement. I.L.R. (1939) Bom. 140=41 Bom.L.R. 168=1939 Bom. 149. *See also* 35 Bom.L.R. 144=1933 Bom. 122; 1939 Sind 110. The *question of immemorial user or lost grant* must be pleaded in every case before a person can be given relief on that head. Whether the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at Common Law, or under the Prescription Act. Where the plaintiffs did allege circumstances, namely, the user by themselves and by their ancestors of the land as pathway for 40 or 50 years, the plaint may on a liberal construction be taken to have relied upon long user leading to an inference of lost grant. 142 I.C. 458=1933 C. 215=56 C.L. J. 274. The *presumption of lost grant* should not be made merely upon establishment of user for a period of 20 years or more. What has to be found as raising the presumption of lost grant is user from time immemorial, although the period for which such user need be proved must depend on the facts and circumstances of each case. 57 C.L.J. 31. *See also* 41 C.W.N. 1169 =1937 Cal. 661; 142 I.C. 458=1933 C. 215.

PARTIES TO SUIT IN RESPECT OF EASEMENT RIGHT.—Dominant and servient tenements owned by several persons—One of them may

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to [1][the Crown], this section shall be read as if, for the words "twenty years" the words "sixty years" were substituted.

LEG. REF.

[1] Substituted for "Government" by A.O.

NOTES.

sue—Other owners need not necessarily be made parties. 41 C.W.N. 769=1937 Cal. 355.

Secs. 15 and 16: OBSTRUCTION TO ANCIENT LIGHT—REMEDY—INJUNCTION OR DAMAGES.—The law does not know of any natural right, apart from a right of easement with reference to a right of passage or right to light and air. No one can claim any natural right against another unless he establishes an easement to that effect. 160 I.C. 955=1936 M. 142. Where the defendant obstructs the ancient light of the plaintiff by erecting a building and plaintiff sues for injunction to have the building demolished or for damages, the question whether an injunction shall issue or whether the plaintiff must be content with an award of damages must depend on the circumstances of each particular case. If it is clear that damages will afford adequate relief to the injured party and the defendant has not been guilty of any high-handed action, or unneighbourly conduct, an award in damages is the appropriate remedy. If the property is still substantially useful to him, depreciation in value can be met by a decree for damages; but where the defendant's building deprives plaintiff to a very great extent of his best source of light and incidentally to a large extent of the beneficial use of his property, damages would not be adequate relief. 1933 R. 351. In order to constitute an actionable obstruction of ancient light, it is not sufficient that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises to prevent the plaintiff from carrying on his business as beneficially as before. The expression "carrying on the business beneficially" is not to be read as depending on the question whether or not the person carrying on the business is likely to lose a customer. The test is whether he would carry on the business less beneficially to himself, whether in discharging his duty to his customers on the one hand or in preserving his health and facility of transacting business on the other. 1933 R. 351.

PLAINTIFF SEEKING INJUNCTION—POWER OF COURT TO DIRECT ENQUIRY AS TO DAMAGES.—Where in a suit relating to an easement of light and air, the plaintiff seeks an injunction restraining the defendant from interfering with his right, the Court is entitled, in a proper case, to order an enquiry as to damages, even though it holds that the plaintiff is not entitled to injunction. No such enquiry can however be ordered when the plaintiff has not proved any damage. 179 I.C. 884=1939 Sind 39.

DECREE FOR INJUNCTION AGAINST OWNER OF SERVIENT TENEMENT—EXECUTION.—Where the owner of a dominant tenement who has obtained an injunction restraining the owner of the servient tenement from building his house beyond a certain height and within a certain distance of the decree-holder's house, seeks to execute his decree by the demolition of the additions alleged to have been made to his house by the judgment-debtor, the real question is whether the owner of the servient tenement has infringed the restrictions imposed on him by the original decree. If he has, he must be made to comply with the decree passed against him. The questions whether the decree-holder has rebuilt his house and has increased the burden on the servient tenement are not material questions. 39 P.L.R. 712=1937 Lah. 419.

Secs. 15, 24 and 27.—A right of way ordinarily entails a point of arrival and a point of departure, both of which must be fixed. A blind lane which is blocked up by a wall on one side, cannot be subject to a right of way. Where a person claims neither a right to pass along a lane nor a right to carry materials over it, but a right to remain on it for hours at a time for a certain number of days in a year and to dump materials there and keep them there in order to repair his own wall, the right claimed is not a right of way as ordinarily understood. Nor can it be called an accessory easement, as the right is claimed by the party to repair his own wall standing on his own land. The easement is what is called a miscellaneous easement, and all that the party can claim is a right to enjoy what he has prescribed for in a reasonable way. The Courts have always leaned against an unreasonable restriction on the servient owner's enjoyment of his own property. I.L.R. (1937) N. 21=1937 N. 322.

Secs. 15 and 47: RIGHT OF REPAIRS.—The right of repairs being a discontinuous easement is not extinguished even though it was not enjoyed within two years next preceding the suit. 1941 N.L.J. 655.

Illustrations.

(*a*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed " as an easement " for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed for the right of way has not been enjoyed " as of right " for twenty years.

Exclusion in favour of reversioner of servient heritage.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B's* land. *A* proves that he has enjoyed the right for twenty-five years ; but *B* shows that during ten of these years *C* had a life-interest in the land ; that on *C's* death *B* became entitled to the land ; and that within two years after *C's* death he contested *A's* claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;

(*b*) a right to the free passage of light or air to an open space of ground ;

NOTES.

Sec. 16.—The mere finding that a *parnala* is old is not sufficient to prove that an easement has been established with respect thereto. 66 I.C. 922. User against kanomdar—Effect as against jenmi or melcharathdar. 24 L.W. 691=1927 M. 73.

Sec. 17, Cl. (a).—The phrase "tend to the total destruction" of the subject of the right of easement, means such an interference as would render the dominant owner's right largely inoperative. 130 I.C. 546=1931 S. 1. Section 17 is intended to apply not to rights of irrigation in natural streams, but to rights in the nature of ***profits a prendre*** which do not include a right to water. 7 Pat.L.T. 547=1926 P. 187. Mere possibility of destruction at some future date is not what is contemplated by Cl. (*a*). 23 B. 666. Right of way land or water cannot be acquired in every direction. 7 C. 145; 8 Beng. L.R. (A.C.). 118. So also an unlimited right of fishery. 9 C. 698=12 C.L.R. 382. *See also* 37 C.W.N. 18 cited under S. 2, Cl. (*b*). Private right of way and highway may exist over the same land. 18 C.W.N. 378=19 C.L.J. 42.

Cl. (*b*).—Extent of right to light by prescription. *See* 3 B.L.R. (O.C.) 41; 14 C. 839. For the purposes of S. 17 (*c*) what is required is that the surface water shall not simply be water flowing on the surface, it must be gathered up in some way either in a defined channel or by being collected in some other way. The word "and" in the clause must be construed as "or". The qualities are not conjunctive. I.L.R. (1937) N. 13=1937 Nag. 310.

A person may acquire a right to easement of water over artificial channels or water derived from artificial tank or pools. 33 M. L.J. 674=44 I.C. 625 (7 M. 530, Foll.). Also in respect of tanks fed by rain water as well as surface water from neighbouring lands. 33 M.L.J. 674. Considering the position of the lands and the conditions of agriculture in Bombay, it must be held that where the plaintiff had been enjoying the water by means of channels through which water passed to a tank, for a certain number of years, no prescriptive right was acquired (*c*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise,

(*d*) a right to underground water not passing in a defined channel.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

NOTES.

to receive the water through the channels unobstructed so as to entitle the plaintiff to seek the removal of these obstructions caused by the defendants. 46 B. 115=1922 B. 378. The right to take water from a river running through an undefined channel over the neighbouring lands is not one coming under S. 17 (*c*), but is a right which, though perhaps could not be acquired by prescription as an easement, could be inferred from long user. 42 B. 288=45 I.C. 448=20 Bom. L.R. 398. *See also* 7 M.H.C. 37 (46). A presumption of lost grant can be made if the usage is long and uninterrupted and if it could form the subject of grant. 42 B. 288. As to what is "*immemorial user*", *see* 56 B. 82=34 Bom.L.R. 92=1932 B. 130. *See also* 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P. C.). A right to the user of water flowing in undefined channels cannot be acquired by prescription. 64 I.C. 153. As to right to percolating water flowing under-ground in undefined channels, *see* 54 M. 793 cited under S. 7.

Sec. 18.—A customary easement is not limited to easements of a kind which could not be recognized at all apart from official customs. 1924 A. 159. In order to establish a customary right it is not necessary to show that it has been exercised since time immemorial. It is sufficient to show that it has been openly enjoyed for such a length of time as suggests that, by agreement or otherwise, the usage has become a customary law of locality. It is not necessary to prove enjoyment of the right for a period of 20 years. Where therefore the Mahomedans have been immersing their tazias at Muharram in two ghats of a tank for such a length of time as to suggest that the usage has become the customary law of the place, they have a customary right to use the ghats for immersing their tazias. There is nothing unreasonable in the custom and it is sufficiently certain and invariable. The mere possibility that the number of tazias immersed may eventually increase so much as to prove a nuisance, is too remote to make the custom unreasonable. 1938 Nag. 177. The right to use the ghats of a tank for the purpose of immersing tazias at muharram is a customary right and not an easement. 1938 Nag. 177. To establish a customary easement, the custom must be reasonable, certain, and the user must not have been permissive or exercised by stealth or force and the right should have been enjoyed for such a length of time as to suggest that by agreement or otherwise the user had become the customary law of the locality. 1939 N.L.J. 246=1939 Nag. 193. *See also* 42 C.W.N. 1102. A customary easement can only be in favour of a class or community and cannot be in favour of an individual. 119 I.C. 695. As to proof of customary rights, *see* 90 I.C. 976. A Court should not decide that a local custom, such as cutting wood from a jungle exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggested that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. 123 I.C. 377=1930 A. 338. A customary right is not an easement in the legal sense of that term. Customary rights have their origin in grant or prescription but it is not necessary that in every case, there should be evidence from which a lost grant may be presumed. Nor is it necessary that the custom should be traced back for the whole time necessary to make it immemorial. 36 C.L. J. 280=1923 C. 200. *See also* I.L.R. (1941) Nag. 460. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different, although the result may be the same. Consequently, where a claim of easement is based on a prescriptive title, it is not open to the appellate Court to treat the cases as one based on custom. 1924 L. 275. Nature to customary easement. *See* 18 M. 320. The distinction between a customary right and customary easement is seen in 46 M. 866=45 M.L.J. 333=1924 M. 197. *See also* 20 I.C. 467; 1933 N. 74; 61 M.L.J. 1=58 I.A. 195 (P.C.). Customary easements and prescriptive easements, distinguished. 2 P. L.R. 454; 29 M. 389. No fixed period is laid down by law as necessary to establish a customary right. *See* 46 M. 866=45 M. L.J. 333. Customary easement—Tenant's claim to take water from well for irrigation —Maintainability as against landlord, *see* 113 I.C. 729. One or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a licence express or implied cannot likewise confer a right as against him. 123 I.C. 377=1930 A. 338. Custo-

Illustrations.

(*a*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. *A*, having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. *A* builds a house in the town near *B's* house. *A* thereupon acquires an easement that *B* shall not open new windows in his house so as to command a view of the portions of *A's* house which are ordinarily excluded from observation, and *B* acquires a like easement with respect to *A's* house.

NOTES.

mary right of pasture on landlord's lands—Proof of. *See* 106 I.C. 195.

Illustrative Cases.—Zamindars in U.P. cannot arbitrarily close a right of way used by occupancy tenants for more than thirty years. 1924 A. 159. In the case of a right of public way over a person's private property claimed by the members of the public at large or a right of a limited class such as the inhabitants of a particular village, the customary period of the public right to the village path, a right which is sought to be established, must be proved by cogent evidence where the interests claimed conflict with those of a private owner. They must be proved by such degree of evidence as is representative of either the public at large or of the particular village or the smaller community alleged to have the right of user. To call three partisan witnesses who can in no sense be said to be representative of either the larger community of a general public or the smaller community of a particular village is no evidence whatever upon which a finding of public right or village custom can be found. 148 I.C. 498 (1)=1934 P. 30. Where it is alleged that there is a public pathway which has been infringed by the defendant before the plaintiff can maintain an action for avoidance of the infringement, special damage must be proved. But where it is more or less a village pathway, wherein the residents on either side of the pathway and round about, may be considered to have a right acquired by long user of passing to and fro and this right is referable to a grant or agreement on the part of the zamindar, it is not necessary to prove any special damage and the residents of the neighbourhood can maintain an action for the avoidance of the obstruction without proving any special damage. Even if a proof of special damage is necessary a very small amount of inconvenience will entitle the plaintiff to the relief claimed. 1933 A. 919. A *right of pasturage* by virtue of a lost grant cannot be established by the inhabitants of a village as they are a variable number of persons. Such a right cannot also be established by prescription under S. 26 of the Limitation Act, inasmuch as to establish such a right it must be shown that it has been peaceably and openly enjoyed by the persons claiming it without interruption for 20 years. That might be so with regard to some of the villagers but could not be so in the case of all the inhabitants. It is clear therefore that the only right of easement which can be claimed in a case like this is the right of easement by custom. 42 C.W.N. 1102. Where the residents of a particular locality claimed a customary right of *easement to go over the land of the defendant, to collect firewood and burn* Holi *and perform some ceremonies,* there and where such right is proved to have been exercised from time immemorial, it was held that the easement was not unreasonable and could be recognized by the Courts. 180 I.C. 233=1938 A.L.J. 1243=1939 All. 165. *See also* 1939 All. 387=1939 A.L.J. 391. A customary right of burial can exist, apart from provisions of this Act; hence where it is found that a certain family used a grave as a burial ground customarily it was held not an easement but a customary right in the nature of an easement. 31 I.C. 805=13 A.L.J. 1094. A right to bury a dead body is not an easement as contemplated by the Easements Act. Such a right cannot be acquired by prescription, though it can be acquired by grant or custom. When the origin of the right is peaceful, the Court can presume either a dedication on the part of the owners or a grant on their part, the origin of which is lost in antiquity. The question whether a plot of land is a graveyard or not is primarily a question of fact. 1934 A.L.J. 809=1934 A. 868. *See also* 32 P.L.R. 157=1932 L. 256; 60 C.L.J. 566=1935 C. 357=39 C.W.N. 387. Right to privacy is customary right. 10 A. 358; 5 B. H.C.R. 42; 9 B.H.C.R. 266; 8 B.H.C. R. 87; 2 Bom.L.R. 454. There is no inherent right of privacy attaching to any property, and this is specially so in a town. Such a right must be acquired either by usage or by grant. 40 P.L.R. 483. *See also* 1939 Mar. L.R 150 (Civil.) If a right of privacy is established the intervention of a space between two houses cannot affect the right of privacy. 28 I.C. 674=13 A.L.J. 361. The purdah system is generally observed by both Hindus and Muhammadans in the United Provinces except by the lowest classes. 28 I.C. 674=13 A.L.J. 361. Where the plaintiff is a 'vaishya' living in a town and the defendant has opened a door which exposes the whole of the plaintiff's 'sahan' as well as the rest of the house to his view, there is an invasion of privacy. 151 I.C. 141=1934 A. 527. The right of privacy is an easement attached to land and not to a person. If there was a right of privacy existing in the house, it is not destroyed because the plaintiff herself has not always observed purdah. 151 I.C. 141=1934 A. 527. A right of privacy is a customary easement and may be acquired in virtue of a local custom. 1935

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A. L. J. 432=1935 A. 754. Where a plaintiff brings a suit claiming relief concerning his right of privacy, the omission on his part to allege the existence of a customary right of privacy is fatal to his case. 155 I.C. 365=1935 A. 649. *See also* 1935 A.L.J. 432=A. 754. Whether the houses in question are on the same side of a street or on the opposite side, a right of privacy exists and this right needs more protection when the person who invades it, is opposite to the person whose right of privacy is invaded and there is invasion of the *right of privacy* if a person constructs a room in the upper storey of his house overlooking another person's house. 24 I.C. 683. In the province of Gujarat there is a customary usage which makes an invasion of the privacy an actionable wrong. 55 I.C. 949=22 Bom.L.R. 226. Where a custom of privacy existed in the locality in which the plaintiff lived and she sued the defendant that her right of privacy was infringed by certain construction made by defendant and where her house was already overlooked from another house and she did not show any reason why she did not object to being overlooked from that particular house and where she endured without protest the invasion of her privacy by the defendant for two years, she is not a person who is entitled to right of privacy, although her suit is brought within limitation. 119 I.C. 834=1929 A. 809. *See also* 40 P.L.R. 483. Where a person alleges that another infringed upon his right of privacy, he must prove that customary right of privacy exists in the neighbourhood in which he lives and further that he is individually or as member of his particular class entitled to take advantage of such custom. 51 A. 986=27 A.L.J. 1028=1929 A. 676. *See also* 1935 A.L.J. 432=1935 A. 754; 155 I.C. 365 =1935 A. 649. A plaintiff is entitled to an injunction restraining his neighbour from opening such windows and ventilators as would infringe the plaintiff's right of privacy which he is entitled to by custom. 74 P.L.R. 1915=29 I.C. 154. A plaintiff cannot ask the defendant to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plaintiff's house but upon certain plots of land acquired by him less than twenty years. 15 I.C. 270. *Held,* on the evidence, that there was a custom of privacy with respect to the roofs of houses in the city of Larkhana in Sind. 66 I.C. 333. By custom, a Mahomedan cannot acquire any right to say prayers on the land of another, except with the other's permission, express or implied. 9 I.C. 45. Where the plaintiffs as owners of cattle living in a particular village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular 'Isthan' in a room, it does constitute a right of the plaintiff's to continue to make those offerings. 1939 A.L.J. 391=1939 All. 387. *See also* 1939 All. 165. The right to cut sugarcane, to extract, boil and concentrate the juice on a piece of land in the *abadi* is in the nature of a customary easement and can be acquired by a tenant against the landlord. 26 I.C. 122=12 A.L.J. 963. A custom to allow the neighbour's trees to overhang one's house and premises, is neither definite nor reasonable. Whether the right to retain trees overhanging another's land is customary easement. *See* 43 B. 164=47 I.C. 629=20 Bom.L.R. 826. *See also* 27 Bom.L.R. 653 =89 I.C. 191=1925 B. 446. Right to use bathing ghat. *See* 20 A. 200. From use of tank for a long period dedication to the public can be inferred. *See* 91 I.C. 712=1926 C. 507. *See also* 1937 Pat. 388=16 Pat. 389 =18 Pat.L.T. 348 (Tank attached to Hindu temple and enclosed—Rights of Mahomedans in general to bathe—No presumption of such customary right can arise from cause of bath of individual mahomedans). A person who is entitled to put up a dam of turf and loose stones, is not necessarily entitled to substitute a tighter and stronger dam. 9 I.C. 636=9 M.L.T. 375. As to right to take water from another well *see* 2 M. L. J. 290. A right to graze cattle in a jungle area of the village can be the subject of a customary right. 20 I.C. 467. *See also*, 19 A. 172. A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. 1924 P. 303. On the contrary, it seems to be an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose, in order to repair their houses. 1924 P. 303. The enjoyment of a right claimed to exist under an alleged custom must be enjoyed as of right, that is to say, all acts must be done under or by virtue of the custom. In order to establish the custom, all acts must have been done without violence, without stealth or secrecy, or without leave or license asked for or given either expressly or impliedly from time to time. No act which can be ascribed to a license can ever support a claim of custom. A zamindar is the owner of the forest and of the waste land lying within his zamindari, and as proprietor can permit his tenants to graze their cattle on land which is not the communal land of the village, and to take dead wood, etc., from the forest or waste land on payment of certain charges prescribed by him. But that is purely a matter of contract between the zamindar and the tenants. A right which can be so acquired on payment of fees or charges can hardly be regarded as a customary right, notwithstanding that the right has been exercised for a long series of years. 20 N.L.J. 131. A haveli is not like property held jointly in co-ownership in the sense that all the rules and incidents of joint property are applicable to it, where any co-owner may alienate his rights

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration.

A has certain land to which a right of way is annexed. *A* lets the land to *B* for twenty years. The right of way vests in *B* and his legal representative so long as the lease continues.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.

And when any incident of any customary easement is inconsistent with such rules nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(*a*) *A*, as owner, of a farm *Y*, has a right of way over *B's* land to *Y*. Lying beyond *Y*, *A* ha another farm *Z*, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of *Y*. He must not use the easement for the purpose of passing to and from *Z*.

(*b*) *A*, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by *A*, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So if *A* lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

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therein, for such a power of alienation would immediately defeat the very object of maintaining a haveli. The law of easements as such cannot be applied to a haveli, for an easement predicates a dominant and servient tenement vested in different persons. The rights of the owners over the haveli partake of the character of easements. They are quasi easements though not easements proper, the nature and extent of such rights being regulated by custom. Such rights can in law and in the nature of things only be attached to immovable property and can only be enjoyed by the owners of such property *qua* owners. 176 I.C. 966=1938 Sind 145. *See also* 1939 Nag. 193; 42 C.W.N. 1102.

Sec. 19.—*See* 14 S.L.R. 132; 18 B. 382. In a severance of tenements, easements used as of necessity or in their continuous will pass by implication of law without any words of grant, but easements which are used from time to time only, do not pass unless the owner by appropriate language shows an intention that they should pass. (*Polden* v. *Bastar*, 1 Q.B. 156, Rel. on.) 1930 P. 7.

Sec. 20.—*See* 25 C. 576; 76 P.R. 1900. There can be no question of easement as regards light and air in the case of joint property. *See* 28 Bom.L.R. 1000=97 I.C. 691 =1926 B. 545.

Secs. 20 and 22.—An owner of a large piece of land divided into several plots for building purposes and sold them to different persons reserving one part for himself and in each sale-deed, there was a covenant by which every purchaser bound himself to keep open a passage 15 feet wide for the common use of the other plot-holders. The defendants erected posts in the passage and reduced its width to 7 ft. In a suit by one of the other plot-holders, the lower Court applied S. 22 of the Act, considered 10 ft. width sufficient and granted a decree accordingly. *Held*, an easement of way over another's land by virtue of an agreement is governed by S. 20 and not S. 22, the rights in this case were governed by the contract between the vendor and the purchaser which should be given full effect to. English cases dealing with restrictive covenants held inapplicable to the present case where the right of way was defined both as to dimensions and direction. 55 B. 138=32 Bom. L.R. 1425=1931 B. 87.

Sec. 21.—Legal user cannot be restrained because it is prompted by improper motive. 18 C.W.N. 1296=20 C.L.J. 97. Grant of way in general terms includes right of passage for scavenger who cleans the privy. *See* 34 Bom.L.R. 1150=1932 B. 574.

Exercise of easement.

Confinement of exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

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Secs. 22 and 23.—Easement confined to a particular purpose ought not to be extended to any other. 19 I.C. 984. As to extent of right of way, *see* 7 C. 145; (1891) Bom.P.J. 244; 15 W.R. 496; (1893) Bom.P.J. 53; 87 I.C. 899=1925 N. 389; 41 C.L.J. 379 =87 I.C. 19=1925 C. 788; 20 N.L.J. 99. The general rule is that a right of way once defined cannot be altered and the dominant owner is entitled to exercise his strict rights unless he can be induced to consent to a deviation. 46 B. 910=24 Bom.L.R. 437. S. 22 does not deal with the question whether the servient owner, when once the right of way has been defined, can substitute a new way and recourse must therefore be had to the common law. 46 B. 910. The owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other. 42 C. 164=20 C.L.J. 97 =18 C.W.N. 1296. A back-door of a house which was occasionally used by the sweepers or the ladies of the house cannot be converted into a main entrance to be used by males. 19 I.C. 984. Under S. 22 the dominant owner must exercise his right in the mode which is least onerous to the servient tenement and cannot impose any additional burden on it. Where the easement right is only to use a roof as an open space, the holder cannot build over that portion. 1924 L. 387. *See also* 44 I.C. 500=1918 M.W.N. 167.

SCOPE OF SECTION.—No man can impose a new or increased restriction or burden on his neighbour by his own act, and an owner of an easement cannot, by altering his dominant tenement, increase his right. 24 C.W.N. 896=32 C.L.J. 27; 97 I.C. 169=24 A.L.J. 810. Every man may open any number of windows in his house looking over his neighbour's land. This right is a continuing one and a man can open new windows from time to time, provided no additional burden is imposed on the servient tenement. Even if the owner of the servient tenement has a technical grievance courts have a discretion to refuse an injunction. In the way a man has a right to open new outlets for drains and new spouts for leading rain water from the terrace of his building to his neighbour's land the Court will not grant an injunction, when it is found that no additional burden is caused to the land of the servient owner. What amounts to an additional burden is a question of fact to be determined in each case from the nature of the right and the circumstances of the case. 20 N.L.J. 99.

ILLUSTRATIVE CASES.—Defendants who had a right to discharge water from his thatched roof to the plaintiff's roof pulled down his house and built a three-storied house with spouts, to discharge water on the plaintiff's land. *Held,* that the burden on the plaintiff's land was increased within the meaning of section. 30 I.C. 941=13 A.L.J. 791. A person is not entitled to enlarge his right of easement by increasing the volume of water flowing through a drain through which he was entitled to discharge only the main water and the ordinary waste water. 102 P.L.R. 1917= 42 I.C. 284. Where the defendant blocked a water channel of the plaintiff by building a wall, the Court directed the opening of another's channel through the defendant's land without demolishing the wall. 29 I.C. 1002=13 A.L.J. 637. The extension of the projection of cornice beyond its original breath and the consequent increase in the flow of rain water on the land of the servient owner or both constitute an addition to the burden of the servient owner. 24 C. W.N. 896=32 C.L.J. 27. The owner of the dominant tenement may raise the height of the eaves so long as he does not throw an increased burden on the servient tenement, but the projection of the new roof should not exceed that of the old, though at an increased height. 28 I.C. 169. But *see also* 138 I.C. 458=34 Bom.L.R. 395=1932 B. 224. Though the projection of eaves resulting in discharge of rain water is an easement according to S. 23, Ill. (*b*) of the Easements Act, the mere projection of the eaves alone is not. The column of air occupied by a projection is not immovable property or any interest therein within the meaning of Art. 144, capable of being acquired by adverse possession. (37 B. 491 and 24 Bom. L.R. 305, Ref.) 34 Bom.L.R. 395=1932 B. 224. Re-construction of a house by the dominant owner involving a change in the situation of the roshandans does not mean a fresh easement requiring a fresh period of twenty years for its acquisition. 45 I.C. 985. Where the plaintiff's right of way is proved over a defined track, occasional deviation therefrom does not affect his right. 18 I.C. 85; 1926 N. 221. The prohibition of the user of the track, during particular season does not negative the claim of a general right of way, but is presumptive proof of a restricted right. 18 I.C. 85. Right of way for sweeper to go to privy of a house and clean it declared by a decree—Privy removed to a different spot in the same house under orders of Municipality—No additional burden is imposed on the servient heritage, if sweeper entered and left the servient heritage land at the same point as before. 33

Illustrations.

(*a*) *A* has a right of way over *B's* fields. *A* must enter the way at either end, and not at any intermediate point.

(*b*) *A* has a right annexed to his house to cut thatching-grass in *B's* swamp. *A*, when exercising his easement, must cut the grass so that the plants may not be destroyed.

Right to alter mode of enjoyment.

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(*a*) *A*, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill provided that it can be worked by the same amount of water.

(*b*) *A* has a right to discharge on *B's* land the rain-water from the eaves of *A's* house. This does not entitle *A* to advance his eaves if, by so doing, he imposes a greater burden on *B's* land.

(*c*) *A*, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of the pollution.

(*d*) *A*, a riparian owner, acquires as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle *A* to pollute the stream by discharging into it poisonous liquor.

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

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Bom.L.R. 1114=1931 B. 490. In the above case, the dominant heritage was not the privy, but the house within which it was enclosed, and so, the removal of it to another spot or re-building of it would not extinguish the easement under S. 45. 1931 B. 490=33 Bom. L.R. 1114. *See also* 15 Bom.L.R. 876 (Projecting eaves); 24 B. 188 (Right to draw water); (1893) Bom.P.J. 143 (Discharging water); 23 B. 595 (Right of way).

PROCEDURE.—If the dominant owner exceeds the right, injunction and not damages is the proper remedy. 28 I.C. 169.

Sec. 23.—Whether any particular user of the passage by the dominant owner does not impose any additional burden upon the servient heritage, is essentially a question of fact, on which a finding should always be had from the lower Courts. (23 B. 595 and 50 B. 635, Rel. on.) 34 L.W. 369=1931 M. 128=61 M.L.J. 58. Where a house formerly used for residential purposes is used as godown for storing, the use of bullock-carts over the passage leading to the godown for carrying goods will throw additional burden on the servient tenement. 13 C. 136, Dist. (*Ibid.*) The right of flow of rain water does not include in law the flow of all kinds of water, *e.g.*, sullage water. Passing of such water constitutes a nuisance and the servient owner has a cause of action against the dominant owner. 11 O.W.N. 657=1934 O. 237.

Sec. 24: PRINCIPLE OF SECTION AND ILLUSTRATIVE CASES.—The dominant owner has a right to do everything requisite to secure to himself the fullest advantage of his servitude but thereby he should not impose any additional burden on the servient tenement. 39 I.C. 590 (2)=18 P.W.R. 1917. Repairing pipes on another's land. 23 C. 525. *See also* I.L.R. (1937) N. 21 (Right to enter on another's land in order to repair one's own wall standing on the land). Repairing roof. *See* 15 M. 286. On this section, *see also* 20 Bom.L.R. 403. The accessory rights mentioned in S. 24 are not intended to deprive the servient owner of his rights of property unless such a result is absolutely essential. 42 B. 529=45 I.C. 422=20 Bom.L.R. 403. (Right to repair walls and eaves through which rain water was discharged.) A person can also enter the neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I.C. 893. Where the repair of the wall is reasonably necessary for its enjoyment the right to go to the neighbour's side of the premises to repair the wall is a necessary easement. 16 I.C. 893. *See also* 42 B. 529. The right does not allow going over the defendant's roof. 16 I.C. 893. Where the legal effect of one of the alternative adjudication in an award is to invest the owner of an estate with the right

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations.

(*a*) *A* has an easement to lay pipes in *B's* land to convey water to *A's* cistern. *A* may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*) *A* has an easement of a drain through *B's* land. The sewer with which the drain communicates is altered. *A* may enter upon *B's* land and alter the drain to adapt it to the new sewer, provided that he does not thereby impose any additional burden on *B's* land.

(*c*) *A*, as owner of a certain house, has a right of way over *B's* land. The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B's* land and repair the way or remove the tree from it.

(*d*) *A*, as owner of a certain field, has a right of way over *B's* land. *B* renders the way impassable. *A* may deviate from the way and pass over the adjoining land of *B*, provided that the deviation is reasonable.

(*e*) *A*, as owner of a certain house, has a right of way over *B's* field. *A* may remove rocks to make the way.

(*f*) *A* has an easement of support from *B's* wall. The wall gives way. *A* may enter upon *B's* land and repair the wall.

(*g*) *A* has an easement to have his land flooded by means of a dam in *B's* stream. The dam is half swept away by an inundation. *A* may enter upon *B's* land and repair the dam.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way, consistent with the enjoyment of the easement: but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations.

(*a*) *A*, as owner of a house, has a right to lead water and send sewage through *B's* land. *B* is not bound, as servient owner, to clear the watercourse or scour the sewer.

NOTES.

to claim an "easement of necessity" over the road leading from the public street to the parent estate, this right must be claimed and established in appropriate legal proceedings against the owner of the servient tenement. It cannot be incorporated in the award by order of the Court purporting to act under C.P. Code, Sch. II, para. 12. 1930 L. 26.

Sec. 24, Ill. (*d*).—Public rights of way are not easements but arise from a dedication to the public evidenced by a deed or implied from custom and user. There can be no right of easement in favour of an indeterminate body of persons. 44 I.C. 868=14 N.L.R. 78. Where the owner of lands renders a way impassable, a person having a right to use the way may deviate from it and pass over adjoining land of the owner provided the deviation is reasonable. (*Ibid.*) Reading Ill. (*d*) along with S. 24 it seems clear that the dominant power is only entitled to deviate from the original way and pass over the adjoining land of the servient owner to such extent as may be really necessary to secure the full enjoyment of his easement. Where the original way is blocked only in its northern portion, there is no justification for any deviation in the southern portion, at a distance of over hundred feet from the original way. Such a diversion can hardly be considered reasonable. **149 I.C. 949 (2)=** 1934 L. 199.

Sec. 27: PRINCIPLE OF SECTION.—*See* 85 I.C. 608=1925 A. 348; 87 I.C. 899=1925 N. 389; I.L.R. (1937) Nag. 21. Where water flowing underground in a defined subterranean channel which forms the source of supply for the plaintiff's springs is abstracted by the defendants by cutting off a channel on their own land very near the springs. *Held*, that plaintiff could restrain by injunction any attempt to divert the underground channel or diminish his water-supply. 25 Bom.L.R. 789=47 B. 809=1923 B. 305. On this section, *see also* 20 B. 788; 13 A.L.J. 637.

(*b*) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on grass growing on the way, provided that *B's* right of way is not thereby obstructed ; but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c*) *A*, in respect of his house, is entitled to an easement of support from *B's* wall. *B* is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d*) *A*, in respect of his mill, is entitled to a watercourse through *B's* land. *B* must not drive stakes so as to obstruct the watercourse.

(*e*) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B's* land. *B* must not plant trees so as to obstruct the passage to *A's* windows of that quantity of light.

Extent of easements.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Easement of necessity.

An easement of necessity, is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

Right of way.

(*a*) a right of way of any one kind does not include a right of way of any other kind :

Right to light or air acquired by grant.

(*b*) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made :

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Sec. 28 (a).—A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind. The right of way appurtenant to the enclosure of a mosque can be used only for the purpose of passing to and from that enclosure, and the managers of the mosque cannot impose any additional burden on the adjoining lands by removing boundary walls or opening new passages from the enclosure of the mosque. If a man has power to make a way across another person's land he must exercise his power in a reasonable manner and have due regard to the convenience of the servient owner as to avoid inflicting on him needless and unreasonable injury. 7 Luck. 540=1932 O. 274. A right of way of one kind, *e.g.*, for persons, cattle and carts, etc., does not include a right of way of another kind; *e.g.*, for sweepers removing nightsoil, in the absence of evidence as to the probable intention of parties, and the purpose for which the right was imposed or acquired. 59 I.C. 426=22 Bom.L.R. 1131. *See also* 90 I.C. 149=26 Cr.L.J. 1493. But *see* 34 Bom.L.R. 1150. Where the grant of right of way was unrestricted. Where an easement is claimed over another's property, the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, *e.g.*, the user of a way for horses may include the right to lead smaller animals as well, but not larger animals or loads. 65 I.C. 579. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, processions and corpses along the path. 65 I.C. 579.

ROAD AND HIGHWAY—DISTINCTION.—A road or path over which individuals or a limited class of public have a right of passage is not a highway. An owner of land adjoining a highway is entitled to such highway at any point at which his land actually touches it, but he has no such right in the case of land adjoining a road not subject to the public right of passage. 7 Luck. 540=1932 O. 274.

Sec. 28 (b), (c) and (d).—As regards an easement of light, there is no rule defining the measure of the dominant owner's right or requiring an angle of 45 degrees through which rays of the sun are to be received. 1923 A. 542. To sustain an action, there must be substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions. 1923 A. 542. *See also* 20 M.L.J. 29=7 M.L.T. 245; 7 Bom.L.R. 352; 7 Bom.L.R. 73; 173 I.C. 380=1938 Sind 37; 29 B. 157; 35 C. 661; 18 C.W.N. 933=27 M.L.J. 117=42 C. 46 (P.C.); 131 I.C. 104=1931 L. 443. The

Prescriptive right to light or air.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive right to pollute air and water.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

Other prescriptive rights.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Increase of easement.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

NOTES.

dominant owner is not entitled to the full amount of light enjoyed during the prescriptive period, but only to so much as is necessary for habitancy or business according to the ordinary notions of mankind. There is no infringement of the right unless the obstruction amounts to a nuisance. 42 C. 46=27 M.L.J. 117=41 I.A. 180 (P.C.). The owner of a dominant heritage has no absolute right to the access of light and air to windows and apertures, and is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement, unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage, or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been used before such interference. An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop or other place of business. So also, to constitute an infringement of an easement of light and air, there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. 179 I.C. 884=1939 Sind 39. In the case of a suit relating to an easement of light and air, reference to reported cases is necessarily of little value, because, whether or not the disturbance of an easement of light and air amounts to a nuisance, depends entirely on the facts and circumstances of each particular case. So also, as the law relating to easements in British India is governed very largely, if not entirely, by the Easements Act in those provinces to which it has been made applicable, it is of little practical use to refer to the provisions of the English statute and decisions in English cases, in a matter relating to easements. 179 I.C. 884=1939 Sind 39. *See also* 1941 Sind 211.

Sec. 28 (e).—If a grazing area is larger than that required by the persons, a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes. 67 I.C. 306. Exclusive fishery rights do not give occupancy right, but lease of holding part of which is under water will give a right to acquisition of occupancy in the whole. 3 P.L.T. 53=1922 P. 9.

Secs. 28, 33 and 35.—ACTION FOR DAMAGES OR INJUNCTION—ELEMENTS TO BE PROVED.—In considering the question about the easement for light, Ss. 28, 33 and 35 have to be read together. In such cases it is clear that damages may only be recovered if there has been substantial interference as described in Expl. 2, S. 33 and that an injunction can only be granted when compensation might be allowed under that section, that is, that both in the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively that there has been substantial interference with physical comfort, etc. 55 A. 711=1933 A.L.J. 1006=1933 A. 492. *See also* 163 I.C. 843=1936 A.L.J. 712=1936 All. 517.

Sec. 29.—The height of the roof in the dominant tenement which had an easement of letting down rain water on another's roof, was raised from 7 feet to 21 feet and instead of allowing the dripping of water along the eaves, it was poured down through pipes: *held*, that burden on the servient tenement was increased thereby and therefore the easement was extinguished. 58 I.C. 967. Plaintiff altered the gabled roof of his house to a pucca flat roof. Formerly there was a right to sprinkle water on the whole length of the eaves on one side of the house. The right to that easement was established. After the alteration the water of the whole roof was discharged through one hole on to the

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(*a*) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. *A* alters the machinery of his mill. He cannot thereby increase his right to divert water.

(*b*) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. *A* extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) *A*, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on *B's* land. *A* buys a field and unites it to his farm. *A* is not thereby entitled to take leaves to manure the field.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to

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NOTES.

defendant's land. *Held,* that change of this character completely destroyed the original easement, and it could not be said that there was any prescriptive right for the new condition of affairs and the burden had not been increased substantially. 55 All. 711=1933 A. L.J. 1006=1933 All. 492. The imposition of an additional burden does not have the effect of extinguishing the right of easement altogether, when the additional burden is separable from the original burden. 40 P.L.R. 298=1938 Lah. 751. A right to use the water of a tank of a particular depth is not enlarged in consequence of excavation and increase in the depth of the tank made by the servient owner. When the water falls below the level of the original depth of the tank as it was before the excavation, the dominant owner cannot take water out of the tank, because that will be increasing the burden of the subservient tenement. 155 I. C. 719=60 C.L.J. 321=1935 Cal. 253. Where drain water has been passing through a drain over another's lands and from there on to the public way, from the putting up of a pipe in a well in the dominant owner's land, it could not be inferred as a matter of law that there has been so much increase in the burden of easement as to destroy the easement. 1941 A.L.J. 282=1941 All. 289.

On this section, *see also* 6 M.H.C. 112; 20 N.L.J. 99; 13 C. 136=13 I.A. 77 (P.C.) as to what amounts to increase of easements. Prescriptive right to maintain dam across river for purpose of taking water to tank through channel—Right to enlarge dimensions of channel or to take increased quantity of water. *See* 1938 Mad. 180=46 L.W. 862.

Sec. 30.—If two houses were common and a certain right of way belonged to the parties, the passage being common, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was reserved for common enjoyment. 36 B. 379=15 I.C. 818=14 Bom. L.R. 418. When a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. 18 L.W. 404 =1923 M. 674. Where the same grantor conveys in the course of one transaction portions of his property to several grantees, each grantee is presumed in law to take his portion subject to such rights, as a right of way as are created in favour of the other grantees. 38 M. 141=24 M.L.J. 552. "Appurtenances" when used in conveyance include a right of way. 38 M. 141.

B. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over *B's* land of light to four windows, six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive user.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A, as owner of a house has a right of way over *B's* land. *C* unlawfully enters on *B's* land, and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: provided that the disturbance has actually caused substantial damage to the plaintiff.

NOTES.

Sec. 31.—If a person cannot obstruct the new user without obstructing the old, he must submit to the new burden. *See* 11 M. L.J. 290; 7 C. 453; Bom.P.J. (1889) 310.

Sec. 32.—Right of co-owner to put up eaves and insert beams in a party wall. *See* 6 Bom.L.R. 682. The law takes no notice of an obstruction which has its origin in the caprice of sentiment of the aggrieved party. It does not concern itself with an obstruction which is trivial or immaterial. In order to amount to disturbance the act complained of must have caused substantial damage, *i.e.*, it must materially affect the comfortable or beneficial enjoyment of the dominant tenement or lessen its selling or letting value. 133 I.C. 214=53 C.L.J. 604.

Sec. 33: PRINCIPLES AND ILLUSTRATIONS.—The law does not concern itself with a disturbance which is trivial or immaterial. Where the plaintiff comes into Court at once, when the disturbance is threatened and the defendant completes his structures pending the suit, he does so at his own peril. 28 I.C. 962=13 A.L.J. 385. As to what amounts to disturbance, *see also* 7 Bom.L. R. 825; *Ibid*. 73; 54 M. 793=1931 M. 284 =61 M.L.J. 563; 133 I.C. 214=53 C.L.J. 604; 5 A. 369; 8 B. 95; 39 C. 59; Bom.P. J. (1895) 272; 3 N.L.R. 114. Under S. 33 any act of the defendant which affects the evidence of easement is enough to sustain an action by the plaintiff, though the plaintiff does not suffer actual damage. In other words there is a wrongful act for which an action lies. In a suit by the plaintiff for an injunction in respect of alleged obstruction to light and air, it was found that there were three windows in the plaintiff's wall which were in existence for over the statutory period and that obstruction was caused to one of them by the defendants raising a wall; but it was also found that the plaintiff was receiving sufficient light and air from other resources. *Held*, that the closing up of one of the windows of the plaintiff did constitute an invasion of the plaintiff's easement though it did not cause actual damage to the plaintiff and therefore the plaintiff had a cause of action against the defendant. 52 L.W. 383 =1940 Mad. 952=(1940) 2 M.L.J. 381. Extent of damage depends on mode of life and place of living. 97 I.C. 500=1926 A. 764. The test of interference with the right to light and air is whether the obstruction amounts to a nuisance. 23 I.C. 959; 152 I. C. 1060=1935 L. 79=37 P.L.R. 34. *See also* 97 I.C. 500=1926 A. 764. There is no actionable wrong unless there is a material interference with the physical comfort of the plaintiff or other substantial damage. 33 I. C. 615=9 S.L.R. 101 (33 M. 327 and *Coll's case*, 1904 A.C. 179 Foll.). If in spite of

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-four.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

NOTES.

an obstruction being created by the servient owner, the same quantity of light still penetrates the ancient windows of a dominant owner the latter has no remedy in equity. 33 I.C. 615=9 S.L.R. 101. Where the plaintiff has a right to pass his rain and sewage water across the defendant's land to the public drain, the diversion of the old route taken by the water in former days and passing it by another route does not constitute an obstruction to the exercise of plaintiff's right. 30 I.C. 508=13 A.L.J. 821. Grazing rights include right to have sufficient pasturage left. 1925 L. 216=92 I.C. 403.

PARTIES.—As a general rule, where a person claims a right of easement on a servient tenement all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. 1924 C. 369. But there are cases which may well be taken as exceptions to the general rule, such as where any of the co-sharers took no part in obstructing the plaintiff's right. 1924 C. 369.

REMEDY.—Where an easement has been disturbed, plaintiff is entitled to an injunction rather than damages. 28 I.C. 962=13 A.L.J. 385. S. 33 allows compensation to be recovered provided that the disturbance has actually caused a substantial damage to the plaintiff. 28 I.C. 962. In case of interference with water supply, the injured party may, under certain circumstances, have a cause of action apart from proof of actual damage and sue for injunction, if he establishes prospective probable damage. 54 M. 793=1931 M. 284=61 M.L.J. 563 (7 M.H. C. R. 60, Rel. on; 31 M. 171, Ref.) The plaintiff sued for a mandatory injunction requiring the defendant to demolish his house so as not to block the windows in his rooms. The plaintiff relied on a mutual agreement which however merely stated that the defendant was not to close the windows in question and the other circumstances indicated that the parties could not have intended that the defendant would not erect any building at all. *Held*, that the plaintiff was not entitled to the injunction as prayed for. *Held, further*, that the plaintiff would not be entitled to damages unless on proof of such diminution of light and air as would be ordinarily necessary and in this connection the Court may take into account the other sources of light and air. 15 L. 320=1934 L. 240.

BURDEN OF PROOF.—In an action for an injunction to restrain infringement of the right to light and air, the plaintiff, in order to succeed, must prove an invasion of his legal right to the easement, sufficient to amount to a nuisance. The easement has not to be measured by the amount of light and air that had been enjoyed. There is no infringement unless that which has been done amounts to a nuisance. A finding that the place still remained a well lighted and well ventilated place, in spite of the alleged infringement, would be fatal to the plaintiff's case, as under S. 33 of the Act the plaintiff cannot succeed in a suit for disturbance of an easement unless he proves substantial damage. The quantity of light to which a right can be acquired is what is required for the ordinary purposes of inhabitance or business of the tenement according to ordinary notions. I.L.R. (1941) Kar. 381=1941 Sind 211. In order to establish substantial damage under S. 33, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which can be ascribed to the interruption of the free passage of light and air. The state of the property at the time of the alleged disturbance of the easement has to be looked to, not as it was before, or as it might be at a future date. The plaintiff cannot claim that sources of light and air alleged to be liable to obstruction at a later date, should be excluded from consideration. I.L.R. (1941) Kar. 381=1941 Sind 211.

Secs. 33 and 35.—*See* 55 A. 711=1933 A. 492; 152 I.C. 1060=37 P.L.R. 34=1935 L. 79. Ss. 33 and 35 make it clear that a plaintiff is not entitled to an injunction in every case of an interference with an easement of light and air. An injunction cannot be granted in the case of an actual interference unless there is an actionable interference with the easement. Under Expls. 2 and 3 of S. 33, no interference with the free passage of light and air is actionable unless such interference is of a substantial character. 163 I.C. 843=1936 A.L.J. 712=1936 A. 517. In cases of dispute about interference of light, light acquired by grant or prescription, and not light which has not yet been acquired by prescription but was only in process of being so acquired, can be taken into account. Light

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(*a*) *A* places a permanent obstruction in a path over which *B*, as tenant of *C's* house, has a right of way. This is substantial damage to *C*, for it may affect the evidence of his reversionary right to the easement.

(*b*) *A*, as owner of a house, has a right to walk along one side of *B's* house. *B* builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to *A*.

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained.

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement—

NOTES.

coming in sufficient amount from sources other than those in dispute should be taken into account. 17 L. 599=165 I.C. 291=1936 Lah. 792.

Sec. 34: RIGHT OF SUPPORT.—Every land owner has a right to the support of his land in its natural state. It is not an easement; it is a right of property. In a suit for injunction restraining the defendant from interfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. 59 C. 363=1932 C. 542. The right to the support of land in its natural state vertically by the subjacent strata and laterally by the adjacent soil, is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support. 11 R. 47=1933 R. 18. Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. [*Pattison* v. *Gilford,* (1874) 18 Eq. 259 and 24 C. 260, Rel. on.] 11 R. 47=1933 R. 18. A suit for perpetual injunction restraining the defendant from removing the necessary lateral support to which the plaintiff's land is entitled is a suit in the nature of a *quia timet* action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore, excavation and removal of the earth on his own land by a defendant, without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not *inter se* constitute an actionable invasion of the latter's right; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. 11 R. 47=1933 R. 18.

Sec. 35.—[*See also* Notes under S. 33.] As to the principles on which Courts will grant injunction in respect of easements, *see* Specific Relief Act, Ss. 52-57 and notes thereunder and C. P. Code, O. 39 and notes thereunder. Court has got discretion to grant injunction or not—Different considerations govern Indian Courts and English Courts—Courts must have consideration for both parties. *See* 3 R. 230=87 I.C. 800=1925 R. 327. An injunction is only an alternative within the discretion of the Court and is not an independent form of relief. 117 I.C. 618=1929 A. 430. It is not granted where pecuniary compensation would afford adequate relief. 165 I.C. 94=1936 N. 274. An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused. 117 I. C. 618=1929 A. 430. The word "when" in S. 35 (*a*) must be construed to mean "when and where" because it would be useless to prescribe that an injunction could be granted when damages can be claimed under S. 33, if damages under S. 33 could not be claimed. 117 I.C. 618=1929 A. 430.

ILLUSTRATIVE CASES—LIGHT AND AIR.—The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or (*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter;

(*b*) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

37. When, from a cause which preceded the imposition of an easement, the

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NOTES.

business of the tenement according to the ordinary notions of mankind. The single question in these cases is whether the obstruction complained of is a nuisance. Where in a suit for a mandatory injunction against the defendant prohibiting him from obstructing the light and air passing through certain ventilators, it was found that even if those ventilators were closed, the courtyard and the plaintiffs' house would receive plenty of light and air, there is no question of any nuisance being caused by the obstruction and the plaintiff is not entitled to any injunction. 152 I.C. 1060 (2)=37 P.L.R. 34=1935 L. 79. The decree issuing injunction about obstruction to light and air should be given in general terms. 25 Bom. L.R. 239=1923 B. 196. The dominant owner acquires by prescription so much light as is sufficient for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind with reference to the locality and surroundings concerned; and the amount received during the period of prescription is immaterial. 57 I.C. 706. It is only substantial privation of light enough to make the occupation of the house uncomfortable, or unfit for business according to the ordinary notions of mankind which gives rise to an actionable claim. The mere fact that light received has become less, gives no right. 42 C. 46 =41 I.A. 180=27 M.L.J. 117 (P. C.). *See also* 97 I.C. 500=1926 A. 764. (As to test of nuisance, *see* 96 I.C. 546=9 N.L. J. 136=1926 N. 474.) In India the right to air is more important than the right to light; damage will be awarded even when the injury is not detrimental to the existence and use of the property. 57 I.C. 706; 19 I.C. 843=6 S.L.R. 255.

WINDOWS AND SHUTTERS.—The right to open and shut windows and shutters into adjoining land can be acquired as an easement. The owner of such an easement is entitled to restrain the servient owner by an injunction from interfering with his rights by erecting a wall or building close to the boundaries. 45 I.C. 435=7 L.W. 332. The Court should issue a mandatory injunction directing defendant to lower the roof of his house so as to enable plaintiff to shut and open the window freely. (*Ibid.*) As to when injunction will be granted in respect of prospective damage to water-supply, *see* 54 M. 793=1931 M. 284=61 M.L.J. 563.

VENTILATORS.—When by the closing of certain ventilators in a house a thorough draft for the house and effective ventilators are not allowed, the injury is so serious that the house will be substantially useless. 19 I.C. 843=6 S.L.R. 255.

RIGHT OF PRIVACY.—To succeed in an action to restrain any interference with a right of privacy, a plaintiff must show not only that such a right of privacy exists by custom in the district in which the premises are situated but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. A contention that the opening of windows overlooking other premises cannot be restrained if such other premises are already overlooked from any parts of adjoining or neighbouring premises such as roofs, is not sound. 1935 A.L.J. 432=1935 A.W.R. 322.

COMPOUND WALL.—Where the raising of a compound wall makes the habitation of a neighbour's room uncomfortable, so much of the wall as produced this effect will be removed. 57 I.C. 706. *See also* 1926 M.W. N. 195=51 M.L.J. 804.

RIGHT OF WAY.—It is only the inconvenience to the public that justifies restriction of right of way. 2 L.L.J. 499.

WATER RIGHTS.—An occupier of abutting lands cannot be restrained in his exercise of his natural rights, simply because he becomes a lessee of other lands not abutting. 24 I.C. 685=1914 M.W.N. 481. Where the water of a stream has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution in supply is caused. 24 I.C. 685. The actual and not a mere threatened use of the water flowing through a natural stream to irrigate lands other than those abutting on the stream gives a right to sue. 24 I.C. 685.

Sec. 36.—Under this section the dominant owner cannot himself abate a wrongful obstruction of an easement. 138 I.C. 38= 1932 N. 83. Dominant owner himself abating nuisance—If offence under Penal Code, S. 426. *See* 29 Bom.L.R. 484.

Sec. 37.—Land acquired under Land Acquisition Act is taken free of easement rights over the same. *See* 14 C. 423; 6 B. L.R. (App.) 74.

Extinction by dissolution of right of servient owner.

person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.

Illustrations.

(*a*) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B's* interest on Sultanpur ends, and with it the easement is extinguished.

(*b*) *A*, in 1860, let Sultanpur to *B* for thirty years from the date of the lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. *B's* interest in Sultanpur then ends, and with it *C's* easement.

(*c*) *A* and *B*, tenants of *C*, have permanent transferable interests in their respective holdings. *A* imposes on his holding an easement to draw water from a tank for the purpose of irrigating *B's* land. *B* enjoys the easement for twenty years. Then *A's* rent falls into arrear and his interest is sold. *B's* easement is extinguished.

(*d*) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the land in favour of *C* in accordance with the provisions of section ten. The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority :

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(*a*) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(*b*) *A* grants *B* an easement over *A's* land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(*c*) *A*, having the right to discharge his eavesdroppings into *B's* yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A's* easement is extinguished to the extent of the interference.

NOTES.

Sec. 38.—An agreement to build a common wall with holes indicating permission to end the rafters of the next storey which may be constructed does not imply consent to close ventilators by building such next storey. 1923 L. 249. Permanent alteration in the dominant heritage must be such "as to show that the dominant owner intended to cease to enjoy" the easement in future, and unless such an intention is established, the dominant owner cannot be disentitled to the easement on the ground of non-user. 25 I.C. 383. An agreement by one of several co-owners of a dominant tenement to effect a release of an easement is not effectual against the other co-owners. 19 I.C. 908 =6 S.L.R. 265. On this section, *see also* 35 C. 889; 26 B. 374; 7 I.C. 813; 8 M.L.T. 292.

Sec. 38, Expl. II.—Where the proprietor of an estate comprising a tank owned an easement of storing water and inundating the lands near by, the mere fact that the predecessors of the defendant in charge of the estate did not think it profitable to repair the tank bund and store water for over 30 years would not amount to an abandonment or implied release of the easement, so as to preclude the defendant from repairing the tank and storing water. 1931 M. 561 (2) =60 M.L.J. 662.

(*d*) *A*, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) *A*, having a projecting roof by means of which he enjoys an easement to discharge eaves-droppings on *B's* land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C's* land. The easement is impliedly released.

Extinction by revocation.

39. An easement is extinguished when the servient owner in exercise of a power reserved in this behalf, revokes the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition, that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants *B* a field inaccessible except by passing over *A's* adjoining land. *B* afterwards purchases a part of that land over which he can pass to his field. The right of way over *A's* land which *B* had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

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NOTES.

Sec. 39.—Where a person grants an easement of a right of way over his land to another and expressly reserves to himself the right to revoke it under certain conditions within a definite period and on payment of a particular amount, it is a reservation made for the beneficial enjoyment of his land. It is in the nature of covenant running with the land and is capable of assignment, and a transferee of the land could enforce it. 1939 N.L.J. 27=1939 Nag. 65.

Sec. 41.—*Held*, that an easement which is once extinguished cannot be revived by any act on the part of the dominant owner. 1930 M.W.N. 120.

Sec. 42.—*See also* notes under S. 13 *supra*. An easement which ceases to be beneficial to the dominant owner might become extinguished. 50 I.C. 756. (33 A. 461, Ref.)

Sec. 43.—Where an additional burden alleged to have been imposed on the servient tenement could be reduced without difficulty to its original limit by the construction or alteration of a structure, the easement is not extinguished. 44 A. 343=20 A.L.J. 202=1922 A. 28. An easement of light and air for windows is not extinguished on demolition of a wall which is re-built without delay, and practically with same dimensions. 24 Bom.L.R. 83=46 B. 448=1922 B. 3; 131 I.C. 429=1931 N. 80 (20 W.R. 185, Diss.; 7 C. 145; 33 M. 327, Ref.) *See also* 1937 Lah. 839 (Replacing of windows—Increase of burden). The owner of an easement is precluded from increasing his right on the alteration of his dominant tenement. In a case where by change of height, eaves discharge water with increased force, it is held that an additional burden is put upon the plaintiff's land. 32 C.L.J. 27=58 I.C. 854=24 C.W.N. 896 (Burden of proof that no additional burden is imposed lies on dominant owner). An owner of the dominant tenement had a right to drop water from his eaves at a distance of seven feet height. He increased the height three times and allowed water to drop through pipes. *Held*, that his easement was extinguished by the increase of burden. 58 I.C. 967. Dominant owner increasing height of water spout dropping water on servient-tenement by four feet—Easement is not destroyed. 102 I.C. 447=1927 L. 492. On this section, *see also* 7 C. 453.

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement :

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage ; and the provisions of section fourteen apply to such way.

Illustrations.

(*a*) *A* grants to *B*, as the owner of a certain house, a right to fish in a river running through *A's* land. The river changes its course permanently and runs through *C's* land. *B's* easement is extinguished.

(*b*) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A's* right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a seacliff. The road is washed away by a permanent encroachment of the sea. *A's* easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

NOTES.

Sec. 45.—*See* 7 Bom.L.R. 352. Even if a door and a part of the house have collapsed, a right of easement already acquired by the plaintiff to use the adjoining lane, as a passage to the site of his house, cannot be extinguished. 27 N.L.R. 213=1931 N. 189. The plaintiff obtained a decree declaring that his sweeper was at liberty to go through the lane on the defendant's land in order to clear the latrine situated in the plaintiff's premises. The privy was subsequently removed by orders of the Municipality, to a different place on the plaintiff's land and the defendant contended that the plaintiff's easement was extinguished by the fact, that the dominant heritage had been destroyed and rebuilt on a different site. *Held,* (*i*) that dominant heritage was not the privy, but the plaintiff's house within which it was enclosed; (*ii*) so the rebuilding of the privy had not the effect of extinguishing the easement under S. 45; (*iii*) the case was governed by S. 23 and as there was no additional burden imposed on the servient heritage and the sweeper entered and left the defendant's land at the same point as before, the rebuilding of the privy did not make the prior decree incapable of execution. 33 Bom.L.R. 1114=1931 B. 490.

Sec. 46.—As to extinction of easements by merger, *see* 1926 C. 92. The unity of the dominant and servient estates in the same person extinguished the easement appurtenant to the dominant estate. But unity of title will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and other circumstances. If there has been unity of possession merely and not unity of seisin for estates in fee simple, an easement which has been thereby suspended will revive on severance of the union, but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive unless they are recreated on severance of the former dominant and servient estates. 50 C. 356=36 C.L.J. 161=1923 C. 8. *See also* A.W.N. (1887) 260. Where the ownership of the two estates is not co-extensive and equal in validity—the dominant tenement being held for a term of years only and the servient tenement in full right of ownership—the acquisition of a right of way is not extinguished but is only suspended by unity of possession of the dominant and servient tenements. (50 Cal. 356, Rel. on). 1939 Rang 421=1940 Rang.L.R. 93. *See also* 1941 Cal. 289. Right of ownership and easement are incompatible. A.W.N. (1883) 68. Before there can be any extinguishment of an easement, there must be a merger of the servient and dominant tenements so as to result in the single ownership of both. Where the owner of the dominant tenement acquires the right of a co-sharer in the servient tenement, the ownership of the two tenements does not merge into one and therefore there is no extinguishment but merely a suspension of the easement (right of way) which can revive after a partition decree. 1941 Cal. 289.

Illustrations.

(*a*) *A*, as the owner of a house, has a right of way over *B's* field. *A* mortgages his house and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage : the easement is not extinguished, except in the case illustrated in section forty-one.

(*c*) The servient owner acquires the dominant heritage in connection with a third person : the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages : the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage : the easement is extinguished.

(*f*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(*g*) *A* has a right of way over *B's* road. *B* dedicates the road to the public. *A's* right of way is not extinguished.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner ; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner :

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877,[1] a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its

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LEG. REF.

[1] *See* now the Indian Registration Act (XVI of 1908).

NOTES.

Sec. 47: PRINCIPLE OF SECTION.—*See* 45 B. 80=57 I.C. 143=22 Bom.L.R. 415. An easement is not extinguished where its user is suspended in pursuance of a contract between the dominant and the servient owners. A person who purchases the servient tenement in an execution sale with knowledge of the easement is bound thereby. 45 I.C. 618=34 P.L.R. 1918. A right of easement acquired by the plaintiff to use the adjoining lane as a passage to his door is not extinguished by temporary non-user not amounting to abandonment. Where the door to which he had a right of way collapsed a few years before but was re-opened before the date of obstruction by the defendant, the plaintiff has a right of action. 134 I. C. 673=1931 N. 189.

WATER.—Flowing of water continuously through a rill, cuttai and another water-course may form a natural stream in which easement rights may be acquired as against Government. 31 I.C. 982. If the Government wished to claim right to water flowing through pattah land they can do it only when classifying the bed separately as poramboke; otherwise the ryot can retain it as his property. 31 I.C. 982. Whether a prescriptive right to light and air is lost through abandonment, depends on the intention of the parties to be gathered from the circumstances and the interval of non-user. 49 I.C. 752. It is not necessary for the building to enjoy the light that it should be identical with that which acquired the right either in structure or the purposes for which it is to be used. 49 I.C. 752. On this section, *see also* 8 M.L.T. 292; 5 M.L.T. 216; 18 I.C. 85. An easement of light and air for windows is not extinguished on demolition of a wall which is re-built without delay. 24 Bom.L.R. 83=46 B. 448=1922 B. 3.

existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages *X* and *Z* and the intervening heritage *Y*. Before the twenty years expire, *A* exercises his right of way over *X*. His rights of way over *Y* and *Z* are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has an easement to draw water from *B's* well. As accessory thereto, he has a right of way over *B's* land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.

Suspension of easement.

49. An easement is supended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an eaesment be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment or suspension.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of *B's* stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. *A* then abandons his easement, and restores the stream to its ancient course. *B's* land is consequently flooded. *B* sues *A* for compensation for the damage caused by the flooding. It is proved that *A* gave *B* a month's

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NOTES.

Sec. 49.—Where the dominant and servient tenements become vested in the same person, the easement remains suspended for the time being; after the vesting ceases or discontinues, the easement becomes revived. 118 I.C. 225=1929 A. 862. On this section, *see also* 16 I.C. 365=1913 M.W.N. 95.

Sec. 50.—The owner of a servient tenement over which the dominant owner had acquired a right to discharge his water, cannot insist that the water should be continued to be so discharged. 46 I.C. 24. *See also* 2 C.L.R. 141. An easement exists only for the benefit of the dominant tenement and a servient owner gets no right to insist on its continuance or to sue for damages on its abandonment. 17 C.W.N. 1056=20 I.C. 815=18 C.L.J. 131. As to the natural right to collect and retain surface water, or to allow it to flow on naturally to the lower lands, *see* 4 P.L.T. 81=2 P. 110. The owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. 4 P.L.T. 81=2 P. 110. The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. (*Ibid.*)

notice of his intention to abandon the easement, and that such notice was sufficient to enable *B*, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Revival of easements.

51. An easement extinguished under section forty-five revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion, (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site ; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner has not to impose a grearer burden on the servient heritage.

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven.

Illustration.

A, as the absolute owner of field *Y*, has a right of way thither over *B's* field *Z*. *A* obtains from *B* a lease of *Z* for twenty years. The easement is suspended so long as *A* remains lessee of *Z*. But when *A* assigns the lease to *C*, or surrenders it to *B*, the right of way revives.

CHAPTER VI.

LICENSES.

" License " defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

NOTES.

Sec. 51.—[*See also* notes under S. 49.] When a dominant tenement is rebuilt, the dominant owner has no right to impose a greater burden on the servient tenement than the prescriptive quantity of the right enjoyed. 33 I.C. 615=9 S. L. R. 101. Blocking up an old window and building another of the same dimensions in another place is an imposition of a burden on the servient tenement, which was not existing till then. 33 I.C. 615. But the right of the dominant owner under the common law to free access of light and air through an ancient window is not lost by shifting the window backwards or forwards. 33 I.C. 615.

Sec. 52.—A licensee is a person without any title and has no interest in the land. 38 A. 178=14 A.L.J. 137. *See also* 132 I.C. 799=8 O.W.N. 714. Licence and easement distinguished. 7 Bom.L.R. 352; 23 B. 397; 4 M. H.C.R. 98; 16 M. 304; 8 Bom.L.R. 310 (Permission to use land as burial ground). The nomenclature used by the parties is not conclusive as to whether a particular transaction is a licence, lease or easement. 1933 A.L.J. 749=1933 A. 735 (F.B.); 16 M. 280 (Right to put up trap for elephants).

LICENCE OR LEASE.—Agreement to occupy portion of railway land for construction of petroleum installations signed by both parties—Restrictions on mode of enjoyment and against sub-letting—Agreement terminable by short notice—Nature of agreement. *See* 1933 A. 735=1933 A.L.J. 749 (F.B.). In deciding whether a document amounts to a lease or is only a licence, the recitals therein can never be conclusive; the Court has took to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties. 1933 A.L.J. 749=1933 A. 735 (F.B.). License, if transferable. *See* 84 I.C. 284=1924 A. 825. License may be implied from circumstances. *See* 1925 A. 203. Certain property was given by a person to a local body for the purposes of a school. The body was allowed to hold possession of the land so long as it was being used for the purpose of the school. There was however no transfer of ownership nor was there any evidence showing transfer of ownership, and there was also no relationship of landlord and tenant between the parties. *Held,* that the permission granted to the local body to hold the land and use it for the purposes of the school was in the nature of a licence. 186 I.C. 890=1940 Lah. 18. The use of land as a *Sehan* does not justify the making of a structure on it for the purpose of protecting cattle. **Where it is not established that the use of a *Sehan* was an easement of necessity or that an easement**

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Grant may be express or implied.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to *B*. *B* is entitled to go on the land and take away the trees.

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

NOTES.

had been acquired, it amounts to a mere license under S. 52. 1934 A. 836. A weighman in an old market allowed by Government to continue the same calling in the new market does not acquire any exclusive privilege and is only a licensee. 23 I.C. 922=12 A.L.J. 447. Validity of transfer by a holder of a license to build. 1 Luck. C. 238=103 I.C. 681=1927 O. 314. A licence having no interest in property cannot maintain a suit for possession. 103 I.C. 43=1927 A. 633. Licence to use privy as dwelling-house—If revocable. 51 B. 274=29 Bom.L.R. 78=1927 B. 115. As to whether a licence is revocable, *see also* 29 Bom.L.R. 312=100 I.C. 393=1927 B. 240.

DEMISE AND NOT MERELY LICENSE—GRANT OF EXCLUSIVE RIGHT OF OCCUPATION.—The effect of a deed which gives the holder an exclusive right of occupation of a shop, although subject to certain reservations and to a restriction of the purpose for which it may be used, amounts in law to a demise of the shop itself and not merely a licence. The main test in such cases is that of exclusive possession. 1933 A. 911. *See also* 1933 A. 735 (F.B.).

Secs. 52 and 56.—A licence is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents. So where, on the death of the original licensee, his heirs continue in occupation, they are on no greater footing than tenants at will. They are trespassers whose possession is adverse to the owner of the property. 54 M. 554=1931 M. 216=60 M.L.J. 709. *See also* 1941 Oudh 172.

Sec. 53.—*See* 7 B. 336.

Sec. 54.—A licence to live for generations must be presumed to permit all enjoyments of life of licensee without restriction. Eating meat or beef is such a reasonable enjoyment of life and it does not *per se* injure the rights of others. *Held,* that a licensee has a right to slaughter cows at his residence. 1930 A.L.J. 875=125 I.C. 14. Two companies engaged in cotton business owned adjoining lands. For many years they had a common agent. I appeared however that the common agent had with the best of motives allowed the defendant to erect superstructures on certain lands belonging to the plaintiff. In a suit by the plaintiff company to recover possession and for an injunction, *held,* that from the conduct of the parties extending for a long time it would be inferred that there was the grant of a valid licence in favour of the defendant company. *Held, also,* that the licence was irrevocable and that the licensor was only entitled to a fair rental of the premises which had been actually built upon. *Held, further,* that the defendant company could rely upon the principle in *Ramsden* v. *Dyson,* L.R. 1 H.L. 129, to the effect that the plaintiff having permitted the defendant to build upon the site, he was estopped from asserting his claim to the piece of land. 1930 B. 70=31 Bom.L.R. 1310. *See also* 136 I.C. 821=1932 A. 572. (Inference of grant or licence from conduct and acquiescence).

Sec. 56.—Validity of transfer by a holder of a licence to build. 1 Luck. C. 238=103 I.C. 681=1927 O. 314. As to transfer by one licensor, to his co-licensor, *see* 1927 A. 197. A transfer by a licensee in favour of a third person which contravenes the provisions of S. 56 makes the transferee who is not in possession a trespasser as against his transferor, a rank trespasser as against the original grantor who will at once have a right to eject the transferee. 1940 O.W.N. 1318=1941 Oudh 172.

HOUSE IN CITY ON SITE OF LANDLORD—TENANT'S OR LICENSEE'S RIGHT TO TRANSFER—PRESUMPTION.—In cases of houses built in cities on the land belonging to landlord,

Illustrations.

(*a*) *A* grants *B* a right to walk over *A's* field whenever he pleases. The right is not annexed to any immovable property of *B*. The right cannot be transferred.

(*b*) The Government grant *B* a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, *B's* servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

NOTES.

there can be no presumption that the tenants or licensees have no power of transfer. If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the license the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer or it was open to him to prove the existence of a custom prohibiting the right of transfer. So far as houses built by tenant in villages are concerned, the rights between the parties are different. A tenant building a house in a village site has only a right to occupy so long as the tenancy lasts or so long as he does not abandon the village. But the same principle cannot apply to houses built in a city. 1934 A.L.J. 728=1934 A. 336.

PRACTICE.—Before a licensor can call upon the Court to decide upon the rights of a licensee to transfer, the terms of the license must be placed before the Court by the licensor and then only it will be in a position to determine as to whether or not having regard to them the licensee had a right of transfer. 1934 A.L.J. 728=1934 A. 336.

Secs. 56 and 60.—In case of *riyayas* occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject the transferee of a *riyaya* he has to prove not only his ownership but must also prove the existence of custom or terms of the grant under which the house in dispute was built, which make the transfer thereof invalid, entitling him to recover possession of the site. 117 I.C. 365=13 R.C. 615=1929 A. 494. On this section, *see also* 54 M. 554, cited under S. 52.

Secs. 57 and 58.—Per *curiam*.—It is necessary that the legislature in India especially in view of conditions prevalent in Bombay should undertake legislation on the lines of the Housing of Working Classes Act of 1890 in England. 51 B. 274=101 I.C. 210=29 Bom.L.R. 78=1927 B. 115.

Sec. 59.—Enjoyment under a licence for a long time does not constitute adverse possession. 44 A. 726=20 A.L.J. 608=1923 A. 140 (1). S. 59 has no application to a case in which one of two joint licensors transfers his interest in the property with respect to which the licence has been granted in favour of his co-licensor. The transferee contemplated by the section must be a person who was not the licensor himself. 98 I.C. 814=1927 A. 197. Under S. 59 the transferee is not as such bound by the term of a licence granted by the vendor, such as, one permitting the use of the land as a wrestling ground. The transfer extinguishes the licence and the recital in the deed of transfer that the transferee should respect the licence has no legal effect. 7 O.W.N. 468=1930 O. 203. S. 59 cannot be interpreted so as to give the transferee a right of revocation of a licence which would not be exercisable by the transferor himself. 102 I.C. 26=1927 O. 206. The use of the words "as such" in S. 59 seems clearly to be intended to indicate that the transferee would not be in any worse position than the transferor. The result of the proviso is that if the grantor of the licence does not revoke it, it does not mean that the transferee cannot do so, but the section cannot be construed as giving the transferee any better rights than were possessed by his transferor much less to hold that the effect of the transfer is *ipso facto* to put an end to all previous licences. The rule laid down by S. 59 is not independent of that laid down by S. 60. Transferee held bound by licence previously granted by transferor. 132 I.C. 536=1931 O. 364. The transferee of a licensor cannot revoke a licence, when the licensee has effected a work of permanent character and incurred expenses. 37 A. 91=26 I.C. 445=13 A.L.J. 1. If the license has become irrevocable in the time of the licensor, the mere fact that he transfers his interest in the land would not extinguish the license. 149 I.C. 389=1934

License when revocable.

60. A license may be revoked by the grantor, unless—

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A.L.J. 698=1934 A. 517. *See also* 91 I.C. 1031=13 O.L.J. 170; 97 I.C. 337=1926 A. 714; 84 I.C. 264=1924 A. 750.

Secs. 59 and 60.—The rule laid down by S. 59 is not independent of that laid down by S. 60 and does not confer upon the transferee any higher rights than those possessed by the transferor. 1931 O. 364 =132 I.C. 536.

Sec. 60.—As the Easements Act is not in force in Bengal, decisions of the Bengal Courts are not binding authorities in provinces where the Easements Act is in force. 9 O.W.N. 986. S. 60 is inapplicable where the defendant's house was not built acting on the licence. 139 I.C. 365=1932 O. 264. The grantor of a licence is under an obligation to place the licensee in a position to enjoy the licence. 36 C.L.J. 271=1923 C. 49. Where a licence coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such licence. 30 I.C. 581=13 A.L.J. 886. *See also* 4 M.H.C.R. 98. An appropriation of the land licensed to any use inconsistent with the enjoyment of the licence works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. 72 I.C. 270=36 C.L.J. 271=1923 C. 49. A licence to catch elephants for consideration is not revocable, for it is a licence coupled with an interest. (*Ibid.*) Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. 36 C.L.J. 271=1923 C. 49. Building licence—Effect of revocation. 19 I.C. 853=19 C.L.J. 321. *See also* 3 A.L.J. 760; 29 A. 133; 34 I.C. 471=12 N.L.R. 75. A licensee permitted to build a house and reside therein is entitled to be indemnified if evicted by the licensor's successor. A bare license may be revoked at the grantor's will and on reasonable notice, but a license coupled with grant is irrevocable. 19 I.C. 853=19 C.L.J. 321; 22 N.L.R. 162. Where a site has been granted to an occupier for building a house, the case is governed in the absence of terms to the contrary by S. 60. 132 I.C. 565=1931 A.L.J. 649. Where a licence is granted to building houses on site and the licensee erects a work of a permanent nature, the license cannot be revoked. 106 I.C. 479=1927 A. 342. *See also* 1940 Lah. 509; 1937 A.L.J. 1297=1938 All. 32. S. 60 (*b*) of the Easements Act cannot be availed of by the licensee when there has been no acting on the licence in the execution of works by him; but if the licensee establishes that the conduct of the licensor has been such as to justify the legal inference that he had by plain implication contracted that the license would be perpetual, he can rely on the equitable doctrine and call upon the Court to intervene for his protection. The contract sought to be inferred does not mean that the real consensus of mind between the two parties must be inferred to have existed, but that the conduct of the parties has been such that equity will presume the existence of such a contract as a matter of plain implication. The onus of establishing such equity is on the licensee. 63 I.A. 140=160 I.C. 837=1936 P.C. 77=70 M.L.J. 190 (P.C.). The words *"acting upon the licence"* in S. 60 (*b*) of the Easements Act must mean acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a license" if he does work and incurs expenses upon his own property. Works done by the licence on his own land may be done without the knowledge of the licensor, and it is impossible to hold that the alleged licensor's land is bound in perpetuity (subject to S. 62) as the result of some works done by the alleged licensee on his own property, of which the former has been unaware. S. 60 is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee rights against him. 63 I.A. 140=160 I.C. 837=1936 P.C. 77=70 M.L.J. 194 (P.C.). Where a person who has given his land to the licensee for certain purpose has given him an undertaking that he would not claim the land so long as it was required for that purpose and on acting on that promise the licensee has erected works of permanent nature, the grantor of the licence is not entitled to recover the land even on payment of compensation because S. 60 does not recognize any such exception. 1940 Lah. 18. The principle of this section is also applicable to Berar. *See* 94 I.C. 923 =1926 N. 376. Section also applies to transferee of property. 97 I.C. 337=1926 A. 714. The principle of S. 60 (*b*) is that the licensee acting upon the license should execute work of a permanent character soon after the grant of a licence or within a reasonable time. It is a principle dictated by justice, equity and good conscience and does not require that in order to prevent revocation of the licence the work of a permanent character must be costly one. Nor does the section impose a duty upon the licensee who has already complied with the terms of the licence to maintain work of a permanent character up to any particular standard of repair. Where the licensee has carried out the terms of the license for building purposes and his incurred expenses in its execution the license (*a*) it is coupled with a transfer of property and such transfer is in force :

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

NOTES.

becomes irrevocable under S. 60 (*b*), Easements Act, and the licensee can be evicted from the premises only when the purpose of the licence is abandoned within the meaning of Cl. (*f*) of S. 62, in other words the licensee has actually abandoned the house whatever the state of repair might be. 1941 O.W.N. 1340. A licence cannot be revoked even when part only of a work of a permanent character has been executed by the licensee. 117 I.C. 224=1929 N. 141. If a person constructs a permanent building on a portion of the site belonging to another under an implied licence from him, the licence cannot be revoked and the licensee cannot be ejected from the building. The irrevocability of the licence in such a case applies to that portion of the site which is covered by the building and not to any other open portion of the site. 118 I.C. 676=1929 N. 269. Where a landlord permits a person wishing to settle on his land to erect a building meant for permanent residence, the fact that it was built with mud would not make it a temporary building. The words of a "permanent character" are used in S. 60 to distinguish it from works of a temporary nature. The question whether a particular work is of a temporary or permanent character is one of fact. 113 I.C. 757. *See also* 1930 B. 70; I.L.R. (1941) Lah. 413=43 P.L.R. 544. Residential house is a work of permanent character, though it has a tiled roof which has to be renewed from time to time. 9 O.W.N. 986 (28 A. 741 Foll.). So also erection of an upper wall at a cost of Rs. 25. 136 I.C. 821=1932 A. 572. Sinking a well and erecting compound wall can be considered to be works of a permanent character within the meaning of S. 60. 186 I.C. 890=1940 Lah. 18. It cannot be said that because the building has not been completed, therefore the work already executed is not of a permanent character. 132 I.C. 536=1931 O. 364. A licence to use the land of another, unless coupled with a transfer of the property, is revocable, subject to the right of the licensee for damages if revoked contrary to the terms of any express or implied contract. A mere licence if revocable at the will of the licensor unless it is coupled with a grant and in that case it will become a lease and would require compulsory registration. 120 I.C. 673 (1). Licence to use Railway siding—Contribution for expenses of upkeep by licensee—Licensee erecting structures on his land on basis of licence—Licensor cannot be permitted to revoke license. 31 Bom.L.R. 1331. *See also* 31 Bom.L.R. 1310. A licensor cannot be allowed to revoke the license on condition of his making compensation to the licensee for loss incurred by the revocation of the licence. 98 I.C. 814=1927 A. 197; 9 O.W.N. 986. Where the licensee has executed work of a permanent character, the license becomes irrevocable. To such a case S. 64 is inapplicable, and the grantor cannot revoke the license by paying compensation. 1933 A.L.J. 1422=1933 A. 842. Buildings of mud walls and thatched roof built for the purpose of school, which were in existence and kept under regular repair for about 30 years, were held to be a work of a permanent character. 102 I.C. 26=1927 O. 206. *See also* 97 I.C. 337=1926 A. 714; 1925 A. 203. Where having regard to the nature of the construction made probably after filling up a part of the ditch, the long period of its occupation, the dimensions of the house and the value of the structure, it was held that it was a work of a permanent character in executing which the defendant's ancestors incurred expenses. *Held,* it was not necessary for the defendant to show that a large sum of money had been actually spent in order to bring the case within the scope of the principle underlying S. 60. *Held, further,* that even a mud house or kacha house may be a work of a permanent character. 1934 A.L.J. 698=1934 A. 517. A licensee is entitled to damages for breach of any contract or for an improper revocation of his license in a proper case; the Court will allow revocation only on payment. 49 I.C. 811=1918 M. M.N. 772. Under the Act a licence is of a personal character not merely as regards the grantee, but also as regards the grantor. It ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. 18 N.L.R. 76=1922 N. 162. The heirs of the licensor may treat that licensee as a trespasser and eject him without notice of revocation. 18 N.L.R. 76. A licence coupled with a void grant is revocable save: (1) when the licensee entered into occupation and paid rent and (2) when the licensee acting on the licence has executed a work of permanent character and incurred expense in so doing. 34 I.C. 471=12 N.L.R. 75 [21 Ch. D. 3; (1901) 2 Ch. 591; 8 A. 60 Ref. to]. A licence cannot be revoked during licensee's lifetime when the licensee had made no permanent improvements. 48 I.C. 723. When plaintiff allowed defendant to execute on plaintiff's land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, *held,* that the agreement created a licence which could not be revoked at the instance of the plaintiff. 47 I.C. 166. A licensee in possession does not, like the tenant, by denying title of the grantor of the licence forfeit the licence and become

Revocation express or implied.

61. The revocation of a license may be express or implied.

Illustrations.

(*a*) *A*, the owner of a field, grants a license to *B* to use a path across it. *A*, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) *A* the owner of a field, grants a license to *B* to stack hay on the field. *A* lets or sells the field to *C*. The license is revoked.

License when deemed revoked.

62. A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled :

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

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liable to ejectment. 1923 A. 403. *See also* 1925 A. 203. A licence is revoked by the transfer of property by the licensor. (108 R. R. 942; 150 E. R. 1543, Foll.) 54 M. 554=1931 M. 216=60 M.L.J. 709.

TREES PLANTED—IF GO WITH LAND.—Trees planted under a licence do not go with the land and the person who planted the trees is entitled to cut and remove them; but he should restore the land in the condition in which it was before the trees were planted. The principle applicable to removal of buildings on another man's land would also apply to trees. 53 L.W. 230=1941 Mad. 379=(1941) 1 M.L.J. 161.

LICENSE TO RESIDE IN HOUSE—REVOCATION BY LANDLORD.—Where the tenants are mere licensees occupying the house as an appurtenant to the holding, the license to reside must be deemed to be revoked under S. 62 where the license is granted for a specific purpose and the purpose is abandoned or has become impracticable. 8 L. 509=10 O.W.N. 398=1933 O. 302. Where certain persons were permitted only to reside in the rooms, any additions made by them would not be governed by the grant and hence S. 60 of the Act will not come into operation. 176 I.C. 135=1938 A.L.J. 465=1938 All. 342.

A PERSON WHO HAS GOT LETTERS OF ADMINISTRATION.—To the estate of the deceased must be regarded as taking the place of that deceased. Therefore any person who on his own admission has entered upon the premises originally with leave and license of the deceased must vacate the premises if the administrator so desires. For this purpose it is enough that the administrator has given some kind of notice. 151 I.C. 971=1934 R. 291.

Secs. 60 and 62: LICENSEE PUTTING UP BUILDING OF PERMANENT CHARACTER—REVOCATION OF LICENSE.—Even though the Easements Act does not expressly apply to cases of licences before the coming into force of the Act, the principles underlying Ch. 6 of the Act, being in consonance with justice, equity and good conscience, may well be applied. Hence, when an owner of land gives permission to another person to put up a building of a permanent character and he incurs expenses in the execution of such work, the licensor is by necessary implication estopped from revoking his permission so as to prejudice the licensee whose position has been compromised in consequence. It would be inequitable, unjust and unfair to allow a licensor to order that the licensee should forthwith remove the work of a permanent character which he has put up after incurring expenditure. In such an event, the transaction ceases to be a mere licence revocable at will, but may in certain circumstances amount to a license coupled with a transfer of interest or, at any rate a case where the licensee acting upon the license has executed a work of a permanent character and has incurred expenses in the execution so as to make the license irrevocable; so long as the construction subsists, the right to revoke it would be in abeyance. 1934 A.L.J. 698=1934 A. 517.

Sec. 61.—Where it was with the plaintiff's permission that the defendant committee put up a thatch on the chabutra adjoining a mosque to afford accommodation for the growing needs of the school within one portion of the mosque. *Held,* that the position of the committee was no better than that of a licensee and that the defendant's attempt to build on the "chabutra," the plaintiff's protest, and the denial of his right followed by the institution of the suit, were circumstances which gave rise to the inference that the plaintiff revoked the license originally granted by him. 1934 A. 732.

Sec. 62.—*See* 21 A.W.N. 175.

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable :

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

THE INDIAN ELECTRICITY ACT (IX OF 1910).

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons explain the necessity for the passing of the Act:—

"When the Indian Electricity Act, 1903, was passed it was clearly recognised to be a somewhat tentative measure, and it was anticipated that amending legislation would be called for at an early date. Having regard to the experience gained in the practical working of the Act, the Government of India in 1907 came to the conclusion that the time had arrived for undertaking this amending legislation, and they refused various difficulties which had arisen in its working to a Committee on which electro-technical and commercial interests were represented.

The Act as at present framed vests its administration in Local Governments, with whom rests the power to grant licenses; but the authority or the previous sanction of the Governor-General in Council is required in regard to so many matters that the practical result has been a dual administration. In the case of cantonments and similar "places in the occupation of Government for naval or military purposes" the administration of the Act is by section 40 placed in the hands of the Governor-General in Council, but these places frequently are situated within larger areas, in respect to which the Local Government is empowered to grant licences, with the result that separate, and not necessarily consistent, licences have been granted by the Governor-General in Council and the Local Government, respectively, to the same licensee, for the same purpose, in one and the same place. The practical effect of the present system has been delay, as it has

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Sec. 62 (f).—*See* 185 I.C. 467.

Sec. 62 (h).—*See* 1937 Nag. 338.

Sec. 63.—A licensee whose licence is revocable is entitled to reasonable notice of revocation. When the exercise of the rights conferred by the licence involves nothing beyond, it may be revoked at will. But where the exercise of the rights has involved the licensee in obligations in other directions, which the immediate determination of the licence would disable him from fulfilling, the licence can only be determined after notice sufficient, in point of time, for the making of substituted arrangements. 61 M.L.J. 958 (P.C.).

Secs. 63 and 64.—In the absence of anything showing the restriction as to the method of building by a licensee of a land set for building purposes, there is no warrant to hold that the licence was granted to build in a particular manner. 18 A.L.J. 781=58 I.C. 410. *See also* Bom. P. J. (1892) 123. A suit for ejectment of a licensee is maintainable without notice to quit even though the licensee has erected huts on the land. 27 C.L.J. 523=45 I.C. 317. *See also* 136 I.C. 821.

Sec. 64.—Section applies to a case where there is not a work of a permanent character. 136 I.C. 821=1932 A. 572. *See also* 1933 A.L.J. 1422=146 I.C. 948=1933 A. 842.

hitherto been virtually impossible for a company to obtain a licence under two or three years. Delays of this nature are obviously most detrimental to the attraction of capital for the development of the resources of the country as the financial position may, and in fact frequently does, change completely between the date of the application and the granting of the licence.

Under the Bill as now drafted the general administration of the Act and, subject to the control of the Governor-General in Council, the granting of all licenses is left in the hands of the Local Government. The rule-making power, and the delegation of the powers of the Telegraph authority to licensees, are reserved to the Governor-General in Council.

Among the more important modifications in the Bill are the following:—

(*i*) The existing provision making licences compulsory has been taken out, the question of supply to the public without licence being otherwise dealt with. It is by no means certain that licences are either necessary or desirable in the case of industrial companies of certain classes.

(*ii*) Provision is made for the grant of licences for "bulk supply", that is to say to meet cases where the applicant company proposes to generate energy and supply it in large quantities to distributors, who would retail it under separate licence to small consumers.

(*iii*) The amendment of licences has been provided for. At present it is necessary to revoke a licence and grant a fresh one in order to effect this object.

(*iv*) The question of compulsory purchase has been dealt with, in regard both to the splitting up of undertaking and to those cases where purchase may be impracticable. The Act provides for the modification, but not for the omission from a licence, of the purchase clauses. But these clauses, conceived as they are in the interests of the local authority concerned in a small area, are entirely out of place, and in Great Britain are regularly omitted, in the case of undertakings covering large areas in which various local authorities intervene. It is proposed therefore to modify the provision.

(*v*) Many difficulties have arisen owing to the hard and fast limits of the area of supply over which a licence operates, consumers just outside the boundary being debarred from participation in the benefits conferred by the public supply. A new section is proposed to deal with the matter and remove obstacles which are likely to impose quite unnecessary hardships on individuals.

(*vi*) It is proposed to amend the provisions of Part III of the Act so as to make them applicable to mines and binding on the Crown. As regards railways and tramways, the proviso to sub-section (1) of section 3 in Part II and the first proviso to sub-section (1) of section 31 in Part III of the Act as it stands lay it down that nothing in these parts respectively relating to the supply or use of energy shall apply to any railway or tramway subject to the provisions of the Indian Railways Act of 1890. The extent to which it is proposed to modify the latter of these provisions is explained in the Notes on Clauses (omitted) while it is proposed, as already mentioned, to repeal the former.

(*vii*) A slight amendment of the Land Acquisition Act, 1894, has been proposed with a view to facilitating its application to electrical works.

The examination of the provisions of the Act has brought to light many minor defects of substance or arrangement which it is desirable to correct and the opportunity has therefore been taken to repeal and re-enact the Act with the necessary modifications."

REPEALS AND AMENDMENTS.

S. 1 am., A.O., 1937.
S. 2 am., Act I of 1922.
S. 3 am., Act XXXVIII of 1920; Act XXXVII of 1925; A.O., 1937.
Ss. 4, 5, 6, 7, 8 and 9 am., A.O., 1937.
S. 10 am., Act XXXVIII of 1920; A.O., 1937.
Ss. 11, 12, 13 and 15 am., A.O., 1937.
S. 17 am., Act I of 1922.
S. 18 am., Act I of 1922; A.O., 1937.
S. 19-A inserted, Act I of 1922.
Ss. 20, 21 and 23 am., Act I of 1922; A.O., 1937.
S. 24 am., Act I of 1922.
Ss. 26, 27 and 28 am., Act I of 1922; A.O., 1937.
S. 29 am., A.O., 1937.
S. 29-A inserted, Act XL of 1923.
S. 30 am., Act I of 1922; A.O., 1937.
S. 32 am., Act XXXVIII of 1920; A.O., 1937.
S. 33 am., Act I of 1922; A.O., 1937.
S. 34 am., A.O., 1937.
Ss. 35 and 36 am., Act I of 1922; A.O., 1937.
S. 36-A inserted, Act X of 1937; am., A.O., 1937.
S. 37 am., Act I of 1922; Act X of 1937.
S. 38 am., Act X of 1937.
S. 44 am., Act I of 1922.
Ss. 49, 51 and 52 am., A.O., 1937.
S. 52 am., Acts X and XXXII of 1940.
Ss. 53 and 55 am., Act I of 1922; A.O., 1937.
S. 57 am., A.O., 1937.
Sch. am., Act I of 1922; A.O., 1937.

CONTENTS.

PART I.
PRELIMINARY.

SECTIONS.
1. Short title, extent and commencement.
2. Definitions.

PART II.
SUPPLY OF ENERGY.
Licenses.

3. Grant of licenses.
4. Revocation or amendment of licenses.
5. Provisions where license of licensee, not being a local authority is revoked.
6. Provisions where license of local authority is revoked.
7. Purchase of undertaking.
8. Provisions where no purchase and license revoked with consent of licensee.
9. Licensee not to purchase, or associate himself with, other licensed undertakings or transfer his undertaking.
10. General power for Government to vary terms of purchase.
11. Annual accounts of licensee.

Works.

12. Provisions as to the opening and breaking up of streets, railways and tramways.
13. Notice of new works.
14. Alteration of pipes or wires.
15. Laying of electric supply-lines or other works near sewers, pipes or other electric supply-lines or works.
16. Streets, railways, tramways, sewers, drains or tunnels broken up to be reinstated without delay.
17. Notice to telegraph-authority.
18. Aerial lines.
19. Compensation for damage.

Supply.

19-A. Point where supply is delivered.
20. Power for licensee to enter premises and to remove fittings or other apparatus of licensee.
21. Restrictions on licensee's controlling or interfering with use of energy.
22. Obligation on licensee to supply energy.
23. Charges for energy to be made without undue preference.
24. Discontinuance of supply to consumer neglecting to pay charge.
25. Exemption of electric supply-lines or other apparatus from attachment in certain cases.
26. Meters.
27. Supply of energy outside area of supply.

PART III.
SUPPLY, TRANSMISSION AND USE OF ENERGY BY NON-LICENSEES.

28. Sanction required by non-licensees in certain cases.
29. Power for non-licensees to break up streets.
29-A. Application of section 18 to aerial lines maintained by railways.
30. Control of transmission and use of energy.

PART IV.
GENERAL.
Protective clauses.

31. Protection of railways and canals, docks, wharves and piers.
32. Protection of telegraphic, telephonic and electric signalling lines.
33. Notice of accidents and inquiries.

SECTIONS.
34. Prohibition of connection with earth, and power for Government to interfere in certain cases of default.

Administration and Rules.

35. Advisory Boards.
36. Appointment of Electric Inspectors.
36-A. Central Electricity Board.
37. Power of Board to make rules.
38. Further provisions respecting rules.

Criminal Offences and Procedure.

39. Theft of energy.
40. Penalty for maliciously wasting energy or injuring works.
41. Penalty for unauthorised supply of energy by non-licensees.
42. Penalty for illegal or defective supply or for non-compliance with order.
43. Penalty for illegal transmission or use of energy.
44. Penalty for interference with meters or licensee's works and for improper use of energy.
45. Penalty for extinguishing public lamps.
46. Penalty for negligently wasting energy or injuring works.
47. Penalty for offences not otherwise provided for.
48. Penalties not to affect other liabilities.
49. Penalties where works belong to Government.
50. Institution of prosecutions.

Supplementary.

51. Exercise in certain cases of powers of telegraph-authority.
52. Arbitration.
53. Service of notices, orders or documents.
54. Recovery of sums recoverable under certain provisions of Act.
55. Delegation of certain functions of Provincial Government to Electric Inspectors.
56. Protection for acts done in good faith.
57. Amendment of the Land Acquisition Act, 1894.
58. Repeals and savings.

THE SCHEDULE.
PROVISIONS TO BE DEEMED TO BE INCORPORATED WITH, AND TO FORM PART OF, EVERY LICENSE GRANTED UNDER PART II SO FAR AS NOT ADDED TO, VARIED OR EXCEPTED BY THE LICENSE.
Security and accounts.

I. Security for execution of works of licensee not being local authority.
II. Audit of accounts of licensee not being local authority.
III. Separate accounts.

Compulsory works and supply.

IV. Execution of work after commencement of license.
V. Provisions as to laying down of further distributing mains.
VI. Requisition for supply to owners or occupiers in vicinity.
VII. Further provisions as to laying of service lines.
VIII. Supply for public lamps.

Supply by bulk-licensees.

IX. Special provisions applying to supply by bulk-licensees.

Charges.
X. Methods of charging.
XI. Maximum charges.
XI-A. Minimum charges.
XII. Charge for supply for public lamps.
Testing and Inspection.
XIII. Licensee to establish testing stations and keep instruments for testing.
XIV. Facilities for testing.
XV. Testing of works.
Plans.
XVI. Plan of area of supply to be made and kept open for inspection.
Additional notice of certain works.
XVII. Notice to Electric Inspector.

THE INDIAN ELECTRICITY ACT (IX OF 1910).[1]

[18*th March*, 1910.

An Act to amend the law relating to the supply and use of electrical energy.

WHEREAS it is expedient to amend the law relating to the supply and use of electrical energy; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN ELECTRICITY ACT, 1910.

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Sonthal Parganas; and

(3) It shall come into force on such date[2] as the Central Government may, by notification in the Official Gazette, direct in this behalf.

Definitions.

2. In this Act, expressions defined in the Indian Telegraph Act, 1885, have the meanings assigned to them in that Act, and, unless there is anything repugnant in the subject or context,—

(*a*) "aerial line" means any electric supply-line which is placed above ground and in the open air:

(*b*) "area of supply" means the area within which alone a licensee is for the time being authorized by his license to supply energy:

(*c*) "consumer" means any person who is supplied with energy by a licensee, or whose premises are for the time being connected for the purposes of a supply of energy with the works of a licensee:

(*d*) "daily fine" means a fine for each day on which an offence is continued after conviction therefor:

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1909, Pt. V, p. 87; for Report of Select Committee, *see ibid.*, 1910, Pt. V, p. 39; and for Proceedings in Council, *see ibid.*, Pt. VI, p. 152 and *ibid*, 1910, Pt. VI, Pp. 12, 157 and 275 dated 5th February, 1910, 19th March, 1910 and 9th 1910, respectively. April,

[2] The Act was brought into force on the 1st January, 1911, *see* Gazette of India, 1910, Pt. I, p. 1236.

NOTES.

Sec. 2 (c): 'CONSUMER', MEANING OF.—In order to hold that a person is a "*consumer*" as defined by S. 2 (*c*) of the Electricity Act, it would *prima facie* be enough to prove either that energy was supplied for the use of that person, or that that person was the owner or occupier of premises connected up with the licensee's electric system. If either of these is proved that person is a consumer under R. 106 of the rule. 172 I.C. 940=39 Cr.L.J. 206=18 Pat.L.T. 986=1938 Pat. 15. Where the registered consumer and the person supplied with the energy is the proprietor of a company, the manager of the company cannot be held to be a "consumer". The premises of the company are not the premises of the manager. The fact that the manager receives the electric bills, signs them and pays the bills cannot make him a consumer. 1938 Pat. 243=1938 P.W.N. 182=19 Pat.L.T. 141. Where a consumer intended to substitute a motor of smaller horse-power in the place of one with a higher horse power and wrote to the U.P. Electric Supply Co. about it and asked them to make the necessary examination, it was held that the company was not entitled, under either Para. 9 (2) or Para. 11 of the conditions of supply to demand a testing fee for that purpose. 1939 A.W.R. (H.C.) 417=1939 All. 498.

(*e*) “distributing main” means the portion of any main with which a service-line is, or is intended to be, immediately connected :

(*f*) “electric supply line” means a wire, conductor or other means used for conveying, transmitting or distributing energy together with any casing, coating, covering, tube, pipe or insulator enclosing, surrounding or supporting the same or any part thereof, or any apparatus connected therewith for the purpose of so conveying, transmitting or distributing, such energy :

(*g*) “energy” means electrical energy when generated, transmitted, supplied, or used for any purpose except the transmission of a message :

(*h*) “licensee” means any person licensed under Part II to supply energy :

(*i*) “main” means any electric supply-line through which energy is, or is intended to be, supplied by a licensee to the public :

(*j*) “prescribed” means prescribed by rules made under this Act :

(*k*) “public lamp” means an electric lamp used for the lighting of any street :

[1][(*l*) “service-line” means any electric supply-line through which energy is, or is intended to be, supplied by a licensee—

(i) to a single consumer either from a distributing main or immediately from the licensee's premises, or

(ii) from a distributing main to a group of consumers on the same premises or on adjoining premises supplied from the same point of the distributing main]:

(*m*) “street” includes any way, road, lane, square, court, alley, passage or open space, whether a thoroughfare or not, over which the public have a right of way, and also the roadway and footway over any public bridge or causeway : and

(*n*) “works” includes electric supply-lines and any buildings, machinery or apparatus required to supply energy and to carry into effect the objects of a license granted under Part II.

PART II.

SUPPLY OF ENERGY.

Licenses.

Grant of licenses.

3. (1) The Provincial Government may, on application made in the prescribed form and on payment of the prescribed fee (if any), grant to any person a license to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy,—

LEG. REF.

[1] Substituted by S. 2 of Act I of 1922.

NOTES.

Sec. 2 (n).—“*Works*” include electric supply lines. I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=1939 Bom. 480.

Secs. 3, 21, 22 and 23.—A licence given by the Local Government to a person under this Act confers the rights on the licensee to supply electric energy in a specified area. Certain statutory powers and duties are conferred and imposed on the licensee. These powers are given for the purpose of enabling licensee, who undertakes a public undertaking, to construct his work, his plant, service mains, etc.; and to maintain them; and certain duties are also imposed on him for the safety of the public or individuals. 63 Cal. 1047=40 C.W.N. 789=1936 Cal. 265. The undertaking being for public benefit, a duty is imposed on the licensee to supply energy to any person who wants to take a supply of energy subject to certain conditions laid down either in the Act or in the Schedule which is incorporated in the licence, and subject to any addition or modification which the Local Government may make. (*Ibid.*) The licensee cannot show undue preference to any particular consumer in the matter of rates; subject to this he is empowered to regulate his relations by agreement with his consumers, but even here there are restrictions imposed. He cannot in his agreement with his consumers insert any condition whatever, but only such conditions as are consistent with the Act or his license and to which previous sanction of the Local Government had been obtained. Subject to these restrictions, the legislature has intended the rights between a licensee and a consumer to be regulated by contract. (*Ibid.*)

(*a*) where the energy to be supplied is to be generated outside such area, from a generating station situated outside such area to the boundary of such area, or

(*b*) where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area.

(2) In respect of every such license and the grant thereof the following provisions shall have effect, namely :—

(*a*) any person applying for a license under this Part shall publish a notice of his application in the prescribed manner and with the prescribed particulars, and the license shall not be granted—

(i) until all objections received by the Provincial Government with reference thereto have been considered by it :

Provided that no objection shall be so considered unless it is received before the expiration of three months from the date of the first publication of such notice as aforesaid ; and

(ii) until, in the case of an application for a license for an area including the whole or any part of any cantonment, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for naval or military purposes, the Provincial Government has ascertained that there is no objection to the grant of the license on the part of the [1][Engineer-in-Chief, Army Headquarters, India] ;

(*b*) where an objection is received from any local authority concerned, the Provincial Government shall, if in its opinion the objection is insufficient, record in writing and communicate to such local authority its reasons for such opinion ;

(*c*) no application for a license under this Part shall be made by any local authority except in pursuance of a resolution passed at a meeting of such authority held after one month's previous notice of the same and of the purpose thereof has been given in the manner in which notices of meetings of such local authority are usually given ;

(*d*) a license under this Part—

(i) may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and as to the limits of price to be charged in respect of the supply of energy, and generally as to such matters as the Provincial Government may think fit ; and

(ii) save in cases in which under section 10, clause (*b*) the provisions of sections 5 and 7, or either of them, have been declared not to apply, every such license shall declare whether any generating station to be used in connection with the undertaking shall or shall not form part of the undertaking for the purpose of purchase under section 5 or section 7 ;

(*e*) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose ;

(*f*) the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every license granted under this Part, save in so far as they are expressly added to, varied or excepted by the license, and shall, subject to any such additions, variations or exceptions which the Provincial Government is hereby empowered to make, apply to the undertaking authorised by the license :

Provided that, where a license is granted in accordance with the provisions of clause IX of the Schedule for the supply of energy to other licensees for dis-

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LEG. REF.

[1] These words were substituted for the words "Director of Military Works" by S. 2 and Sch. I Act XXXVII of 1925.

tribution by them, then, in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the license.

[1][* * * * * *]

Revocation or amendment of licenses.

4. (1) The Provincial Government may, if in its opinion the public interest so requires, revoke a license, in any of the following cases, namely :—

(*a*) where the licensee, in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act ;

(*b*) where the licensee breaks any of the terms or conditions of his license the breach of which is expressly declared by such license to render it liable to revocation ;

(*c*) where the licensee fails, within the period fixed in this behalf by his license or any longer period which the Provincial Government may substitute therefor by order under sub-section (3), clause (*b*), and before exercising any of the powers conferred on him thereby in relation to the execution of works,—

(i) to show, to the satisfaction of the Provincial Government that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his license, or

(ii) to make the deposit or furnish the security required by his license ;

(*d*) where the licensee is, in the opinion of the Provincial Government, unable, by reason of his insolvency, fully and efficiently to discharge the duties and obligations imposed on him by his license.

(2) Where the Provincial Government might, under sub-section (1), revoke a license, it may, instead of revoking the license, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose, and any further terms or conditions so imposed shall be binding upon, and be observed by, the licensee, and shall be of like force and effect as if they were contained in the license.

(3) Where in its opinion the public interest so permits, the Provincial Government may, on the application or with the consent of the licensee, and if the licensee is not a local authority, after consulting the local authority (if any) concerned,—

(*a*) revoke a license as to the whole or any part of the area of supply upon such terms and conditions as it thinks fit, or

(*b*) make such alterations or amendments in the terms and conditions of a license, including the provisions specified in section 3, sub-section (2), clause (*f*), as it thinks fit.

Provisions where license of licensee, not being a local authority, is revoked.

5. Where the Provincial Government revokes, under section 4, sub-section (1), the license of a licensee, not being a local authority, the following provisions shall have effect, namely :—

(*a*) the Provincial Government shall service a notice of the revocation upon the licensee, and, where the whole of the area of supply is included in the area for which a single local authority is constituted, upon that local authority also, and shall in the notice fix a date on which the revocation shall take effect ; and on and with effect from that date all the powers and liabilities of the licensee under this Act shall absolutely cease and determine ;

(*b*) where a notice has been served on a local authority under clause (*a*), the local authority may, within three months after the service of the notice, and with the written consent of the Provincial Government by notice in writing, require the licensee to sell, and thereupon the licensee shall sell, the undertaking to the local authority on payment of the value of all lands, buildings, works, materials

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LEG. REF.

[1] Sub-S. (3) was omitted by S. 2 and Sch. I, Act XXXVIII of 1920.

and plant of the licensee suitable to, and used by him for, the purposes of the undertaking, other than a generating station declared by the license not to form part of the undertaking for the purpose of purchase, such value to be, in case of difference or dispute, determined by arbitration :

Provided that the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market-value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance that they are in such a position as to be ready for immediate working, and to the suitability of the same for the purposes of the undertaking, but without any addition in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking, or of any similar considerations ;

(*c*) where no purchase has been effected by the local authority under clause (*b*), and any other person is willing to purchase the undertaking, the Provincial Government may, if it thinks fit, with the consent of the licensee or without the consent of the licensee in case the price is not less than that for which the local authority might have purchased the same, require the licensee to sell, and thereupon the licensee shall sell, the undertaking to such other person ;

(*d*) where no purchase has been effected under clause (*b*) or clause (*c*) within such time as the Provincial Government may consider reasonable, or where the whole of the area of supply is not included in the area for which a single local authority is constituted, the Provincial Government shall have the option of purchasing the undertaking and, if the Provincial Government elects to purchase, the licensee shall sell the undertaking to the Provincial Government upon terms and conditions similar to those set forth in clause (*b*) ;

(*e*) where a purchase has been effected under any of the preceding clauses,—

(*i*) the undertaking shall vest in the purchasers free from any debts, mortgages or similar obligations of the licensee or attaching to the undertaking :

Provided that any such debts, mortgages or similar obligations shall attach to the purchase-money in substitution for the undertaking ; and

(ii) the revocation of the license shall extend only to the revocation of the rights, powers, authorities, duties and obligations of the licensee from whom the undertaking is purchased, and, save as aforesaid, the license shall remain in full force, and the purchaser shall be deemed to be the licensee :

Provided that where the Provincial Government elects to purchase under clause (*d*), the license shall, after purchase, in so far as the Provincial Government is concerned, cease to have any further operation ;

(*f*) where no purchase has been effected under any of the foregoing clauses, the licensee shall have the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit :

Provided that, if the licensee does not exercise such option within a period of six months from the date on which the same became exercisable, the Provincial

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NOTES.

Sec. 5 (*f*): ATTACHMENT OF PROPERTY OF LICENSEE WHOSE LICENCE HAS BEEN REVOKED.—Where the judgment-debtor is a licensee whose licence under the Electricity Act has been revoked, the Court when it has to consider whether under S. 60, C.P. Code, his property is or is not liable to attachment and sale in execution of the decree, has to bear in mind S. 4, C.P. Code. As the Electricity Act is a special law, the provisions under the C.P. Code are subject to any conditions regulating that procedure by the provisions of the Electricity Act. When a licence is revoked certain provisions laid down by S. 5 of the Act have an imperative effect and under those provisions the licensee has the option of disposing the property of the undertaking in such manner as he thinks fit under cl. (*f*) only. That clause is more or less residuary and comes into operation only when the preceding provisions in the earlier clauses have been complied with. I.L.R. (1939) All. 901=1939 A.L.J. 983=1940 All. 24.

Government may forthwith cause the works of the licensee in, under, over, along or across any street to be removed and every such street to be reinstated, and recover the cost of such removal and reinstatement from the licensee;

(*g*) if the licensee has been required to sell the undertaking, and if the sale has not been completed by the date fixed in the notice issued under clause (*a*), the purchaser may, with the previous sanction of the Provincial Government, work the undertaking pending the completion of the sale.

Provisions where license of local authority is revoked.

6. (1) Where the Provincial Government revokes the license of a local authority under section 4, sub-section (1), and any person is willing to purchase the undertaking, the Provincial Government may, if it thinks fit, require the local authority to sell, and thereupon the local authority shall sell, the undertaking to such person on such terms as the Provincial Government thinks just.

(2) Where no purchase has been effected under sub-section (1), the licensee shall have the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit:

Provided that, if the licensee does not exercise such option within a period of six months from the date on which the same became exercisable, the Provincial Government may forthwith cause the works of the licensee in, under, over, along or across any street to be removed and every such street to be reinstated, and recover the cost of such removal and reinstatement from the licensee.

Purchase of undertaking.

7. (1) Where a license has been granted to any person not being a local authority, and the whole of the area of supply is included in the area for which a single local authority is constituted, the local authority shall, on the expiration of such period, not exceeding fifty years, and of every such subsequent period not exceeding twenty years, as shall be specified in this behalf in the license, have the option of purchasing the undertaking, and, if the local authority, with the previous sanction of the Provincial Government, elects to purchase, the licensee shall sell the undertaking to the local authority on payment of the value of all lands, buildings, works, materials and plant of the licensee suitable to, and used by him for, the purposes of the undertaking, other than a generating station declared by the license not to form part of the undertaking for the purpose of purchase, such value to be, in case of difference or dispute, determined by arbitration:

Provided that the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market-value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance that they are in such a position as to be ready for immediate working, and to the suitability of the same for the purposes of the undertaking:

Provided also that there shall be added to such value as aforesaid such percentage, if any, not exceeding twenty per centum on that value as may be specified in the license, on account of compulsory purchase.

(2) Where—

(*a*) the local authority does not elect to purchase under sub-section (1), or

(*b*) the whole of the area of supply is not included in the area for which a single local authority is constituted, or

(*c*) a licensee supplies energy from the same generating station to two or more areas of supply, each controlled by its own local authority, and has been granted a license in respect of each area of supply, the Provincial Government shall have the like option upon the like terms and conditions.

(3) Where a purchase has been effected under sub-section (1) or sub-section (2),—

(*a*) the undertaking shall vest in the purchasers free from any debts, mortgages or similar obligations of the licensee or attaching to the undertaking:

Provided that any such debts, mortgages or similar obligations shall attach to the purchase-money in substitution for the undertaking; and

(*b*) save as aforesaid, the license shall remain in full force, and the purchaser shall be deemed to be the licensee:

Provided that where the Provincial Government elects to purchase under sub-section (2) the license shall, after purchase, in so far as the Provincial Government is concerned, cease to have any further operation.

(4) Not less than two years' notice in writing of any election to purchase under this section shall be served upon the licensee by the local authority or the Provincial Government as the case may be.

(5) Notwithstanding anything hereinbefore contained, a local authority may, with the previous sanction of the Provincial Government waive its option to purchase and enter into an agreement with the licensee for the working by him of the undertaking until the expiration of the next subsequent period referred to in sub-section (1), upon such terms and conditions as may be stated in such agreement.

Provisions where no purchase and license revoked with consent of licensee.

8. Where, on the expiration of any of the periods referred to in section 7, sub-section (1) neither a local authority nor the Provincial Government purchases the undertaking and the license is, on the application or with the consent of the licensee, revoked, the licensee shall have the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit;

Provided that, if the licensee does not exercise such option within a period of six months, the Provincial Government may proceed to take action as provided in section 5, clause (*f*), proviso.

Licensee not to purchase, or associate himself with other licensed undertakings or transfer his undertakings.

9. (1) The licensee shall not, at any time without the previous consent in writing of the Provincial Government, acquire, by purchase or otherwise, the license or the undertaking of, or associate himself so far as the business of supplying energy is concerned with, any person supplying, or intending to supply, energy under any other license, and, before applying for such consent, the licensee shall give not less than one month's notice of the application to every local authority, both in the licensee's area of supply, and also in the area or district in which such other person supplies, or intends to supply, energy:

Provided that nothing in this sub-section shall be construed to require the consent of the Provincial Government for the supply of energy by one licensee to another in accordance with the provisions of clause IX of the Schedule.

(2) The licensee shall not at any time assign his license or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the Provincial Government.

NOTES.

Sec. 9, Cl. (2).—A 'charge' is a 'transfer' within the meaning of sub-S. (2) of S. 9 of the Act. 1941 A.L.J. 518=1941 All. 345 (F.B.). Per *Iqbal Ahmad, C.J.*—Even though a 'charge' may not be a 'transfer' within the meaning of the Transfer of Propery Act, there is no adequate reason to give a restricted meaning to the word transfer in the Electricity Act; the more so as the last mentioned Act is not *in pari materia* with the Transfer of Property Act. The word transfer is used in S. 9 (2) in a wide sense as embracing the transactions which either in present or in future may lead to the passing of the undertaking from one person to another. 196 I.C. 425=1941 A.L.J. 158 =1941 All. 345 (F.B.).

Sec. 9 (2) and (3).—Where a licensee company for supply of electricity executed without the consent of Government, a debenture trust deed whereby the whole undertaking was transferred to trustees for debenture-holders and also purported to create a mortgage over the entire property of the company and it further purported to create a charge over the property in favour of the debenture-holders, it was held that the deed so far as it intended to operate as a transfer of the properties to the trustees was void

(3) Any agreement relating to any transaction of the nature described in sub-section (1) or sub-section (2), unless made with, or subject to, such consent as aforesaid, shall be void.

General power for Government to vary terms of pur-

10. Notwithstanding anything in sections 5, 7 and 8, the Provincial Government may, [1][* * *] in any license to be granted under this Act,—

(*a*) vary the terms and conditions upon which, and the periods on the expiration of which, the licensee shall be bound to sell his undertaking, or

(*b*) direct that, subject to such conditions and restrictions (if any) as it may think fit to impose, the provisions of the said sections or any of them shall not apply.

Annual accounts of licensee.

11. (1) Every licensee shall, unless expressly exempted from the liability by his license, or by order in writing of the Provincial Government, prepare and render to the Provincial Government or to such authority as the Provincial Government may appoint in this behalf on or before the prescribed date in each year, an annual statement of accounts of his undertaking made up to such date, in such form and containing such particulars, as may be prescribed in this behalf.

(2) The licensee shall keep copies of such annual statement at his office and sell the same to any applicant at a price not exceeding five rupees per copy.

Works.

Provisions as to the opening and breaking up of streets, railways and tramways.

12. (1) Any licensee may, from time to time but subject always to the terms and conditions of this license, within the area of supply, or, when permitted by the terms of his license to lay down or place electric supply-lines without the area of supply without that area—

LEG. REF.

[1] The words "with the previous sanction of the Governor-General in Council" were omitted by S. 2 and Sch. I of Act XXXVIII of 1920.

NOTES.

in view of the provisions of S. 9 (2) of the Act and that it was similarly void in so far as it purported to create a mortgage but that it was valid in so far as it purported to create a charge which entitled the debenture-holders to rank as secured creditors in the winding up of the company. A charge could not be regarded as a transfer either *in presenti* or *in futuro*. I.L.R. (1940) All. 568=1940 A.L.J. 449=1940 All. 458. Words *'transfer'* and *'undertaking'* are used in widest sense in this section. Where a licensee took in partners and the partnership-deed vested the buildings, machinery, books, papers and the licence of electricity in the partners, *held,* that it amounted to 'transfer of undertaking' under this section. 167 I.C. 707=1937 Rang. 47.

Sec. 12.—The Act does not authorise a licensee to place any work on any private lands without the consent of the owner or occupier, except in the case provided for by the first proviso to S. 12 (1). But in the case of lands dedicated to public use, the licensee would be able to place its works without the consent of the authorities in charge of such lands and without paying any compensation for the same. The Local Government might while granting the licence insert a term in it regarding rent or compensation for the use of such lands and in such cases undoubtedly a duty to pay rent or compensation will arise. I.L.R. (1937) 2 Cal. 746=41 C.W.N. 1045=1937 C. 521. The ordinary rule of law is that whoever owns the site is the owner of everything up to the sky and down to the centre of the earth, and such owner can, therefore, object to the laying of electric wire on his land although the line may be laid, more than 30 feet above land. There is no law authorising the District Magistrate to grant permission to an electric company to erect a post over the land of a person. 114 I.C. 692=1929 L. 226. A post was erected on the land of a person. Permission from the District Magistrate for erecting it was obtained not before erecting but after institution of suit by the owner of land. Lower Court dismissed the suit. *Held,* that High Court could not interfere with the decision. 114 I.C. 692=1929 L. 226. The Civil Courts have no jurisdiction to decide as to whether a bracket should be fixed on a particular private wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it. It is entirely for the District Magistrate to decide these questions. 196 I.C. 547=1941 Pesh. 73.

(*a*) open and break up the soil and pavement of any street, railway or tramway;

(*b*) open and break up any sewer, drain or tunnel in or under any street, railway or tramway;

(*c*) lay down and place electric supply lines and other works;

(*d*) repair, alter or remove the same; and

(*e*) do all other acts necessary for the due supply of energy.

(2) Nothing contained in sub-section (1) shall be deemed to authorise or empower a licensee, without the consent of the local authority or of the owner and occupier concerned, as the case may be, to lay down or place any electric supply-line, or other work in, through or against any building, or on, over or under any land not dedicated to public use whereon, wherever or whereunder any electric supply-line or work has not already been lawfully laid down or placed by such licensee:

Provided that any support of an aerial line or any stay or strut required for the sole purpose of securing in position any support of an aerial line may be fixed on any building or land or, having been so fixed, may be altered, notwithstanding the objection of the owner or occupier of such building or land, if the District Magistrate or, in a Presidency-town [1][* *] the Commissioner of Police by order in writing so directs:

Provided, also, that, if at any time the owner or occupier of any building or land on which any such support, stay or strut has been fixed shows sufficient cause, the District Magistrate or, in a Presidency-town [1][* *] the Commissioner of Police may by order in writing direct any such report, stay or strut to be removed or altered.

(3) When making an order under sub-section (2), the District Magistrate or the Commissioner of Police, as the case may be, shall fix the amount of compensation or of annual rent, or of both, which should in his opinion be paid by the licensee to the owner or occupier.

(4) Every order made by a District Magistrate or a Commissioner of Police under sub-section (2) shall be subject to revision by the Provincial Government.

(5) Nothing contained in sub-section (1) shall be deemed to authorise or empower any licensee to open or break up any street not repairable by [2][the Central Government or the Provincial Government] or a local authority, or any railway or tramway, except such streets, railways or tramways (if any), or such parts thereof, as he is specially authorised to break up by his license, without the written consent of the person by whom the street is repairable or of the person for the time being entitled to work the railway or tramway, unless with the written consent of the Provincial Government:

Provided that the Provincial Government shall not give any such consent as aforesaid, until the licensee has given notice by advertisement or otherwise as the Provincial Government may direct, and within such period as the Provincial Government may fix in this behalf, to the person above referred to, and until all representations or objections received in accordance with the notice have been considered by the Provincial Government.

Notice of new works.

13. (1) Where the exercise of any of the powers of a licensee in relation to the execution of any works involves the placing of any works in, under, over, along or across any street, part of a street, railway, tramway, canal or waterway, the following provisions shall have effect, namely:—

LEG. REF.

[1] The words "or Rangoon" omitted by A.O., 1937.

[2] Substituted for the words "the Government" by A.O., 1937.

(*a*) not less than one month before commencing the execution of the works (not being a service-line immediately attached, or intended to be immediately attached, to a distributing main, or the repair, renewal or amendment of existing works of which the character or position is not to be altered), the licensee shall serve upon the person responsible for the repair of the street or part of a street (hereinafter in this section referred to as "the repairing authority") or upon the person for the time being entitled to work the railway, tramway, canal or waterway (hereinafter in this section referred to as "the owner"), as the case may be, a notice in writing describing the proposed works, together with a section and plan thereof on a scale sufficiently large to show clearly the details of the proposed works, and not in any case smaller than one inch to eight feet vertically and sixteen inches to the mile horizontally, and intimating the manner in which, and the time at which, it is proposed to interfere with or alter any existing works, and shall upon being required to do so by the repairing authority or owner, as the case may be, from time to time give such further information in relation thereto as may be desired;

(*b*) if the repairing authority intimates to the licensee that it disapproves of such works, section or plan, or approves thereof subject to amendment, the licensee may, within one week of receiving such intimation, appeal to the Provincial Government whose decision, after considering the reasons given by the repairing authority for its action, shall be final;

(*c*) if the repairing authority fails to give notice in writing of its approval or disapproval to the licensee within one month, it shall be deemed to have approved of the works, section and plan, and the licensee, after giving not less than forty-eight hours' notice in writing to the repairing authority, may proceed to carry out the works in accordance with the notice and the section and plan served under clause (*a*);

(*d*) if the owner disapproves of such works, section or plan, or approves thereof subject to amendment, he may, within three weeks after the service of the notice under clause (*a*) serve a requisition upon the licensee demanding that any question in relation to the works or to compensation, or to the obligations of the owner to others in respect thereof, shall be determined by arbitration, and thereupon the matter shall, unless settled by agreement, be determined by arbitration,

(*e*) where no requisition has been served by the owner upon the licensee under clause (*d*), within the time named, the owner shall be deemed to have approved of the works, section and plan, and in that case, or where after a requisition for arbitration the matter has been determined by arbitration, the works may, upon payment or securing of compensation, be executed according to the notice and the section and plan, subject to such modifications as may have been determined by arbitration or agreed upon between the parties.

(*f*) where the works to be executed consist of the laying of any underground service-line immediately attached, or intended to be immediately attached, to a distributing main, the licensee shall give to the repairing authority or the owner, as the case may be, not less than forty-eight hours' notice in writing of his intention to execute such works;

(*g*) where the works to be executed consist of the repair, renewal or amendment of existing works of which the character or position is not to be altered, the licensee shall, except in cases of emergency, give to the repairing authority, or to the owner, as the case may be, not less than forty-eight hours' notice in writing of his intention to execute such works, and, on the expiry of such notice, such works shall be commenced forthwith and shall be carried on with all reasonable despatch, and, if possible, both by day and by night until completed.

(2) Where the licensee makes default in complying with any of these provisions, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

(3) Notwithstanding anything in this section, the licensee may, in case of emergency due to the breakdown of an underground electric supply-line, after giving notice in writing to the repairing authority or the owner, as the case may be, of his intention to do so, place an aerial line without complying with the provisions of sub-section (1):

Provided that such aerial line shall be used only until the defect in the underground electric supply-line can be made good, and in no case (unless with the written consent of the Provincial Government) for a period exceeding six weeks, and shall be removed as soon as may be after such defect is removed.

Alteration of pipes or wires.

14. (1) Any licensee may alter the position of any pipe (not forming, in a case where the licensee is not a local authority, part of a local authority's main sewer), or of any wire under or over any place which he is authorised to open or break up, if such pipe or wire is likely to interfere with the exercise of his powers under this Act; and any person may alter the position of any electric supply-lines or works of a licensee under or over any such place as aforesaid, if such electric supply-lines or works are likely to interfere with the lawful exercise of any powers vested in him.

(2) In any such case as aforesaid the following provisions shall, in the absence of an agreement to the contrary between the parties concerned, apply, namely :—

(*a*) not less than one month before commencing the alteration, the licensee or other person desiring to make the same (hereinafter in this section referred to as "the operator") shall serve upon the person for the time being entitled to the pipe, wire, electric supply-lines or works, as the case may be (hereinafter in this section referred to as "the owner"), a notice in writing, describing the proposed alteration, together with a section and plan thereof on a scale sufficiently large to show clearly the details of the proposed works, and not in any case smaller than one inch to eight feet vertically and sixteen inches to the mile horizontally, and intimating the time when it is to be commenced, and shall subsequently give such further information in relation thereto as the owner may desire;

(*b*) within fourteen days after the service of the notice, section and plan upon the owner, the owner may serve upon the operator a requisition to the effect that any question arising upon the notice, section or plan shall be determined by arbitration, and thereupon the matter shall, unless settled by agreement, be determined by arbitration;

(*c*) every arbitrator to whom a reference is made under clause (*b*) shall have regard to any duties or obligations which the owner is under, and may require the operator to execute any temporary or other works so as to avoid as far as possible interference therewith;

(*d*) where no requisition is served upon the operator under clause (*b*) within the time named, or where such a requisition has been served and the matter has been settled by agreement or determined by arbitration, the alteration may, upon

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NOTES.

Sec. 14.—The defendants who were a corporation had obtained a licence under the Act and as such licensees had put up an aerial line, etc., on a certain street within the Municipal district of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the N.-W. Railway Company, that the latter should erect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiff's suit was for a declaration that the cost of removal should be borne by defendants. *Held,* that S. 14 of the Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. 95 I.C. 226=1926 S. 115.

Secs. 14 and 19.—An operator cannot claim damages for acts of his own or done on his behalf and at his expense by the owner. Where a gas company was cut off from reasonable access to its own property by acts done in the exercise of its powers by the Electric Supply Company and those acts caused damage, detriment and inconvenience, *held,* that the damage claimed to have been suffered could be compensated under S. 19, and S. 14 did not apply and the gas company could not be deprived of its remedies. 16 Bom.L.R. 964=26 I.C. 892=1939 Bom. 124.

payment or securing of any compensation accepted or determined by arbitration, be executed in accordance with the notice, section and plan and subject to such modifications as may have been determined by arbitration or agreed upon between the parties ;

(*e*) the owner may, at any time before the operator is entitled to commence the alteration, serve upon the operator a statement in writing to the effect that he desires to execute the alteration himself and requires the operator to give such security for the repayment of any expenses as may be agreed upon or, in default of agreement, determined by arbitration ;

(*f*) where a statement is served upon the operator under clause (*e*), he shall, not less than forty-eight hours before the execution of the alteration is required to be commenced, furnish such security and serve upon the owner a notice in writing intimating the time when the alteration is required to be commenced, and the manner in which it is required to be made ; and thereupon the owner may proceed to execute the alteration as required by the operator ;

(*g*) where the owner declines to comply, or does not, within the time and in the manner prescribed by a notice served upon him under clause (*f*), comply with the notice, the operator may himself execute the alteration ;

(*h*) all expenses properly incurred by the owner in complying with a notice served upon him by the operator under clause (*f*) may be recovered by him from the operator.

(3) Where the licensee or other person desiring to make the alteration makes default in complying with any of these provisions, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

Laying of electric supply-lines or other works near sewers, pipes or other electric supply-lines or works.

15. (1) Where—

(*a*) the licensee requires to dig or sink any trench for laying down any new electric supply-lines or other works, near to which any sewer, drain, watercourse or work under the control of the Provincial Government or of any local authority, or any pipe, syphon, electric supply-line or other work belonging to any duly authorized person, has been lawfully placed, or

(*b*) any duly authorized person requires to dig or sink any trench for laying down or constructing any new pipes or other works, near to which any electric supply-lines or works of a licensee have been lawfully placed,

the licensee or such duly authorised person, as the case may be (hereinafter in this section referred to as " the operator ") shall, unless it is otherwise agreed upon between the parties interested or in case of sudden emergency, give to the Provincial Government or local authority, or to such duly authorized person, or to the licensee, as the case may be (hereinafter in this section referred to as " the owner "), not less than forty-eight hours' notice in writing before commencing to dig or sink the trench and the owner shall have the right to be present during the execution of the work, which shall be executed to the reasonable satisfaction of the owner.

(2) Where the operator finds it necessary to undermine, but not to alter, the position of any pipe, electric supply-line or work, he shall support it in position during the execution of the work, and before completion shall provide a suitable and proper foundation for it where so undermined.

(3) Where the operator (being the licensee) lays any electric supply-lines across, or so as to be liable to touch, any pipes, lines or service-pipes or service-lines belonging to any duly authorized person or to any person supplying, transmitting or using energy under this Act, he shall not, except with the written consent of such person and in accordance with section 34, sub-section (1), lay his electric

supply-lines so as to come into contact with any such pipes, lines or service-pipes or service-lines.

(4) Where the operator makes default in complying with any of the provisions of this section, he shall make full compensation for any loss or damage incurred by reason thereof.

(5) Where any difference or dispute arises under this section, the matter shall be determined by arbitration.

(6) Where the licensee is a local authority, the references in this section to the local authority and to sewers, drains, water-courses or works under its control shall not apply.

Streets, railways, tramways, sewers, drains or tunnels broken up to be reinstated without delay.

16. (1) Where any person, in exercise of any of the powers conferred by or under this Act, opens or breaks up the soil or pavement of any street, railway or tramway, or any sewer, drain or tunnel, he shall—

(*a*) immediately cause the part opened or broken up to be fenced and guarded ;

(*b*) before sun-set cause a light or lights, sufficient for the warning of passengers to be set up and maintained until sunrise against or near the part opened or broken up ;

(*c*) with all reasonable speed fill in the ground and reinstate and make good the soil or pavement, or the sewer, drain or tunnel, opened or broken up, and carry away the rubbish occasioned by such opening or breaking up ; and,

(*d*) after reinstating and making good the soil or pavement, or the sewer, drain or tunnel, broken or opened up, keep the same in good repair for three months and for any further period, not exceeding nine months, during which subsidence continues.

(2) Where any person fails to comply with any of the provisions of sub-section (1), the person having the control or management of the street, railway, tramway, sewer, drain or tunnel in respect of which the default has occurred, may cause to be executed the work which the defaulter has delayed or omitted to execute, and may recover from him the expenses incurred in such execution.

(3) Where any difference or dispute arises as to the amount of the expenses incurred under sub-section (2), the matter shall be determined by arbitration.

Notice to telegraph-authority.

17. (1) A licensee shall, before laying down or placing, within ten yards of any part of any telegraph-line, any electric supply-line or other works [1][not being either service lines] or electric-supply lines for the repair, renewal or amendment of existing works of which the character or position is not to be altered), give not less than ten days' notice in writing to the telegraph-authority, specifying—

(*a*) the course of the works or alterations proposed,
(*b*) the manner in which the works are to be utilized,
(*c*) the amount and nature of the energy to be transmitted, and
(*d*) the extent to, and manner in, which (if at all) earth returns are to be used ;

and the licensee shall conform with such reasonable requirements, either general or special, as may be laid down by the telegraph-authority within that period for preventing any telegraph-line from being injuriously affected by such works or alterations :

Provided that, in case of emergency (which shall be stated by the licensee in writing to the telegraph-authority) arising from defects in any of the electric supply-lines or other works of the licensee, the licensee shall be required to give

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LEG. REF.

[1] These words were substituted for the words "not being service-lines immediately attached or intended to be immediately attached to a distributing main" by S. 4 of Act I of 1922.

only such notice as may be possible after the necessity for the proposed new works or alterations has arisen.

(2) Where the works to be executed consist of the laying [1][or placing] of any [2][*service line] [3][* * *] the licensee shall, not less than forty-eight hours before commencing the work, serve upon the telegraph-authority a notice in writing of his intention to execute such works.

Aerial lines.

18. (1) Save as provided in section 13, sub-section (3), nothing in this Part shall be deemed to authorize or empower a licensee to place any aerial line along or across any street, railway, tramway, canal or waterway unless and until the Provincial Government has communicated to him a general approval in writing of the methods of construction which he proposes to adopt :

Provided that the communication of such approval shall in no way relieve the licensee of his obligations with respect to any other consent required by or under this Act.

(2) Where any aerial line has been placed or maintained by a licensee in breach of the provisions of sub-section (1), the Provincial Government may require the licensee forthwith to remove the same, or may cause the same to be removed and recover from the licensee the expenses incurred in such removal.

[4][(3) Where any tree standing or lying near an aerial line, or where any structure or other object which has been placed or has fallen near an aerial line subsequently to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of energy or the accessibility of any works, a Magistrate of the first class or, in a Presidency-town [5][* *], the Commissioner of Police may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with as he thinks fit ;]

(4) When disposing of an application under sub-section (3), the Magistrate or Commissioner of Police, as the case may be, shall, in the case of any tree in existence before the placing of the aerial line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee.

[6][*Explanation.*—For the purposes of this section, the expression "tree" shall be deemed to include any shrub, hedge, jungle-growth or other plant.]

Compensation for damage.

19. (1) A licensee shall, in exercise of any of the powers conferred by or under this Act, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him.

(2) Save in the case provided for in section 12, sub-section (3), where any

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LEG. REF.

[1] These words were inserted by Act I of 1922.

[2] The word "underground" was omitted, *ibid.*

[3] The words "immediately attached or intended to be immediately attached to a distributing main" were omitted, *ibid.*

[4] This sub-section was substituted by S. 5 of Act I of 1922.

[5] The words "or Rangoon" were omitted by A.O., 1937.

[6] These words were inserted by S. 5 of Act I of 1922.

NOTES.

Sec. 19.—*See* 16 Bom.L.R. 964=26 I. C. 892=39 B. 124, cited under S. 14. S. 19 of the Act primarily prohibits the licensee from doing anything which may amount to a nuisance, in the exercise of the powers given by the Act and by the licence. Any infringement of any private right could only be justified on proof of the fact that without infringing those rights, the duties imposed by the licence could not be carried out. Considerations of public welfare do not warrant an infringement of private rights, unless it is expressly or by necessary implication authorised by statute. The duty cast on the licensee by S. 19 is enforceable at law. There is nothing in the Electricity Act to relieve the licensee from the liability to an action for injunction restraining him from infringing the rights of others. 1939 A.L.J. 19=I.L.R. (1939) All. 237=1939 All. 280.

difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration.

Supply.

Point where supply is delivered.

[1][19-A. For the purposes of this Act, the point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall be determined in such manner as may be prescribed.]

Power for licensee to enter premises and to remove fittings or other apparatus of licensee.

20. (1) A licensee or any person duly authorised by a licensee may, at any reasonable time, and on informing the occupier of his intention, enter any premises to which energy is or has been supplied by him, for the purpose of—

(*a*) inspecting and testing the electric supply-lines, meters, fittings, works and apparatus for the supply of energy belonging to the licensee ; or

(*b*) ascertaining the amount of energy supplied or the electrical quantity contained in the supply ; or

(*c*) removing, where a supply of energy is no longer required, or where the licensee is authorised to take away and cut off such supply, any electric supply-lines, [2][meters,] fittings, works or apparatus belonging to the licensee.

(2) A licensee or any person authorized as aforesaid may also, in pursuance of a special order in this behalf made by the District Magistrate, or, in a Presidency-town [3][* *] by the Commissioner of Police, and after giving not less than twenty-four hours' notice in writing to the occupier, enter any premises to which energy is or has been supplied, or is to be supplied, by him, for the purpose of examining and testing the electric wires, fittings, works, and apparatus for the use of energy belonging to the consumer.

[4][(3). Where a consumer refuses to allow a licensee or any person authorised as aforesaid to enter his premises in pursuance of the provisions of sub-section (1) or sub-section (2), or, when such licensee or person has so entered, refuses to allow him to perform any act which he is authorised by those sub-sections to perform or fails to give reasonable facilities for such entry or performance, the licensee may after the expiry of twenty-four hours from the service of a notice in writing on the consumer, cut off the supply to the consumer for so long as such refusal or failure continues, but for no longer.]

Restrictions on licensee's controlling or interfering with use of energy.

21. (1) A licensee shall not be entitled to prescribe any special form of appliance for utilising energy supplied by him, or save as provided by section 23, sub-section (2), or by section 26, sub-section (7), in any way to control or interfere with the use of such energy :

Provided that no person may adopt any form of appliance, or use of energy supplied to him so as unduly or improperly to interfere with the supply by the licensee of energy to any other person.

[5][(2) Subject to the provisions of sub-section (1), a licensee may, with the previous sanction of the Provincial Government given after consulting the

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LEG. REF.

[1] This section was inserted by S. 6, Act I of 1922.

[2] This word was inserted by S. 7, *ibid.*,

[3] The words " or Rangoon " were omitted by A.O., 1937.

[4] This sub-section was added by S. 7 of Act I of 1922.

[5] These sub-sections were inserted by S. 8, Act I of 1922.

NOTES.

Sec. 21: SCOPE.—S. 21 which speaks to regulating the relations with consumers has nothing to do with the charges to be made for energy supplied. The section which deals with the matter is S. 23. 35 C. W. N. 933.

Sec. 21 (2).—The rule made by Khattar Electric Engineering and General Supply Co., Ltd., Dera Ismail Khan, providing that every consumer shall pay a minimum charge of Rs. 25 per annum, had not been made with the approval of the Government. The fact that in 1936 the company had addressed local authority where the licensee is not the local authority, make conditions not inconsistent with this Act or with his license or with any rules made under this Act, to regulate his relations with persons who are or intend to become consumers, and may with the like sanction given after the like consultation add to or alter or amend any such conditions ; and any conditions made by a licensee without such sanction shall be null and void :

Provided that any such conditions made before the 23rd day of January, 1922, shall, if sanctioned by the Provincial Government on application made by the licensee before such date as the Provincial Government may, by general or special order, fix in this behalf, be deemed to have been made in accordance with the provisions of this sub-section.

(3) The Provincial Government may, after the like consultation, cancel any condition or part of a condition previously sanctioned under sub-section (2) after giving to the licensee not less than one month's notice in writing of its intention so to do.]

[1][(4)] Where any difference or dispute arises as to whether a licensee has prescribed any appliance or controlled or interfered with the use of energy in contravention of sub-section (1), the matter shall be either referred to an Electric Inspector and decided by him, or, if the licensee or consumer so desires, determined by arbitration.

Obligation on licensee to supply energy.

22. Where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled, on application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply :

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum

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LEG. REF.

[1] This sub-section, which was originally numbered " (2) " was renumbered " (4) " by S. 8 of Act I of 1922.

NOTES.

a letter to the Chief Engineer on the subject and had received the reply that in the case of each consumer the recovery of the minimum charge was lawful from the date of the contract entered into by that consumer with the company is no approval of the rule and therefore the rule is *ultra vires.* 181 I.C. 345=1939 Pesh. 8.

Secs. 21 and 24.—S. 24 of the Electricity Act authorises the licensee to cut off supply only of that premises the charge of which is in arrear. It does not authorise the discontinuation of supply to premises the charge of which has been paid off. A clause in the agreement between the licensee and the consumer, empowering the licensee to discontinue the supply to certain premises for non-payment of charges of other premises of the consumer is inconsistent with S. 24 and is *ultra vires* and unenforceable under S. 21 (2). The previous sanction of the Local Government for the insertion of such a condition, under S. 21 (2) of the Act, is invalid and unenforceable. 39 C.W.N. 526=61 C.L.J. 111=1935 Cal. 298.

Sec. 22.—*See* 63 C. 1047 noted under S. 3 *supra.* There is nothing in the Act which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. 97 I.C. 537=1926 Lah. 349. Before a consumer can be supplied electric power from a new connection in substitution of an old one he must put in a fresh requisition in writing under paras. 4 and 5 of cl. (6) of the Schedule to the Act. 49 B. 182=26 Bom. L.R. 1206=1925 Bom. 120. A person entitled to supply of energy under S. 22 of the Act, has a cause of action for a suit for damages on account of licensee's failure to supply energy according to S. 22 and para. VI to the schedule. A Civil Court including the Judge, Small Cause Court has jurisdiction to entertain such suit. From the general scheme of the Act it is clear that most of the disputes are to be decided by arbitration. If the intention was to bar the civil remedy a similar provision would have been inserted for the breach of S. 22 also. 1941 A.L.W. 450=1941 O.W.N. 606=1941 All. 301=1941 A.L.J. 331.

demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration.

Charges for energy to be made without undue preference.

23. (1) A licensee shall not, in making any agreement for the supply of energy, show undue preference to any person, but may, save as aforesaid, make such charges for the supply of energy as may be agreed upon, not exceeding the limits imposed by his license.

(2) No consumer shall, except with the consent in writing of the licensee, use energy supplied to him under one method of charging in a manner for which a higher method of charging is in force.

[1][(3) in the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer—

(*a*) by the actual amount of energy so supplied, or

(*b*) by the electrical quantity contained in the supply, or

(*c*) by such other method as may be approved by the Provincial Government.

(4) Any charges made by a licensee under clause (*c*) of sub-section (3) may be based upon, and vary in accordance with, any one or more of the following considerations, namely :—

(*a*) the consumer's load factor, or

(*b*) the power factor of his load, or

(*c*) his total consumption of energy during any stated period, or

(*d*) the hours at which the supply of energy is required.]

24. [2][(1) Where any person neglects to pay any charge for energy or any

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LEG. REF.

[1] These sub-sections were added by S. 9 of Act I of 1922.

[2] This paragraph was numbered as sub-section " (1) " by S. 10, *ibid.*

NOTES.

Sec. 23.—*See* 63 C. 1047 noted under S. 3, *supra.* A consumer of electricity employing electrical machinery is entitled within his own premises to use all reasonable tests which might be necessary to discover a defect. It is not obligatory on any one, whatever machinery he may happen to use to call in an expert on every occasion when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If, in the case of electric supply, it is a reasonable test for a consumer to use an electric lamp and if he *bona fide* uses a lamp for this purpose without permission, S. 23 has no application nor is he guilty under S. 39 as his action does not amount to dishonest abstraction of the company's electric energy. 151 I.C. 19=35 Cr. L.J. 1274=1934 A. 320. Per *Suhrawardy, J.*—The words "such other" in cl. (*c*) of S. 23 (3) cannot be interpreted as preventing the Government from utilizing either method with such modifications as they think fit. 35 C.W.N. 933=58 C. 1458=1932 C. 14. Per *Graham, J.*—S. 23 (3) seems to give the licensee the option of adopting any one of the three methods mentioned. 35 C.W.N. 933=58 C. 1458. The consumer and the supplier may enter into any agreement as to the charge for supply of energy subject to the limitation mentioned in S. 23. Where the rate agreed and sanctioned by Government was 7as. per unit *plus* Rs. 5 per month per kilowatt of the rated capacity of the consuming devices installed provided the combined charges shall not exceed the flat rate of 8 as. per unit, *held,* that the charges for actual consumption and kilowatt were two parts of the same method of charging and that even if they were different it was *intra vires* of the Government to fix them under S. 23 (3) (*c*). The system adopted cannot be said to amount to a double system of charge and the consumer is bound to pay the charges as agreed. 35 C.W.N. 933=58 C. 1458.

Sec. 23 (3) (c).—S. 23 (3) (*c*) contemplates charges made on the basis of consumption. It does not authorise a licensee to levy minimum charges without any agreement with the consumer. Nor can the licensee invoke cl. (*c*) of S. 23 (3) to support its claim for minimum charges when the Local Government has not exercised their powers under that clause by a notification under it. 63 Cal. 1047=40 C. W. N. 789=1936 Cal. 265.

Sec. 24: POWERS UNDER—NATURE AND EXTENT OF—CONDITIONS OF EXERCISE.—The power to discontinue supply to a premises is power given in addition to the rights to realise the arrears by a suit; and this statutory power should be exercised in good faith and reasonably, and only as a last resort after all the formalities laid down in the Act had been complied with. 62 C. 886 =39 C.W.N. 526=61 C.L.J. 111=1935 C. 298.

NOTICE.—The notice under this section is purely for the protection of the consumer, and no question of public policy is involved

Discontinuance of supply to consumer neglecting to pay charge.

[1][sum, other than a charge for energy,] due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and re-connecting the supply, are paid, but no longer.

[2][(2)] [3][* *] Where any difference or dispute has been referred under this Act to an Electric Inspector before notice as aforesaid has been given by the licensee, the licensee shall not exercise the powers conferred by this section until the Inspector has given his decision :

[4][Provided that the prohibition contained in this sub-section shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Electric Inspector of the amount of the licensee's charges or other sums in dispute or for the deposit of the licensee's further charges for energy as they accrue, and the consumer has failed to comply with such request.]

Exemption of electric supply lines or other apparatus from attachment in certain cases.

25. Where any electric supply-lines, meters, fittings, works or apparatus belonging to a licensee are placed in or upon any premises, not being in the possession of the licensee, for the purpose of supplying energy, such electric supply-lines, meters, fittings, works and apparatus shall not be liable to be taken in execution under any process of any Civil Court or in any proceedings, in insolvency against the person in whose possession the same may be.

Meters.

26. (1) In the absence of an agreement to the contrary, the amount of energy, supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter :

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.

(2) Where the consumer so enters into an agreement for the hire of a meter, the licensee shall keep the meter correct, and, in default of his doing so, the consumer shall, for so long as the default continues, cease to be liable to pay for the hire of the meter.

(3) Where the meter is the property of the consumer, he shall keep the meter correct, and, in default, of his doing so, the licensee may, after giving him seven days' notice, for so long as the default continues, cease to supply energy through the meter.

LEG. REF.

[1] These words were substituted for the words "other sum", Act I of 1922.

[2] This paragraph was originally a proviso and was numbered sub-section "(2)", *ibid.*

[3] The words "Provided that" were omitted, *ibid.*

[4] Proviso added by S. 10, Act I of 1922.

NOTES.

in it. So, it is open to the consumer to waive the notice if he so desires. 20 N.L.J. 200=171 I.C. 640=1937 Nag. 379.

Sec. 24 and Sch., Cl. (vi).—The licensee must bear the charge of the service line whether the consumer has paid the initial expenditure or not. The licensee can discontinue the supply of energy if the consumer's installation is defective. In case of any alleged defect, the licensee can refer the matter to an electric inspector and he is to decide the matter. If energy is supplied to the consumer knowing that the installation is defective, the consumer will not pay for a new fuse or cut-out if the old melts on account of defective installation. 45 I.C. 171.

(4) The licensee or any person duly authorised by the licensee shall, at any reasonable time and on informing the consumer of his intention, have access to, and be at liberty to inspect and test, and for that purpose, if he thinks fit, take off and remove, any meter referred to in sub-section (1); and, except where the meter is so hired as aforesaid, all reasonable expenses of, and incidental to, such inspecting, testing, taking off and removing shall, if the meter is found to be otherwise, than correct, be recovered from the consumer and, where any difference or dispute arises as to the amount of such reasonable expenses, the matter shall be referred to an Electric Inspector, and the decision of such Inspector shall be final:

Provided that the licensee shall not be at liberty to take off or remove, any such meter if any difference or dispute of the nature described in sub-section (6) has arisen until the matter has been determined as therein provided.

(5) A consumer shall not connect any meter referred to in sub-section (1) with any electric supply-line through which energy is supplied by a licensee, or disconnect the same from any such electric supply-line, without giving to the licensee not less than forty-eight hours' notice in writing of his intention.

(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electric Inspector, or by a competent person specially appointed by the Provincial Government in this behalf; and, where the meter has, in the opinion of such Inspector or person, ceased to be correct, such Inspector or person shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time as the meter shall not, in the opinion of such Inspector or person, have been correct, [1][* * * * *] and where the matter has been decided by any person other than the Electric Inspector, an appeal shall lie to the Inspector, whose decision shall in every case be final; but, save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

[2][Provided that, before either a licensee or a consumer applies to the Electric Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.]

(7) In addition to any meter which may be placed upon the premises of a consumer in pursuance of the provisions of sub-section (1), the licensee may place upon such premises such meter, maximum demand indicator or other apparatus as he may think fit for the purpose of ascertaining or regulating either the amount of energy supplied to the consumer, or the number of hours during which the supply is given, or the rate per unit of time at which energy is supplied to the consumer, or any other quantity or time connected with the supply:

Provided that the meter, indicator or apparatus shall not, in the absence of an agreement to the contrary, be placed otherwise than between the distributing mains of the licensee and any meter referred to in sub-section (1):

Provided also, that, where the charges for the supply of energy depend wholly or partly upon the reading or indication of any such meter, indicator or apparatus as aforesaid, the licensee shall, in the absence of an agreement to the contrary, keep the meter, indicator, or apparatus correct; and the provisions of sub-sections (4), (5) and (6) shall in that case apply as though the meter, indicator or apparatus were a meter referred to in sub-section (1).

Explanation.—A meter shall be deemed to be "correct" if it registers the amount of energy supplied, or the electrical quantity contained in the supply,

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LEG. REF.

[1] The words "on the basis of the previous supply" omitted by Act I of 1922.

[2] This proviso was added, *ibid.*

NOTES.

Sec. 26 (5) deals with a case of connecting a new meter with the licensee's supply line. R. 31 (1) of the Electricity Rules on the other hand does not deal with cases which S. 26 (5) contemplates. R. 31 (1) deals with the tampering of seals placed on a meter which is already working. There is therefore no conflict between S. 26 (5) and R. 31 (1). I.L.R. (1939) Bom. 496 =41 Bom.L.R. 878=1939 Bom. 480.

within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be "correct" if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus.

Supply of energy outside area of supply.

27. Notwithstanding anything in this Act, the Provincial Government may, by order in writing, and subject to such conditions and restrictions, if any, as it thinks fit to impose, authorise any licensee to supply energy to any person outside the area of supply, and to lay down or place electric supply lines for that purpose:

Provided, first, that no such authority shall be conferred on the licensee within the area of supply of another licensee without that licensee's consent, unless the Provincial Government considers that his consent has been unreasonably withheld:

Provided, secondly, that such authority shall not be conferred unless the person to whom the supply is to be given has entered into a specific agreement with the licensee for the taking of such supply:

Provided, thirdly, that a licensee on whom such authority has been conferred shall not be deemed to be empowered outside the area of supply to open or break up any street, or any sewer, drain or tunnel in or under any street, railway or tramway, or to interfere with any telegraph-line, without the written consent of the local authority or person by whom such street, sewer, drain or tunnel is repairable, or of the telegraph-authority, as the case may be, [1][unless the Provincial Government, after such inquiry as it thinks fit, considers that such consent has been unreasonably withheld.]

Provided, fourthly, that, save as aforesaid, the provisions of this Act shall apply in the case of any supply authorised under this section as if the said supply were made within the area of supply.

PART III.

SUPPLY, TRANSMISSION AND USE OF ENERGY BY NON-LICENSEES.

Sanction required by non-licensees in certain cases.

28. (1) No person, other than a licensee, shall engage in the business of supplying energy with the previous sanction of the Provincial Government and in accordance with such conditions as the Provincial Government may fix in this behalf, and any agreement to the contrary shall be void:

[2][* * * * * *]

Provided [3][*] that such sanction shall not be given within the area for which a local authority is constituted, without that local authority's consent, or within the area of supply of any licensee, without that licensee's consent, unless the Provincial Government considers that consent has been unreasonably withheld.

(2) Where any difference or dispute arises as to whether any person is or is not engaging, or about to engage, in the business of supplying energy within the meaning of sub-section (1), the matter shall be referred to the Provincial Government and the decision of the Provincial Government thereon shall be final.

Power for non-licensees to break up streets.

29. (1) The local authority may, by order in writing, confer and impose upon any person, who has obtained the sanction of the Provincial Government under section 28 to engage in the business of supplying energy, all or any of the powers and liabilities of a licensee under sections 12 to 19 both inclusive, and the provisions of the said sections shall thereupon apply as if such person were a licensee under Part II.

(2) A local authority, not being a licensee, shall, for the purpose of lighting any street, have the powers and be subject to the liabilities respectively conferred

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LEG. REF.

[1] Added by S. 12 of Act I of 1922.

[2] The first proviso omitted by S. 13, *ibid.*

[3] The word "also" omitted, by *ibid.*

and imposed by sections 12 to 19, both inclusive, so far as applicable, as if it were a licensee under Part II.

(3) In cases other than those for which provision is made by sub-section (1), the person responsible for the repair of any street may, by order in writing, confer and impose upon any person who proposes to transmit energy in such street all or any of the powers and liabilities of a licensee under sections 12 to 19 (both inclusive), in so far as the same relate to—

(*a*) opening or breaking up of the soil or pavement of such street, or

(*b*) laying down or placing electric supply-lines in, under, along or across such street, or

(*c*) repairing, altering or removing such electric supply-lines, and thereupon the provisions of the said sections shall, so far as aforesaid, apply to such person as if he were a licensee under Part II.

(4) If no order is made within fourteen days after the receipt of an application for the same under sub-section (1) or sub-section (3), the order so applied for shall be deemed to have been refused, and every order, and every refusal to make an order, under sub-section (1) or sub-section (3), shall be subject to revision by the Provincial Government.

Application of section 18 to aerial lines maintained by railways.

[1][29A. The provisions of sub-sections (3) and (4) of section 18 and of the *Explanation* thereto shall apply in the case of any aerial line placed by any railway administration as defined in section 3 of the Indian Railways Act, 1890, as if references therein to the licensee were references to the railway administration.]

Control of transmission and use of energy.

30. (1) No person, other than a licensee duly authorized under the terms of his license, shall transmit or use energy at a rate exceeding two hundred and fifty watts,—

(*a*) in any street, or

(*b*) in any place,

(i) in which one hundred or more persons are likely ordinarily to be assembled, or

(ii) which is a factory within the meaning of the [2]Indian Factories Act, [3][1911], or,

(iii) which is a mine within the meaning of the [4]Indian Mines Act, 1901, [5][or

(iv) to which the Provincial Government, by general or special order, declares the provisions of this sub-section to apply],

without giving not less than seven clear days' notice in writing of his intention to the District Magistrate or, in a Presidency town, [6]* *, to the Commissioner of Police, and complying with such of the provisions of Part IV, and of the rules made thereunder, as may be applicable :

Provided that nothing in this section shall apply to energy used for the public carriage of passengers, animals or goods on, or for the lighting or ventilation of the rolling-stock of, any railway or tramway subject to the provisions of the Indian Railways Act, 1890 :

Provided, also, that the Provincial Government may, by general or special order and subject to such conditions and restrictions as may be specified therein, exempt from the application of this section or of any such provision or rule as

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LEG.. REF

[1] Inserted by S. 2 of Act XL of 1923.

[2] *See now* the Factories Act, XXV of 1934.

[3] These figures were substituted for the figures "1881" by S. 14 of Act I of 1922.

[4] *See* now the Indian Mines Act, IV of 1923.

[5] The word "or" and sub-clause (*iv*) were inserted by Act I of 1922.

[6] The words "or Rangoon" were omitted by A.O., 1937.

aforesaid any person or class of persons using energy on premises upon or in connection with which it is generated, or using energy supplied under Part II in any place specified in clause (*b*).

(2) Where any difference or dispute arises as to whether a place is or is not one in which one hundred or more persons are likely ordinarily to be assembled, the matter shall be referred to the Provincial Government and the decision of the Provincial Government thereon shall be final.

(3) The provisions of this section shall be binding on the Crown.

PART IV.

GENERAL.

Protective Clauses.

Protection of railways and canals, docks, wharves and piers.

31. No person shall, in the generation, transmission, supply or use of energy, in any way injure any railway, tramway, canal or water-way or any dock, wharf or pier vested in or controlled by a local authority, or obstruct or interfere with the traffic on any railway, tramway, canal or water-way.

Protection of telegraphic, telephonic and electric signalling lines.

32. (1) Every person generating, transmitting, supplying or using energy (hereinafter in this section referred to as the "operator") shall take all reasonable precautions in constructing, laying down and placing his electric supply-lines and other works and in working his system, so as not injuriously to affect, whether by induction or otherwise, the working of any wire or line used for the purpose of telegraphic, telephonic or electric-signalling communication, or the currents in such wire or line.

(2) Where any difference or dispute arises between the operator and the telegraph-authority as to whether the operator has constructed, laid down or placed his electric supply-lines or other works, or worked his system, in contravention of sub-section (1), or as to whether the working of any wire, line or current is or is not injuriously affected thereby, the matter shall be referred to [1][the Central Government]; and [1][the Central Government], unless [2][it] is of opinion that the wire or line has been placed in unreasonable proximity to the electric supply-lines or works of the operator after the construction of such lines or works, may direct the operator to make such alterations in, or additions to, his system as may be necessary in order to comply with the provisions of this section, and the operator shall make such alterations or additions accordingly:

Provided that nothing in this sub-section shall apply to the repair, renewal or amendment of any electric supply-line so long as the course of the electric supply-line and the amount and nature of the energy transmitted thereby are not altered.

(3) Where the operator makes default in complying with the requirements of this section, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

Explanation.—For the purposes of this section, a telegraph-line shall be deemed to be injuriously affected if telegraphic, telephonic or electric-signalling communication by means of such line is, whether through induction or otherwise, prejudicially interfered with by an electric supply-line or work or by any use made thereof.

33. [3][(1) If any accident occurs in connection with the generation, trans-

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LEG. REF.

[1] Substituted by A.O., 1937.

[2] This word was substituted for the word "he" by S. 2 and Sch. I of Act XXXVIII of 1920.

[3] This sub-section was substituted by Act I of 1922. S. 15.

NOTES.

Sec. 33.—It was held under the old section that its applicability was not confined to the accidents occurring in connection with the works of persons licensed under Parts II and III of the Act, nor to cases in which

Notice of accidents and inquiries.

mission, supply or use of energy in, or in connection with any part of the electric supply-lines or other works of any person, and the accident results or is likely to have resulted in loss of life or personal injury, such person shall give notice of the occurrence, and of any loss of life or personal injury, actually occasioned by the accident, in such form and within such time and to such authorities as the Provincial Government may, by general or special order, direct.]

(2) The Provincial Government may, if it thinks fit, require any Electric Inspector, or any other competent person appointed by it in this behalf, to inquire and report—

(*a*) as to the cause of any accident affecting the safety of the public, which may have been occasioned by or in connection with the generation, transmission supply or use of energy, or

(*b*) as to the manner in, and extent to, which the provisions of this Act or of any license or rules thereunder, so far as those provisions affect the safety of any person, have been complied with.

Prohibition of connection with earth, and power for Government to interfere in certain cases of default.

34. (1) No person shall, in the generation, transmission, supply or use of energy, permit any part of his electric supply-lines to be connected with earth except so far as may be prescribed in this behalf or may be specially sanctioned by the Provincial Government.

(2) If at any time it is established to the satisfaction of the Provincial Government—

(*a*) that any part of an electric supply-line is connected with earth contrary to the provisions of sub-section (1), or

(*b*) that any electric supply-lines or other works for the generation, transmission, supply or use of energy are attended with danger to the public safety or to human life or injuriously affect any telegraph-line, or

(*c*) that any electric supply-lines or other works are defective so as not to be in accordance with the provisions of this Act or of any rule thereunder,

the Provincial Government may by order in writing specify the matter complained of and require the owner or user of such electric supply-lines or other works to remedy it in such manner as shall be specified in the order and may also in like manner forbid the use of any electric supply-line or works until the order is complied with or for such time as is specified in the order.

Administration and rules.

Advisory Boards.

35. (1) The Central Government may for the whole or any part of British India, and each Provincial Government may for the whole or any part of the province, by notification in the official Gazette, [1] * * * constitute an Advisory Board.

(2) Every such Board shall consist of a chairman and not less than two other members.

LEG. REF.

[1] The words " or the local official Gazette, as the case may be " were omitted by A.O., 1937.

NOTES.

the accident actually resulted in personal injury or death. *See* 39 M. 686=18 M. L. J. 150=30 I.C. 444.

CONTINUANCE IN FORCE OF RULES AND REGULATIONS MADE UNDER ACT IX OF 1910 AND ACT V OF 1923.—Rules made before the 31st day of March, 1937, under S. 37 of the Indian Electricity Act, 1910, and regulations made before the 28th day of March, 1937, under S. 28 of the Indian Boilers Act, 1923, by the Governor-General in Council shall, on and from the said dates respectively, be deemed to have been made under the said sections of the said Acts by the authority substituted for the Governor-General in Council by the Indian Electricity (Amendment) Act, 1937, and the Indian Boilers (Amendment) Act, 1937, respectively, and shall continue to be in force until superseded by rules or regulations made under the said sections of the said Acts by the Central Electricity Board or the Central Boilers Board, as the case may be. (*Vide* S. 2 of Act XXIV of 1937.)

[1]* * * * * *

[2][(3)] The Central Government or the Provincial Government as the case may be, may, by general or special order,—

[3][(*a*) determine the number of members of which any such Board shall be constituted and the manner in which such members shall be appointed.]

[4][(*b*)] define the duties and regulate the procedure of any such Board,

[4][(*c*)] determine the tenure of office of the members of any such Board, and

[4][(*d*)] give directions as to the payment of fees to, and the travelling expenses incurred by, any member of any such Board in the performance of his duty.

Appointment of Electric Inspectors.

36. (1) The Central Government may, by notification in the official Gazette appoint duly qualified persons to be Electric Inspectors, and every Electric Inspector so appointed shall [5][in relation to mines oil-fields and railways] exercise the powers and perform the functions of an Electric Inspector under this Act within such areas and subject to such restrictions as the Central Government may direct.

(2) The Provincial Government may, by notification in the official Gazette, appoint duly qualified persons to be Electric Inspectors within such areas as may be assigned to them respectively ; and every Inspector so appointed shall [5][except in relation to mines, oil-fields and railways] exercise the powers and perform the functions of an Electric Inspector under this Act subject to such restrictions as the Provincial Government may direct.

(3) In the absence of express provision to the contrary in this Act or any rule thereunder, an appeal shall lie from the decision of an Electric Inspector to the Gentral Government or the Provincial Government, as the case may be [6][or, if the Central Government or the Provincial Government, as the case may be, by general or special order, so directs to an Advisory Board.]

Central Electricity Board.

[7][36A. (1) A Board to be called the Central Electricity Board shall be constituted to exercise the powers conferred by section 37.

(2) The Central Electricity Board shall consist of fifteen members namely :—

(*a*) a chairman to be nominated by the Central Government ;

(*b*) one member to be nominated by each of the Provincial Governments of Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces [8][and Berar], Assam, the North-West Frontier Province, Sind and Orissa ;

(*c*) one member, holding office for a period of three years to be nominated alternatively by the Provincial Government of Delhi and the Provincial Government of Ajmer-Merwara ;

(*d*) one member to be nominated by the Chief Commissioner of Railways ; and

(*e*) one member to be nominated by the Chief Inspector of Mines.

(3) Any vacancy occurring in the Board otherwise than by the expiry of the term of office of the member referred to in clause (*e*) of sub-section (2), shall be filled as soon as may be by a nomination made by the authority by whom the member vacating office was nominated.

(4) The Board shall have full power to regulate by by-laws or otherwise its own procedure and the conduct of all business to be transacted by it.

(5) The powers of the Central Electricity Board may be exercised notwithstanding any vacancy in the Board.]

LEG. REF.

[1] Sub-section (3) was omitted by S. 16 of Act I of 1922.

[2] This sub-section which was originally numbered " (4) ", was renumbered " (3) ", *ibid.*

[3] This clause was inserted by S. 16 of Act I of 1922.

[4] The original clauses (*a*), (*b*) and (*c*) were re-lettered (*b*), (*c*) and (*d*) respectively, *ibid.*

[5] These words were inserted by A.O., 1987.

[6] These words were inserted, S. 17, of Act I of 1922.

[7] This section was inserted by S. 3 of Act X of 1937.

[8] These words were inserted bo A.O., 1937.

Power for Board to make rules.

37. (1) The [1][Central Electricity Board] may make rules for the whole or any part of British India, to regulate the generation, transmission, supply and use of energy and, generally, to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the form of applications for licenses and the payments to be made in respect thereof;

(*b*) regulate the publication of notices;

(*c*) prescribe the manner in which objections with reference to any application under Part II are to be made;

(*d*) provide for the preparation and submission of accounts by licensees in a specified form;

(*e*) provide for the securing of a regular, constant and sufficient supply of

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LEG. REF.

[1] These words were substituted for the words Governor-General in Council by S. 4 of Act X of 1937.

NOTES.

Sec. 37.—The Power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. Because in their licence the electric company are empowered to have a generating station somewhere within the limits of Madras, they are not free from the ordinary control of the local authority in respect of the steam boiler which they use to provide motive power for generation. [(1881) 6 A.C. 193, Ref.] Nor does the fact that it is a company of public utility with compulsory obligations to the public confer on it immunity from the control of the local authority. [(1899) 2 Q.B. 664; (1909) 2 K.B. 744; (1900) 82 L.T. 562; (1909) 2 K.B. 138; (1903) 88 L.T. 772, Ref.] 54 M. 364=1931 Mad. 152 =60 M.L.J. 551.

RULES 31 AND 37.—The provisions of R. 31 deal with the point of commencement of supply of energy by the licensee to the consumer and not with the question of control over an electric line as a matter of fact. R. 31 is one of the rules relating to the conditions of supply which is a matter of concern between the licensee and the consumer rather than a matter affecting the public; whereas R. 37 is one of the rules of precaution for the safety of the public. 1933 R. 70=11 Rang. 162=34 Cr.L.J. 1040. R. 37 applies to all electric supply lines, and in considering whether the case is governed by R. 37 or not, it is unnecessary to determine whether the line in question is a service-line or not. Under R. 37 the licensee is responsible that all electric supply lines under his control, even if they are on a consumer's premises, are maintained in a safe condition. In truth and in fact the consumer gets the use of the control of the electric current only when it reaches his switch and not as soon as it passes through the metre. 11 R. 162. *See also* 41 Bom. L.R. 878. The contention that if the consumer elects to take a supply of energy from the licensee's distributing main at any point outside his premises, and receives the supply through the licensee's meter, and thereafter it is conveyed through a line which has been constructed by the consumer and at his cost, the obligation to keep in a safe condition the line and works from the point of commencement of supply (*i.e.*, the meter) to the consumer's premises and also the line and works on the consumer's premises, is cast upon the consumer and not on the licensee cannot be accepted, for it runs counter to the object and effect of the Electricity Act. The licensee is not entitled by agreement with the consumer to release himself from the obligation to see that the line, apparatus and works by which electricity is transmitted, so long as he retains control of them, are maintained in a safe condition because this obligation is cast upon him not merely for the benefit of the consumer and the licensee, but also for the protection and in the interest of the public generally. Where therefore the licensee allows the stay wire in the road to be in an unsafe condition the licensee fails to perform an obligation imposed upon him under the Act and is guilty of a breach of R. 37 and can be convicted under R. 107. But a conviction in the alternative under R. 107 and S. 47 however is not in accordance with law, for, the case falls neither under S. 236 nor S. 367 (3), Cr. P. Code. 1933 Cr. C. 477=1933 R. 70. The evidence for the prosecution showed that when the officials of a licensee company visited the premises of the accused the seals which the company had affixed to the meter placed upon the premises of the accused had been removed. *Held,* that the accused must be held responsible for removing these seals and that his conviction under R. 106 read with R. 37 (4) was justified. 116 I.C. 889=1929 L. 867.

energy by licensees to consumers and for the testing at various parts of the system of the regularity and sufficiency of such supply, and for the examination of the records of such tests by consumers ;

(*f*) provide for the protection of persons and property from injury by reason of contact with, or the proximity of, or by reason of the defective or dangerous condition of, any appliance or apparatus used in the generation, transmission, supply or use of energy ;

RULE 40-A.—BOMBAY GOVERNMENT NOTIFICATION DATED 15-11-1934—"THEIR OWN WORKS" — INTERPRETATION OF—"WORKS"—MEANING OF.—The words "their own works" in the notification dated 15-11-1934, issued by the Government of Bombay under R. 40-A of the Electricity Rules, 1922, cannot be interpreted as being limited to works carried out on the premises of the various bodies referred to there. The words mean works carried out by the exempted bodies themselves or perhaps works belonging to them; and by "works" is meant the kind of works referred to in the rule and not the kind of works referred to in the definition in the Electricity Act. 43 Bom.L.R. 99. 1941 Bom. 100. *See also* I.L.R. (1939) Bom. 496.

RULE 48 OF THE INDIAN ELECTRICITY RULES 1937, introduced by the Notification dated 27-3-1937, did not come into force until 22-3-1938; and R. 48 cannot therefore apply to any installation works carried out before 22-3-1938, and after March, 1937. Nor would the old R. 40-A of the Electricity Rules, 1922, would apply, because under the Notification of 23-3-1937, the old R. 40-A was superseded when the new rules were made applicable on 27-3-1937. S. 24 of the General Clauses Act of 1897 is of no avail in such a case and R. 40-A of the old cannot be regarded as superseded only when the new R. 48 came into force, because the notification of March, 1937, expressly superseded the rules of 1922. 43 Bom.L.R. 99 =1941 Bom. 100.

"COMMERCIAL PREMISES" in the context of the classification rules for electric supply by an electric licensee means nothing more than "premises used for purposes of business." The words cannot be read as being in contradiction to trade premises. Premises used for running a coffee-hotel must be regarded as "Commercial premises" for the purpose of fixing rates for the supply of electric energy. 1941 M.W.N. 253=53 L.W. 359 =(1941) 1 M.L.J. 411=1941 Mad. 439.

RULE 106 FRAMED UNDER ACT—*Quaere*.—Whether R. 106 of the rules framed under the Electricity Act is *ultra vires* of the rule making power conferred by S. 37 (4). 172 I.C. 940=39 Cr.L.J. 206=18 Pat.L.T. 986=A.I.R. 1938 Pat. 15. The definition of '*consumer*' includes any person who is supplied with energy by a licensee, and any person whose premises are for the time being connected for the purposes of a supply of energy with the works of the licensee, Therefore in a prosecution for offences under sec. 44 and R. 106, *prima facie* it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. 172 I.C. 940=18 Pat.L.T. 986=1938 Pat. 15. It is clear from the provisions of S. 37 of the Electricity Act that R. 106 was one which the Government of India had power to make and the necessity of a rule fixing responsibility for the integrity of the seals of the meter fixed on the consumer's premises is obvious. It is equally obvious that in case of a conviction under R. 106, although the breaking of a seal on a meter fixed on a consumer's premises is sufficient to render the consumer liable to a fine, the fine would be adopted to the circumstances of the case. 151 I.C. 1039=1934 N. 245. Rule 106 is unreasonable and repugnant to the general principles of law, and is in excess of the powers conferred by S. 37 (4). It is also inconsistent with the provisions of S. 44 of the Act. Consequently this rule is *ultra vires* of the Governor-General in Council and is therefore invalid. 12 R. 515=35 Cr.L.J. 1364 =1934 R. 178.

RULE 107.—R. 107 framed under S. 37 of the Act imposes penalties only on licensees and owners (*i.e.*, experts). It is not applicable to consumers, who are not experts. The only rules which any non-expert can observe are Rr. 29 and 40-A which are provided for by Rr. 106 and 106-A. 60 Bom. 770=37 Cr.L.J. 1124=38 Bom.L.R. 434= 1936 Bom. 327.

UNDER R. 123 it is not the workman who actually carries out the installation that is guilty of any offence; it is only the person under whose immediate supervision the work is carried out that is liable to punishment under the rule. I.L.R. (1940) All. 67=1940 All. 5=1939 A.L.J. 1032.

RULE 62 (3) (*a*): LIABILITY UNDER—CIVIL RIGHTS.—The civil rights of a person would not in any way protect him against criminal liability for his acts and omissions under R. 62 (3) (*a*) of the Indian Electricity Rules. He has every right to move against the Electric Supply Co., to have the wire removed from over his land, but the wire being where it is he is not justified in law in effecting additions and alterations in his house making the aerial line running over land accessible otherwise than by the aid of a ladder or other special appliance. 15 Pat.L.T. 761=1934 P. 523.

(*g*) for the purposes of electric traction regulate the employment of insulated returns, or of uninsulated metallic returns of low resistance, in order to prevent fusion or injurious electrolytic action of or on metallic pipes, structures or substances, and to minimise, as far as is reasonably practicable, injurious interference with the electric wires, supply-lines and apparatus of parties other than the owners of the electric traction system, or with the currents therein, whether the earth is used as a return or not ;

(*h*) provide for preventing telegraph-lines and magnetic observatories or laboratories from being injuriously affected by the generation, transmission, supply or use of energy ;

(*i*) prescribe the qualifications to be required of Electric Inspectors ;

(*j*) authorize any Electric Inspector or other officer of a specified rank and class to enter, inspect and examine any place, carriage or vessel in which he has reason to believe any appliance or apparatus used in the generation, transmission, supply or use of energy to be, and to carry out tests therein, and to prescribe the facilities to be given to such Inspectors or officers for the purposes of such examinations and tests :[1]*

(*k*) authorize and regulate the levy of fees for any such testing or inspection and, generally for the services of Electric Inspectors under this Act ; [2][and

(*l*) provide for any matter which is to be or may be prescribed ;

(3) Any rules made in pursuance of clause (*f*) or clause (*h*) of sub-section (2) shall be binding on the Crown].

[2][(4)] In making any rule under this Act, the [3][Central Electricity Board] may direct that every breach thereof shall be punishable with fine which may extend to three hundred rupees, and, in the case of a continuing breach, with a further daily fine which may extend to fifty rupees.

Further provisions respecting rules.

38 (1). The power to make rules under section 37 shall be subject to the condition of the rules being made after previous publication.

(2) The date to be specified in accordance with clause (3) of section 23 of the General Clauses Act, 1897, as that after which a draft of rules proposed to be made under section 37 will be taken into consideration shall not be less than three months from the date on which the draft of the proposed rules was published for general information.

[4][* * * * * *]

[4][(3)] All rules made under section 37 shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act.

Criminal Offences and Procedure.

39. Whoever dishonestly abstracts, consumes or uses any energy shall be

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LEG. REF.

[1] The word "and" was omitted by S. 18 of Act I of 1922.

[2] The word "and", clause (*l*) and sub-section (3) were inserted and the original sub-section (3) was re-numbered (4), *ibid.*

[3] These words were substituted for the words Governor-General in Council" by S. 4 of Act X of 1937.

[4] Sub-section (3) was omitted and the original sub-section (4) re-numbered (3) by S. 5 of Act X of 1937.

NOTES.

Secs. 37 and 38: RULES UNDER.—Validity of rules made and duly published by the Governor-General can be canvassed in a Court of law. 12 R. 515=35 Cr.L.J. 1364 =1934 R. 178. The definite policy underlying the penal rules framed under S. 37 is to make licensees and owners who are experts, having, or supposed to have some knowledge of the technical matters relating to electricity liable for breaches of the rules. An owner as defined under the rules is a sort of quasi-licensee; a person who is not a licensee, but authorised by Government under Part III of the Act to supply energy. The rules, however, clearly are not part of the Act, and the provision in S. 38 (4) giving them the same force as if they had been enacted by the Act does not make them so. 60 Bom. 770=37 Cr.L.J. 1124= 38 Bom.L.R. 434=1936 Bom. 327.

Sec. 39.—The word "dishonestly" is a legal expression having the same sense as that in which it is used in the Penal Code. 27 I.C. 591.

Theft of energy.

deemed to have committed theft within the meaning of the Indian Penal Code ; and the existence of artificial means for such abstraction shall be *prima facie* evidence of such dishonest abstraction.

Penalty for maliciously wasting energy or injuring works.

40. Whoever maliciously causes energy to be wasted or diverted, or, with intent to cut off the supply of energy, cuts or injures, or attempts to cut or injure, any electric supply-line or works, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Penalty for unauthorised supply of energy by non-licensees.

41. Whoever, in contravention of the provisions of section 28, engages in the business of supplying energy shall be punishable with fine which may extend to three thousand rupees, and, in the case of a continuing contravention, with a daily fine which may extend to three hundred rupees.

NOTES.

BURDEN OF PROOF—CIRCUMSTANTIAL EVIDENCE.—S. 39 does not remove from prosecution the burden of proving an offence against an individual. Such proof must naturally be circumstantial in character. Where the person charged is the lessee or owner of the house and the consumer of the electricity (that is, the person who is officially on the company's books as the consumer in the particular house) and where there is a large and obvious erection on the roof of the house or in any part of the house, where it could not possibly escape the notice of the consumer and where in addition the person charged is the only person who would gain advantage from the theft of the electricity, the charge under S. 39 is made out. 146 I.C. 814=1933 A.L.J. 1175. S. 39 does not say that dishonest abstraction or consumption or use of energy is theft. S. 39 means no more than that the offender is to be tried in the same way as if he had committed the offence of theft. 1936 Cal. 753. Abstraction is not always a necessary ingredient for an offence under S. 39. The consuming of electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered, amounts to a dishonest user within the meaning of S. 39, and the persons causing or allowing the alteration of the figures on the dial must be deemed to have committed theft within the meaning of S. 379, Penal Code. 1936 C. 753.

OFFENCE UNDER SECTION — CONSUMER USING ELECTRICAL MACHINERY—*Bona fide* CONDUCT.—A consumer employing electrical machinery is entitled within his own premises to use all reasonable tests which might be necessary to discover a defect. It is not obligatory on any one, whatever machinery he may happen to use, to call in an expert on every occasion when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If, in the electric supply, it is reasonable for a consumer to use an electric lamp and he *bona fide* uses a lamp for this purpose without permission, S. 23 has no application nor is he guilty under S. 39 as his action does not amount to dishonest abstraction of the company's electric energy. 151 I.C. 19=35 Cr. L.J. 1274=1934 A. 320.

Secs. 39 and 44 (c).—S. 39 dispenses with direct proof of abstraction by the accused person, but does not indicate the person who is to be held liable for the constructive abstraction. S. 44 (*c*) also enables a presumption to be raised, under certain circumstances, that the prevention of a meter from duly registering itself has been knowingly and wilfully caused by the consumer in whose custody or control the meter is proved to be. But the prosecution cannot avail itself of this statutory presumption as against an accused person unless that person is shown to be a consumer within the meaning of S. 2 (*c*). 1938 P.W.N. 182=19 Pat.L.T. 141=A.I.R. 1938 Pat. 243. Where an offence falls under both Ss. 39 and 44 (*c*), the mere fact that a charge could have been made under S. 44 (*c*) does not prevent a charge made under S. 39 from being properly made especially where the offence under S. 39 is clearly established. S. 39 is in fact the major offence. 65 I.A. 158=42 C.W.N. 621=1938 P.C. 130=(1938) 1 M.L.J. 647 (P.C.). Sc. 39 and 44, Electricity Act, are to be considered as separate enactments for purposes of S. 26, General Clauses Act. 1936 Cal. 753.

Secs. 39 and 50: THEFT OF ELECTRIC ENERGY—PERSONS AUTHORISED TO PROSECUTE.—S. 39 creates an offence, and prosecution for the theft of èlectric energy can be instituted only by one of the persons mentioned in S. 50. Where the prosecution is not instituted at the instance of the Government or an Electric Inspector but by the Executive Officer of a Cantonment Board who are licensees for distribution of electric energy, the proceedings are liable to be quashed in the absence of evidence to show that the Executive Officer has authority from the Board to institute the proceedings, as he cannot be deemed to be an aggrieved person within the meaning of S. 50. 37 P.L.R. 758.

Penalty for illegal or defective supply or for non-compliance with order.

42. Whoever—

(*a*) being a licensee, save as permitted under section 27 or section 51 or by his license, supplies energy or lays down or places any electric supply-line or works outside the area of supply; or,

(*b*) being a licensee, in contravention of the provisions of this Act or of the rules thereunder or in breach of the conditions of his license and without reasonable excuse, the burden of proving which shall lie on him, discontinues the supply of energy or fails to supply energy; or

(*c*) makes default in complying with any order issued to him under section 34, sub-section (2);

shall be punishable with fine which may extend to one thousand rupees, and, in the case of a continuing offence or default, with a daily fine which may extend to one hundred rupees.

Penalty for illegal transmission or use of energy.

43. Whoever in contravention of the provisions of section 30, transmits or uses energy without giving the notice required thereby, shall be punishable with fine which may extend to five hundred rupees, and, in the case of a continuing offence, with a daily fine which may extend to fifty rupees.

Penalty for interference with meters or licensee's works and for improper use of energy.

44. Whoever—

(*a*) connects any meter referred to in section 26, sub-section (1), or any meter, indicator or apparatus referred to in section 26, sub-section (7) with any electric supply-line through which energy is supplied by a licensee, or disconnects the same from any such electric supply-line, without giving to the licensee forty-eight hours' notice in writing of his intention; or

(*b*) lays, or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee, without such licensee's consent; or

(*c*) maliciously injures any meter referred to in section 26, sub-section (1), or any meter, indicator or apparatus referred to in section 26, sub-section (7), or wilfully or fraudulently alters the index of any such meter, indicator, or apparatus, or prevents any such meter, indicator or apparatus from duly registering; or

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NOTES.

Sec. 44.—The latter part of S. 44 of the Act does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. I.L.R. (1940) 2 Cal. 571. Presumption under—When to be raised—not available against a person not proved to be consumer. 1938 P.W.N. 182 =19 Pat.L.T. 141=1938 Pat. 243. *See also* I.L.R. (1940) 2 Cal. 571. In prosecution for offences under this section *prima facie* it is enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. 1938 Pat. 15=18 Pat.L. T. 986.

Sec. 44 (b) OF THE ACT does not require that the "works" laid or connected up with any other works belonging to the licensee must also be works belonging to the licensee. I.L.R. 1939 Bom. 496=41 Bom.L.R. 878 =1939 Bom. 480. "Works" as defined by S. 2 (*n*) of the Electricity Act, include electric supply lines. The point at which the supply of energy by a licensee to a sonsumer shall be deemed to commence, where the amount supplied is ascertained by meter, is the point at which the conductor enters the meter, in view of S. 35 read with S. 19-A of the Act. The supply line up to the point at which it enters the meter constitutes "works" within the meaning of S. 2 (*n*). Where a person therefore removes the meter board to a new position, after breaking open the seals which had been placed by the licensee upon the meter, laying additional lines from the former position of the meter up to its new position, his act amounts to an offence under S. 44 (*b*) of the Electricity Act as well as an offence under R. 31 (1) read with R. 122 (*a*) of the Electricity Rules. I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=1939 Bom. 480.

(*d*) improperly uses the energy of a licensee ;

shall be punishable with fine which may extend to [1][five hundred] rupees, and, in the case of a continuing offence, with a daily fine which may extend to [2][fifty] rupees ; and [3][if it is proved that any artificial means exist] for making such connection as is referred to in clause (*a*) or such communication as is referred to in clause (*b*) or for causing such alteration or prevention as is referred to in clause (*c*) or for facilitating such improper use as is referred to in clause (*d*) [4][and that] the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, [5][it shall be presumed, until the contrary is proved,] that such connection, communication, alteration, prevention or improper use, as the case may be, has been knowingly and wilfully caused by such consumer.

Penalty for extinguishing public lamps.

45. Whoever maliciously extinguishes any public lamp shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to three hundred rupees, or with both.

Penalty for negligently wasting energy or injuring works.

46. Whoever negligently causes energy to be wasted or diverted, or negligently breaks, throws down or damages any electric supply-line, post, pole or lamp or other apparatus connected with the supply of energy, shall be punishable with fine which may extend to two hundred rupees.

Penalty for offences not otherwise provided for.

47. Whoever in any case not already provided for by sections 39 to 46 (both inclusive), makes default in complying with any of the provisions of this Act, or with any order issued under it, or, in the case of a licensee, with any of the conditions of his license, shall be punishable with fine which may extend to one hundred rupees, and, in the case of a continuing default, with a daily fine which may extend to twenty rupees :

Provided that, where a person has made default in complying with any of the provisions of sections 13, 14, 15, 17 and 32, as the case may be, he shall not be so punishable if the Court is of opinion that the case was one of emergency and that the offender complied with the said provisions as far as was reasonable in the circumstances.

Penalties not to affect other liabilities.

48. The penalties imposed by sections 39 to 47 (both inclusive) shall be in addition to, and not in derogation of, any liability in respect of the payment of compensation or, in the case of a licensee, the revocation of his license, which the offender may have incurred.

LEG. REF.

[1] These words were substituted for the words "three hundred" by S. 19 of Act I of 1922.

[2] This word was substituted for the word "thirty", *ibid.*

[3] These words were substituted for the words "the existence of artificial means," *ibid.*

[4] These words were substituted for the words "shall, where," *ibid.*

[5] These words were substituted for the words "be *prima facie* evidence," *ibid.*

NOTES.

Sec. 44 (d): PROSECUTION UNDER—ONUS OF PROOF.—The latter part of S. 44 of the Electricity Act does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. I.L.R. (1940) 2 Cal. 571=1941 Cal. 87.

Sec. 47.—A conviction in the alternative under R. 107 and S. 47 is not in accordance with law. *See* 1933 Cr.C. 477=A.I.R. 1933 R. 70 cited under S. 37. S. 47 deals in terms with default in complying with any of the provisions of the Act, or with any order issued under it, or in the case of a licence with any of the conditions of his licence; but it does not deal with a breach of any of the rules made under the Act. Section cannot be held by implication to provide a penalty for breach of the rules also. 69 Bom. 770=37 Cr.L.J. 1124=38 Bom.L.R. 434=1936 Bom. 327.

Penalties where works belong to Government.

49. The provisions of sections 39, 40, 44, 45, and 46 shall, so far as they are applicable, be deemed to apply also when the acts made punishable thereunder are committed in the case of energy supplied by or of works belonging to, [1][any Government in British India].

Institution of prosecutions.

50. No prosecution shall be instituted against any person for any offence against this Act or any rule, license or order thereunder, except at the instance of the Government or an Electric Inspector, or of a person aggrieved by the same.

Supplementary.

Exercise in certain cases of powers of telegraph-authority.

51. Notwithstanding anything in sections 12 to 16 (both inclusive) and sections 18 and 19, the Provincial Government may, by order in writing, for the placing of appliances and apparatus for the transmission of energy, confer upon any public officer or licensee, subject to such conditions and restrictions (if any) as the Provincial Government may think fit to impose, and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph-authority possesses under that Act, with respect to the placing of telegraph-lines and posts for the purposes of a telegraph established or maintained by the Government or to be so established or maintained.

Arbitration.

52. Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the license of a licensee, be determined by such person or persons as the Provincial Government may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the [2][*] Arbitration Act, [3][1940].

Service of notices, orders or documents.

53. (1) Every notice, order or document by or under this Act required or authorised to be addressed to any person may be served by post or left,—

(*a*) where [4][the Central Government or the Provincial Government] is the addressee, at the office of [5][such officer as the Central Government or the Provincial Government, as the case may be, may designate in this behalf;]

[6][(*aa*) where the Federal Railway Authority is the addressee, at the office of the Authority;]

(*b*) where a local authority is the addressee, at the office of the local authority;

LEG. REF.

[1] These words were substituted for the words "the Government" by A.O., 1937.

[2] The word "Indian" was omitted by Act XXXII of 1940.

[3] Substituted by Act X of 1940.

[4] These words were substitued for the words "the Government" by A.O., 1937.

[5] These words were substituted for the words "the Secretary in the Public Works Department", by S. 21 of Act I of 1922.

[6] This clause was inserted, by A.O., 1937.

NOTES.

Sec. 50.—S. 50 of the Act applies to a prosecution under S. 379, I.P. Code, read with S. 39 of the Act for the theft of electricity. An offence of this nature is an offence against the Electricity Act as it would not have been an offence under S. 379, I.P. Code, if it had not been for the provisions of S. 39 of that Act. It is an offence which is created by that section and the Legislature intended S. 50 to apply to an offence of this nature. 165 I.C. 689=1936 A.L.J. 955=1936 All. 742. The phrase "at the instance of" in S. 50 means merely at the solicitation of or at the request of. Where a prosecution under the Act is instituted by the police on report from the Electric Company whose officers come into Court and give evidence, the prosecution is really at the instance of the Electric Company who is a 'person aggrieved', although they may not make the immediate complaint on which the Magistrate takes cognizance of the offence. (*Ibid.*) A licensee-company is a "person aggrieved" within the meaning of S. 50. 116 I.C. 889=1929 L. 867. So also a person who is directly in charge of an Electric Company such as its Chief Residential Engineer. 1938 Pat. 15=18 Pat.L.T. 986=172 I.C. 940. *See also* 35 P.L.R. 753, cited under S. 39, *supra*.

(*c*) where a company is the addressee, at the registered office of the Company, or, in the event of the registered office of the Company not being in India, at the head office of the Company in India ;

(*d*) where any other person is the addressee, at the usual or last known place of abode or business of the person.

(2) Every notice, order or document by or under this Act required or authorized to be addressed to the owner or occupier of any premises shall be deemed to be properly addressed if addressed by the description of the " owner " or " occupier " of the premises (naming the premises), and may be served by delivering it, or a true copy thereof, to some person on the premises, or, if there is no person on the premises to whom the same can with reasonable diligence be delivered, by affixing it on some conspicuous part of the premises.

Recovery of sums recoverable under certain provisions of Act.

54. Every sum declared to be recoverable by section 5, clause (*f*), section 6, sub-section (2), section 14, sub-section (2), clause (*h*), section 16, sub-section (2), section 18, sub-section (2) or sub-section (4), or section 26, sub-section (4) and every fee leviable under this Act, may be recovered, on application to a Magistrate having jurisdiction where the person liable to pay the same is for the time being resident, by the distress and sale of any movable property belonging to such person.

Delegation of certain functions of Provincial Government to Electric Inspectors.

55. The Provincial Government may, by general or special order, authorise the discharge of any of its functions under section 13 or section 18, [1][or section 34, sub-section (2)] or clause V, sub-clause (2), or clause XIII of the Schedule by an Electric Inspector.

Protection for acts done in good faith.

56. No suit, prosecution or other proceeding shall lie against any public officer, or any servant of a local authority, for anything done, or in good faith purporting to be done, under this Act.

Amendment of the Land Acquisition Act, 1894.

57. (1) In section 40, sub-section (1), clause (*b*), and section 41, sub-section (5), of the Land Acquisition Act, 1894, the term " work " shall be deemed to include electrical energy supplied, or to be supplied, by means of the work to be constructed.

(2) The Provincial Government may, if it thinks fit, on the application of any person, not being a company, desirous of obtaining any land for the purposes of his undertaking, direct that he may acquire such land under the provisions of the Land Acquisition Act, 1894, in the same manner and on the same conditions as it might be acquired if the person were a company.

Repeals and savings.

58. (1) The Indian Electricity Act, 1903, is hereby repealed :

Provided that every application for a license made and every license granted under the said Act shall be deemed to have been made and granted under this Act.

(2) Nothing in this Act shall be deemed to affect the terms of any license which was granted, or of any agreement which was made, by or with the sanction of the Government for the supply or use of electricity before the commencement of this Act.

THE SCHEDULE.

PROVISIONS TO BE DEEMED TO BE INCORPORATED WITH, AND TO FORM PART OF, EVERY LICENSE GRANTED UNDER PART II, SO FAR AS NOT ADDED TO, VARIED OR EXCEPTED BY THE LICENSE.

[See *section* 3, *sub-section* (2), *clause* (*f*).]

Security and Accounts.

Security for execution of works of licensee not being local authority.

I. Where the licensee is not a local authority, the following provisions as to giving security shall apply, namely :—

LEG. REF.

[1] These words, figures and brackets were inserted by S. 22 of Act I of 1922.

(*a*) The licensee shall within the period fixed in that behalf by his license, or any longer period which the Provincial Government may substitute therefor by order under section 4, sub-section (3), clause (*b*), of the Indian Electricity Act, 1910, before exercising any of the powers by the license conferred on him in relation to the execution of works show, to the satisfaction of the Provincial Government, that he is in a position fully and efficiently to discharge the duties and obligations imposed upon him by the license throughout the area of supply.

(*b*) The licensee shall also within the period fixed in that behalf by his license, or any longer period which the Provincial Government may substitute therefor by order under section 4, sub-section (3), clause (*b*), of the Indian Electricity Act, 1910, and before exercising any of the powers conferred on him in relation to the execution of works, deposit or secure to the satisfaction of the Provincial Government such sum (if any) as may be fixed by the license or, if not so fixed, by the Provincial Government.

(*c*) The said sum deposited or secured by the licensee under the provisions of this clause shall be repaid or released to him on the completion of the works or at such earlier date or dates and by such instalments, as may be approved by the Provincial Government.

Audit of accounts of licensee not being a local authority.

II. Where the licensee is not a local authority, the following provisions as to the audit of accounts shall apply, namely :—

(*a*) The annual statement of accounts of the undertaking shall, before being rendered under section 11 of the Indian Electricity Act, 1910, be examined and audited by such person as the Provincial Government may appoint or approve in this behalf, and the remuneration of the auditor shall be such as the Provincial Government may direct and his remuneration and all expenses incurred by him in or about the execution of his duties to such an amount as the Provincial Government shall approve, shall be paid by the licensee on demand.

(*b*) The licensee shall afford to the auditor, his clerks and assistants, access to all such books and documents relating to the undertaking as are necessary for the purposes of the audit, and shall when required, furnish to him and them all vouchers and information requisite for that purpose, and afford to him and them all facilities for the proper execution of his and their duty.

(*c*) The audit shall be made and conducted in such manner as the Provincial Government may direct.

(*d*) Any report made by the auditor, or such portion thereof as the Provincial Government may direct, shall be appended to the annual statement of accounts of the licensee, and shall thenceforth form part thereof.

(*e*) Notwithstanding the foregoing provisions of this clause, the Provincial Government may, if it thinks fit, accept the examination and audit of an auditor appointed by the licensee.

Separate accounts.

III. The licensee shall, unless the Provincial Government otherwise directs, at all times keep the accounts of the capital employed for the purposes of the undertaking distinct from the accounts kept by him of any other undertaking or business.

Compulsory works and Supply.

Execution of work after commencement of license.

IV. The licensee shall, within a period of three years after the commencement of the license, execute to the satisfaction of the Provincial Government all such works as may be specified in the license in this behalf or, if not so specified, as the Provincial Government may, by order in writing issued within six months of the date of the commencement of the license, direct.

Provisions as to laying down of further distributing mains.

V. (1) Where, after the expiration of two years and six months from the commencement of the license, a requisition is made by six or more owners or occupiers of premises in or upon any street or part of a street within the area of supply or by the Provincial Government or a local authority charged with the public lighting thereof, requiring the licensee to provide distributing mains throughout such street or part thereof, the licensee shall comply within six months with the requisition, unless—

(*a*) where it is made by such owners or occupiers as aforesaid, the owners or occupiers making it do not, within fourteen clear days after the service on them by the licensee of a notice in writing in this behalf, tender to the licensee a written contract duly executed and with sufficient security binding themselves to take, or guaranteeing that there shall be taken, a supply of energy for not less than two years to such amount as will in the aggregate produce annually, at the current rates charged by the licensee, a reasonable return to the licensee ; or

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NOTES.

Cls. 5, 6 and 10.—Clauses 6 and 5 cast the obligation on the licensee to supply electric energy to an applicant or a group of applicants for supply of electric energy only when the applicant or group of applicants enter into a written contract with the licensee. The only power reserved to the licensee by the Act in the matter of rates which may be exercised by him apart from contract is that he can charge on any one of the three alternative modes specified in Cls. (*a*), (*b*) and (*c*) of sub-S. (3) of S. 23 of the Act; and even when the licensee intends to prefer to go upon the basis of S. 23 (3) (*c*), the consumer can by following the procedure laid down in Cl. 10 of the Schedule, compel the licensee to adopt either of the modes mentioned in Cls. (*a*) and (*b*). 63 Cal. 1047=162 I.C. 811=40 C.W.N. 789=1936 Cal. 265.

(*b*) where it is made by the Provincial Government or a local authority, the Provincial Government or local athority, as the case may be, does not, within the like period, tender a like contract binding itself to take a supply of energy for not less than seven years for the public lamps in such street or part thereof.

(2) Where any difference or dispute arises between the licensee and such owners or occupiers as to the sufficiency of the security offered under this clause, or as to the amount of energy to be taken or guaranteed as aforesaid, the matter shall be referred to the Provincial Government and either decided by it or, if it so directs, determined by arbitration.

(3) Every requisition under this clause shall be signed by the maker or makers thereof and shall be served on the licensee.

(4) Every requisition under this clause shall be in a form to be prescribed by rules under the Indian Electricity Act, 1910 ; and copies of the form shall be kept at the office of the icensee and supplied free of charge to any applicant.

Requisition for supply to owners or occupiers in vicinity.

VI. (1) Where [1][after distributing mains have been laid down under the provisions of clause IV or clause V and the supply of energy through those mains or any of them has commenced,] a requisition is made by the owner or occupier of any premises situate within [2][the area of supply] requiring the licensee to supply energy for such premises, the licensee shall, within one month from the making of the requisition, [3][or within such longer period as the Electric Inspector may allow] supply, and, save in so far as he is prevented from doing so by cyclones, floods, storms or other occurrences beyond his control, continue to supply, energy in accordance with the requisition :

Provided first, that the licensee shall not be bound to comply with any such requisition unless and until the person making it—

(*a*) within fourteen days after the service on him by the licensee of a notice in writing in this behalf, tenders to the licensee a written contract, in a form approved by the Provincial Government duly executed and with sufficient security binding himself to take a supply of energy for not less than two years to such amount as will produce, at current rates charged by the licensee, a reasonable return to the licensee, and,

(*b*) if required by the licensee so to do, pays to the licensee the cost of so much of any service-line as may be laid down or placed for the purposes of the supply upon the property in respect of which the requisition is made, and of so much of any service-line as it may be necessary for the said purposes to lay down or place beyond one hundred feet from the licensee's distributing main, although not on that property :

Provided, secondly, that the licensee shall be entitled to discontinue such supply—

(*a*) if the owner or occupier of the property to which the supply is made has not already given security, or if any security given by him has become invalid or insufficient, and such owner or occupier fails to furnish security or to make up the original security to a sufficient amount as the case may be, within seven days, after the service upon him of notice from the licensee requiring him so to do, or

(*b*) if the owner or occupier of the property to which the supply is made adopts, any appliance, or uses the energy supplied to him by the licensee for any purposes, or deals with it in any manner so as unduly or improperly to interfere with the efficient supply of energy to any other person by the licensee, or

(*c*) if the electric wires, fittings, works and apparatus in such property are not in good order and condition, and are consequently likely to affect injuriously the use of energy by the licensee, or by other persons, or

(*d*) if the owner or occupier makes any alterations of, or additions to, any electric wires, fittings, works or apparatus within such property as aforesaid, and does not notify the same to the licensee before the same are connected to the source of supply, with a view to their being examined and tested : [4][but the licensee shall re-connect the supply with all reasonable speed on the cessation of the act or default or both, as the case may be, which entitled him to discontinue it.]

LEG. REF.

[1] These words were inserted by S. 23 of Act I of 1922.

[2] These words were substituted for the words "one hundred yards from any distributing main," *ibid.*

[3] These words were inserted by S. 23 of Act I of 1922.

[4] These words were added by *ibid.*

NOTES.

Cl. 6.—The licensee must bear the charge of the service line whether the consumer has paid the initial expenditure or not. 45 I.C. 171. As to discontinuance of supply of energy if the consumer's installation is defective, see *ibid*.

Cl. 6, PROV. (2).—A part of the electric apparatus, namely, the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy. *Held,* such a state of things must certainly be deemed to be "likely to affect injuriously the use of energy by the licensee or by other persons", and accordingly the electric company were entitled upon discovering this condition of things, to discontinue the electric supply. Where a main fuse was burnt out, in other words, where the cut-out became defective, *held,* the Company was entitled to discontinue the supply of energy to the consumer. 75 I.C. 456=4 L. 182=1924 L. 142.

Provided, thirdly, that the maximum rate per unit of time at which the owner or occupier shall be entitled to be supplied with energy shall not exceed what is necessary for the maximum consumption on his premises, and, where the owner or occupier has required a licensee to supply him at a specified maximum rate, he shall not be entitled to alter that maximum, except after one month's notice in writing to the licensee, and the licensee may recover from the owner or occupier any expenses incurred by him by reason of such alteration in respect of the service-lines by which energy is supplied to the property beyond one hundred feet from the licensee's distributing main, or in respect of any fittings or apparatus of the licensee upon that property: and

Provided, fourthly, that, [1][if any requisition is made for a supply of energy and] the licensee can prove to the satisfaction of an Electric Inspector,—

(*a*) that [2][the nearest distributing main] is already loaded up to its full current carrying capacity, or

(*b*) that, in case of a larger amount of current being transmitted by it, the loss of pressure will seriously affect the efficiency of the supply to other consumers in the vicinity,
the licensee may refuse to accede to the requisition for such reasonable period, not exceeding six months, as such Inspector may think sufficient for the purpose of amending the distributing main or laying down or placing a further distributing main.

(2) Any service-line laid for the purpose of supply in pursuance of a requisition under sub-clause (1) shall, notwithstanding that a portion of it may have been paid for by the person making the requisition, be maintained by the licensee.

(3) Where any difference or dispute arises as to the amount of energy to be taken or guarantee as aforesaid, or as to the cost of any service-line or as to the sufficiency of the security offered by any owner or occupier, or as to the improper use of energy, or as to any alleged defect in any wires, fittings, works or apparatus; or as to the amount of the expenses incurred under the third proviso to sub-clause (1), the matter shall be referred to an Electric Inspector and decided by him.

(4) Every requisition under this clause shall be signed by the maker or makers thereof and shall be served on the licensee.

(5) Every requisition under this clause shall be in a form to be prescribed by rules under the Indian Electricity Act, 1910; and copies of the form shall be kept at the office of the licensee and supplied free of charge to any applicant.

Further provisions as to laying of service-lines.

[3][VII. The licensee shall, before commencing to lay down or place a service-line, in any street in which a distributing main has not already been laid down or placed, serve upon the local authority (if any) and upon the owner or occupier of all premises abutting on so much of the street as lies between the points of origin and termination of the service-line so to be laid down or placed, twenty-one days' notice stating that the licensee intends to lay down or place a service-line and intimating that, if within the said period the local authority or any five or more of such owners or occupiers require, in accordance with the provisions of the license, that a supply shall be given for any public lamps or to their premises, as the case may be, the necessary distributing main will be laid down or placed by the licensee at the same time as the service-line.]

Supply for public lamps.

VIII. (1) Where [4][after distributing mains have been laid down under the provisions of clause IV or clause V and the supply of energy through those mains or any of them has commenced] a requisition is made by the Provincial Government or by a local authority requiring the licensee to supply for a period of not less than seven years energy for any public lamps within the [5][area of supply] the licensee shall supply, and save in so far as he is prevented from doing so, by cyclones, floods, storms or other occurrences beyond his control, continue to supply energy for such lamps in such quantities as the Provincial Government or the local authority, as the case may be, may require.

(2) The provisions of sub-clause (*b*) of the first proviso, of sub-clauses (*c*) and (*d*) of the second proviso, and of the third and fourth provisos to sub-clause (1) and the provisions of sub-clauses (2) and (3) of clause VI shall, so far as may be, apply to every case in which a requisition for the supply of energy is made under this clause as if the Provincial Government or local authority were an owner or occupier within the meaning of those provisions.

Supply by bulk-licensees.

Special provisions applying to supply by bulk-licensees.

IX. (1) Where, and in so far as, the licensee (hereinafter in this clause referred to as "the bulk-licensee") is authorized by his license to supply energy to other licensees for distribution by them (hereinafter in this clause referred to as "distributing licensees") the following provisions shall apply, namely :—

LEG. REF.

[1] These words were substituted for the words "in the event of any requisition being made for a supply of energy from any distributing main of which," by Act I of 1922, S. 23.

[2] These words were substituted for the word "it", *ibid.*

[3] This clause was substituted by S. 24 of Act I of 1922.

[4] These words were inserted by S. 25, *ibid.*

[5] These words were substituted for the words "distance of one hundred yards from any distributing main," by S. 25, *ibid.*

(*a*) any distributing licensees within the bulk-licensee's area of supply may make a requisition on the bulk-licensee, requiring him to give a supply of energy and specifying the point, and the maximum rate per unit of time, at which such supply is required, and the date upon which the supply is to commence, such date being fixed after the date of receipt of the requisition so as to allow an interval that is reasonable with regard to the locality and to the length of the electric supply-line and the amount of the plant required ;

(*b*) such distributing-licensee shall, if required by the bulk-licensee so to do, enter into a written agreement to receive and pay for a supply of energy for a period of not less than seven years of such an amount that the payment to be made for the same at the rate of charge for the time being charged for such supply shall not be less than such an amount as will produce a reasonable return to the bulk-licensee on the outlay (excluding expenditure on generating plant then existing and any electric supply-line then laid down or placed) incurred by him in making provision for such supply ;

(*c*) the maximum rate per unit of time at which a distributing licensee shall be entitled to be supplied with energy shall not exceed what is necessary for the purposes for which the supply is required by him, and need not be increased except upon a fresh requisition made in accordance with the foregoing provisions ;

(*d*) if any difference or dispute arises under this clause, it shall be determined by arbitration, and, in the event of such arbitration, the arbitrator shall have regard to the following amongst other considerations, namely :—

(i) the period for which the distributing-licensee is prepared to bind himself to take energy ;

(ii) the amount of energy required and the hours during which the bulk-licensee is to supply it ;

(iii) the capital expenditure incurred or to be incurred by the bulk-licensee in connection with the aforesaid supply of energy ; and

(iv) the extent to which the capital expended or to be expended by the bulk-licensee in connection with such supply may become unproductive upon the discontinuance thereof.

(2) Notwithstanding anything in sub-clause (1) the bulk-licensee shall give a supply of energy to any distributing-licensee within his area of supply applying therefor even although the distributing licensee desires to be supplied with only a portion of the energy required for distribution by him :

Provided that the distributing licensee shall, if so required by the bulk-licensee, enter into an agreement to take such energy upon special terms (including a minimum annual sum to be paid to the bulk-licensee) to be determined, if necessary, by arbitration in the manner laid down in sub-clause (1) (*d*).

(3) The maximum price fixed by a license for energy supplied to a distributing licensee shall not apply to any partial supply given under sub-clause (2).

(4) Every distributing licensee, who is supplied with energy by a bulk-licensee and intends to discontinue to receive such supply, shall give not less than twelve months' notice in writing of such intention to the bulk-licensee :

Provided that, where the distributing-licensee has entered into a written agreement with the bulk-licensee to receive and pay for a supply of energy for a certain period, such notice shall be given so as not to expire before the end of that period.

Charges.

[1][* * * * * *]

Methods of charging.

[2][X. (1)] [2][* *] Where the licensee charges by any method [3][approved by the Provincial Government, in accordance with section 23, sub-section (3), clause (*c*), of the Indian Electricity Act, 1910] any consumer who objects to that method may, by not less than one month's notice in writing, require the licensee to charge him, at the licensee's option, either by the actual amount of energy supplied to him or by the electrical quantity contained in the supply and thereafter the licensee shall not, except with the consent of the consumer, charge him by another method.

[4][(2)] [4][* * *] Before commencing to supply energy through any distributing main, the licensee shall give notice, by public advertisement, of the method by which he proposes to charge for energy so supplied ; and, where the licensee has given such notice, he shall not be entitled to change that method of charging without giving not less than one month's notice in writing of such change to the Provincial Government, to the local authority (if any), concerned, and to every consumer of energy who is supplied by him from such distributing main.

[5][(3)] [5][* * *] If the consumer is provided with a meter in pursuance of the provisions of section 26, sub-section (1), of the Indian Electricity Act, 1910, and the

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LEG. REF.

[1] The first part of Clause X up to and including sub-clause (*c*) was omitted by S. 26 of Act I of 1922.

[2] The first proviso was numbered sub-clause "(1)" and the words "Provided first, that" were omitted, *ibid.*

[3] These words figures and brackets were substituted for the words "so approved by the Local Government," *ibid.*

[4] The second proviso was numbered sub-clause "(2)" and the words "Provided, secondly that" were omitted by S. 26 of Act I of 1922.

[5] The third proviso was numbered sub-clause "(3)" and the words "Provided, thirdly that" were omitted, *ibid.*

licensee changes the method of charging for the energy supplied by him from the distributing main, the licensee shall bear the expense of providing a new meter, or such other apparatus as may be necessary by reason of the new method of charging.

Maximum charges.

XI. Save as provided by clause 9, sub-clause (3), the prices charged by the licensee for energy supplied by him shall not exceed the maxima fixed by his license, or in the case of a method of charge approved by the Provincial Government, such maxima as the Provincial Government shall fix on approving the method :

Provided that, if at any time after the expiration of seven years from the commencement of the license, the Provincial Government considers [1][* * *] that the maxima so fixed or approved as aforesaid should be altered, it [2][shall refer the matter to an advisory Board and, if the Board recommends any alteration, may make an order in accordance with such recommendation], which shall have effect from such date as may be mentioned therein.

Provided also, that, where an order in pursuance of the foregoing proviso has been made, no further order altering the maxima fixed thereby shall be made until the expiration of another period of five years.

Minimum charges.

[3][XI-A. A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his license, and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for which such minimum charge is made.]

Charge for supply for public lamps.

XII. The price to be charged by the licensee and to be paid to him for energy supplied for the public lamps, and the mode in which those charges are to be ascertained, shall be settled by agreement between the licensee and the Provincial Government or the local authority, as the case may be, and, where any difference or dispute arises, the matter shall be determined by arbitration.

Testing and Inspection.

Licensee to establish testing stations and keep instruments for testing.

XIII. The licensee shall establish at his own cost and keep in proper condition such number of testing stations, situated at such places within reasonable distance from any distributing main, as the Provincial Government may direct for the purpose of testing the pressure or periodicity of the supply of energy in the distributing main, and shall supply and keep in proper condition thereat, and on all premises from which he supplies energy, such instruments for testing as an Electric Inspector may approve, and shall supply energy to each testing station for the purpose of testing.

Facilities for testing.

XIV. The licensee shall afford all facilities for inspection and testing of his works and for the reading, testing and inspection of his instruments, and may, on each occasion of the testing of his works or the reading, testing or inspection of any instruments, be represented by an agent, who may be present, but shall not interfere with the reading, testing or inspection.

Testing of works.

XV. On the occasion of the testing of any works of the licensee by an Electric Inspector reasonable notice thereof shall be given to the licensee ; and the testing shall be carried out at such suitable hours as in the opinion of the Electric Inspector, will least interfere with the supply of energy by the licensee, and in such manner as the Electric Inspector may think fit ; but, except under the provisions of an order made in each case in that behalf by the Provincial Government, the Electric Inspector shall not be entitled to have access to, or interfere with, the works of the licensee at any points other than those at which the licensee himself has access to the same :

Provided that the licensee shall not be held responsible for any interruption or irregularity in the supply of energy which may be occasioned by, or required by the Electric Inspector for the purpose of, any such testing as aforesaid :

Provided, also, that the testing shall not be made in regard to any particular portion of the works oftener than once in any three months unless in pursuance of an order made in each case in that behalf by the Provincial Government.

Plans.

Plan of area of supply to be made and kept open for inspection.

XVI. (1) The licensee shall, after commencing to supply energy forthwith cause a plan to be made of the area of supply, and shall cause to be marked thereon the alignment [4][and, in the case of underground works, the approximate depth] below the surface of all his then existing electric supply-lines, street-distributing boxes and other works, and shall once in every year cause that plan to be duly corrected so as to

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LEG. REF.

[1] The words "or is satisfied" were omitted by S. 27 of Act I of 1922.

[2] These words were substituted for the words "may, after such inquiry (if any) as it thiks fit, make an order accordingly," *ibid.*

[3] This clause was inserted by S. 28, *ibid.*

[4] These words were substituted for the words "and the approximate height above or depth" by S. 29 *ibid.*

NOTES.

Cl. 11-A.—Cl. 11-A is the only provision which empowers or authorises the licensee to levy minimum charges. But such power can only be exercised by a licensee through a contract entered into with the consumer. When there is no such contract with an intending consumer, the licensee cannot claim or sue for minimum charges. 63 Cal. 1047=40 C.W.N. 789=1936 Cal. 265.

show the electric supply-lines, street-distributing boxes and other works for the time being in position. The licensee shall also, if so required by an Electric Inspector, cause to be made sections showing the approximate level of all his existing underground works other than service-lines.

[1][(2) Every such plan shall be drawn to such scale as the Provincial Government may require provided that no scale shall be required unless maps of the locality on that scale are for the time being available to the public.]

[1][(3) Every such section shall be drawn to horizontal and vertical scales which shall be such as the Provincial Government may require.]

(4) Every plan and section so made or corrected, or a copy thereof, marked with the date when it was so made or corrected, shall be kept by the licensee at his principal office or place of business within the area of supply, and shall at all reasonable times, be open to the inspection of all applicants, and copies thereof shall be supplied on such terms and conditions as may be prescribed by rules under the Indian Electricity Act, 1910.

(5) The licensee shall, if required by an Electric Inspector and, where the licensee is not a local authority, by the local authority (if any) concerned, supply free of charge to such Electric Inspector or local authority a copy of every such plan or section duly corrected so as to agree with the original kept at the principal office or place of business of the licensee.

Additional notice of certain works.

Notice to Electric Inspector.

XVII. On the day next preceding the commencement of any such works as are referred to in section 13 of the Indian Electricity Act, 1910, the licensee shall, in addition to any other notices which he may be required to give, serve upon the Electric Inspector, or such officer as the Provincial Government may appoint in this behalf for the area of supply, a notice in writing stating that he is about to commence the works, and the nature and position of the same.

THE EMPLOYERS' LIABILITY ACT (XXIV OF 1938).

[24*th September*, 1938.

An Act to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen.

WHEREAS it is expedient to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE EMPLOYERS' LIABILITY ACT, 1938.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "workman" means any person who has entered into, or works under a contract of, service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, oral or in writing, and

(*b*) "employer" includes any body of persons whether incorporated or not, and any managing agent of an employer, and the legal representatives of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Defence of common employment barred in certain cases.

3. Where a personal injury is caused to a workman—

(*a*) by reason of the omission of the employer to maintain in good and safe condition any way, works, machinery or plant connected with or used in his trade or business, or by reason of any like omission on the part of any person in the service of the employer who has been entrusted by the employer with the duty of seeing that such way, works, machinery or plant are in good and safe condition; or

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LEG. REF. Act I of 1922.

[1] This sub-clause was substituted by S. 29

(*b*) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

(*c*) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed; or

(*d*) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved by any authority and which has been so approved) or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties;

a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

Risk not to be deemed to have been assumed without full knowledge.

4. In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

Saving.

5. Nothing in this Act shall affect the validity of any decree or order of a Civil Court passed before the commencement of this Act in any such suit for damages.

THE EMPLOYMENT OF CHILDREN ACT (XXVI OF 1938).

[AMENDED BY ACT XV OF 1939.]

[1*st December,* 1938.

An Act to regulate the admission of children to certain industrial employments.

WHEREAS it is expedient to regulate the admission of children to certain industrial employments; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE EMPLOYMENT OF CHILDREN ACT, 1938.

(2) It extends to the whole of British India.

Definition.

2. In this Act [1][(*a*)] "competent authority", in respect of a major port, as defined in the Indian Ports Act, 1908, and in respect of a federal railway, as defined in the Indian Railways Act, 1890, means the Central Government, and in any other case means the Provincial Government;

[1][(*b*) "occupier" of a workshop means the person who has ultimate control over the affairs of he workshop;

(*c*) "prescribed" means prescribed by rules made under this Act;

(*d*) "workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises

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LEG. REF.

[1] In section 2 after the words "In this Act" the letter and brackets "(*a*)" has been inserted, and to the said section as so amended the sub-secs. (*b*) to (*d*) added by Act XV of 1939.

to which the provisions of section 50 of the Factories Act, 1934, for the time being apply.]

Prohibition of employment of children in certain occupations.

3. (1) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation connected with the transport of passengers, goods or mails by railway.

(2) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation involving the handling of goods within the limits of any port to which for the time being any of the provisions of the Indian Ports Act, 1908, are applicable.

[1][(3) No child who has not completed his twelfth year shall be employed or permitted to work, in any workshop wherein any of the processes set forth in the Schedule is carried on:

Provided that nothing in this sub-section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family only and without employing hired labour or to any school established by, or receiving assistance or recognition from, a Provincial Government.

Power to amend the Schedule.

3-A. The Provincial Government, after giving, by notification in the official Gazette, not less than three months' notice of its intention so to do, may, by like notification, add any description of process to the Schedule, and thereupon the Schedule shall have force in the Province as if it has been enacted accordingly.

Notice to inspector before carrying on work in certain processes.

3-B. Before work in any of the processes set forth in the Schedule is carried on in any workshop after the 1st day of October, 1939, the occupier shall send to the inspector, within whose local limits the workshop is situated, a written notice containing—

(*a*) the name and situation of the workshop,

(*b*) the name of the person in actual management of the workshop,

(*c*) the address to which communications relating to the workshop should be sent, and

(*d*) the nature of the processes to be carried on in the workshop.

Disputes as to age.

3-C. If any question arises between an inspector and an employer as to whether any child has or has not completed his twelfth or fifteenth year, as the case may be, the question shall, in the absence of a certificate as to the age of such child, granted by a prescribed medical authority, be referred by the inspector for decision to the prescribed medical authority.]

Penalty.

4. Whoever employs any child or permits any child to work in contravention of the provisions of section 3 [2][or fails to give notice as required by section 3-B] shall be punishable with fine which may extend to five hundred rupees.

Procedure relating to offences.

5. (1) No prosecution under this Act shall be instituted except by or with the previous sanction of an inspector appointed under section 6.

[3][(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.]

LEG. REF.

[1] Sub-section (3) of section 3 and sections 3-A, 3-B and 3-C added by Act XV of 1939.

[2] Inserted by *ibid*.

[3] Sub-section (2) of section 5 substituted by *ibid*.

(3) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Appointment of Inspectors.

6. The competent authority may appoint persons to be inspectors for the purpose of securing compliance with the provisions of this Act, and any inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Power to make rules.

7. (1) The competent authority may by notification in the official Gazette and subject to the condition of previous publication make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) regulate the procedure of inspectors appointed under section 6, and

(*b*) make provision for the grant of certificates of age in respect of young persons in employment or seeking employment, [1][the medical authorities] which may issue such certificates, the form of such certificate, the charges which may be made therefor, and the manner in which such certificates may be issued:

Provided that no charge shall be made for the issue of any such certificate if the application is accompanied by evidence of age deemed satisfactory by the authority concerned.

Amendment of section 6, Act XV of 1908.

8. Sub-section (1-A) of section 6 of the Indian Ports Act, 1908, and the words, brackets, figure and letter "and sub-section (1-A)" in sub-section (2) of the said section shall be omitted.

[2][THE SCHEDULE.

(*See* sections 3, 3-A and 3-B.)

List of processes.

1. Bidi-making.
2. Carpet-weaving.
3. Cement manufacture, including bagging of cement.
4. Cloth-printing, dyeing and weaving.
5. Manufacture of matches, explosives and fireworks.
6. Nica-cutting and splitting.
7. Shellac manufacture.
8. Soap manufacture.
9. Tanning.
10. Wool cleaning.]

THE INDIAN EVIDENCE ACT (I OF 1872).

Year.	No.	Short title.	Amendments.
1872	I	The Indian Evidence Act, 1872.	Repealed in part 44 and 45 Vict., c. 58, S. 127, X of 1897; XII of 1927. Repealed in part and amended, X of 1914. Amended, XVIII of 1872; III of 1887; III of 1891, Ss. 1 to 8; V of 1899; XVIII of 1919; XXXI of 1926; X of 1927; XXXV of 1924; I of 1938. See Act XXX of 1939.

LEG. REF.

[1] Substituted by Act XV of 1939.

[2] Schedule added by Act XV of 1939.

For *Statement of Objects and Reasons*, see *Gazette of India*, 1868, p. 1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, see *ibid.*, 1871, Pt. V, p. 273, and for the second Report of the Select Committee, dated 30th January, 1872, see *ibid.*, 1872, Pt. V, p. 34; for discussions in Council, see *ibid.*, 1868, Supplement pp. 1060 and 1209; *ibid.*, 1871, Extra Supplement, p. 42, and Supplement, p. 1641 and *ibid.*, 1872, pp. 136 and 230.

This Act has been declared to be in force in the Sonthal Parganas, by the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3; in the Chittagong Hill-tracts, by the Chittagong Hill-tracts Regulation 1900 (1 of 1900); in British Baluchistan, by the British Baluchistan Laws Regulation, 1913 (2 of 1913), S. 3; in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 of 1929); in the Khondmals District, by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.; and in the Angul District, by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Sch.; also by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (14 of 1874), in the following Scheduled Districts, namely, the Districts of Hazaribagh, Lohardaga (now the Ranchi District—*see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum—*see* Gazette of India, 1881, Pt. I, p. 504 [the Lohardaga or Ranchi District included at this time the Palamau District, separated in 1894]; and the Tarai of the Province of Agra, *ibid.*, 1876, Pt. I, p. 505; Ganjam and Vizagapatam—*see* Gazette of India, 1899, Pt. I, p. 720.

CONTENTS.

PREAMBLE.

PART I.
RELEVANCY OF FACTS.
CHAPTER I.
PRELIMINARY.

SECTIONS.
1. Short title.
Extent.
Commencement of Act.
2. [*Repealed.*]
3. Interpretation clause.
4. "May presume."
"Shall presume."
"Conclusive proof."

CHAPTER II.
OF THE RELEVANCY OF FACTS.

5. Evidence may be given of facts in issue and relevant facts.
6. Relevancy of facts forming part of same transaction.
7. Facts which are the occasion, cause or effect of fact in issue.
8. Motive, preparation and previous or subsequent conduct.
9. Facts necessary to explain or introduce relevant facts.
10. Things said or done by conspirator in reference to common design.
11. When facts not otherwise relevant become relevant.
12. In suits for damages, facts tending to enable Court to determine amount are relevant.
13. Facts relevant when right or custom is in question.
14. Facts showing existence of state of mind, or of body or bodily feeling.
15. Facts bearing on question whether act was accidental or intentional.
16. Existence of course of business, when relevant.

ADMISSIONS.

17. Admission defined.
18. Admission—
by party to proceeding or his agent;
by suitor in representative character;
by party interested in subject-matter;
by person from whom interest derived.

SECTIONS.
19. Admissions by persons whose position must be proved as against party to suit.
20. Admissions by persons expressly referred to by party to suit.
21. Proof of admissions against persons making them, and by or on their behalf.
22. When oral admissions as to contents of documents are relevant.
23. Admissions in civil cases when relevant.
24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.
25. Confession to police-officer not to be proved.
26. Confession by accused while in custody of police not to be proved against him.
27. How much of information received from accused may be proved.
28. Confession made after removal of impression caused by inducement, threat or promise, relevant.
29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.
30. Consideration of proved confession, affecting person making it and others jointly under trial for same offence.
31. Admissions not conclusive proof, but may estop.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.
When it relates to cause of death; or
is made in course of business; or
against interest of maker; or
gives opinion as to public right or custom, or matters of general interest; or
relates to existence of relationship; or
is made in will or deed relating to family affairs; or
in document relating to transaction mentioned in section 13, clause (*a*); or
is made by several persons and expresses feelings relevant to matter in question.

SECTIONS.

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account when relevant.
35. Relevancy of entry in public record, made in performance of duty.
36. Relevancy of statements in maps, charts and plans.
37. Relevancy of statement as to fact of public nature contained in certain Acts or notifications.
38. Relevancy of statements as to any law contained in law books.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

39. What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

JUDGMENTS OF COURTS OF JUCTICE WHEN RELEVANT.

40. Previous judgments relevant to bar a second suit or trial.
41. Relevancy of certain judgments in probate, etc., jurisdiction.
42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.
43. Judgments etc., other than those mentioned in sections 40 to 42, when relevant.
44. Fraud or collusion in obtaining judgment or incompetency of Court, may be proved.

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

45. Opinions of experts.
46. Facts bearing upon opinions of experts.
47. Opinion as to handwriting, when relevant.
48. Opinion as to existence of right or custom, when relevant.
49. Opinion as to usages, tenets, etc., when relevant.
50. Opinion on relationship, when relevant.
51. Grounds of opinion, when relevant.

CHARACTER, WHEN RELEVANT.

52. In civil cases, character to prove conduct imputed, irrelevant.
53. In criminal cases, previous good character relevant.
54. Previous bad character not relevant, except in reply.
55. Character as affecting damages.

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

56. Facts judicially noticeable need not be proved.
57. Facts of which Court must take judicial notice.
58. Facts admitted need not be proved.

CHAPTER IV.

OF ORAL EVIDENCE.

59. Proof of facts by oral evidence.
60. Oral evidence must be direct.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

61. Proof of contents of documents.
62. Primary evidence.
63. Secondary evidence.
64. Proof of documents by primary evidence.
65. Cases in which secondary evidence relating to documents may be given.
66. Rules as to notice to produce.
67. Proof of signature and handwriting of person alleged to have signed or written document produced.
68. Proof of execution of document required by law to be attested.
69. Proof, where no attesting witness found.
70. Admission of execution by party to attested document.
71. Proof when attesting witness denies the execution.
72. Proof of document not required by law to be attested.
73. Comparison of signature, writing or seal with others, admitted or proved.

PUBLIC DOCUMENTS.

74. Public documents.
75. Private documents.
76. Certified copies of public documents.
77. Proof of documents by production of certified copies.
78. Proof of other official documents.

PRESUMPTION AS TO DOCUMENTS.

79. Presumption as to genuineness of certified copies.
80. Presumption as to documents produced as record of evidence.
81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.
82. Presumption as to document admissible in England without proof of seal or signature.
83. Presumption as to maps or plans made by authority of Government.
84. Presumption as to collections of laws and reports of decisions.
85. Presumption as to powers-of-attorney.
86. Presumption as to certified copies of foreign judicial records.
87. Presumption as to books, maps and charts.
88. Presumption as to telegraphic messages.
89. Presumption as to due execution, etc., of documents not produced.
90. Presumption as to documents thirty years old.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.
92. Exclusion of evidence of oral agreement.
93. Exclusion of evidence to explain or amend ambiguous document.
94. Exclusion of evidence against application of document to existing facts.
95. Evidence as to document unmeaning in reference to existing facts.
96. Evidence as to application of language which can apply to one only of several persons.
97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.
98. Evidence as to meaning of illegible characters, etc.

SECTIONS.

99. Who may give evidence of agreement varying terms of document.
100. Saving of provisions of Indian Succession Act relating to wills.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

101. Burden of proof.
102. On whom burden of proof lies.
103. Burden of proof as to particular fact.
104. Burden of proving fact to be proved to make evidence admissible.
105. Burden of proving that case of accused comes within exceptions.
106. Burden of proving fact especially within knowledge.
107. Burden of proving death of person known to have been alive within thirty years.
108. Burden of proving that person is alive who has not been heard of for seven years.
109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.
110. Burden of proof as to ownership.
111. Proof of good faith in transactions where one party is in relation of active confidence.
112. Birth during marriage conclusive proof of legitimacy.
113. Proof of cession of territory.
114. Court may presume existence of certain facts.

CHAPTER VIII.

ESTOPPEL.

115. Estoppel.
116. Estoppel of tenant;
and of licensee of person in possession.
117. Estoppel of acceptor of bill of exchange, bailee of licensee.

CHAPTER IX.

OF WITNESSES.

118. Who may testify.
119. Dumb witnesses.
120. Parties to civil suit, and their wives or husbands.
Husband or wife of person under criminal trial.
121. Judges and Magistrates.
122. Communications during marriage.
123. Evidence as to affairs of State.
124. Official communications.
125. Information as to commission of offences.
126. Professional communications.
127. Section 126 to apply to interpreters, etc.
128. Privilege not waived by volunteering evidence.
129. Confidential communications with legal advisors.
130. Production of title deeds of witness not a party.
131. Production of documents which another person having possession could refuse to produce.
132. Witness not excused from answering on ground that answer will criminate.

SECTIONS.

Proviso.
133. Accomplice.
134. Number of witnesses.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135. Order of production and examination of witnesses.
136. Judge to decide as to admissibility of evidence.
137. Examination-in-chief.
Cross-examination.
Re-examination.
138. Order of examinations.
Direction of re-examination.
139. Cross-examination of person called to produce a document.
140. Witnesses to character.
141. Leading questions.
142. When they must not be asked.
143. When they may be asked.
144. Evidence as to matters in writing.
145. Cross-examination as to previous statements in writing.
146. Questions lawful in cross-examination.
147. When witness to be compelled to answer.
148. Court to decide when question shall be asked and when witness compelled to answer.
149. Question not to be asked without reasonable grounds.
150. Procedure of Court in case of question being asked without reasonable grounds.
151. Indecent and scandalous questions.
152. Questions intended to insult or annoy.
153. Exclusion of evidence to contradict answers to questions testing veracity.
154. Question by party to his own witness.
155. Impeaching credit of witness.
156. Questions tending to corroborate evidence of relevant fact, admissible.
157. Former statements of witness may be proved to corroborate later testimony as to same fact.
158. What matters may be proved in connection with proved statement relevant under section 32 or 33.
159. Refreshing memory.
When witness may use copy of document to refresh memory.
160. Testimony to facts stated in document mentioned in section 159.
161. Right of adverse party as to writing used to refresh memory.
162. Production of documents.
Translation of documents.
163. Giving, as evidence, of document, called for and produced on notice.
164. Using as evidence, of document production of which was refused on notice.
165. Judge's power to put questions or order production.
166. Power of jury or assessors to put questions.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. No new trial for improper admission or rejection of evidence.
SCHEDULE.—REPEALED.

THE INDIAN EVIDENCE ACT (I OF 1872).

[15*th March*, 1872.

Preamble.

WHEREAS it is expedient to consolidate, define and amend the law of evidence ; It is hereby enacted as follows :—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short title.

1. (1) This Act may be called THE INDIAN EVIDENCE ACT, 1872.

NOTES.

Sec. 1.—Rules in this Act are rules of logic. 1914 M.W.N. 931. Act is not exhaustive. 39 C. 164=15 C.W.N. 1053=14 C.L.J. 375; 14 C. 721. Act not exhaustive of the rules of evidence and the Courts can invoke the aid of the principles of jurisprudence of English law as supplementing and explaining the rules given in the Act. 39 M. 449=28 M.L.J. 329. In questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is, as it was intended to be, a complete Code of the law of evidence in British Burma. 1938 R.L.R. 190=175 I.C. 465=1938 R. 177 (F.B.). *See also* 65 C.L.J. 520=41 C.W.N. 1103. The provisions of the Act are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope, unless clearly repealed or altered by another statute. 7 L. 84=94 I.C. 901=1926 L. 88. The records of the German Court authenticated in the manner prescribed by secs. 14 and 15 of the English Extradition Act are admissible in evidence. 39 C. 164=15 C.W.N. 1053=12 I.C. 273. Evidence properly admitted for one purpose must be admissible for all purposes in the cause. 37 B. 122=40 I.A. 1 =24 M.L.J. 176=17 C.W.N. 388 (P.C.) (On appeal from 12 Bom.L.R. 316=5 I.C. 457). *See also* 11 Bom.L.R. 926=4 I.C. 652. There is no ground why a party having once denied cannot on a reconsideration subsequently admit the genuineness of a document, and if this is so a Court could not be precluded from taking such document into consideration. 1941 O. 189=1940 O.W.N. 1344. No Court has a right to look at any document or any papers other than those on the record unless the Judge gives to the parties to the suit an opportunity of being heard and making their submission with regard to what is contained in documents outside the record to which the Judge desires to refer. 1923 C. 194. The mere summoning of a record does not constitute it a part of the evidence in the case in which it is summoned. The contents in those documents, if sought to be relied upon, must be formally proved. 1940 A.W.R. (B.R.) 153=1940 R. D. 242. A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution; but it can treat it as sufficient proof thereof. 1940 N.L.J. 437=1940 Nag. 382. *Statements made at the local inspection* are inadmissible and a judge should not bring such statements into thecase as evidence. No statement by any person is evidence unless given on oath in the witness-box. 1935 N. 69. Conjecture should not be the basis of a judgment. 1924 N. 363. Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. 1923 L. 630. *See also* 1924 P. 284; 36 I.C. 906. Omission to object to the reception of evidence does not make irrelevant evidence relevant and the objection can be taken on second appeal. 44 B. 192=55 I.C. 316=22 Bom.L.R. 57. *See also* 47 M.L.J. 640; 1924 N. 358; 79 I.C. 1029=1924 A. 918; 40 I.C. 553 ; 135 I.C. 572=1931 M. 601. Where a piece of evidence not proved in the proper manner has been admitted without objections, the opposite party cannot challenge it at a later stage. But the principle on which unobjected evidence is admitted, does not apply where evidence has been received without objection in direct contravention of an imperative provision of law. 27 C.W.N. 134=1922 C. 160. *See also* 1939 A. 61=1939 A.L.J. 128. There can be no conditional admissibility of a document. There cannot be an order that while a document is inadmissible as lease, it is admissible as a receipt. If it is held to be not a lease, it can be admitted unconditionally. But if it is held to be a lease, it cannot be admitted as a receipt. 1941 A.W.R. (Rev.) 979=1941 R.D. 932. An objection as to the mode of proof not taken in the Courts below cannot be taken for the first time in second appeal. 64 I.C. 266=36 C.L.J. 186. An erroneous omission to object to evidence irrelevant and consequently inadmissible under any circumstances, does not make it admissibie. But the Court will not entertain for first time in appeal an objection that a document not admissible has been improperly admitted in evidence. 45 C. 159=21 C.W.N. 996. A Court refusing to admit a piece of evidence in the first instance has no jurisdiction to take the same into consideration at a subsequent stage, unless some good explanation or reason is shown by the party producing the same. Once a document is admitted at a late stage by a dodge or trick, there is an end of the matter. 182 I.C. 407=1939 Pat. 530. Documentary evidence relevant to the case and admitted without objection in the first Court cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used. 40 I.C. 553; 32 P.L.R. 470=

NOTES.

134 I.C. 770. *See also* 167 I.C. 190=I.L.R. (1937) N. 68=1937 N. 13. Evidence which is relevant under any circumstances whatsoover must be distinguished from evidence which is admissible if certain conditions were fulfilled. 9 I.C. 211=13 C.L.J. 18. In the latter case objection should be taken at the ealiest possible stage and if such objection is not taken the appellate Court will not entertain it. 9 I.C. 211=13 CL.J. 18, An objection relating to the mode of proof of a document must be raised when the document is sought to be put in evidence and if raised at a later stage, it does not deserve serious consideration. 63 C. 1053=1936 C. 316. There is a distinction between the relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Act cannot be made relevant because it is let without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, no objection as to its admissibility can be allowed at a later stage. But the omission to object to the admission of irrelevant evidence cannot possibly make it relevant. 1936 L. 114. It is too late in appeal to object to a document which had been admited without objection in the first Court. 3 L. 59=1922 L. 281. When at a trial, admissibility of evidence is objected to, it is the duty of the trial Judge to decide at once whether it is admissible. If he holds it inadmissible the document should not find a place on the record and assessors or jurors should be warned not to rely on it. 50 I.C. 481=98 P.L.R. 1918. Where the Court passed an interlocutory order that the evidence was admissible such an order can legally be varied by the Court, though in practice it is not often done. Court therefore can hold the evidence as inadmissible which was formerly held admissible. 39 P.L.R. 262=1937 L. 176. It is wrong for a Civil Court to rely too much on decisions in criminal cases when deciding questions of title in civil suits. 21 P.L.T. 873. A party who did not object to the admissibility of secondary evidence of a registered will even in his appeal memo. cannot be allowed to urge it. 31 I.C. 600. When a documents is tendered in evidence and no objection whatever is taken to it either as to its being secondary evidence or as to its being tendered in circumstances that would justify its being received as secondary evidence, it is too late in appeal to take the point that it should not have been received. I.L.R. (1937) N. 68=1937 N. 13. The relevant point of time in the proceedings at which the condition of admissibility must be fulfilled is the time when it has to be admitted by the Court before which the evidence is produced and relied on and not the moment when the case is decided. 190 I.C. 849=1940 N.L.J. 459=1940 Nag. 340. No statement of counsel concerning relevant facts in the case can be accepted otherwise than in the witness-box. 1935 N. 69=17 N.L.J. 189. Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used. 43 M.L.J. 448=1922 M. 394 [43 M. 609; 38 M. 160, Foll.]. If a party to a suit consents to the recitals in prior judgment being taken as proof of a will, he cannot object in appeal. (*Ibid.*) The omission by a party to prevent irrelevant evidence from being admitted will not in the absence of a deliberate consent to waive objections, cure the defect. 36 I.C. 906. When the lower Court has given a finding that the document is legally proved, the appellate Court should sparingly interfere with the findings when no objection was taken at the hearing. 32 I.C. 760; 10 O.W.N. 173=1933 O. 128. It does not follow that a document is invalid, merely because it may not be admissible in evidence. 1923 N. 109. Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal. 44 I.C. 422=3 P.L.J. 306. If a document is once admitted in the lower Court without objection, no party can take objection to its being referred to by the Court. 36 I.C. 96=10 S.L.R. 4. Where the only reason given for admitting a document in appeal is that it is a public document but it relates to facts which the defendant is entitled to meet, the admission is illegal. 150 I.C. 306=1934 N. 124. Legal practitioners should confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be in Court for a specific purpose it cannot be treated as evidence in the case for any purpose other than the one for which it was summoned. 131 I.C. 513=1931 A. 600. It is not safe to assume that a case must be false if some of the evidence in support of it appears to be ambiguous or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a good case by false or exagerated evidence. 24 C.W.N. 626 (P.C.). As to admissibilty of notes of evidence of a speech in a trial for sedition, *see* 1940 O.W.N. 965. The Court is not entitled to attribute to the witnesses conspiracy and perjury, unless the story told by them, coupled with the surrounding circumstances is of itself so unnatural and improbable that only one conclusion, *viz.*, conspiracy and perjury, is reasonably possible. 1934 P.C. 12=66 M.L.J. 151 (P.C.). An appellate tribunal may bring its knowledge of life and business to bear even in cases where in the lower Court contemporary communications and course of business are used, and it can say that evidence given about them at the trial cannot be true. 34 I.C. 273 (P.C.). In a matter of appreciation of evidence and the credibility of witness the opinion of the trial judge should not be lightly disturbed on appeal. 39 B. 386=42 I.C. 119=28 M.L.J. 593 (P.C.). *Also* 43 C. 707=31 M.L.J. 1=43 I.A. 73 (P.C.); 28 C.L.J. 306=48 I.C, 561; 39 A. 426; 39 I.C. 666; 27 I.C. 276=20 C.L.J. 501. When dealing with a version spread over several consecutive stages, it is inevitable that careful regard should be had to them all and their truth or falsehood tested on a review of the entire

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts-martial [1][other, than Courts-martial convened under the Army Act], [2][the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934,] [3][or the Air Force Act] but not to affidavits[4] presented to any Court or officer, nor to proceedings before an arbitrator;

Commencement of Act.

And it shall come into force on the first day of September, 1872.

LEG. REF.

[1] Inserted by Act XVIII of 1919.

But *see* the Army Act (44 & 45 Vict., c. 58), sec. 127, which is as follows:—

"A Court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any legislature whatsoever, other than Parliament of the United Kingdom." Act I of 1872 is (subject to such modifications as theGovernor-General in Council may direct) applicable to all proceedings before the Indian Marine Courts. *See* the Indian Marine Act (XIV of 1887), sec. 68.

[2] Inserted by Act XXXV of 1934.

[3] Inserted by Act X of 1927.

[4] As to practice relating to affidavits, *see* Civil Procedure Code, 1908, sec. 30 (*c*) and Sch. I, O. XIX; Cr.P. Code, 1898, secs. 539 and 539-A

NOTES.

case. The incidents have to be judged in the light of what preceded and followed, and it would be an error to segregate the incidents and test their veracity in isolation. 52 L.W. 57=72 C.L.J. 263=1940 P.C. 93 (P.C.). A witness's evidence should not be rejected merely because he appeared to be nervous while in the box. 187 I.C. 747=1940 A.L.J. 26=1940 All. 175. The fact that the witnesses for one of the parties to a suit happen to be his employees is not a sufficient ground for not relying on their evidence, especially when none but the employees could be witnesses to the transaction in dispute. 189 I.C. 232=1940 Pat. 629. Where the rejection of a witness's evidence by the trial Judge is solely based on the evidence, oral and documentary, placed before him, and he makes no comment on the demeanour of the witness or on his truthfulness apart from comments on the probabilities of the truth of the story actually told by him viewed in the light of the surrounding circumstances, the appellate Court is in as good a position to judge of the matter as the trial Court. 1934 P.C. 12=66 M.L.J. 151 (P.C.). *See also* 8 Luck. 315=1933 O. 128. Where the evidence produced by one party is in direct conflict with the evidence produced by the other the following tests may be applied for judging the veracity of the witness: (1) the evidence which is consistent with the finding which is already established; (2) the comparative nearness in relationship of the witness; (3) the impartiality of the witnesses; (4) the inherent probability of their statements; (5) the impression created in the minds of the Judge by the demeanour of the witnesses in the box. 9 L. 121=1933 O. 197. Mere verbal contradictions and discrepancies are not sufficient to discredit the clear and consistent testimony of eye-witnesses, which is also supported by the circumstantial evidence. The measure of stupidity of these witnesses especially when they are villagers, is not the measure of their veracity and truthfulness. 8 Luck. 570=1933 O. 333. *See also* 56 M. 356=64 M.L.J. 439. When a witness makes a reckless statement which appears to be altogether false, the safest course is not to place any reliance on his evidence. 11 O.W.N. 950=1934 O. 388. Discrepancies in the statements of witnesses on material points should not be lightly passed over, as the value of their testimony is seriously affected by them. 36 A. 187=26 M.L.J. 442=23 I.C. 715 (P.C.). As to appreciation of evidence, *see* 45 M.L.J. 438=23 C.W.N. 589=77 I.C. 141 (P.C.). Misapprehension implies a positive and demonstrable mistake or misunderstanding, whereas misappreciation of evidence is more subjective and by no means so capable of logical demonstration. I.L.R. (1938) N. 442=177 I.C. 605 (2)=1938 N. 394. There is no ground why a party having once denied cannot on a reconsideration subsequently admit the genuineness of a document, and if this is so a Court could not be precluded from taking such document into consideration. 192 I.C. 259=1940 O.W.N. 1344=1941 Oudh 189. It cannot be said to be an axiom of law that every Court must reject examination-in-chief whenever cross-examination does not confirm it. A Court may believe any witness or any part of any witness's evidence and disbelieve any other part and it is entitled to come to the conclusion that the examination-in-chief is true and that statements in cross-examination are false. 1937 M.W.N. 986. As to trial Judge's opinion of witness when open to criticism on appeal, *see* 76 I.C. 63=46 M.L.J. 334. Low status of witness is not sufficient to discredit him. 1924 M.W.N. 445=1924 P. C. 106 (P.C.). Where the parties to a suit are at issue on a vital question, such as the genuineness of defendant's signature to the document sued on, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The Privy Council upheld the finding of the Chief Court as to the genuineness of the signature, in reversal of the decision of the first Court. 38 C. 805=21 M. L.J. 1127=38 I.A. 155 (P.C.). In a dispute as to facts, great weight, naturally attaches to the finding of the trial Judge. 15 C.W.N. 717=10 I.C. 963 (P.C.). The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. 45 A. 300=21 A.L.J. 143=1923 A. 352. In India where references to time are generally mere approximations there is large margin of honest

NOTES.

error. 15 Bom.L.R. 297=19 I.C. 326. A theory of improbability in order to prevail against positive evidence must be clear and cogent; it must be such as to justify the rejection of the positive evidence as concocted and unreliable. 24 C.W.N. 860=59 I.C. 814=47 C. 1043. Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the character and position of the person is above reproach this probability becomes stronger. The mere fact that this or that thing in a complete transaction is improbable does not count for much as against clear and distinct evidence of reliable witnesses. 39 C. 244=13 I.C. 577=16 C.W.N. 266. The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915. 1923 L. 601. Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. 1923 L. 438 (2). Without deliberately intending to tell a lie human beings are prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination. 8 O.L.J. 433=1922 O. 178. The evidence of respectable persons with special means of knowledge owing to relationship to the parties on the matters they depose to should not be viewed with suspicion especially in cases where only oral evidence will ordinarily be available. 25 I.C. 660=7 O.L.J. 383. It is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case, unless that evidence receives corroboration. 1922 P. 111. Where a party comes into a Court with a story, which cannot be believed in its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. 19 Cr.L.J. 877=47 I.C. 73. The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is now not implicitly followed by Courts in the appreciation of evidence. It is the duty of the Court to sift the evidence and separate the truth from the falsehood, if it can. 1923 R. 30. It is generally unsafe to apply the doctrine *falsus in uno falsus in omnibus* to evidence of witnesses in India. Where the evidence is substantially correct simply because there are deliberate falsehoods in it, it should not be totally rejected. 10 O.W.N. 482=1933 O. 269. *Circumstantial evidence* is evidence of circumstances, as opposed to what is called direct evidence. 10 I.C. 929=12 Cr.L.J. 329. Circumstantial evidence in order to justify a conviction must be exhaustive and must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. 38 I.C. 759=32 P.R. (Cr.) 1916. Circumstantial evidence must like any other evidence be tested and weighed and must prevail or not by its own inherent proving force. 1 L.W. 1007=26 I.C. 332=16 Cr.L.J. 38. To justify an inference of guilt from circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any reasonable hypothesis other than that of his guilt. 59 I.C. 358=22 Cr.L.J. 154. *See also* 65 P.L.R. 1917=42 I.C. 129; 8 C.W.N. 278; 39 I.C. 322. A '*chance witness*' whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation, though not necessarily a false witness, it is proverbially rash to rely upon such evidence. 193 I.C. 209=1941 O.W.N. 565=1941 P.C. 11 (P.C.).

A Judge cannot travel beyond the record of the case before him and rely for the rejection of an important witness in the case on information gained from other cases heard by him. 193 I.C. 327=1941 Lah. 22. Record requisioned —When becomes evidence in the case. A record which has been requisitioned does not become part of the evidence in a pending case merely from the fact that it has been requisitioned. If any document or statement contained in the record are relied upon by a party then they must be duly proved and brought on the record as evidence in the pending case. 1941 R.D. 868=1941 O.A. (Supp.) 788=1941 A.W.R. (Rev.) 914. Where a document called from a witness is produced by him and that is the document required, he should be allowed to prove it so that it can be admitted in evidence although the demand for the document does not describe it as fully as it may. 22 Pat.L.T. 656=1941 Pat. 202.

CIRCUMSTANTIAL EVIDENCE AS TO MARRIAGE.—Even though the connection between a man and a woman was at its inception adulterous, the presumption of a marriage arises in a case where it is established that the husband of the woman had divorced her and after that they continued to live together, treated each other as husband and wife and were looked upon by others as such. 35 P.L.R. 532=1934 L. 517. Continuous living as man and wife raises presumption of legal marriage and this presumption is greatly strengthened when they are described as man and wife in municipal papers. 1934 A. 884. A presumption of a marriage arises in a case where it is established that the parties were living together as man and woman and after the death of the man the latter was allowed by his reversioners to retain his property for a period of 41 years. 1937 O.W.N. 1221. Where the evidence was that a widow after her husband's death lived with his first cousin as man and wife, had several children by him, and the two were together cultivating lands and there was nothing to show that they were outcasted or their status as man and wife was repudiated under the circumstances, it would not be justifiable to hold that there has not been a re-marriage. 18 R.D. 417. *See also* 1937 O.W.N. 619=1936 O. 298. Medical certificate—Value of. 1937 C. 697. Where the *slide taken by the Medical Officer* containing a smear of the discharge from the penis of the person accused of *adultery* was shown to have contained spermotoza and it was also proved that there was a whitish discharge known as leucorrhoea from the vagina of the woman. *Held*, that the evidence was not conclusive proof that the two were caught "*in*

NOTES.

flagranti delicto" in the very act of coitus.' 8 Luck. 301=1933 O. 148.

An approximate *estimate of the age of a party* made by the third parties who might not have had any special means of knowledge is not of much value. 56 A. 766=1934 A. 406 (F. B.). In criminal proceedings the *statement of a witness's age* forms no part of his deposition and is not usually the statement of the witness himself, but an estimate of the Court. 1933 P. 627. It is a well-known fact that when the age is not in issue, villagers are particularly careless in stating their age. As such the statement of age cannot be of such positive character in determining a particular issue long after the date, when the determination of age was not one under consideration when the statement was made. 1939 A.W.R. (B.R.) 44=1939 R.D. 164. In the case of an unsworn testimony of a young child, that evidence is admissible. Sec. 13 of the Oaths Act expressly provides for cases in which the provisions of secs. 5 and 6 of that Act have not been carried out. 39 Cr.L.J. 585 =1938 M.W.N. 90=1938 M. 490=(1938) 1 M.L.J. 289. *Children are a most untrustworthy class of witness*, for when of a tender age, they often mistake dreams for reality repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. 34 P.L.R. 536=1933 L. 667. The proper tests to be applied with reference to the evidence of a child witness are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. 1941 O.W.N. 1246. *It is not likely for a boy of about seven years to distinguish between things heard by him and those which he has seen*; and when there is a clear indication of inconsistent statements in his evidence, not much importance can be attached to it. It is not illegal to examine a witness of tender years; but it is important that the Judge should, as a precaution, ascertain in the first instance by means of a few simple questions whether the intelligence of the child is such that it is capable of giving credible evidence; it is also desirable that the record of evidence should show that such a test has been in fact made. When it does not appear that any such attempt was made to test the capacity of the child witness to give his testimony, it is not safe to rely on the evidence of such a witness. 15 P.L.T. 586 =1934 P. 651. It is not necessary to tender the *evidence taken on commission* formally at a trial to make it evidence in the case. (36 C. 566, Ref.) 37 C.W.N. 666=1933 C. 412. Where an *arbitrator has examined witnesses* and recorded evidence with due formality, it is open to the *parties by consent to treat such statements as evidence* and proceed with the case before the Court from the stage it has reached before the arbitrator. The consent in such a case relates to the manner in which the evidence has to be proved and not to the relevancy of the evidence itself. 1934 M. 610=67 M.L.J. 358. It is unsafe to rely completely on the evidence of trackers as to the correspondence of trackers. 42 I.C. 129=18 Cr.L.J. 897. Sometimes the identification of the particular accused by witnesses to whom they are strangers is useful. 17 Cr.L.J. 156=33 I.C. 636. Where a witness was examined before the committing Magistrate and was simply tendered for cross-examination in the Sessions Court and the evidence before the committing Magistrate was marked as exhibit in the Sessions Court, such procedure is illegal. 30 I.C. 439=1915 M.W.N. 544. But *see also* 39 Mys. H. C. R. 581=12 Mys.L.J. 1. Statements of accused in police custody are notoriously untrustworthy. 20 I.C. 721=1912 M.W.N. 825. In criminal cases, it is the weight of the evidence and not the number of the witnesses, which the Court has and ought to consider. 63 I.C. 407=24 O.C. 225. When in murder case the only eye-witness to the occurrence has been disbelieved on several points, it is not safe to base a conviction on the evidence of such witness, especially when no motive for the murder has been made out. 11 O.W.N. 969=1934 O. 373. Conviction should be resorted to only after the reasonable exclusion of every conceivable hypothesis of innocence. 9 I.C. 400=12 Cr.L. J. 690. Evidence cannot be admitted on the intention of parties when that intention is clearly expressed in the deed. 1928 C. 825.

EXAMINATION OF PARTY—DEFENDANT AS PLAINTIFF'S WITNESS.—Where the plaintiff refrained from giving evidence on his own behalf and adopted instead the tactics of calling the defendant as a witness for the plaintiff, with the usual result that important features of his case were denied by his own witness, their Lordships condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put the defendant forward as a witness of truth. 172 I.C. 633=47 L.W. 124=1938 P.C. 59 (P.C.). If a party appears as a witness on behalf of the opposing party the Court should before proceeding to record his statement question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness the Court should point out to the party producing him that ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insist on examining the opposite party as his own witness the Court should be careful not to allow him to cross-examine his own witness because unless the evidence is declared hostile, the party producing the witness has no right to cross-examine his own witness. 35 P.L.R. 28=1934 L. 126. The fact that a witness was cited on behalf of the defendants and his evidence went entirely to support the plaintiff's case does not entitle a Court to reject his evidence as that of a witness who had been "won over" by the plaintiff. 147 I.C. 591=1934 A. 226.

REPETITION AND HEARSAY.—Distinction between. *See* 14 P.L.T. 482=1933 P. 199. No standard of special strictness is applicable to the *proof of collateral relationships* in India, and there is no rule that a person claiming as a collateral

2. [*Repeal of enactments.*] *Rep. by Act I of* 1938, *S.* 2 *and Sch.*

Interpretation clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

"Court."

"Court" includes all Judges[1] and Magistrates,[2] and all persons, except arbitrators, legally authorized to take evidence.

LEG. REF.

[1] *Cf.* the Code of Civil Procedure, 1908 (Act V of 1908); sec. 2, the Indian Penal Code (Act XLV of 1860); sec. 19, General Act, Vol. I and for a definition of "District Judge," the General Clauses Act (X of 1897), sec. 3 (15), General Acts, Vol. IV.

[2] *Cf.* the General Clauses Act (X of 1897), sec. 3 (31), and Code of Criminal Procedure (V of 1898).

NOTES.

heir is bound to allege and prove his title through the common ancestor in all its stages. (6 C. 626, Expl.) 168 I.C. 881=46 L.W. 88=39 Bom.L.R. 1005=1937 P.C. 201 (P.C.). The Evidence Act does not contain any express provision making evidence of general reputation admissible as *proof of relationship.* 46 L.W. 88=1937 P.C. 201 (P.C.).

PLEADINGS AND EVIDENCE.—A statement of a party before Court but not on oath is only part of the pleading and not legal evidence. 35 P.L.R. 99=1934 L. 234. Evidence in a previous suit or affidavits filed in a previous litigation do not prove anything. Such evidence or such affidavits can be used powerfully when put to a witness as a means of destroying that witness's testimony and if the attack thus launched is successful it results in the witness leaving the box discredited. That does not however prove what is contained in his previous evidence or affidavits. The matter ends with a witness discredited. 1941 N.L.J. 596. The doctrine of the onus of proof is merely academic where both parties give evidence. Where there is evidence on both sides, the question of onus does not arise at all, and the judge has to determine the issue between the parties on the evidence before him. 1938 P.W.N. 773. Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree, and it may be sufficient of itself; but the fact that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material. 170 I.C. 335=1937 P.C. 310=(1937) 2 M.L.J. 772 (P.C.). *See also* 65 C.L.J. 520=41 C.W.N. 1103. It is possible that scandalous and indecent matter might be expunged by the trial Court from the evidence recorded on commission. If it proves to be irrelevant then the matter should be noted in the judgment in the case. But once evidence has been recorded on commission it must remain as such on the record. If it is irrelevant or inadmissible, it will not aid in the determination of the case and should be neglected. 1940 A.M.L.J. 4.

Sec. 2 (NOW REPEALED), ENGLISH LAW.—Cl. (1), sec. 2 precludes the Courts from following English Rules of Evidence in future. 7 I.A. 63 (70) (P.C.). There are however several Acts of Parliament relating to evidence that are in force in India. *See* Whitley Stokes' Anglo-Indian Codes, Vol. II, pp. 822-827; Field, p. 53 (6th Ed.). *See also* 14 C. 721. Sec. 2 (1) of the Act repeals the whole of the English Common Law on evidence so far as it was in force in British India before the passing of that Act. The section, in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It must be recognised, however, that the principle of exclusion adopted by theAct, should not be applied so as to exclude matters which may be essential for the ascertainment of truth. The relaxation of the rule as to reception of hearsay evidence must be held to be permissible where such a course tends to the due investigation of truth, and the attainment of justice. 65 C.L.J. 520=41 C.W.N. 1103. *See also* 175 I.C. 465=1938 R. 177 (F.B.). S. 2 (1) (now repealed) in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. 193 I.C. 220=1941 O.W.N. 572=53 L.W. 469=45 C.W.N. 435=1941 P.C. 16=I.L.R. (1941) 1 Cal. 468 (P.C.).

Sec. 3 : COURT.—The definition of "Court" in this Act is framed only for purposes of this Act and should not be extended beyond its legitimate scope. 12 B. 36. "Court" includes both Judge and jury. 4 C. 483. Registrar or Sub-Registrar, not Court under C. P. Code [Cr. P. Code, sec. 105 (2)]; so also a Magistrate holding preliminary enquiry in police investigation. 11 B. 702. The term, "matters before it," include matters which do not fall within the definition of "evidence." 1924 N. 385=79 I.C. 609. "Court" includes all Magistrates. 36 I.C. 171=34 P.R. (Cr.) 1916.

FACT.—Fact in issue cannot be proved by one not called as a witness. 13 I.C. 220=13 Cr.L.J. 28. Misrepresentation of fact—Fact, meaning of. 36 I.C. 850=16 P.R. (Cr.) 1916. State of a man's mind is a fact. 29 Ch.D. 483. Possession is a fact. 25 I.C. 510. On this section, *see also* 38 Bom.L.R. 1122=1937 B. 31.

DOCUMENT.—The definition of the word "document" in sec. 3 of the Evidence Act and sec. 29 of the I.P. Code, applies to the word as used in sec. 2 (6) of the Press (Emergency Powers) Act, 1931. 1934 A. 1031=153 I.C. 411.

"EVIDENCE."—This is only a definition of the word as used in the Act. 4 C. 492. The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, *viz.*, witnesses and

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.
(*b*) That a man heard or saw something, is a fact.
(*c*) That a man said certain words, is a fact.
(*d*) That a man holds certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
(*e*) That a man has a certain reputation, is a fact.

"Relevant."

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue."

The expression "facts in issue" means and includes—

any fact, from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations.

A is accused of the murder of *B*.
At his trial the following facts may be in issue:—
that *A* caused *B's* death;
that *A* intended to cause *B's* death;
that *A* had received grave and sudden provocation from *B*;
that *A*, at the time of doing the act which caused *B's* death was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document."

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing[1] is a document;
Words printed, lithographed or photographed are documents;
A map or plan is a document;
An inscription on a metal plate or stone is a document;
A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
such statements are called oral evidence;

LEG. REF.

[1] *Cf.* Definition of writing in sec. 3 (58), General Clauses Act (X of 1879).

NOTES.

documents, and by means of which the Court is convinced of these facts. 26 N.L.R. 229=1930 N. 242 (F.B.). *See also* 38 Bom.L.R. 1122 =1937 B. 31 (confession of co-accused). Heading of deposition—Entry in—Proof of religion—Not much importance to be attached. 176 I. C. 242=1938 R. 89.

"PROVED"—Meaning of. *See* 1929 A. 303= 107 I.C. 564. *Also* 31 Bom.L.R. 515; 1934 A. 390=154 I.C. 405. A Court, when it has to consider whether a fact is proved or not, must not expect evidence which cannot be produced or evidence which it is unnecessary to produce. Further more, a Court must consider all the evidence before it and this not merely as a number of independent bits of evidence. The whole of the evidence must be considered together and the cumulative effect of it must be weighed. 184 I.C. 521=1939 O.W.N. 1114.

"NOT PROVED"—PROOF IN CIVIL AND CRIMINAL CASES.—The evidence in criminal cases must be such as to exclude any reasonable doubt of guilt; if there be any such doubt the accused is entitled to be acquitted. 22 C. 323.

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

"Proved."

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved."

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved."

A fact is said not to be proved when it is neither proved nor disproved.

"May presume."

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it;

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved;

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a*) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A's* trial the following facts are in issue:—

A's beating *B* with the club;
A's causing *B's* death by such beating;
A's intention to cause *B's* death.

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

6. Facts which, though not in issue, are so connected with a fact in issue

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NOTES.

Sec. 4.—Under sec. 4, it is open to a Court in India upon proof of a marriage either to regard as proved the subsistence of that marriage on a later date, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of sec. 4 in a judicial manner according to the circumstances of the case. 193 I.C. 209=1941 P.C. 11=1941 O.W.N. 565 (P.C.).

Sec. 5: SCOPE OF SECTION.—Act does not lay down rules as to the weight of evidence; it only deals with admissibility (Field, 6th Ed., 64). In determining the relevancy or otherwise of any evidence, the Court cannot consider matters beyond the purview of the Evidence Act. 24 I.C. 165=12 A.L.J. 285. In a trial for murder, the case against the accused should be determined on evidence which is relevant and admissible under the Act. 62 I.C. 545=22 Bom.L.R. 1274. Suit for profits against son of lambardar—Evidence as to the difficulty of collecting rent and difficulty in finding other lambardar on the death of the original lambardar is admissible. 1928 A. 166=107 I.C. 702.

Sec. 6.—Principles of the sections relating to relevancy of facts are mere rules of logic. 1914 M.W.N. 931. Declarations in order that they might be admissible as *res gestae* should be contemporaneous with the transaction in issue, that is, the interval should not be such as to give time or opportunity for fabrication and

Relevancy of facts forming part of same transaction.

as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a*) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact.

(*b*) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(*c*) *A* sues *B* for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d*) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Facts which are the occasion, cause or effect of facts in issue.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened , or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a*) The quesstion is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(*b*) The question is, whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c*) The question is, whether *A* poisoned *B*.

The state of *B's* health before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

NOTES.

they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the immediate influence of some principal transaction relevant to the issue and are so connected with it as to characterise or explain it. The bare statement of a complainant made sometime after the occurrence is not admissible in evidence. 1941 O.W.N. 1290. Statement made to Police —Admissibility of. *See* 50 I.C. 487=17 A.L.J. 760. Evidence of woman raped—*Res gestae*. *See* 4 M.L.J. 491=1921 Lah. 258, note under sec. 8. Where a woman raped made a statement to her relative shortly after and committed suicide about 3 days after the occurrence, such statement is not admissible under sec. 6. 1930 M.W.N. 702. In a case of rape, a statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged but as corroborating the credibility of the complainant and of the evidence of the consistency of her conduct. 43 I.C. 443=19 Cr. L.J. 155 (F.B.). *See also* 1930 C. 132=124 I.C. 175 (statement by the girl to the mother that she was bitten by a leech to be used only to contradict the statement made by the girl). Unless a statement by the girl to her father and the offence under sec. 376, I.P. Code, form *res gestae*, such statement is not of much value. 1930 L. 337=127 I.C. 862. Hearsay evidence—Statement of by-stander, admissibility. 34 P.R. (Cr.) 1914=27 I.C. 664.

Sec. 7.—Where the accused takes the defence founded on an *alibi*, reasoning from probabilities, cannot take the place of evidence. 1930 P. 509=128 I.C. 351.

Secs. 7 and 45.—Evidence that there were foot-prints at or near a scene of offence or that the foot-prints came from a particular place or led to a particular place, is relevant evidence under S. 7 and statements as to these facts made by person skilled in identifying foot-prints are not excluded by S. 45. The words 'science' or 'art' in S. 45 are to be construed widely. The amendment relating to finger impressions is made to meet particular decisions which had been given by the Courts. The amendment does not operate to limit in any way the wide meanings which should be given to the expressions 'science' or 'art'. Whether a particular tracker called upon to assist, is or is not an expert in this art or science, is of course a matter to be decided by the Judge or Magistrate, before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given such consideration as it may deserve. 1942 Sind 11.

Sec. 8: *Cuniffe, J.*—S. embodies, in a

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

NOTES.

statutory form, the rule of evidence that the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission ot the crime. It is controlled and circumscribed by sec. 27 of the Act, 63 C. 1053 =1936 C. 316. *See also* I.L.R. (1936) N. 78.

MOTIVE: Per *Crump, J.*—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. 62 I.C. 545=22 Bom.L.R. 1274. Motive can never supply want of reliable evidence of the offence. 7 L. 84=94 I.C. 901.

EVIDENLE OF CONDUCT.—As to evidence of conduct and surrounding circumstances, *see* 22 C. 406; 24 W.R. 176; 7 A. 385: 25 S.L.R. 55= 1927 Sind 28; 1937 Sind 93; 35 C.W.N. 705=59 C. 40; 161 I.C. 885=1926 Pesh. 72. 'Conduct' may in certain circumstances include statements as well as acts but in doing so it still retains the difference between an act and a statement. A statement must consist of words, whether they be spoken,or written, or spelled out as would be done by a mute person on his fingers; and words would not always be statements. Acts however exclude words and cannot be translated into words. So where an accused takes certain articles belonging to the deceased from various places and hands them over to the police, he cannot be said to be making a statement; much less making a statement amounting to a confession. To such case sec. 8 applies. I.L.R. (1941) All. 280= 1941 All. 145=1941 A.L.J. 86. *See also* 1941 O.W.N. 722.

Res gestae—REPORT BY WOMAN RAPED—STATEMENTS TO NEIGHBOURS.—The statements were inadmissible under sec. 6 but admissible as a complaint under sec. 8. 4 L.L.J. 491=1921 Lah. 258. As to statements of a raped girl, to persons immediately after occurrence, *see* 82 I.C. 142=1925 N. 74; 1926 P. 58.

STATEMENT TO POLICE OFFICER AND COMPLAINT IN HIS PRESENCE—ADMISSIBILITY.—The evidence of police officer and the complainant as to the pointing out of the various places by the accused was a confession of his guilt made while he was in the custody of the Police-officer and inadmissible under secs. 25 and 26. The evidence could not be treated as evidence of conduct, apart from the accompanying statements under sec. 8 of the Act. 52 I.C. 601=21 Bom.L.R. 724; 152 I.C. 473=11 O.W.N. 1383.

ACCUSED POINTING OUT SPOT TO POLICE-OFFICER—CONDUCT.—If an accused accompanies a police officer and points out the spot where the stolen property is concealed, it amounts to conduct proof of which is admissible under sec. 8. 35 I.C. 962=17 Cr.L.J. 402; I.L.R. (1936) N. 78=164 I.C. 964=1936 N. 200. *See also* 63 C. 1063=1936 C. 316; 1937 N. 220=I.L.R.. 1937) N. 268 (conversation between accused and police at time of search leading to discovery of incriminating articles is admissible). But the mere fact that the accused pointed out the several places of incidents narrated by the approver is not admissible as evidence of conduct. 1929 L. 794. Statement by person robbed immediately after robbery and assault is admissible as part of the *res gestae.* 6 P. 747= 1928 P. 162. Rape—No direct evidence—Child on whom rape committed refused to make any statement—Prosecution tried to put statement of mother as regards answers given by child in reply to questions put to her—Statements held not admissible. 1930 L. 84=120 I.C. 539. Sec. 8 does not render a statement by a woman raped admissible in evidence when there is nothing to corroborate or confirm the same. 131 I.C. 436=1931 M. 233 (2). Where the accused (a woman) is on her trial for making a false charge of rape, the fact that she made certain allegations which she related in the course of an enquiry which she sought and demanded is relevant. 1935 N. 69=17 N.L.J. 189. A dying declaration by a deceased person made in the form of signs and gestures in answer to questions put to him is admissible in evidence. 38 Bom.L.R. 818=1937 B. 372.

CONDUCT OF ACCUSED.—Whether the evidence against a person charged with an offence under sec. 147, I. P. Code, is open to doubt, his conduct, some time after the occurrence, cannot be taken to be evidence under sec. 8 and cannot be used against him in the case. 54 I.C. 775=21 Cr.L.J. 167. As to evidence of conduct or character, *see* 97 I.C. 1041=1927 S. 28. As to evidence of subsequent conduct, *see also* 5 W.R. (Cr.) 28; 9 A. 568. The conduct of a person who has had no part in a crime and has not been called as a witness cannot be brought under sec. 8 of the Evidence Act as being a relevant fact constituting motive or preparation. 1935 N. 81=17 N.L.J. 274. Though the mere fact that an accused person has absconded will not necessarily fix him with guilt, the fact is undoubtedly a piece of relevant evidence against him. 35 P.L.R. 740. Where the accused, who is charged under sec. 411, I. P. Code, for dishonestly receiving a bullock knowing it to be stolen property, states to the police that he purchased it from a certain person and produces in support of his statement a receipt which is found not to include the bullock and as to which there is evidence that he made an attempt to get it altered, the conduct of the accused can be taken into account to prove his guilty knowledge. 35 P.L.R. 738=1934 L. 695. Admissibility of statements accompanying acts. *See* 3 B. 17; 14 B. 260; 10 Bom.L.R. App. 2; 4 Bom.L.R. 284. *See also* 1941 O.W.N. 722 (Admissibility of voluntary statements to police by accused subsequent to the first information report.) What the conspirators did, that is to say, their conduct, is relevant under sec. 8 and

Explanation 1.— The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(*a*) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(*b*) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(*c*) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B* is relevant.

(*d*) The question is whether a certain document is the will of *A*.

The facts, that not long before the date of the alleged will *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(*e*) *A* is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f*) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A's* presence—"The police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant.

(*g*) The question is whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A's* presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts.

(*h*) The question is whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that enquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i*) *A* is accused of a crime.

NOTES.

it is immaterial whether the conduct on which the prosecution relies was previous or subsequent to carrying out of the object of the conspiracy. 1941 O.W.N. 133=42 Cr.L.J. 165 =191 I.C. 466=1941 O.A. 65=1941 Oudh 130.

EXPL. (1).—What is relevant under sec. 8 is the particular act upon the statement, and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved. Otherwise the statements are inadmissible. 29 N.L.R. 251=1933 N. 136.

EXPL. (2)—An informer's statement to the police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused. 12 I.C. 87=4 Bur. L.T. 222. But the finding of marked coins on the accused and opium on the informer are circumstances from which it may be inferred that the accused sold the opium. (*Ibid.*) The statement made by the police officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under sec. 8, Expl. 2 because such a statement could not be said to affect the conduct of the accused. 52 I.C. 601=21 Bom. L.R. 724. Charge of forgery of a sale deed—Statements made by accused before Registrar—Admissibility of. 1933 M.W.N. 96. Absence of entries in account book is relevant fact. *See* 1924 N. 22= 76 I.C. 327. Agent acting nefariously, presumption from. 80 I.C. 969=17 S.L.R. 15 (33). First information report as evidence of conduct. *See* 54 C. 237=99 I.C. 227. Accusation by woman against man for attempt to ravish—Statements by her to witnesses—Silence of accused—Relevancy. 1938 R. 127.

Secs. 8 and 32: A statement of a *person believed but not proved to be dead* is no doubt not admissible under sec. 32 of the Evidence Act, but the document however is admissible under sec. 8, to a limited extent, to show the conduct of the party. It however is not a direct proof of the facts contained in it. 40 P.L.R. J. and K. 1. Where the deceased had made a complaint to the police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, it is admissible under sec. 8 whether or not it is admissible under sec. 32 (1). It is evidence of the conduct of a person, an offence against whom was the subject of the trial. I.L.R. (1938) 1 C. 290=42 C.W.N. 129=1938 C. 51.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attemped to conceal things, which were or might have been used in committing it, are relevant.

(*j*) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—

as a dying declaration, under section 32, clause (1), or

as corroborative evidence under section 157.

(*k*) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which established the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a*) The question is, whether a given document is the will of *A*.

The state of *A's* property and of his family at the date of the alleged will may be relevant facts.

(*b*) *A* sues *B* for a libel imputing disgraceful conduct to *A* ; *B* affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.

(*c*) *A* is accused of a crime.

The fact that, soon after the commission of the crime, *A* absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d*) *A* sues *B* for inducing *C* to break a contract of service made by him with *A*. *C*, on leaving *A's* service, says to *A*—" I am leaving you because *B* has made me a better offer." This statement is a relevant fact as explanatory of *C's* conduct, which is relevant as a fact in issue.

(*e*) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A's* wife. *B* says as he delivers it—" *A* says you are to hide this." *B's* statement is relevant as explanatory of a fact which is part of the transaction.

NOTES.

Sec. 9 : SCOPE OF SECS. 9 AND 11.—*See also* notes under secs. 14 and 15, *infra*. Secs. 9 and 11 read along with sec. 21 of the Evidence Act amply justify a Court in admitting into evidence all previous statements made by the accused bearing on the question of his guilt whether made to a police officer or to officer or to a third party if the statement is relevant to the fact in the issue. These sections are not controlled by the Criminal Procedure Code. 73 I.C. 963=6 P.L.T. 381. If after the commission of a crime a person whose name is mentioned as a participator in the crime absconds, his conduct implies that he is concerned in the crime. Anything therefore which tends to explain his conduct and furnishes motive other than a guilty conscience is relevant under sec. 9. 62 I.C. 545=22 Bom.L.R. 1274. Admissibility of judgment to prove identity. *See* 18 A. 78. As to comparison of thumb marks to prove identity, *see* 1 C.W.N. 33; 9 C.W.N. 520. As to recitals of boundaries in documents between strangers to suit, *see* 45 C.L.J. 55=30 C.W.N. 761; 8 L. 657=1927 L. 448. *See also* notes under sec. 13, *infra*. Evidence of identification of accused. 28 O.C. 258=90 I.C. 444. In a case of sedition, the copy of the accused's letter to the press is admissible under secs. 9 and 14, but it is necessary to prove that such a letter was sent before it could be admitted. 30 Bom. L.R. 314=1928 B. 77. In an offence of conspiracy to commit dacoity, evidence as to previous association of accused for criminal purposes is admissible under sec. 9 but not under sec. 11. 54 B. 524=32 Bom.L.R. 324. As to the admissibility of evidence of assessment of neighbouring land to determine the letting of a piece of land, *see* 1940 Cal. 47=44 C.W.N. 165=I.L.R. (1940) 1 C. 168.

(*f*) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

NOTES.

Sec. 10 : SCOPE OF ENGLISH AND INDIAN LAW.—Sec. 10 is wider than the English Law. As soon as it is shown with regard to an individual conspirator that he was in privy with the combination and its objects and adopted the acts already performed, he as a conspirator becomes bound by the antecedent and consequent acts of his fellow-conspirator. 17 P.R. (Cr.) 1915=28 I.C. 738. *See also* 37 C. 467=14 C.W.N. 1114=7 I.C. 359. Sec. 10 of the Evidence Act is quite comprehensive. Its provisions are much wider and the section renders admissible in cases of conspiracy such evidence which is not ordinarily admissible under the English or Indian law. The first thing for the prosecution in a case of conspiracy is to give satisfactory evidence to show a common purpose. The existence of the assent of minds which is involved in a conspiracy may be and from the secrecy of the crime, usually must be, inferred from the proof of facts and circumstances which, taken together apparently indicate that they are merely part of some complete whole. 1939 A.L.J. 785=1939 All. 567. There is a considerable inconsistency between sec. 10 and the illustration thereto. 37 C. 467=14 C.W.N. 1114. It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to commit an offence to attract the operation of sec. 10 against the accused. 37 C. 467. *See also* I.L.R. (1936) N. 152=1936 N. 97. The object of sec. 10 is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts, words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained. 11 P.L.T. 45=1929 P. 145 (F.B.). *See also* 1930 M.W.N. 1264. Sec. 10 means this: if two persons conspire together to commit an offence each is regarded as being the agent of the other and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained. First, you must find that there was a conspiracy, and, secondly, that the person to whom the doctrine is to apply should have joined the conspiracy before they can be made liable for anything said or done by others. 31 Bom.L.R. 515. The terms of sec. 10 are very wide and apply to acts done in connection with the conspiracy, and under the section an *act done by third persons* may in certain circumstances be treated actually as evidence of the existence of the conspiracy ; as for instance when an act is done or something is said in the presence of the persons implicated. But mere statements of third parties made in the absence of the persons implicated form a class by themselves, of no probative value whatever standing alone. The section does not permit of the attaching of weight as real evidence to mere statements of this kind made in the absence of the accused persons, and independent evidence required as corroboration of such statements must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be direct or circumstantial evidence. But it must be evidence which standing alone, would be properly treated as evidence for a jury of a proved intention, so that there would be evidence apart from the statements of the alleged fellow conspirators, incriminating the persons charged. The evidence must be proof of intention and not merely proof of a possible motive for the intention. 178 I.C. 324=1938 P.W.N. 403=1938 P. 497. The words of sec. 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words "Common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiray was on foot, are relevant as evidence of the common intention once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. Such statement is therefore inadmissible in evidence against co-conspirator. 190 I.C. 233=52 L.W. 662=1940 P.C. 176=(1940) 2 M.L.J. 811 (P.C.). *See also.* 1941 O. W.N. 133=1941 Oudh 130. When sec. 10 refers to the common intention of the conspirators, it refers to the common intention in the future, not to common intention in the past. I.L.R. (1939) Kar. 449=40 Cr.L.J. 882=1939 Sind 185. Where from the dying declaration made by a. person, who is alleged to have been murdered, it appears that there was clearly a conspiracy wrongly to implicate a

NOTES.

particular person the High Court before it would rely on the evidence of witnesses who have so conspired, and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose must have some other evidence before it which would enable it to distinguish the true from the false. 175 I.C. 99=39 Cr.L.J. 545=1938 Sind 94

EVIDENCE OF CONSPIRACY.—Possession of seditious literature by one member is evidence against the others for finding out the object of the association, even where such possession was obtained or such essays written before the association was formed or before other members joined the association. 46 C. 215=23 C.W.N. 193. As to evidence of conspiracy, *see also* 30 C. 983 ; I.L.R. (1939) All. 736 ; 4 C.W.N. 523 ; 25 B. 230 ; 28 C. 797 ; 7 Beng.L.R. 63 and 9 Beng.L.R. 36 App. 2 ; 106 I.C. 721=2 Luck. 631 ; I.L.R. (1936) N. 152=165 I.C. 913=1936 N. 97. A document of which the writer is not known if found in the possession of a conspirator would not by itself be admissible for the purpose of proving the truth of its contents as against other accused. The fact of possession would be evidence to show that the conspirator in whose possession it was found had received and preserved it. 169 I.C. 977=38 Cr.L.J. 818=1937 C. 99 (S.B.). *See also* 1933 All. 690. The ciphers or cipher lists discovered at the searches could not be treated as acts, words or deeds of any particular person, but the fact that they existed and that the names and addresses of a number of persons who are alleged to be parties to a conspiracy as charged are mentioned in them, the fact that they are in peculiar forms, such as is not likely to be used for any lawful purpose, taken along with other matter brought out in evidence gives rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy ; and in the absence of evidence that the matters appearing from the secret documents are associated with some legitimate or lawful purpose, the ciphers, are themselves material affording good reasons for inferring that the names, addresses and other matters appearing in the ciphers are connected with the furtherance of the objects of the conspiracy and as such evidence under sec. 10. 1937 C. 99 (S.B.). The finding of closed covers relating to the conspiracy in possession of one of the conspirators is relevant against the others under sec. 10. 17 P. R. (Cr.) 1915=28 I.C. 738. Confession of co-accused implicating co-conspirators—Admissibility. 106 I.C. 721=2 Luck. 631. Whenever evidence is sought to be let in under sec. 10 the accused is entitled to insist on strict compliance with its provisions, namely proof of reasonable ground for belief that the persons named have conspired together. 42 C. 957=19 C.W.N. 676. On a charge of conspiracy, particular facts are proved to show that one or more of the accused took part in it, after general evidence of the existence of conspiracy is first given. 42 C. 957. Cipher Code was in itself held to be good ground for supposing that the persons named has conspired to commit an offence and any other acts or writings of individual conspirators in furtherance of the common design became admissible under sec. 10. 1929 P. 145=11 Pat.L.T. 45 (F.B.).

ILLUSTRATIVE CASES.—In cases of forgery letter written by a third party to a stranger is not admissible against accused. 25 Bom.L.R. 248. *See also* 40 C. 783. In a charge of conspiracy, evidence of gambling and cocaine cases prior to conspiracy charged are admissible in evidence. 46 C. 710=54 I.C. 53. The evidence of an Excise Inspector, of raids on the dens was admissible as leading up to the admission made to him. 46 C. 710. Confession of co-accused by itself not sufficient to have a conviction upon. 48 A. 409=95 I.C. 74. Trial under sec. 222, Penal Code—Accused warder in jail—Evidence of previous conduct about carrying negotiations was held admissible. 1922 L. 631=119 I.C. 762. "Anything said" would include the statements made, speeches delivered, or declarations made. Anything "done" must be some act done and not merely the intention or knowledge of the person. "Anything written" would include a manuscript, signed or unsigned, written by the person, and matter transcribed by him on a typewriter. But a document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found had received and preserved it. 1933 A.L.J. 799 =1933 A. 690. *See also* 169 I.C. 977=38 Cr.L. J. 818. In order to establish that the accused were in correspondence with an individual going by the name of M. N. Roy in Berlin, it is not incumbent upon the prosecution to establish that any of the letters were, in fact, written by the particular M. N. Roy. It is enough to show that some person living in Berlin was in conspiracy with the accused and correspondence was passing between them. 1933 A. 690. The common intention of the conspirators is common intention in the future and not in the past. 1939 Sind 185. A document written by a woman since deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed to turn for guidance, is admissible under sec. 10, as the statement if proved is itself a relevant fact by virtue of sec. 10. The statement by the writer is a relevant fact and being admissible under sec. 10 is evidence against all the conspirators including the accused, to the effect that the third person made his statement concerning the accused. 147 I.C. 32=1934 C. 221 (F.B.). A confessional statement made by a deceased conspirator after he had rendered himself liable to criminal prosecution is admissible in evidence against a co-conspirator under sec. 10, though not under sec. 32 (3) when general evidence of the existence of a conspiracy has already been given. 38 C.W.N. 1015. *See also* 159 I.C. 919=1936 O.W.N. 28=1936 O. 164.

SECS. 10 AND 30.—The confession of a person who is dead and has never been brought to trial is not admissible under sec. 30 as the confession

Illustrations.

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen.

The fact that *B* procured arms in Europe for the purpose of the conspiracy. *C* collected money in Calcutta for a like object; *D* persuaded persons to join the conspiracy in Bombay. *E* published writtings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Kabul the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove *A's* complicity, in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspracy or after he left it.

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

NOTES.

of a co-accused. Nor can it be admitted under sec. 10, because sec. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and does not apply to a confession made after the conspiracy, and the acts done in pursuance thereof were at an end. Sec. 10 cannot be extended to cover the case of a confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it. 175 I.C. 99=39 Cr.L.J. 545=1938 Sind 94. Sec. 10 does not apply to incriminating statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others unless the special provisions of sec. 27 let in part of a confession to a police officer. A confession by a conspirator made to a Magistrate in Court implicating other conspirators is admissible in evidence under sec. 30, but statements made by a conspirator to the police are not admissible in evidence, if they are incriminating. For sec. 10, Evidence Act, is not intended to remove those restrictions which the Evidence Act and the Criminal Procedure Code place upon the admissibility of statements made to the police. Sec. 10 does not avoid in appropriate cases the operation of eithe sec. 25, Evidence Act, or sec. 162, Cr. P. Codr It makes no difference if because a man is deaf these statemens are written. I.L.R. (1939) K ar. 449=184 I.C. 145=1939 Sind 185.

Sec. 11.—[*See also* notes under sec. 13 *infra.*]

SCOPE OF SECTION.—*See also* notes under sec. 9. "Highly probable," meaning of. 13 M. L. T. 282=18 I.C. 997. The expression 'highly probable or improbable' is significant indicates that the connection betwecn the facts in issue and the collateral facts sought to be proved must be immediate as to render the co-existence of the two highly probable. 1933 A.L.J. 799=1933 A, 690. Proof of custom opposed to personal law. *See* 8 I.C. 897. Section to be liberally construed, The illustrations do not go beyond cases familiar in English law. There is a difference between the existence of a fact and a statrment as to its existence; sec. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence if a statement does not fall within sec. 32 it cannot be admissible even under sec. 11. 56 A. 766=1934 A. 406 (F.B.) Sec. 11 is controlled by scc. 32 where evidence cnnsists of that of persons who are dead. 1928 C. 893=110 I,C. 521. *See also* 1939 M.W.N. 841=1940 Mad. 273. Statements of living persons who had not been examined as witnesses are inadmissible under sec. 11 or sec. 32. 1929 O. 113; 11 B.H C. 90, 91. A statement included in the definition of "fact" and statements can, therefore, be relevant under sec. 11. 171 I.C. 481=1937 O. W.N. 1058. On this sectton, *sec also* 1925 P. 68; 1924 C. 1067=28 C.W.N, 1092; 1924 M. 537=78 I.C. 176. A judgment in civil suit is relevant under sec. 11. 37 M. 238=23 M.L.J. 447. Although at one time it was held that a judgment not *inter partes* eould not be admitted in evidence under any circumstaness, the tendency in recent years is to admit such judgments under certain circumstances and for limited pnrposes under sec. 43, read with secs. 11 and 13 of the Evidence Act. 59 C.L.J. 320=1934 C. 788. Entry in butwara papers. *See* 87 I.C. 694=1926 C. 115. Entry in Hospital Register—In-door patients in a hospital—Admissible to prove that the person mentioned in the entry was in the hospital on a certain date. 56 P.L.R. 1918=43 I.C. 429. Statement of wounded person on the day of occurrence to a Magistrate to the effect that it was the accused who had attacked herself and her co-wife. *Held*, sec. 11 does not justify the admission of the contents of the statements. 54 I.C. 887=23 C.W.N. 933. Copies of printed newspapers containing an account of some proceedings, found in possession of one accused, are evidence of the fact of the publication of such an account in that paper but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned "highly probable or improbable." 1933 A.L,J. 799=1933 A. 690. A lctter written by the accused where it is self-condemnatory is *prima facie* evidence against him and is admissible in evidence; it is enough if it can be traced to the writer. It is admissible though it was intercepted or surreptitiously detained and opened. 41 C. 545=22 I.C. 179=18 C.W.N. 386. Facts disclosing similar fraudulent transactions are admissible to prove intent. 39 A. 273=39 I.C, 673=15 A.L.J. 241. Horoscope. *See* 21 O.C. 298=48 I,C. 400. Police Report. *See* 2 O.L.J. 299=30 I.C. 292. The previous activities of the accused against the complainants are admissible under sec. 11. 6 R. 6=1928 R. 118. Deed inadmissible by reason of sec. 49, Registration Act, is admissible under sec. 11 if it is inconsistent with fact in issue. 1930 A. 130. Contents of will left by deceased are admissible under secs. 11 and 21 (2) to prove religion of executant. 7 R. 720=1933 R. 42. Where the precise date of the death of the

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*) The question is, whether *A* committed a crime at Calcutta on a certain day.

The fact that, on that day, *A* was at Lahore is relevant.

The fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b*) The question is, whether *A* committed a crime.

The circumstances are such that the crime must have been committed, either by *A*, *B*, *C* or *D*. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either *B*, *C* or *D*, is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant:—

NOTES.

last holder is in question, a statement in a copy of the application for probate of his will that the deceased died on a particular date is admissible in evidence under sec. 11, if not under sec. 32 (5), where it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the application was filed about one year after the testator's death. (45 I.A. 256; 20 C. 758; 25 M. 183, Ref.) 12 P.L.T. 891=1931 P. 224. Where question as to dedication to religious endowment is in issue, the gift of property to the institution is admissible. 1930 A.L.J. 964. A statement by a person that certain parties are governed by a particular school of Hindu law is admissible in evidence under sec. 11 only if he is a member of a connected family (*i.e.*) a family which had descended from the same stock from which those parties descended, and not when he is neither an agnate nor a relative of theirs. 43 C.W.N. 395.

Secs. 11, 14 and 15.—Except as evidence of intention, evidence of similar transactions is inadmissible in evidence under secs. 14 and 15 17 Mys.L.J. 238. The *first information report*, besides its use as a corroborative or contradictory piece of evidence under secs. 147 and 145 of the Evidence Act, becomes when duly proved a relevant fact within the meaning of sec. 11 (2) of that Act and as such retains some evidential value even after being sworn against by the author thereof. 190 I.C. 322.

Sec. 12.—*See* 47 C. 671=24 C.W.N. 501=58 I.C. 929; 164 I.C. 385=1936 R. 332.

Sec. 13 : SCOPE OF SECTION.—Sec. 13 of the Evidence Act is nothing more than a declaration of the common rule of evidence in England, but it has been given wider construction in this country and it is not confined, as it is confined in England, to the proof of incorporeal rights. But although that be the case in India, its application cannot be extended to allow judgments to be used in evidence in cases which are definitely excluded by secs. 40 to 44 of the Evidence Act. Where, therefore, what the plaintiff in a suit seeks to establish through a judgment is not a right or custom but a fact—a fact which was presumably proved in a previous action to which the defendant in the suit was not a party, the case comes neither under secs. 40 to 44, nor under sec. 13 of the Evidence Act, and the judgment not *inter partes* is not admissible in evidence. 166 I.C. 664. *See also* 42 P.L.R. 247= 1940 Lah. 309; 1937 Lah. 437. Sec. 13 (*a*) only refers to the admissibility of any transaction by which a right is asserted. It would be a far-fetched application of the section to say that if in a deed of partition between two persons rights are alleged with reference to the property which either has or has not any reference to the right to partition, these allegations should be considered as a transaction by which the right is asserted. 54 C.L.J. 353=1932 C. 398. *See also* 31 C.W.N. 32=1927 C. 1. Ordinarily and in the absence of special circumstances, a judicial decision in recognition of denial of a custom is good evidence in proof thereof. There may be cases in which the judicial decision relating to a custom may not be of great value: but where it is arrived at in a well-contested case in which there is no reason to suppose that the parties could not, or did not, produce all evidence available to them the value of the decree as a piece of evidence is great. 1939 A.L.J. 708= 1939 A.W.R. (H.C.) 671=1939 All. 626. Section not confined to public rights, but also applies to private rights. 6 C. 171. *See also* 39 C.L.J. 526. It also covers rights of ownership and also incorporeal rights. 10 B. 439; 15 M. 12; 12 A. 1. But *see* 145 I.C. 944=1933 P. 636.

A statement of a Kulkarni of a village as to the existence of a tenancy right in the village is admissible. 190 I.C. 342=45 C.W.N. 57=1940 P.C. 192=(1941) 1 M.L.J. 427 (P.C.). *See also* 45 C.W.N. 590 (Statement in deed of transfer about nature of tenancy). A *map prepared in a previous suit* is not relevant under sec. 13 in a subsequent suit, when the land in dispute in the two suits is different. 190 I.C. 689=42 P.L.R. 247=1940 Lah. 309. *Documents of transfers and sub-leases* dating from 1879, in all of which there (*a*) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence ;

NOTES

is an assertion that the lease is permanent, is admissible in evidence under sec. 13 for the purpose of proving that the lease is permanent. The assertion of a right to transfer necessarily implies the existence of a permanent lease. 190 I.C. 622=71 C.L.J. 209=1940 Cal. 393.

DOCUMENTS ADMITTED UNDER THIS SECTION.—Where a custom is pleaded to prevail in a village under which the ryots are entitled to sell their houses in the village, copies of *sale deeds* produced to prove the instances of such a custom are admissible in evidence. 1940 A.L.J. 650=1940 All. 535. Under this section, maps. 5 C. 287 ; 164 I.C. 277=1936 P. 462 ; rent receipts, 16 M. 194 ; entries in taluq maps, 22 I.C. 645 ; 1936 P. 462; old maps, 16 C.W.N. 116=13 I.C. 332; sale deeds, 23 W.R. 293; zamindari papers, 101 I.C. 792=1927 C. 576; documents under which title to land is devised, when title is in question, have been admitted. (*Ibid.*) Patwari papers. 1936 R.D. 479. *See also* 39 Bom.L.R. 288. As to chittas by Government, *see* 98 I.C. 85; 40 C.W.N. 821. Recitals in sale-deed are not evidence of title and cannot be used to prove a grant. It is however permissible to use them, not as evidence of grant, but to show the nature of the title that was being asserted and as transactions relevant under sec. 13, Evidence Act, by which a right was claimed or asserted on some past occasion. 1933 P. 656. *See also* I.L.R. (1938) L. 494=40 P.L.R. 1054=1938 L. 795.

A *sale certificate* is admissible in evidence under sec. 13 as a transaction by which the right to possession of certain plot of land as constituting the tenancy-lands was recognised. 71 C.L.J. 504=1940 Cal. 539. "Instances in which the right was claimed, recognised or exercised"—Meaning of. 15 P. 260=1936 P. 543. *See also* 40 P.L.R. 968=1938 L. 635; 41 P.L.R. 21; 1939 Lah. 105 ; 45 C.W.N. 590. Judgments not *inter partes* in previous cases in which the right involved in the present litigation was asserted are admissible. 60 I.C. 142. *See also* 1927 N. 19; 13 O.L.J. 684=1 Luck. 50; 13 O.L.J. 696=1 Luck. 489; 6 C. 171; 28 C.W.N. 942; 82 I.C. 99=1926 C. 194; 40 C.L.J. 30=1924 C. 1046; 176 I.C. 549=1938 S. 132 (Proceedings under sec. 145, Cr. P. Code); 1924 O. 19; 11 C. 745; 15 C. 233; 13 C. 352; 12 M. 9; 15 M. 12; 22 I.A. 60=22 C. 43 (P.C.); 24 I.A. 10=19 A. 277 (P.C.); 29 I.A. 24=29 C. 187 (P.C.); 25 C. 522; 24 B. 598 (599); 40 I.C. 159; 1930 P. 231=125 I.C. 115; 162 I.C. 334=1936 O.W.N. 375. Judgments not *inter partes* are admissible to show the existence of custom of a public nature. *See* 7 W.R. 210; 7 M.H.C. 307; 12 M. 9; 163 I.C. 924=1936 L. 929. The word "asserted" in sec. 13 (*b*) of the Evidence Act includes both a statement and enforcement by Act. The evidence tendered under this section need not necessarily be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act, would also be admissible, if it amounted to a claim. A.I.R. 1939 M. 432=49 L.W. 409=(1939) 1 M.L.J. 602=186 I.C. 255. Under sec. 13 instances "in which the right of custom is claimed, recognised or exercised," etc., must be instances prior to the suit in question. *Post litem* instances are inadmissible. 1939 Lah. 105; 41 P.L.R. 670=1939 Lah. 152 ; 41 P.L.R. 21. *See also* 67 C.L.J. 111=1938 C. 763 (Recitals in decree); 1939 L. 152; 1937 L. 223; 1939 L. 152. Also as authoritative statement of facts as found by the Court. 94 I.C. 694=9 N.L.J. 215; 22 N.L.R. 49=1926 N. 109; 1926 N. 129; 1 Luck. 489=1926 O. 578. *See also* 1938 C. 763. Also as evidence of transactions but not as proof of title. 36 C.W.N. 866=140 I.C. 385. A judgment not *inter partes*, together with the plaint which preceded it and the steps in execution which followed, are admissible as evidence of an assertion of right, but cannot alter the burden of proof as between rival claimants. 167 I.C. 329=1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.). *See also* 1937 L. 437; 65 C.L.J. 333=1937 C. 373. A decision in a custom case is not a judgment *in rem*. It is only relevant under sec. 13 of the Evidence Act as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons. 36 P.L.R. 256=1934 L. 861; 34 P.L.R. 753=1933 L. 553. It is doubtful whether a judgment recognizing a custom is relevant under sec. 13. Even if it is, it is far from having the same importance as a clear cut instance of custom recognised by the parties themselves. 17 L. 809=39 P.L.R. 148=1937 Lah. 223. Judgments subsequent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute are not admissible in evidence. 1939 L. 152. The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case, evidence of that fact in another case, where parties are not the same. 56 I.A. 119=56 C. 1003=1929 P.C. 99=56 M.L.J. 562 (P.C.). Where a judgment is not *in rem* nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. 26 N.L.R. 33=1930 N. 1 (F.B.). Decrees. 1929 C. 472=114 I.C. 670; 1929 P. 749. In a rent suit, decree by another co-sharer landlord is admissible. 112 I.C. 785=1928 C. 355; *contra* 112 I.C. 787=1928 C. 353. Judgment referring to illegitimacy of a person is admissible as establishing an instance in which the legitimacy of the person was denied. 3 Luck. 481=1928 O. 233. A judgment in which the purchase at a revenue sale by the plaintiff's predecessor is recited is admissible in evidence as evidence of a transaction within the meaning of sec. 13 of the Act, though the defendants were not parties thereto. 56 C.L.J. 369=1933 C. 222. *See also* 41 Bom.L.R. 561 ; 1939 Bom. 313. The purpose of sec. 13 is to enable a right which may be constituted by a number

NOTES.

of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of sec. 13 for the purpose of ascertaining the parties to the dispute and the contention of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of facts as evidence of those facts in another case. 176 I.C. 549=1938 Sind 132; 1939 A.L.J. 708=1939 All. 626. *See also* 73 C.L.J. 76. Although a finding in a previous suit *inter partes* does not operates as *res judicata*, it is the paramount duty of the party against whom it is given to displace that finding. 73 C.L.J. 76. Previous proceedings on the question of the existence of the right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issue before it, leave should not ordinarily be refused even though they are produced late. 51 L.W. 339=1940 Mad. 540=(1940) 1 M.L.J. 302. Judgment not *inter partes* is admissible for certain purposes. 59 C.L.J. 320=1934 C. 788. *See also* 1940 R. D. 623=1941 A.W.R. (Rev.) 433. Judgment not *inter partes* is admissible to prove motive of transaction alleged to be benami. 8 P. 783=1929 P. 739. Judgment not *inter partes* in which an adoption was upheld is admissible. 114 I.C. 616. *See also* 41 Bom.L.R. 561=1939 Bom. 313. But judgment not *inter partes* throwing light on title of landlord in respect of other villages is not admissible. 31 Bom.L.R. 335. Where certified copies of the decree and of two pedigrees found with it are produced, the Court may presume that the two pedigrees, found with the decree were the two pedigrees filed in the suit. Both pedigrees should be admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship under sec. 32 (5). The statement in the decree that the pedigrees were filed is evidence under sec. 35 as an entry in a public record or under sec. 13, as evidence of the course of proceedings in a suit. 56 A. 468=1934 P.C. 157=67 M.L.J. 274 (P.C.). A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible as establishing a particular transaction in which the partibility of the estate was asserted and recognised. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit. 58 I. A. 125=58 C. 1187=61 M.L.J. 9 (P.C.). *See also* 41 P.L.R. 670=1939 Lah. 152. In order to prove the existence or non-existence of a particular custom it is only judgment that can be produced as an instance. But if such judgment is not produced a Judge's recitals about such judgment cannot be relied on. 181 I.C. 703=41 P.L.R. 670=1939 Lah. 152. Statement made in prior litigation is admissible in subsequent suit. 1929 A. 361. Assertion of right under cl. (*b*) need not be successful assertion. 92 I.C. 104. *See also* 1938 L. 846. As to family custom, *see* 82 I.C. 886=40 C.L.J. 331. A kabala reciting that holding was homestead land is admissible although it is not *inter partes*. 55 C. 355=1928 C. 315. Also discharged mortgage bond to prove rate of rent. 1928 C. 703 (2). Also the statement of agent that his principal was a bastard. 1928 O. 233=3 Luck. 466. Will containing recital as to permanent tenancy where question related to nature of tenancy is admissible. 56 C. 275=1929 C. 473; 46 C.W.N. 169. Dispute regarding nature of land—Recitals in sale deeds in favour of one party to suit showing nature of same land—Admissible both under secs. 13 (*b*) and sec. 32. 52 A. 464=1930 A. 299. *See also* 1937 L. 688; 1938 L. 846. Recitals in mortgage-deed—Evidentiary value against third party. 57 I.A. 339=58 C. 858=60 M.L.J. 142 (P.C.); 1937 L. 688. Recital in *Zarpeshgi* deed describing the land as *zirat*—Extent of admissibility. 150 I.C. 884=1934 P. 81. *See also* 1939 Sind 209; 39 Bom.L.R. 288; 46 C. W.N. 169; 1940 Mad. 273. In a suit for a declaration against the landlord that plaintiff has a rent-free title to the land, a kabala, which is a title deed of plaintiff is admissible in evidence, at least, to explain the nature of his possession. 1933 P. 685. Suit to establish right as mahant—Papers containing recognition of rights by revenue officers and residents of villages—Admissible. 1930 A.L.J. 964. *See also* 20 Pat. 870 (Village note as evidence of custom). The opinion expressed by the Law Committee of a Municipality by its resolution is not admissible in evidence when the members of the Committee have not been examined. 1931 A.L.J. 757=1931 A. 499 (S.B.). Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings within the meaning of sec. 33, Evidence Act, so as to make statements made therein as to the existence of a custom admissible in a subsequent civil suit between the parties. But the statements cannot at the same time be excluded. Though they may not be admissible as evidence of the custom, they can be looked into to assess the value of the Deputy Collector's report and order. These latter are admissible under sec. 13, Evidence Act, as recognizing a custom in dispute. 1935 A. 187; 1937 L. 223.

RECITAL OF BOUNDARIES IN DOCUMENTS BETWEEN STRANGERS, not admissible. 8 L. 651=1927 L. 448; 1934 L. 750. But *see* 1933 P. 636=145 I.C. 944; 1936 L. 114; 1936 L. 1005. *See also* 45 C.L.J. 55; 44 C.L.J. 582=99 I.C. 907=1927 C. 230 (following 23 B. 63; 11 Bom. L.R. 409; 14 C.L.J. 467); 101 I.C. 542=45 C. L.J. 138; 30 C.W.N. 826=1926 C. 822; 30 C. W.N. 761=1926 C. 948; 1926 C. 479=91 I.C. 688; 10 Mys.L.J. 75. Also that in documents executed by third parties to plaintiffs is not admissible if the executant is not dead and does not come to corroborate it. 109 I.C. 728=1928 L. 428. Recitals of boundaries relating to adjacent lands are not admissible. 110 I.C. 520=1928 C. 893. *See also* 1939 M.W.N. 841=

(*b*) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is whether *A* has a right to a fishery. A deed conferring the fishery on *A's* ancestors, a mortgage of the fishery by *A's* father, a subsequent grant of the fishery by *A's* father, irreconcilable with the mortgage, particular instances, in which *A's* father exercised the right, or in which the exercise of the right was stopped by *A's* neighbours, are relevant facts.

Facts showing existence of state of mind, or of body, or bodily feeling.

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

NOTES.

1940 Mad. 273 (Description of land as being situate in a particular village). A mere statement of boundary cannot be classed with any of the verbs in sec. 13 "created, modified, recognised, asserted or denied," and is, therefore, not admissible under sec. 13 (*a*). 107 I.C. 293=1928 M. 105 (2). Reference to a work of history and social customs at the appellate stage of a case in proof of a custom which has not been pleaded is irregular and must be avoided. Such a work by an author who is alive and available as a witness to the custom set up is inadmissible in evidence when the author is not called as a witness and no reason is adduced for not calling him. 192 I.C. 290=21 Pat.L.T. 1118=1941 Pat. 146.

Secs. 13 and 32 (3).—Evidence given by a widow holding a life-estate under a will in probate proceedings as to the necessity for an alienation by her by way of mortgage is not admissible in evidence against her successor-in-interest to the estate in a suit against the latter by the alienee to enforce the mortgage. 173 I.C. 983=19 P.L.T. 234=1938 P. 301.

Secs. 13 and 42.—A judgment on a question of custom is relevant, not merely as an instance under sec. 13 but also under sec. 42 as evidence of custom. But its value depends upon the nature of the inquiry and the evidence produced. 177 I.C. 775=40 P.L.R. 29=1938 L. 309.

Sec. 14.—S. 14 applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does in a trial for the offence of arson. 1941 Rang.L.R. 566=1941 Rang. 324. The mental capacity of a party cannot be said to be irrelevant when upon the contractual relations entered into by the party, his property is sought to be made liable and the contract is in English, a language of which the party is said to be ignorant; and, when he is shown to be lacking in mental capacity, it is incumbent upon the party attaching liability to establish that the party liable has signed the contract with an understanding mind. 1942 Sind 17.

Illus. (b).—*See* 75 I.C. 67 and 76. *See also* 8 B. 223; 11 B.H.C. 90 (93); 61 I.C. 647.

Illus. (e).—*See* 13 B. 532.

Secs. 14 and 15; RELATION OF SECS. 14 AND 15—OPINIONS OF JUDGES. Evidence of the opinions of the other Judges on other documents written or attested by the accused in proceedings to which he is not a party is not admissible to prove his intention or knowledge in his trial for giving false evidence in respect of an alleged forged document. 38 I.C. 723=13 N.L.R. 35. Sec. 15 must be read as subject to sec. 14 so far as evidence of knowledge and intention is concerned. (*Ibid.*) *See also* 1928 Lah. 382. It is settled law that under neither of secs. 14 and 15 can the evidence of facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the Act in question was done accidentally or with a particular knowledge or intention, evidence of similar acts may, under certain conditions, be admitted. Sec. 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact. 1928 L. 382=112 I.C. 850.

PREVIOUS CONVICTION—EVIDENCE NOT ADMISSIBLE TO SHOW STATE OF MIND.—60 I.C. 331=5 P.L.J. 706; 112 I.C. 850=1928 L. 382; 8 Mys.L.J. 385. But *see* 146 I.C. 1064=1933 O. 355=10 O.W.N. 688, when it was held admissible to prove habit and association.

EVIDENCE OF PREVIOUS CRIME—ADMISSIBILITY.—When a person is charged with an offence, evidence of his participation in an independent crime cannot be received as substantive evidence of the offence on trial but evidence may be given to prove the elements mentioned in sec. 14, such as intention, etc. 22 I.C. 187=18 C.L.J. 578. In a prosecution under sec. 209, I. P. Code, evidence relating to other suits by the accused against other persons may be admissible under secs. 14 and 15 to show the *animus* of the accused, and a systematic course of fraud and to rebut the plea of good faith or mistake. 46 I.C. 896=22 C.W.N. 494. But the evidence relating to similar suits by other persons is not admissible, unless those suits form part of the same transaction or the result of a conspiracy between them. (*Ibid.*) *See also* 6 B.H.C. 90. Series of similar acts involving forgery is evidence of intention but not forgery itself. 40 C. 783=33 I.C. 306=20 C.W.N. 262; 8 Mys.L.J. 385. In a prosecution under sec. 304-A, I. P. Code, for rash driving of motor-car, evidence regarding similar occurrence previously is inadmissible under sec. 14 or sec. 15. 1929 M.W.N. 395. In a charge under sec. 409, I. P. Code, for embezzling specific sums, evidence of embezzling other sums is not admissible. 1928 L. 382=112 I.C. 850; 142 I.C. 274 (2)=1933 C. 136. Where proceedings under sec. 108 (*b*), Cr. P. Code, are started

[1][*Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where upon the trial, of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.]

Illustrations.

(*a*) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

[2][(*b*) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

(*c*) *A* sues *B* for damage done by a dog of *B's* which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are relevant.

(*d*) The question is, whether *A*, the acceptor of a bill of exchange, knew that the name of the payees was fictitious.

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person.

LEG. REF.

[1] Substituted by S. 1 (1) of Act III of 1891.

[2] Substituted by S. 1 (2) of Act III of 1891.

NOTES.

against a person in order to prevent him from delivering speeches likely to create communal tension, in the inquiry, speeches delivered by the same person on prior occasions are admissible in evidence under sec. 14 of the Evidence Act. They serve to show the existence of a particular state of mind or intention. Ill. (*e*) to the section is very similar to the facts of the case. 189 I.C. 74=41 Cr.L.J. 713=1940 Nag. 134.

Previous Dacoities.—In a charge of dacoity, evidence of other dacoities committed by the accused is admissible either under section 14 or 15. 1912 M.W.N. 49=13 I.C. 781. Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity, it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he was acquitted on a charge of dacoity, it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of dacoity. 7 O.W.N. 862=128 I.C. 739=1930 O. 455. In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, simple theft or bad livelihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged. 46 B. 958=25 Bom. L.R. 214; 32 Bom.L.R. 324=1930 B. 157.

Previous Cheating.—Where a licensed clerk was charged with cheating by collecting 2 annas more than what was due, from each licensee, evidence of similar action with others is not admissible under sec. 14 or 15. 34 A. 93=12 I.C. 987=8 A.L.J. 1269. *See also* 17 Mys.L.J. 238.

Counterfeit Coins and Instruments.—In the trial of a person for being in possession of counterfeit coins and instruments and materials for counterfeiting in his house in the district where he is tried, evidence of such possession in his house in another district is admissible. 61 I.C. 647=22 Cr.L.J. 407.

Possession of Stolen Cattle.—In Sind possession of stolen cattle three or four months after theft is sufficient to raise presumption of guilt under this section; but the accused may set up title by lawful origin to rebut the presumption. 38 I.C. 271=10 S.L.R. 167. The accused was charged under sec. 420, I. P. Code, for having borrowed money on mortgage, representing himself to be major, though he was minor, *held*, that the evidence of transactions which took place on the occasion of the loan was relevant to show the intention or knowledge or otherwise of the accused. L.R. 1 A. (Cr.) 103.

Offnece under Sec. 124-A, I. P. Code—Speeches.—Previous speeches forming part of a series of speeches nor lectures delivered, within a short period of time are admissible. Period of six months not long. 1930 L. 867. Other newspaper articles written by the accused at the same time are admissible. 8 Mys.L.J. 49. A writing made some time after the committing of an offence under sec. 124, I. P. Code, is admissible in evidence under sec. 14 of the Evidence Act. But the writing should be within a reasonable time of the particular occurrence. 30 Bom.L.R. 315=1928 B. 78. A Court has no concern with the justice or otherwise of the claims of the accused or with the rectitude of his political views, but the Court may take cognizance of the fact that he does hold certain views; for as a guide to his conduct and intentions these views are most relevant consideration. 1933 Cr. C. 833=1933 A. 498.

(*e*) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact that previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B* is relevant, as proving *A's* intention to harm *B's* reputation by the particular publication in question.

The fact that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B*.

(*f*) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust *C*, who was insolvent, suffered loss.

The fact that at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that *A* made the representation in good faith.

(*g*) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner, by the order of *C*, a contractor.

A's defence is that *B's* contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C's* own account, and not as agent for *A*.

(*h*) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith and that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that *A* knew of the notice did not disprove *A's* good faith.

(*i*) *A* is charged with shooting at *B* with intent to kill him. In order to show *A's* intent the fact of *A's* having previously shot at *B* may be proved.

(*j*) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.

(*k*) The question is, whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(*l*) The question is, whether *A's* death was caused by poison.

Statements made by *A* during his illness as to his symptoms are relevant facts.

(*m*) The question is, what was the state of *A's* health at the time an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question are relevant facts.

(*n*) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B's* attention was drawn on other occasions to the defect of that particular carriage is relevant.

The Fact that *B* was habitually negligent about the carriages which he let to hire is irrelevant.

(*o*) *A* is tried for the murder of *B* by intentionally shoooting him dead.

The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*.

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

(*p*) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Facts bearing on question, whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional [1][or done with a particular knowledge or intention], the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

LEG. REF.

[1] The words within brackets were inserted by Act III of 1891, S. 2.

NOTES.

Sec. 15 : SCOPE OF SECTION.—Per *Walsh, J.* —Sec. 15 is applicable to all cases where the question is whether an untruthful statement is "accidental or intentional or made with particular knowledge or intention." 39 A. 273=15 A.L.J. 241. There is a presumption of user as of right from open user for a long time. 95 I.C. 269=1926 L. 522. Evidence of a single act is admissible and in this sense one evidentiary fact can form a series within the meaning of S. 15, with the fact to be proved. The acts

Illustrations.

(*a*) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b*) *A* is employed to receive money from the debtors of *B*. It is *A's* duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(*c*) *A* is accused of fraudulently delivering to *B*, a counterfeit rupee.

The question is, whether the delivery of the rupee was acicdental.

The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and E are relevant, as showing that the delivery to *B* was not accidental.

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(*b*) The question is, whether a particular letter reached *A*. The facts that it was posted in due course and was not returned through the Dead Letter Office, are relevant.

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any

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NOTES.

of which evidence is tendered must be of the same specific kind as that in question. 1941 Rang. L.R. 566=1941 Rang. 324.

SUBSEQUENT OCCURRENCES.—Sec. 15 covers both previous and subsequent similar occurrences. 46 I.C. 696=22 C.W.N. 494.

INCIDENTS IN A SERIES OF SIMILAR TRANSACTIONS.—Where the accused administered *Dhatura* poison to *A* and *B*, both of whom died from the effects thereof, and on the following day administered the same poison to *D*, who also died, the acts against *A* and *B* are relevant to a case of murder of *D*, as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention. 9 I.C. 931=32 P.L.R 1911. *See also* 73 I.C. 262=1923 N. 248. Evidence of similar acts may be received to prove a party's knowledge of the nature of the main act or transaction and of his intent with respect thereto. 19 C.W.N. 676=45 C. 957. To admit evidence under this head the other acts must be of the same specific kind as the one in question and not of a different character. 45 C. 957. The acts tendered must also have been proximate in point of time to that in question. 45 C. 957. In a case of criminal misappropriation evidence of similar acts in the previous year is admissible. 1928 L. 880=111 I.C. 387; I.L.R. (1939) Kar. 249. The words of sec. 15 are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved. There is also a difference between the admissibility of evidence and its cogency or weight. I.L.R. (1940) Kar. 249=184 I.C. 474=1939 Sind 209. The report of a Naib Tahsildar which is based on the statements of unknown persons who happened to be present at the time of his inspection, is purely a hearsay evidence and is not legally admissible. 1940 A.W.R. (B R.) 152.

EVIDENCE OF ASSOCIATION AND JOINT ACTION.—Sec. 15 is not applicable where there was no question of the act being accidental or intentional or forming part of a series of similar transactions. 47 C. 671=24 C.W.N. 501=58 I.C. 929 (F.B.). Sec. 14 would not also apply where the defence was a complete denial and no question of the character contemplated in sec. 14 did or could possibly arise. 47 C. 671. Where the accused who were charged with dacoity pleaded that their presence in company, and armed at a spot was accidental and innocent it is open to the prosecution to rebut this story, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. 71 I.C. 360=24 Cr.L.J. 136 (Pesh.). In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. 71 I.C. 360. S. 15 admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for this purpose. (*Ibid.*)

Sec. 16.—Refusal of a registered letter sent by post precludes the person refusing from pleading ignorance of its contents. 16 W.R. 223. *See also* 16 C. 681; 9 A. 366. But there must be evidence of posting and of proper address. *See* sec. 114, illus. (*f*).

Sec. 17:—Admission may be verbal or con-

Admission defined.

inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission by party to proceeding or his agent ;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

NOTES.

tained in documents (as) maps, bills, receipts, pleadings, letters, books and other entries or even horoscopes. 23 W.R. 325 ; 11 C.L.J. 22 ; 5 C. 864 ; 22 W.R. 220 ; 7 W.R. 249 ; 9 W.R. 162 ; 23 W.R. 27 ; 1924 O. 19 ; 73 I.C. 428 ; 28 M.L.J. 266 ; 28 M.L.J. 92=26 I.C. 899. Admissions of liability made by some of several defendants in their written statement in the suit will not be evidence against the other defendants who have no opportunity of testing their veracity by cross-examining them. If the plaintiff wants to rely on such admissions he must examine the admitting defendants at the trial and make the admissions evidence. 44 Mys.H.C.R. 499=18 Mys.L.J. 186. The entire statement must be taken together; particular passages cannot be selected to the exclusion of the rest. Admission operates merely to shift the onus and raises only a rebuttable presumption. 1924 N. 387=78 I.C. 981 ; 10 L. 694=1928 L. 318. Admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take one part of an admission and reject another part. 49 A. 704=100 I.C. 1037=1927 A. 385. An admission is the best evidence against the party making the same, and unless it is shown that it is untrue and is made under circumstances which does not make it binding on the party, must be presumed to be true. The weight of the admission increases with the knowledge and deliberation of the speaker or the solemnity of the occasion on which it is made. 38 C.W.N. 861. *See also* 39 P.L.R. 876. Admissions are of no evidential value once they are proved untrue. 49 A. 707. As to who can make binding admissions, *see* 26 C.W.N. 273=15 L.W. 404=1922 P.C. 102. As to admissions gathered from entries in account books, *see* 23 L.W. 272=96 I.C. 423=1926 M. 955. *See also* 1937 C. 433 (S.B.). The value of admissions must depend upon the circumstances in which they were made, and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also a material point to be considered. If the facts admitted is one within the personal knowledge of the party admitting and there is no evidence of convincing explanation, forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. 1939 A.L.J. 708=1939 All. 626. A plea of a particular status taken on the basis of a document is a matter which relates to the interpretation of that particular document and cannot operate as an admission under sec. 17. The nature of the document and the status of the parties concerned have to be determined according to the terms of the document itself and by a competent Court. No amount of interpretation of the document by a party can therefore operate as an admission. 1940 O.W.N. 1233. Mere acceptance of rent does not constitute settlement of land, nor would the filing of an arrears of rent suit constitute such a settlement. But the latter would operate as an admission under sec. 17 against the zamindar. 1941 A.W.R. (Rev.) 454=1941 R.D. 414. As to admissibility of statement of accused to police as admission, *see* 44 C.L.J. 253=1927 C. 17. As to effect of erroneous admission, *see* 77 I.C. 875. An erroneous admission may be withdrawn. 1931 L. 6.

VAGUE ADMISSION IS NO ADMISSION.—21 A.L.J. 869=1924 A. 193.

ADMISSION IN FIRST INFORMATION REPORT is valuable corroborative evidence; it cannot support a conviction, when the maker of the report himself is an accused person and cannot therefore be examined as a witness. 63 I.C. 822=22 Cr.L.J. 694 (L.). But where such a report contains an admission not amounting to a confession the admission is admissible in evidence against the accused. 63 I.C. 822.

SECS. 17, 18 AND 31: ADMISSIONS—EVIDENTIARY VALUE.—Where a person who is alleged to have made an admission regarding his status in an agreement with the Government files a suit for a declaration as to his status as against others, the Government are neither a necessary nor a proper party to this question which is independent of the validity or invalidity of the agreement. As between the parties to the suit, it will be necessary to consider whether the statement in the agreement amounts to the admission claimed and, if so, to consider its evidential value along with the other evidence, as sec. 31, Evidence Act, expressly provides that admissions are not conclusive proof of the matters admitted. Even if it amounts to a clear admission, it will not act as a bar to the suit. 63 I.A. 248=60 B. 634=71 M.L.J. 691 (P.C.).

Sec. 18 to 21.—It cannot be said that Ss. 18 to 21 of the Act do not apply to admissions in criminal cases. The illustrations given apply to criminal cases, and there is nothing in the sections to suggest that they apply to civil cases and civil cases only. Incriminating statements made by an accused under S. 164, Cr. P. Code, though not admissible as confessions in evidence will not necessarily be excluded. They may be admitted as admissions against interest under Ss. 18 to 21 of the Evidence Act. The fact that the statement is not a full confession but is only a partial confession or something less than a confession or is of a self-exculpatory nature cannot be made a ground for excluding it either from evidence or from consideration. It is true that extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to have

NOTES.

no reasonable doubt as to their truth. I.L.R. (1941) Kar. 257=1941 Sind 129.

Sec. 18—"Proceedings", meaning of.—146 I.C. 653=1933 R. 292. "Presumptive evidence," meaning of. *See* 1926 L. 299=93 I.C. 309. Where a certain fact was sought to be proved by the plaintiff by referring to an admission contained in a document and the defendant remained *ex parte*, *held*, that the admission should be given effect to unless there was anything in the plaintiff's own evidence contradicting it. Such an admission is presumptive evidence. 1926 L. 299. For an admission to be relevant, it should be shown that the person who made it had an interest at the time of making it within sec. 18. 21 I.C, 714=19 C.L J. 1. The statement of one person cannot be regarded as the admission of another person merely on the allegation that the two are in collusion. 151 I.C. 261=1934 A. 684. Statements by previous mahants cannot be regarded as admissions binding on the present incumbent of the office. 12 L. 497=1931 L. 161. Admission not to be used against a co-defendant unless it is made in his character of a person jointly interested with the co-defendant. 30 C.W.N. 254=1926 C. 705. An admission or even confession by a co-defendant is no evidence 29 P.L.R. 715=1928 L. 769; 1929 L. 721=11 L.L.J. 404. Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own. 122 I.C. 109=1930 L. 238. *See also* 70 C.L.J. 200. Recital in a mortgage bond as to receipt of consideration is admissible as against a subsequent purchaser. 8 P. 766=1929 P. 254.

ADMISSION BY PARTIES TO SUIT.—Such admissions are generally contained in pleadings, written statements or depositions. *See* 7 W.R. 249; 9 W.R. 162; 5 Beng.L.R. 529; 14 W.R. (P.C.) 28; 13 M.I.A. 438; 15 W.R. 437; 17 W.R. 372; 22 W.R. 303; 23 W.R. 27. Such writings (to become admissible) must conform to legal requirements. 24 W.R. 114; 6 C. 762. *See also* 21 W.R. 34; 21 W.R. 414. An admission could only be given in evidence against the party making it and not against any other party. The only exceptions to the rule are laid down by secs. 18 to 20 of the Evidence Act. 137 I.C. 710=34 Bom.L.R. 35=1932 B. 117. An admission on a pure question of law is not binding upon a party. 1928 L. 779=113 I.C. 99; 1929 N. 343=119 I.C. 698; 1929 L. 879=120 I.C. 532. But admission as to existence of custom is binding. 1928 L. 779=113 I.C. 99.

ADMISSION BY AGENT, BINDING ON PRINCIPAL.—*See* 2 Bom.L.R. 651; *also* 12 P.L.T. 582. The fact of agency must be proved. 3 Bom.L.R. 273; 46 I.C. 709=19 Cr.L.J. 789. Statement of agent before Settlement Officer that his principal was a bastard is admissible as an admission. 3 Luck. 416=1928 O. 233. A person called by a party as his witness cannot be deemed to be his 'agent' within the meaning of sec. 18. 34 Bom.L.R. 35.

ADMISSION BY COUNSEL—ATTORNEYS AND PLEADERS.—As to circumstances when they are binding on the client and when not, *see* 18 M. 73. Admission by pleader in lower Court cannot be set aside by engaging another pleader in appeal. *See* 102 I.C. 283 following 9 W.R. 465; 11 M.I.A. 253; 6 C.W.N. 52; 21 M. 279; 22 M. 538 (adverse opinion expressed by vakil in argument not binding on client); 9 W.R. 375; 6 C.W.N. 52; 21 M. 279; 22 M. 538 (admission of fact by a vakil is binding on client). But *see also* 17 W.R. (Cr.) 49, where the Court held that such admissions are not binding in criminal cases. *See also* 27 C. 421; nor when they relate to matters of law. *See* 18 W.R. 367; 16 W.R. 246=1934 A. 531.

ADMISSION BY PARTNERS.—*See* 11 C. 588. An admission by one partner made in a representative capacity would be evidence against the firm. If in a suit against a partnership for damages for infringement of trade mark, one of the partners admits the infringement but disputes the claim for damages, the admsssion will bind the other partners. 148 I.C. 763=1934 L. 625. Admissions by one of several *co-defendants*. Such admission can only bind the persons making it. 22 W.R. 519; 6 A. 395; 7 A. 353; 22 I.A. 113 (P.C.); 22 W.R. 214; 9 C.L.R. 359; 2 C.W.N. 166; 11 C. 588; W.R. (F.B. Rul.) 23. Admissions by *guardians* do not generally bind the wards. *See* 10 C.L.R. 377; 20 W.R. 223. (Signature of guardian when not binding on minor. 13 C. 292.) So also are admissions by guardian *ad litem* or next friend (Tay., Evi., 8th Ed., Sec. 742; Field, 6th Ed., p. 89). As to admissions by Court of Wards, *see* 24 I.A. 107 (P.C.). Statements made by suitor in representative capacity are binding. *See* 1 W.R. 339 (executor); *see also* 8 W.R. 63; 14 W.R. 162. As to statements by interested persons when binding. *see* 5 W.R. 268; 10 W.R. 89; 14 W.R. 484; 18 W.R. 105=22 I.C. 714=19 C.L.J. 1. Evidence as to admissions and promises made by alleged thieves before a *panchayat* is admissible without proof of the actual words used. 13 P.R. 1914 (Cr.)=26 I.C. 625. Bhatwara Kesra is admissible in evidence. 1929 P. 32=7 P. 85.

Secs. 18 and 21, Illus. (c) and (d).—A statement by the accused which amounts to an admission that he was present at the scene of the crime and that he was accompanying the persons who had committed the crime and which is otherwise exculpatory, fixing the sole guilt on the other man, although entirely inadmissible as against the other accused, is admissible for what it is worth, against the person making it under sec. 18 of the Evidence Act, *vide* Illus. (*c*) and (*d*) to sec. 21. 162 I.C. 6=1936 R. 131. An admission of incriminating facts made by an accused person to a Magistrate under sec. 164, Cr. P. Code, or a statement made to the Court during the course of the trial, admitting that he was at the scene of the crime when the murder took place, cannot be ruled out as inadmissible in evidence. It is admissible in evidence for what it is worth against the accused making it under secs. 18 to 21 of the Evidance Act. Such a statement is not a confession. A confession must either admit in terms the offences or at any rate substantially all the facts which constitute the offence. I.L.R. (1939) Kar. 800=41 Cr.L.J. 477=1940 Sind 53.

by suitor in representative character :

Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject-matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations.

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*.

A denies that rent was due from *C* to *B*.

A statement by *C* that he owed *B* rent is an admission, and is relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

Admissions by persons expressly referred to suit. by party to

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is whether a horse sold by *A* to *B* is sound.

A says to *B*—" Go and ask *C* ; *C* knows all about it." *C's* statement is an admission.

Proof of admissions against persons making them, and by or on their behalf.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest ; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following, cases :—

NOTES.

Sec. 19.—On the section, *see* 5 M. 239; 25 M. L.J 51; 25 M.L.J. 329=20 I.C. 792; 62 I.C. 417. Secs. 19 and 20 are exceptions to the general rule in sec. 18.

Sec. 20.—*See also* notes under sec. 18 *supra*. Sec. 20 contemplates the existences of three parties: first the party who refers; secondly, the party who is referred; and thirdly, the party to whom the reference is made. The principle is that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt as his own the information furnished by the third party. These conditions cannot be said to be fulfilled where a master calls for a report from a servant, regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indicate that in doing so the master intends to regard the servant's report as conclusive on the matter. Sec. 20 cannot apply to such a case and the report of the servant cannot become admissible as against the master in a suit for damages for wrongful dismissal, even if such report corroborates the version of the dismissed servant (plaintiff). 40 C.W.N. 865. Unless an express reference has been made to a witness on a certain question his statement will not constitute an admission as regards that question. L.R. 2 A. 204. Admission by person nominated by the parties. 80 I.C. 16=46 A. 710. *See also* 42 M. 625; 21 A.L.J. 209=71 I.C. 761. Agreement to be bound by the statement of a referee is an admission. 103 I.C. 34=1927 A. 659. *See also* 1939 A.W.R. (H.C.) 7. Effect of admission. *See* 37 I.C. 933. *See also* 1935 O. 118=1935 O. W.N. 15. Effect of entry by creditor in debtors' books. *See* 14 Bom.L.R. 1020.

Sec. 21: ADMISSION—EFFECT.—An admission may be proved as against the person who makes

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

NOTES.

it or his representative in interest but it cannot be proved by or on behalf of the person who makes it or by his representative in interests. This section is the affirmance of the well-known rule that a man shall not be allowed to make evidence for himself. 1939 Mar.L.R. 244 (Civ.). Admissions are not conclusive unless they amount to estoppel. 53 B. 321=1929 B. 147; 164 I.C. 530; 40 C.W.N. 75. Mere admission of signature on blank paper, effect of. *See* 165 I.C. 805=17 P.L.T. 621=1936 P. 588. If the Court wishes to proceed upon the admission of a party, it should consider the admission as a whole or reject it altogether. 1935 P. 24; 14 L. 218=1933 L. 179; 39 L.W. 34=1934 M. 100; 151 I. C. 297=11 O.W.N. 579 and 1367=1934 O. 370; 1933 R. 326. An admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue. 34 P.L.R. 788 (2)=1933 L. 885; 1934 L. 662=35 P.L.R. 578. *See also* 1939 Mar.L.R. 253 (Civil); 15 Luck. 191=1940 Oudh 35 (admission shifts the burden of proof on the party making it). *See also* 1939 Mar.L.R. 253. Evidentiary nature of admissions vary very much in value according to circumstances and the Court is quite at liberty to reject them, if it is satisfied from other circumstances that they are untrue. 152 I.C. 1042. Admission in a document by a *pardanashin* lady. 59 C.L.J. 532=1934 C. 851. *See also* 40 C.W.N. 75=164 I.C. 530. A statement made by a party to the suit to a third party or stranger of which the other party had no knowledge, and the truth of which he never directly or indirectly admitted is altogether inadmissible in evidence. 1940 A.M.L.J. 115.

"ADMISSION" AND "CONFESSION"—DISTINCTION.—Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent, while the term confession is usually used in Criminal Courts as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all. 37 C. 467; 1929 C. 539. Under sec. 21 a confession being a species of admission would be relevant and can be proved against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession. 1934 A.L.J. 178=1934 A. 351=56 A. 720; 1939 Mar.L.R. 244 (Civil); 170 I.C. 201=1937 C. 433; 1939 A.L.J. 107 (Admission of guilt in an application to Magistrate is admissible under sec. 21. It does not become imadmissible under secs. 24 and 25). *See also* 163 I.C. 805=17 Pat.L.T. 472=1936 P. 358; 167 I.C. 30=1937 M. 19.

ADMISSIONS BY REPRESENTATIVE IN INTEREST are binding.—*See* 22 C. 909=22 I.A. 129; 1926 O. 41; 24 C. 62 (purchaser at execution sale is representative of judgment-debtor and is bound by the latter's admissions). *See also* 1924 N. 208; 8 I.A. 65=10 C.L.R. 281; 17 M. 223; 31 C. 380; 100 I.C. 835=26 C.W N. 273 (P C.). Where the *son and mukhtar-i-am of a party makes an admission* before the partition officer, it is admissible under sec. 21 in proceedings for the division of joint *sir*; it would constitute a strong piece of evidence, but is not conclusive. 1940 A W.N. (B.R.) 138=1940 R.D. 364. Where the *admissions are wrong in point of fact* and are made in ignorance of legal rights they have *no binding effect*. 1941 A.L.W. 492=1941 O.W.N 648=1941 Oudh 429 The admission of one defendant contained in deposition in an earlier suit is not admissible in a subsequent suit against persons who were his co-defendants in the earlier suit. 20 Pat. 855

ORAL CONFESSION.—An oral confession by an accused to a Magistrate is, as an admission by him, a relevant fact and may be proved at his trial under this section by the evidence of the Magistrate. 1929 L. 794.

ADMISSION BY WITNESS.—Where in cross-examination a witness admits that a statement previously made by him is false, he ought to be asked in re-examination why he made a statement which was false, The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that the statement is in substance true. 51 I.C. 449=20 Cr.L.J. 465. *See also* 13 C.W.N. 409=1 I.C. 320; 7 I.C. 505; 20 W.R. 69; 2 A.L.J. 21. Admission by the accused made before the beginning of the proceedings alone can be proved under sec. 21, as in a civil suit. 36 M. 457=22 M.L.J. 73. The deposition of an insolvent reduced to writing is admissible as evidence aginst him in a criminal charge. 54 I. C. 478=46 C. 996 [(1896) 2 Q.B. 260; 19 Ch. D. 580, Ref.]. Oral and documentary evidence as to the statement of a postman in a departmental enquiry are inadmissible in evidence in his absence. 26 I.C. 307 (1)=16 Cr.L.J. 3. Statement on oath at coroner's inquest is admissible at the trial. 50 B. 111=28 Bom.L.R. 111=1926 B. 151. Will is admissible to prove religion of deceased. 7 R. 720. A document containing the admission of third persons cannot be used as evidence against the parties, but the document can be admitted in evidence as proof of the fact mentioned therein as evidence of the transaction if it could be shown that it was executed in due course of business to settle disputes between the parties. 146 I.C. 937=1934 P. 48. A party cannot use in his favour an admission by his predecessor made in his own interest. 41 C. 57=17 C.W.N. 1013=20 I. C. 78. *See also* 93 I.C. 996=1926 L. 381. Statement of deceased's father as to the exclusion of daughters from inheritance by custom is admissible. 8 Luck. 445=1933 O. 246. *See also* 1937 C. 515=41 C.W.N. 1089. Where a woman has described herself as the wife of a person in a contemporaneous transaction, it would be admissible in evidence when there is a dispute as to the fact of marriage, because she had the special knowledge in respect of the marriage and it would be proved by her. 193 I. C. 161=1941 O.W.N. 249=1941 Oudh 284. As to admission in *butwara* proceedings, *see* 1926 C.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a*) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine; nor can *B* prove a statement by himself that the deed is forged.

(*b*) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

NOTES.

290. A confession is evidence for the prisoner as well as against him and must be taken altogether. 52 I.C. 145=20 Cr.L.J. 737 (N.). But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. (*Ibid.*) If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part. 53 I.C. 145=20 Cr.L. J. 737 (N.). Danger of resting judgment upon verbal admissions of the sum due. *See* 10 I.A. 74 (79)=13 C.L.R. 266 (271) (P.C.). Entries in solicitor's books of account regarding object of purchase for client are neither in admissible nor irrelevant, nor hearsay. 33 C.W.N. 493= =57 M.L.J. 581 (P.C.). The statement that a document is a copy of the original is admissible when made by a deceased person in a document relating to a relevant fact and also as an admission under sec. 21. 56 I.A. 146=52 M. 453 =56 M.L.J. 730 (P.C.). Where the execution of a mortgage deed is admitted but the receipt of consideration is denied, the onus lies heavily on the defendant (executant) because it was inconsistent with his own admissions in writing. 1928 P.C. 39=54 M.L.J. 208 (P.C.). In a title suit, the proceedings in the previous title suit between the present defendant and a third person are relevant under sec. 19 and the pleading of the defendants are admissible as admission of the defendants under S. 21. 1930. P. 405. *See also* 35 P.L.R. 463=1934 L. 527; 41 C.W.N. 1089=1937 C. 515.

DENIALS OF PARTY.—Though 'Court' is bound to receive admissions in evidence, no such rule applies to denials. 49 A. 482=1927 A. 383. Cl. (3) of sec. 21 is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance, as part of the *res gestae* or as a statement accompanying or explaining a particular conduct. Where a purchase is made by a parent in the name of his child the contemporaneous acts of the parent may be admissible but not the subsequent acts and declarations. 7 O.W.N. 683=1930 O. 441. An admission by a Hindu father that a house built by him was constructed out of the self-acquisition of one of his sons only has the effect of relieving that son from proving that the house was built out of his self-acquisitions; but it does not relieve him from proving what the actual cost of construction was, when he claims that amount out of his father's estate. 62 C.L.J. 430=40 C.W.N. 75. An admission made by a party is not absolutely binding on him and its only effect is to shift the burden as against him. He is at liberty to prove that his admission was mistaken or untrue and is not estopped or concluded by it unless another person has been induced by it to alter his condition. 67 C.L.J. 495. *See also* 1939 Mar.L.R. 253 (Civil); 15 Luck. 191=1940 Oudh 35.

Secs. 21-25.—Unless it is so specifically stated in the Cr. P. Code, no rule about the relevancy of evidence in the Evidence Act is affected by any provisions of the said Code. The admission of guilt in an application presented to a Magistrate is admissible under sec. 21 of the Evidence Act. It does not become irrelevant under sec. 24 or sec. 25 of the Act. I.L.R. (1939) All. 367=1939 A.L.J. 107=1939 All. 242.

Secs. 21-27.—Secs. 21 to 27 of the Evidence Act do not suggest that statements which would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused person might make many admissions which do not implicate itself him in any criminal charge; and these would be admissible under sec. 21 of the Evidence Act in a trial on a criminal charge against him. Where in the course of an inquiry into the conduct of certain police officers held by a Magistrate who is deputed for the purpose, the officers who are not even under arrest make certain statements to the Magistrate, such statements are admissible in evidence against them in a trial on a charge against them under secs. 348 and 330, I. P. Code, of wrongful confinement and hurt for the purpose of exhorting a confession. Such statements are not statements recorded under sec. 164, Cr. P. Code. 1941 M.W.N. 505 =54 L.W. 81=1941 Mad. 720.

Secs. 21 and 34.—Under sec. 21, an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission Statements in zamindari papers which are entries in books of account regularly kept in the course of business are relevant under sec. 34 of the Evidence Act. Such statements can therefore be taken into account though they may be admissions on behalf of the zamindar. 1940 P.W.N. 498=19 Pat. 398=1940 Pat. 622.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(*c*) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, clause (2).

(*d*) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*.

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Admissions in civil cases when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise[1] having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

LEG. REF.

[1] For prohibition of such inducements, etc., *see* the Code of Criminal Procedure, 1898 (Act V of 1898), sec. 343.

NOTES.

Sec. 23.—When an attorney goes to an adverse party with a view to a compromise or to an action, you must always look with great care to his evidence of what then occurred. *Per* Lord St. Leonards in 5 H.L. Cases at p. 245. Admissions before a person to whom the parties went for a compromise are admissible. *See* 95 I.C. 363=1926 L. 548. But an offer of a certain compensation without prejudice in land acquisition proceedings is not admissible. 92 I.C. 319=1926 L. 509. Where certain letters were in the ordinary course tendered by the plaintiffs in evidence and they were marked 'without prejudice' and the defendant's counsel admitted them, *held*, that the privilege was withdrawn and that the letters were as free to be used as evidence in the judicial proceeding. *Held also*, that under sec. 23 of the Evidence Act in order to sustain a plea of privilege as regards the letters it must be shown that both the addressor and the addressee intended to claim the same. 6 O.W.N. 1088=1930 O. 105.

Sec. 24 : CONFESSION, WHAT IS.—A confession is not defined in the Evidence Act but it has been judicially interpreted as meaning an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. The statement should however be considered as a whole. It would not be right to take isolated portions of it and to consider whether any of them, regarded separately, amounts to an admission of guilt or not. 1933 Cr.C. 1284=1933 R. 326. It is only when an utterance is made with an *animus confitendi* that it would become a confession; if, therefore, the declaration is made neither with

NOTES.

an intention to confess, nor does it amount to an admission of facts from which guilt is directly deducible, the declaration would not amount to a confession. When a statement is not a confession there is no impediment in strict law to use it against the person making it in the capacity of an accused. But the practice of taking a statement on oath as from a witness and then using it at a later stage against an accused is not a commendable one. Further, part of a statement cannot be used to corroborate evidence which includes that statement itself, and which is obviously in much need of corroboration. 1937 N. 254=I.L.R. (1937) N. 524; 43 C.W.N. 893=1939 Cal. 610. A man of sound mind and of full age who makes a statement in ordinary simple language must be bound by the language of the statement made and by its ordinary plain meaning. 159 I.C. 875=1936 O. 156. Where the accused in a conversation with the remanding Magistrate stated to the Magistrate that the police wanted him to turn approver; that he had given true facts to the police; that he was in fact guilty and that he had told the police where he had sold the stolen property. *Held*, there was no confession; all that was said to the Magistrate was that the accused had made disclosures to the police on the promise of pardon. 148 I.C. 400=1933 L. 987. *See also* 1941 P.W.N. 653 (mere admission of being present in the company of docoits is no confession of docoity). A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by secs. 24, 25 or 26. 1931 All. 9. Oral confession—Accused not shown to understand language in which questions put, but in answer making signs—Conduct held not to amount to confession. 1930 L. 84=120 I.C. 539. Any statement by a person which would suggest an inference as to his guilt may be a confession. 59 I.C. 324=22 Bom.L.R. 1247; 1930 A. 29. As to confession to panchayatdars, *see* 76 I.C. 829=1924 M. 230. Sec. 24 will apply even if the person confessing was not an accused person at the time of confession. A statement falling within sec. 339 (2) of the Code excludes the operation of sec. 24. 59 I.C. 324=22 Bom.L.R. 1247. To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. It is enough if they lead to an inference of guilt. 43 I.C. 605 19 Cr.L.J. 189 (M.). But the statement of a man who takes particular care at every stage to show that he did not take part in the offence does not amount to confession. 1935 A.W.R. 48. The words "accused person" in secs. 24 to 26 include any person who subsequently becomes accused, provided that at the time of making the statements criminal proceedings were in prospect. (*Ibid.*) There is no provision of law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court-house. 1930 L. 171. *See also* 165 I.C. 795=38 Cr.L.J. 84.

Inadmissible Confession.—Inadmissible confession would be inadmissible wholly. 38 I.C. 767=18 Cr.L.J. 383 (Bur.). The Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. 1930 A.L.J. 1481 (F.B.); 35 P.L.R. 559=1934 L. 673; 143 I.C. 362=1933 L. 665; 35 P.L.R. 659=1934 L. 630; 1933 M. 888=65 M.L.J. 837; 1933 B. 401; 1933 A.L.J. 581; 34 P.L.R. 349=1933 L. 232; 1933 R. 326. But it is not an infallible rule of practice that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole, and cannot accept only the inculpatory element, while rejecting the exculpatory element as inherently incredible. 144 I.C. 160=1933 Pesh. 38; 1933 R. 204=149 I.C. 49; 11 O.W.N. 636=1934 O. 222.

Acceptance or Rejection of Confession.—Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. 1939 Lah. 534. In a case where there is evidence other than the confession of the accused, the Court is not bound to take the confession as a whole. If it is satisfied that a part of the confessional statement is false, it may reject that part and take into consideration that part of the confession which corroborates the evidence of the witnesses. 188 I.C. 326=41 Cr.L.J. 576=1940 Lah. 157. The Court is at liberty to disregard any statement in the confession which it disbelieves. 46 I.C. 705=19 Cr.L.J. 785 (N.). The circumstances under which a confession is made must always be scrutinized with great care and caution, and in all cases the period of the detention of the accused in police custody before a confession is made is always an important fact to be carefully considered. Illegal detention does not necessarily vitiate a confession. It is a fact to be carefully considered in every case. 31 S.L.R. 494=1937 Sind 251. Where the confession of an accused has been excluded by the trial Magistrate under sec. 24, it cannot be taken into consideration in revision even though such confession may be excluded wrongly. 1930 S. 168.

Confession—Evidentiary Value.—All parts of a confession are not entitled to equal weight. Some may be believed while others rejected. 3 O.W.N. 800=1926 O. 618. *See also* 42 P.L.R. 1. The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority is a rule of policy. 18 C.W.N. 705=23 I.C. 678 (P.C.). A confession to be admissible must be voluntary and made without any pressure. 35 A. 260=19 I.C. 307; 52 I.C. 881 (1)=20 Cr. L.J. 721. *See also* 47 L.W. 143. Under sec. 24 of the Evidence Act, which is a rule of exclusion, it is not necessary that there should be a decision in so many words that a confession is not irrelevant. In every case in which a

NOTES.

confession is admitted in a criminal case, that fact that evidence of the confession is admitted is sufficient to make the confession evidence. It is open no doubt to the defence to object to the evidence of confession going in, but till such objection is raised, there is no need for the Court to pronounce a formal decision on the question of the relevancy of the confession. The actual fact of admission of the confession is suffiicient for the purpose. 1938 M.W.N. 1120=48 L.W. 777=(1938) 2 M.L.J. 1065. If a confession is not voluntary in the wider sense of the term, *ex hypothesi* the person who made it did not do so with the desire to tell the truth. This fact, in itself, introduces an element of suspicion. In such circumstances if facts are proved which suggest, that an inducement of some kind, although outside the terms of sec. 24, was in fact given, the Court may well refuse to accept the confession as true. 63 C. 1053=1936 C. 316. Where the Magistrate in whose presence a confession was made is called as a witness and swears that the statements was made before him freely and willingly and not in the presence of a policeman, the confession is voluntary and can be acted upon. 2 L.L.J. 653. Where the accused are unable to explain away their confessions which clearly indicate their guilt, the confessions alone are sufficient for their conviction. 5 O.W.N. 968=1928 O. 35 (*a*). The evidence of an admission of guilt to villagers may be strong as evidence against an accused as a confession before a Magistrate. It requires no corroboration. 5 O.W.N. 698=1928 O. 393; 1929 O. 272. Where an attempt is made to rely upon an extra-judicial confession, every precaution should be taken to ascertain as exactly as possible the very words which were used by the prisoner who is supposed to have confessed. 28 S.L.R. 285=1934 Sind 119. Though extra-judicial confessions have to be received with care and caution there is no reason why they should not be believed when they are clear, consistent and convincing. 12 Mys.L.J. 73=39 Mys.H.C.R. 320. Confession against himself to a witness is valid and admissible. 1929 M. 92. Where a confession was approved to have been made without any sort of influence or tutoring and the same was not contradicted by other evidence, *held*, that the accused could validly be convicted on the strength of the confession alone. 114 I.C. 771=1929 O. 167. *See also* 167 I.C. 162=41 C.W.N. 183=1937 C. 39; 38 Cr.L.J. 84=165 I.C. 795. Where the main foundation for the conviction is the confession alleged to have been made by the accused there are three things which the prosecution must establish: (*a*) that a confession was made, (*b*) that evidence of it can be given, and (*c*) that it is true. 152 I.C. 1032=1934 Sind 172. Where the case against the accused depends mainly upon an alleged confession and there is a conflict as to the manner in which the confession had been obtained by the prosecuting agency, the accused is justified in asking the Court to give him the benefit of the doubt. 119 I.C. 420=30 Cr.L.J. 1080. No doubt the admission of an accused is to be taken as a whole. But where there is evidence to show that any portion of the exculpatory statements is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory. 40 P.L.R. 265=1938 L. 850. Where the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable. 177 I.C. 617=40 P.L.R. 890=1938 L. 594.

CONFESSION IN POLICE CUSTODY, INADMISSIBILITY OF.—Question of admissibility of confession comes when statement is made to police officer or while in police custody. 1929 C. 539. When a confession was made after being in police custody for several days and protracted consultation between the accused and the investigating officers and was subsequently retracted, the confession is inadmissible. 53 I.C. 929=23 C.W.N. 886. *See also* 1937 C. 39=41 C.W.N. 183; 5 L.L.J. 128; 21 Cr.L.J. 177=54 I.C. 881 (P.); 18 Cr.L.J. 106=37 I.C. 314=10 Bur.L.T. 270; 17 Cr.L.J. 402=35 I.C. 962. Moral exhortation is not objectionable. 5 W.R. 32. The mere fact of the accused being in police custody is no basis to presume that his confession was induced by threat or promise. 98 I.C. 250=1926 O. 622. Where the threats made do not influence the accused's confession it is admissible. 5 W.R. 175. A self-exculpatory statement by an accessary after the fact is inadmissible in evidence. 99 I.C. 282=30 C.L.J. 503. Sec. 24 does not admit as legal evidence an incriminating statement to headman at the latter's suggestion to speak the truth, lest witnesses for the other side may let it out when called. 18 Cr.L.J. 106=37 I.C. 314.

CONFESSION UNDER INDUCEMENT, THREAT, ETC.—WHAT CONSTITUTES INDUCEMENT.—The expression "you had better tell the truth" has always been held to import a threat or promise unless the words are qualified in some manner. The words do not mean mere exhortation to tell the truth, for the accused had already been questioned by the police. The words are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that amounts to an inducement. 152 I.C. 998=1934 L. 417. *See also* 167 I.C. 795; 1937 C. 39; 41 C.W.N. 183; 1938 P. 308=17 P. 369; 1940 All. 46; 1941 M.W.N. 956. The question whether the words used were intended to convey to accused an inducement, etc., must depend on surrounding circumstances, in which those words were used. The burden is on prosecution to prove that the confession was not improperly induced. 1933 Sind 409. Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration, the confession made under such circumstances is inadmissible. 45 A. 633=21 A.L.J. 585=74 I.C. 529. Sec. 24 makes a confession inadmissible if it appears to have been caused by any inducement or promise. 45 A. 300=21 A.L.J. 143=1923 A. 352; 1929 Sind 245; 1930 A. 29. The expression used in sec. 24 of the Evidence Act is not "proved" but "if it appears" which is not as

NOTES.

strong an expression as "proved." Though the accused has not adduced evidence to substantiate the allegation that the confession was obtained by threat or inducement, it is still open to him to show that the circumstances under which it was made would justify that inference. *Quaere*: whether the onus of proving that a confession is voluntary is on the accused or the prosecution. 33 C.W.N. 1112=1929 C. 726; 61 C. 399=38 C.W.N. 659=1934 C. 636. Under sec. 24, unless it appears to a Court that an inducement, threat or promise was held out by a person in authority a confession would be relevant without any formal proof of the voluntary nature of the statement and formal evidence that the statement was voluntary is not required from the prosecution in practice. 54 L.W. 327=(1941) 2 M.L.J. 1070. Where the accused whose confession is being recorded informs the Magistrate that he is making the confession under inducement, the confession is not admissible, and cannot be allowed to go to the jury. Whether there was inducement or not is immaterial. 45 B. 1086=60 I.C. 1006. A confession by an accused to a Magistrate who did not record or administer any of the necessary warnings or adopt any of the safeguards, made after the police had threatened him and retracted at the earliest possible moment after the accused got out of the influence of the police, is inadmissible and insufficient in itself to base a conviction. 1933 M.W.N. 723. Where a confession is positively proved by the record of Magistrate that it was voluntary, the mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced, in the absence of the evidence to suggest that any police officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon. (8 L. 230, Ref.) 34 P.L.R. 704=1933 L. 388. Where the Magistrate has not put the necessary preliminary questions to the accused with a view to satisfy himself that his statement was voluntary, the irregularity can be cured under sec. 533 of the Cr. P. Code, provided the omission has not injured the accused in his defence on the merits. In other words, the Court is enabled under sec. 533 to take evidence to prove that the confession was "duly made," *i.e.*, in accordance with secs. 164 and 364. If the questions were not put at all, the confession is not 'duly made.' But it is not necessarily irrelevant. The Court may satisfy itself that there was no inducement or threat and so fulfil the requirements of sec. 24, Evidence Act. The weight to be attached to it depends on the facts of each case. 1933 A.L.J. 1551 (F.B.). The statements made by the accused in the trial of the police officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. 59 I.C. 324=22 Bom.L.R. 1247. A confession made by an accused person under fear, encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate is inadmissible in evidence. 60 I.C. 417=32 C.L.J. 204. A confession made by an accused person on an inducement by a police officer that he would be offered a pardon is inadmissible in evidence. 60 I.C. 417. The evidence of an accomplice, if suspicious, requires corroboration. 60 I. C. 417; 9 P. R. 1911 (Cr.)=10 I.C. 340. The fact that a police-officer got by means of threat an information from a prisoner as to a circumstance incriminating the latter does not render that information inadmissible in evidence. 17 Cr.L.J. 33=32 I.C. 321. It is not possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat, or promise, except upon evidence which is before the Court. 4 P.L.T. 186=72 I.C. 961; 1928 L. 676. The influence may be suggested by the confession itself or by the prosecution evidence or by the evidence adduced by accused or by surrounding circumstances which the Court is bound to take into consideration. 72 I.C. 961=4 P.L.T. 186.

Under sec. 24 of the Evidence Act there must be something from which the Court can infer that the inducement or promise was given to the accused by some person who had authority to give it. It must be shown that hope was directly inspired by some one who had authority to make the promise. 109 I.C. 225=1928 C. 500. An approver's disclosure is in its very nature always the result of an inducement of promise namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats of violence, to that extent the provisions of sec. 24 would be applicable and the confessional statement would have to be ruled out of evidence. 9 L. 608=1928 L. 320 (2). The mere fact that there was a race for pardon does not detract from the value of the confession, if that *race for pardon* does not appear to have been caused by an inducement or promise held out by one in authority. 113 I.C. 65=30 Cr.L.J. 49.

Who are Persons in authority from Whom Threat or Inducement proceeds.—There is no statutory definition of the words "person in authority"; but it is well settled that the words have reference to a person who has authority to interfere in the matter under inquiry. Generally speaking a 'person in authority' is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. 12 P. 241=14 P.L.T. 82=1933 P. 149 (S.B.). S. 24 refers only to a person in actual authority, the test being the possession of some power or control over the accused with reference to his case. 37 I.C. 42=18 Cr.L.J. 58. The belief of an accused that the persons to whom he made a confession were 'persons in authority' is not sufficient to bring them within the term. The test is: Had the person authority to interfere with the matter? Whether a certain person is a person in authority would largely depend upon the circumstances of each particular case. Mukhais to whom confession was made by accused were held to be not persons in authority. 152 I.C. 1032=1934 S. 172. The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, has the person any authority to interfere in the matter and any concern or interest in it sufficient to

NOTES.

give him authority. 43 I.C. 605=19 Cr.L.J. 189 (M.). *See also* 40 B. 220=17 Bom.L.R. 1059. *Police Patel* in a village is such a person. 40 B. 220=17 Bom.L.R. 1059. So also a *Mukhia* of a village. 97 I.C. 44=1926 A. 737. Also village choukhidar. 1936 A.L.J. 999=1936 A. 753 (F.B.). *See also* 17 P. 369 174 I.C. 524=1938 P. 308. A collecting panchayat and an assistant panchayat are both persons "in authority" within the meaning of the section. 50 C. 127=1933 C. 458. Panchayatdars are not persons in authority within the meaning of sec. 24. They cannot be treated as men having any authority over the accused. 45 M.L.J. 845=1924 M. 230. The *president of a panchayat* which was to consider a case is a person in authority within sec. 24, and a confession made to him is not therefore admissible in law. 20 C.W.N. 512=33 I.C. 828. The president of a Village Vigilance Committee is a person in authority within the meaning of sec. 24. 1939 M.W.N. 341=49 L.W. 522=1939 Mad. 515; I.L.R. (1940) Lah. 217=42 P.L.R. 711. Whether a person who is merely the landlord of the village and a member of the Union Board is a person in authority within the meaning of sec. 24. *See* 63 C. 1089=1936 C. 227. As to agent of landlord, *see* 164 I.C. 891=1936 L. 264. The words "person in authority" in sec. 24 include the prosecutor. 68 I.C. 413=26 C.W.N. 54. A confession made by an accused to the Superintendent of Excise in a trial for illicit possession of opium is admissible provided no inducement, threat or promise was held out to the accused for making the confession. 22 C.W.N. 451=45 I.C. 284. An Honorary Magistrate who is also a *zaildar* is a 'person in authority' within the meaning of sec. 24. 152 I.C. 998=1934 L. 417. A *lambardar* being a person in authority, a confession induced by him by the use of threats is inadmissible. 4 L.L.J. 235=1922 L. 263; 26 P.R. 1916 (Cr.); 34 I.C. 642. A *zaildar* or *lambardar* is an officer who is to help the police in their investigation. 14 P.R. 1911 (Cr.)=12 I.C. 973. *See* 1929 O. 272; 1936 A.L.J. 376=1936 A. 470; 18 L. 794=40 P.L.R. 186. *See also* 1928 L. 476 (where a villager was directed by the police to make the accused to confess by inducement). A confession made to *Thugyi* by an accused who had been sent for by the former after being told that he would not be punished if he was not a party to the offence is irrelevant and inadmissible in evidence as the *Thugyi* is a person in authority within the meaning of sec. 24. 26 I.C. 129. Other answers and questions based on the inadmissible statement are also inadmissible. (*Ibid.*) Neither a co-villager, nor a zamindar, is a person in authority unless the zamindar is directed by the police to investigate. 37 I.C. 42=18 Cr.L.J. 58; 9 I.C. 718=12 Cr.L.J. 119. *Katwar* in C. P. is not a police officer. 25 Cr.L.J. 147=1924 N. 29. (*See also* notes under sec. 25, *infra.*) A confession to a Jail Warder held to be of no value. 1930 M. W.N. 1249. Where a post office clerk begged of his superior to be saved if he disclosed every thing and the latter having promised to help him the accused made a confession. *Held,* that the confession was procured by inducement held out by a person in authority. 60 C. 719=1933 C. 644. A village headman is a person in authority but where accused made the confession of his own accord out of remorse and there was no proof of inducement such confession is admissible. 6 O.W.N. 947. An inamdar holds semi-official position and he is not a person in authority under this section. 1929 L. 558. A village punch actively assisting the police officet is a 'person in authority' and a statement made to him under veiled threat and inducement is inadmissible. 8 P. 289=1929 P. 275. Statement made to moniagar on his asking accused to speak the truth is not one made under threat or promise and is admissible whether moniagar is "a person of authority." 1929 M.W.N. 791.

DUTY OF COURT.—The Judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every judge is "why the accused made the confession"? It is important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be satisfied. 55 A. 91=1933 A. 31. It is for the Judge to decide for himself whether *prima facie* the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he must exclude it from the consideration of the jury. It is not the province of jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true and it is for jury to make up their minds whether they should accept the confession, and in doing so they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or not. 142 I.C. 639=1933 C. 187. Before admitting confessions it is the duty of the Judge to satisfy himself that there has not been any inducement of the nature described in sec. 24. If the circumstances are such as to raise a strong suspicion in his mind that the confession has been induced by threats or promises of the nature described in that section, then the confession is irrelevant. It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat. 184 I.C. 222=43 C.W.N. 893=1939 Cal. 610. Where the confession was taken at extraordinary length throughout a considerable number of days and it described in the greatest possible detail a

NOTES.

whole series of crimes which had been committed and it further appeared that the confession was probably induced by some threat or promise. *Held*, that the confession should not be admitted in evidence till there was a thorough enquiry that it had been made voluntarily. 145 I.C. 863=1933 C. 835 (S.B.). When once the voluntary character of a confession is challenged by the defence the Judge should make a thorough enquiry to see whether in fact the confession was voluntary. 1933 C. 835. *See also* 1939 M.W.N. 611; 17 Mys.L.J. 238; 1939 A.L.J. 966=1939 A.W.R. (H.C.) 768.

RETRACTED CONFESSION, EVIDENTIARY VALUE OF.—A retracted confession uncorroborated in material points by other reliable evidence, is of no value. Conviction on it would be bad. 58 I.C. 49=5 P.L.J. 430. *See also* 30 I.C. 436; 16 Cr.L.J. 612; 75 I.C. 151=24 Cr.L.J. 304; 1929 L. 597 (whether against himself or co-accused); 1933 Sind 133; 146 I.C. 180; 11 O.W.N. 851=1934 O. 405. *See also* 63 C.L.J. 232=1936 C. 316; 1937 L. 208; 163 I.C. 319=1936 N. 88. If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. 55 A. 91=1933 A. 31. Where a confession is neither voluntary nor true and is subsequently retracted it is not sufficient for the conviction of the maker especially on a capital charge of murder. 145 I.C. 470=34 Cr.L.J. 1009=1933 O. 265. A convicted prisoner undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner. *Held*, the statement was not admissible in evidence. 54 I.C. 893=21 Cr.L.J. 189=18 A.L.J. 87. *See also* 62 I.C. 545=22 Bom.L.R. 1274. It is unsafe for a Court to rely and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true. 26 C.W.N. 1010=71 I.C. 497=1928 L. 329 (2); 1930 C. 141; 1930 A. 29. *See also* 1938 L. 731; 68 C.L.J. 206. A retracted confession should carry practically no weight as against a person other than its maker. 26 C.W.N. 1010=71 I.C. 497. It is very unsafe to convict an accused person upon a retracted confession unless the confession is confirmed by other evidence. 36 I.C. 133=17 Cr.L.J. 453. *See also* 151 I.C. 716=1934 L. 715; 196 I.C. 597; 1941 Nag. 86. The corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the co-accused with the crime. 19 Cr.L.J. 275=44 I.C. 179. The amount of corroboration depends on the circumstances of each case. 145 I.C. 133=35 Bom.L.R. 371=1933 B. 230. Where in case of an alleged poisoning of husband by wife, the wife retracted her confession which was voluntary and various articles stained with the poison were recovered in the viscera and vomits of the deceased. *Held*, there was sufficient corroboration. 15 L. 310=152 I.C. 206=1934 L. 150 (2). When a retracted confession is the sole evidence against an accused, it can be of but little value, especially remembering the competition for pardon which sometimes occurs where a number of persons are suspected of an offence and some have already confessed or are believed to have confessed. 17 Cr.L.J. 226=34 I.C. 642=26 P.R. 1916 (Cr.). A Court should not convict a person upon a statement made by him but subsequently retracted owing to a promise of pardon, in the absence of corroboration in material particulars unless the peculiar circumstances of making the confession or the reasons of retraction show the genuineness of the confession in spite of its revocation. 31 I.C. 831=16 Cr.L.J. 815. It is, however, not safe in general to convict on an uncorroborated confession from point of view of common experience and prudence, and when it is a question of a confession against a co-accused the corroboration must not only confirm the general story of the crime but must clearly connect the co-accused with it. 30 P.R. 1914 (Cr.)=15 Cr.L.J. 626=25 I.C 634. *See also* 30 I.C. 436=16 Cr.L.J. 612; 8 P. 289=1929 P. 275. There is no rule of law requiring a retracted confession to be supported by corroborative confession in material particulars. The use to be made of such a confession is more a matter of prudence than of law. 46 I.C. 1005=19 Cr.L.J. 861 (N.). *See also* 26 C.W.N. 1010; 152 I.C. 1032=1934 Sind 172; 151 I.C. 924=1934 L. 89; 57 C.L.J. 213=1933 C. 747 (F.B.). The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. 52 I.C. 50. *See also* 60 I.C. 789; 25 I.C. 634. A retracted confession is admissible in evidence but it should have no weight unless either corroborated in a material particular or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases, the retracted statement may be given full weight. 8 P. 262=1929 P. 212; 1929 M.W.N. 791; 143 I.C. 499=34 P.L.R. 704=1933 L. 388; 159 I.C. 875=1936 O. 156. Accused fully alive to consequences—Confession unexplained—Conviction on basis of retracted confession is legal. 1929 O. 381. A retracted extra-judicial confession can in law be a sufficient basis to support a conviction. 1929 Sind 253. There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted provided that the Court is convinced that the statement is voluntary and true. 1930 A. 29. *See also* 1930 C. 141; 12 Mys.L.J. 353; 11 Mys.L.J. 407; 150 I.C. 1056=35 Cr.L.J. 1180. It should very carefully scrutinise the confession and then decide for itself whether it is reliable and trustworthy. When the Court finds that the confession is not true, and is made with the sole object of implicating others without any intention to implicate himself, it cannot be acted upon by the Court and a conviction cannot be based on it. 151 I.C. 298=11 O.W.N. 1012; 1934 O. 418. The mere fact of the retraction of a confession is not in itself sufficient to make it appear that it was unlawfully induced but will be corroboration of the approver's statement. 113

NOTES.

I.C. 65=30 Cr.L.J. 49. The confession of an accused although retracted, may be taken into consideration against a co-accused. 119 I.C. 325=30 Cr.L.J. 1046 and is admissible in evidence against co-accused. 1930 L. 667. But its value as a piece of evidence is almost nil. 1935 A.W.R. 48. *See also* 10 O.W.N. 405=1933 O. 263. It can sustain a conviction if it is corroborated by the production of articles for which the accused can give no explanation. (*Ibid.*) There is no absolute rule that a confession, having been retracted cannot be acted upon without material corroboration. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, the confession can be acted upon as it stands and without any further corroboration. 53 M. 160=1929 M. 837=57 M.L.J. 681. *See also* 1930 A. 29 (confession by a Sessions Judge before a Magistrate but retracted later). Court is at liberty to base a conviction on the retracted confession of the accused, if it thinks that it has a ring of truth about it. But it should be very slow to base a conviction upon such a confession which is not corroborated by any other satisfactory evidence, which does not impress the Court and which does not explain any strong motive for the crime. 11 O.W.N. 950=1934 O. 388. Where the confession is voluntary and not made under pressure, then there cannot be any doubt as to his guilt and conviction may be maintained even though it was subsequently retracted by him. 119 I.C. 420=1930 L. 88; 1930 O. 353.

RETRACTED CONFESSION—PROOF OF.—Where a confession is retracted both before the committing Magistrate and the Sessions trial it cannot be used unless the Court is otherwise satisfied of its truth and voluntary character. 45 M.L.J. 613=1924 M. 391. *See also* 93 I.C. 978=1925 L. 605; 1933 O. 315=8 Luck. 518. After the confession of an accused was recorded pardon was tendered to him, and he was examined as witness for the prosecution. He denied all knowledge of the occurrence and also did not seem to recollect anything about the confession. His examination was therefore stopped by the Magistrate and the pardon withdrawn. But he was not tried jointly with the other accused and was examined as a prosecution witness in the Sessions Court. There also he denied all knowledge and made serious allegations against the police. He was declared hostile and cross-examined and for the purpose of contradicting him, the confession made by him was read over to him. *Held*, that the prosecution was not justified in reading the confession which he retracted and which according to him was not voluntary. 61 C. 399=38 C.W.N. 659=1934 C. 636. Where approver is tried on the basis of his statement which is retracted it must be corroborated by other evidence. 9 L. 608=1928 L. 320 (2). Where an accused when retracting a confession alleged ill-treatment and inducement by the police to extract the confession, the onus is on him to prove such ill-treatment and inducement. 47 I.C. 811=22 C.W.N. 809. A first information report is not admissible in evidence at all, if in substance it is a confession to the police. 73 I.C. 266=1923 N. 251. *See also* 63 I.C. 822 (L.).

EXTRA-JUDICIAL CONFESSION THOUGH RETRACTED subsequently is undoubtedly admissible. When the subsequent discoveries fully corroborate it, a conviction could be sustained on that alone. I.L.R. (1940) Nag. 679=1940 N.L.J. 623=1941 N. 86.

STATEMENT NOT AMOUNTING TO CONFESSION.—A statement made by an accused to a police officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case. 23 Cr.L.J. 193=65 I.C. 849. *See also* 1941 Lah. 82. The word "confession" in sec. 252 is not restricted to actual admission of guilt but includes inculpatory statements from which inferences of guilt can reasonably be drawn or which suggest the guilt of the person making the statement. 42 I.C. 1092=19 Cr. L.J. 42 (L.B.). Every statement made to the police by an accused person is not a confession and statements which are not of an incriminating nature are admissible. 151 I.C. 437=1932 Sind 100. If the first information of an offence is given by the accused to a police officer, and that information admits his own guilt, it is "confession", which cannot be proved under sec. 25 of the Evidence Act. 36 Bom. L. R. 1117. *See also* 34 P.L.R. 1000=1933 L. 899. Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused. 34 P.L.R. 259=1933 L. 167. Where the circumstances of the case compel a tribunal to act only upon a confession, and to reject all other evidence, the confession must be used *literatimet verbatim* and due effect must be given to every statement in it whether in favour of the accused or against him. 38 I.C. 740=18 Cr.L.J. 356; 14 Cr.L.J. 252=19 I.C. 508. Confession made to police officer is admissible to prove the ownership of property regarding which he is charged. 56 I.C. 62=21 Cr.L.J. 414 (N.). Section applies to every police officer and is not restricted to Regular Police Force. 26 C. 569. An admission made by the accused to the police is inadmissible against him under sec. 25. 17 Cr.L.J. 512=36 I.C. 480. As to distinction between admission and confession before police, *see* 10 Beng.L.R. App. 2; 6 C. 530; 10 C. 1022. The test which has to be applied in deciding whether sec. 25 applies, is the position of the person at the time when it is proposed to prove the admission not his position at the time when he is alleged to have made it. 13 Cr.L.J. 465=15 I.C. 305; 11 Mys.L.J. 438. A confession therefore made to a police officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. A confession made by an accused to a police officer might be admissible in favour of a co-accused but not against him. 15 I.C. 305. A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and a

Confession to police officer not to be proved.

25. No confession made to a police officer[1] shall be proved as against a person accused of any offence.

LEG. REF.

[1] As to statements made to a police officer investigating a case, see sec. 162, Cr. P. Code (V of 1898).

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fortiori that it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court, under the provisions of sec. 155. 61 C. 967=38 C.W.N. 1005=1934 C. 616. The expression "police officer" in sec. 25 is used in its usual and more comprehensive meaning, and includes police officers of the Native States as those of British India. 43 I.C. 111=14 N.L.R. 192. The term "police officer" in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. 71 I.C. 360=24 Cr.L.J. 136 (Pesh.). Hence in common parlance and among the generality of people, a Sub-Divisional Magistrate cannot be taken to be a police officer. He is a member not of the police service but of the Provincial Civil Service and much of his work is judicial. 150 I.C. 991=1934 P. 256. Police officer includes person invested with police powers. 8 R. 52 (Assistant Superintendent of Pakokku Hill Tracts exercising the powers of Additional District Magistrate). The statements of approver to a Police Inspector being really confessions, are inadmissible. 35 M. 247=22 M.L.J. 490 (S.B.). *See also* 15 Cr.L.J. 474=24 I.C. 562; 15 I.C. 325. Confession made to a police officer in Nizam's Dominions is not admissible in evidence. 19 Cr.L.J. 73; 43 I.C. 111=14 N.L.R. 192. Confession before Administrator in Portuguese territory not admissible. *See* 26 Bom.L.R. 706=1924 B. 480. Even if a police-man happens to be a member of a crowd of villagers and a confession was made to the villagers at large, the mere fact that a police-man happened to be present in the crowd would not make the confession inadmissible in evidence. 1934 A.L.J. 143=1934 A. 132. The accused, who was charged with murder, made a statement on a morning to the Superintendent of Police, which led to the discovery of a bill-hook which the accused said was the weapon used by him to kill the deceased. It was admitted that for four hours on the night before and for two hours on the morning on which he made the statement, the Supetintendent of Police was questioning him. *Held*, that this was a flagrant violation of the Madras Police Executive Orders, and that the statement of the accused was not a voluntary statement and could not be admitted as it was ruled out by S. 24, although the evidence regarding the production of the bill-hook alone could be admitted in evidence. 1934 M.W.N. 1134=50 L.W. 742.

Secs. 24-26.—The word "accused" in secs. 24 and 26 includes any person who subsequently becomes accused. A person who is suspected of complicity in a murder and makes a confession before the coroner under sec. 19 of the Coroner's Act, is an accused person within the meaning of secs. 24 and 26 when he is later on charged with the murder or abetment of murder. His confession would be admissible against him and against his co-accused if the requisites of an admissible confession are present, though it may be retracted later on. 42 Bom.L.R. 938=1941 Bom. 50=I.L.R. (1941) Bom. 27.

Sec. 25.—The test to decide whether a statement is a confession or not, is to see whether the accused states that he has done something which amounts to an offence thereby accusing himself of committing of an offence. 17 P. 15=19 P.L.T. 452=1938 P.W.N. 338. The prohibition contained in S. 25 applies only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and does not apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence. 43 P.L.R. 672. The prohibition contained in S. 25 is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of any offence made by the accused to a police officer, and it makes no difference whether the offence is one of which the accused can be convicted at the trial at which it is sought to prove the confession made to a police officer. The admissibility of a confession does not depend upon the offence charged. A confession made by an accused to the police of an offence of culpable homicide not amounting to murder is not admissible in a trial for murder on the same facts. 1941 Sind 134=I.L.R. (1941) Kar. 292. A confession made to the police in the course of the investigation of a crime is inadmissible in evidence, though the confession relates to another crime. The whole spirit of S. 25 is to exclude confessions to the police, and the moment a statement is found to amount to a confession it does not matter at all of what crime it is a confession. I.L.R. (1937) M. 358=1937 M. 209=(1937) 1 M.L.J. 154. Excepting in very rare cases the value of an *extra-judicial confession* is not very high and where there is no other corroborative evidence in support of it, it is very unsafe to rely on such confession. 184 I.C. 390=1939 A.L.J. 732=1939 All. 685. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. A confession cannot be construed as a statement by an accused "suggesting the inference that he committed" the offence. 66 I.A. 66=43 C.W.N. 473=(1939) 1 M.L.J. 756=1939 P.C. 47 (P.C.); 1941 O.W.N. 722=1941 Oudh 359. Confession made to private individual in presence of chaukidar—Admissibility of. 11 O.W.N. 636=1934 O. 222. A statement by an accused arrested on a charge of unlawful possession

Confession by accused while in custody of police not to be proved against him.

26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate,[1] shall be proved as against such person.

LEG. REF.

[1] A Coroner has been declared to be a Magistrate for the purposes of this section, *see* sec. 20, Coroners' Act (IV of 1871).

NOTES.

of opium to Excise Officers, the police servants remaining in room in another part of the house, is still a statement made while in police custody and therefore inadmissible. 39 I.C. 977=21 C.W.N. 694. Whether Excise Officers who have large powers of search, arrest and detention are to be regarded as police officers within the meaning of sec. 24. 21 C.W.N. 694; 28 Bom.L.R. 1196=1927 B. 4 (F.B.) (overruling 28 Bom.L.R. 674). *See also* 82 I.C. 151=46 C. 411; 28 Bom.L.R. 674=97 I.C. 665=1926 B. 517. Confession made to excise peon is inadmissible under sec. 25. 31 Bom. L.R. 49=1929 B. 70. *See also* 7 R. 771. An admission of the accused to the Excise Sub-Inspector is inadmissible under S. 25. 150 I.C. 1144=1934 N. 136. An Excise Officer is a police officer. 61 C. 607=38 C.W.N. 930=1934 C. 580 (F.B.); 1935 N. 13. Village Chaukidars are police officers within the meaning of sec. 25. 16 Cr.L.J. 62=26 I.C. 654; 165 I.C. 701=1936 A.L.J. 999=1936 A. 753 (F.B.); 17 P. 369=174 I.C. 524=1938 P. 308. But see *contra* 1934 A.L.J. 143=1934 A. 132. *Kotwar* in C. P. is not a police officer. 76 I.C. 291=1924 N. 29; 57 I.C. 88=21 Cr.L.J. 568 (N.). Village Munsiff is not a police officer. 7 M. 287. A political Muharriar Oghi is a police officer within the meaning of sec. 25. 144 I.C. 160=34 Cr.L.J. 804. A member of the frontier constabulary is a police officer. 71 I.C. 360=24 Cr.L.J. 146 (Pesh.). As to village headman in Burma, *see* 2 R. 31=81 I.C. 540. An extra-judicial confession made by the accused to a lambardar and a safedposh cannot be admitted in evidence. 35 P.L.R. 659. Under S. 25 only *confessions are excluded and not admissions not amounting to a confession.* The accused, a police officer, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount. *Held,* that statement as to acceptance of bribe being confession was inadmissible under S. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up being admission was admissible. 193 I.C. 878=1941 Lah. 82.

Secs. 25 and 27.—As sec. 25 stands at present confessions made in a first information report must be excluded from its operation. But, however, the statements made in the course of such an inadmissible confession are not excluded for the purposes of sec. 27. I.L.R. (1940) Nag. 679=1940 N.L.J. 623.

Sec. 26: CONFESSION IN CUSTODY OF POLICE —EXTRA-JUDICIAL CONFESSION.—The accused who was in the lock-up of the Magistrate under trial was sent up by the Magistrate to a hospital for treatment with two policemen in charge. The latter waited outside in the verandah. During his examination inside the dispensary by the doctor, the accused made a confession within the hearing of the doctor. *Held*, that it was excluded by sec. 26. 42 B. 1 =42 I.C. 597=19 Bom.L.R. 683. *See also* 1939 A.L.J. 732; 91 I.C. 806=1925 L. 557; 1937 M. 209=(1937) 1 M.L.J. 154; I.L.R. (1940) Nag. 679=1940 N.L.J. 623; 1936 L. 380; 1936 N. 103. A confession while in police custody is of little value. 10 P.R. 1914 (Cr.)=25 I.C. 825. *See also* 12 W.R. (Cr.) 82. As to meaning of "in custody," *see* 77 I.C. 429=1924 R. 173. Evidence to prove a confession made while an accused person is in police custody is inadmissible. 22 I.C. 150=15 Cr.L.J. 6. *See also* 22 B. 235; 1929 N. 350. In 7 W.R. (Cr.) 56, evidence of policeman who overheard a prisoner's statement made in another room to another held admissible. But *see also* 20 B. 165; 39 I.C. 977=21 C.W.N. 694. Where the accused in judicial lock-up made a confession to fellow prisoners, the policeman whose duty it was to guard the lock-up was present. *Held*, that his presence did not make the confession inadmissible as accused was in magisterial custody as opposed to police custody. 151 I.C. 894=1934 L. 75. A police officer when giving evidence should not be allowed to state that an admission of guilt was made by the accused. 13 I.C. 783=16 C.W.N. 238; 15 C. 607. *See also* 19 B. 363. An accused's confession to some person other than a police officer is admissible in evidence. 26 I.C. 654; (as) at coroner's inquest. 28 Bom. L.R. 111=50 B. 111=1926 B. 151. Admissions of facts which are not of an incriminating nature are admissible in evidence. 4 Bom.L. R. 312. Actual arrest and detention are not necessary. 1 R. 609=77 I.C. 429=1924 R. 173. Statement made by accused to the police in ignorance of the complaint filed against him is admissible under secs. 25 and 26 as the accused was not in police custody nor was he aware of the complaint against him and the statement could be used as an admission under sec. 18 of the Evidence Act and to use the statement was not contrary to sec. 162 of the Criminal Procedure Code. 9 P.L.T. 449=111 I.C. 721=1928 P. 473. The accused was in the police lock-up for three days and was subsequently brought out temporarily, and taken to the house of the Superintendent of Post Offices. The accused made a confession before this officer and was subsequently taken back to the police lock-up. *Held*, that the confession was inadmissible in evidence as the separation of the accused from the police was only temporary. 108 I.C. 398=1928 L. 282. Sec. 26 is not inapplicable in cases where the arrest by the police officer of person making

[1][*Explanation.*—In this section " Magistrate " does not include the head of a village discharging magisterial functions in the Presidency of Forst St. George [2][* *] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.[3]]

LEG. REF.

[1] The explanation was added by Act III of 1891, sec. 3.

[2] Words 'or in Burma' omitted by A.O., 1937.

[3] *See* now the Code of Criminal Procedure (Act V of 1898).

NOTES.

the confession is illegal. Whether the arrest is legal or illegal the mischief which the section is intended to avert remains all the same, and a confession made by the arrested persons while in the custody of the police officer is inadmissible under sec. 26. The illegality of the arrest does not affect the operation of sec. 26. 17 P. 369 =19 P.L.T. 268=1938 P. 308.

POLICE OFFICERS referred to in sec. 26 need not be investigating police officers. 42 B. 1= 42 I.C. 97=19 Bom.L.R. 683. Sec. 26 has always been taken to apply to confessions made to some person other than a police officer. I. L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). Confessional statement to *dafadar* after arrest not admissible. *See* 21 P.L.T. 171. A confession to a Police Patel is inadmissible. 31 I.C. 340 (2)=17 Bom.L.R. 898. Police officers in Native States are police officers under this section. 22 B. 235. *See also* 20 B. 795 and other cases cited under sec. 25. Jailor is not police officer. 20 B. 794. Where the accused was in the custody of the village chaukidar when he admitted his guilt before certain villagers. *Held*, that the confession was not admissible in evidence. 8 Luck. 410=10 O.W. N. 348=1933 O. 192 ; 11 O.W.N. 119=1934 O. 19. As sec. 25 refers only to a police officer, a Court should not extend it to other classes of officers merely on grounds of similarity of functions. The restrictive provisions of sec. 25 should not be applied to Excise Officers. 39 Cr.L.J. 338=1938 M. 460=(1938) 1 M.L.J. 238. But *see also* 1938 Sind 1=32 S.L.R. 185. Statements by accused to C.I.D. Officer—Admissibility. 1938 M.W.N. 825. The expression 'police officer' is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a police officer apply with equal is not greater force to an officer who is clothed with powers of a police officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. Hence an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a police officer within the scope of sec. 25. 32 S.L.R. 185=172 I.C. 968=1938 Sind. 1. Where an accused confesses to having caused the death of a woman and admits having robbed her after her death, but during that confession introduces into it circumstances with a view to excuse himself from a conviction for murder, it cannot be contended that the confession must be accepted as it is and that so taken it is not sufficient for a conviction. Such a contention is wholly unacceptable and is contrary to practise and authority. When the confession is shown to be voluntary and made with due apprehension of what was said and of the consequences, the confession must be accepted and acted upon along with other circumstances as a whole, including the other evidence, in the case. 187 I.C. 481=1940 M. W.N. 169.

STATEMENT MADE IN POLICE CUSTODY AND BEFORE MAGISTRATE is not admissible either against him or against a person jointly tried with him, unless it has led to discovery of any fact mentioned in sec. 27. 28 I.C. 145=16 Cr. L.J. 257. A confession though made in the presence of a Magistrate is of very little value, when the accused is not aware of his presence. 22 I.C. 150=15 Cr.L.J. 6. *See also* 31 S.L.R. 460=1937 Sind 212. A confession made in the presence of a Magistrate though on leave, is nevertheless relevant and admissible. 22 I.C. 150. *Judge's instruction* in French India who is a sort of committing Magistrate with power to commit or discharge a prisoner but not to convict is "a Magistrate" within the meaning of sec. 26 and a statement made by an accused in police custody to such person is admissible in evidence. 52 M. 529=56 M.L.J. 628. Confession to Honorary Magistrate—Admissibility of. 152 I.C. 998=1934 L. 417. Confession made before Magistrate of Native State, is within the section. 144 I.C. 157=1933 A. 286 ; 151 I.C. 311=1934 Sind 103. A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession is certainly admissible in evidence against the accused ; its value is not discounted by the fact that the accused was at that time in the custody of the police. 1930 M.W.N. 1249. The mere fact that the Court constable was allowed to remain present while the co-accused were making their confessions before the Magistrate does not involve the total exclusion of the confessions from evidence, but it certainly detracts from their evidentiary value. 152 I. C. 275=14 P.L.T. 111=1934 P. 586. *See also* 165 I.C. 319=1936 R. 455. The "custody" of a police officer for purposes of sec. 26, is not mere physical custody. A person may be in the custody of a police officer, though the latter may not be physically in possession of the person of the accused making the confession. Once an accused person is arrested by a police officer and is in his custody, the mere fact that for some purpose or other the police officer happens to be temporarily absent and during such absence leaves the accused in charge of a private individual, does not terminate the custody of the police officer. The accused must be deemed to be still in the custody of the police officer. 17 P. 369=19 P.L.T. 268=1938 P. 308; 1941 Pesh. 22.

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

NOTES.

ORAL CONFESSION.—A confession to be admissible in evidence need not be recorded. It may be oral, and may be proved by the Magistrate to whom the oral confession was made. 45 I.C. 843; 11 P.R. 1918 (Cr.); 34 P.L.R. 896=1933 L. 513; 1934 A.L.J. 178=1934 A. 351. *See also* 1933 Cr.C. 1513=1933 L. 998; 10 O.W.N. 923=1933 O. 432. A confession made by an accused to a Magistrate on leave in the presence of a police officer who had the accused under arrest at the time is not admissible in evidence, where no record was made of his statement under sec. 164 of the Cr. P. Code. 118 I.C. 46=1929 A. 855. Where a Magistrate simply accompanies a police officer while the police officer is making the investigation, the evidence of the Magistrate as to what happened is not admissible under sec. 26. 34 Cr.L.J. 754=1933 A. 394. *See also* 1941 Pesh. 22 (confession to doctor while in police custody, but not in presence of police officer is inadmissible).

PLEA OF GUILTY BY UNDEFENDED ACCUSED ENFEEBLED BY ILLNESS.—A plea of guilty can be allowed to be withdrawn of the accused was at the time of making it, enfeebled by illness and was undefended. 28 I.C. 145=16 Cr.L.J. 257.

CONFESSION—ADMISSIBILITY OF, AGAINST CO-ACCUSED.—A confession by an accused is not admissible against co-accused under sec. 30. If the former is convicted on his plea of guilty. 28 I.C. 145=16 Cr.L.J. 257; 159 I.C. 875=1936 O. 156. A confession of an accused recorded outside British India by a Magistrate is not excluded by sec. 26. 69 I.C. 257=17 N.L.R. 113.

Sec. 27.—(*N.B.—See also* Notes under secs. 24-26.)

SCOPE OF SECTION.—*See* 45 C. 557=22 C.W.N. 213=44 I.C. 321; 1941 Nag. 86. Sec. 27 has to be read as a proviso not only to sec. 26 but to secs. 25 and 26 taken together. 1941 P.W.N. 653. Sec. 27 has no application to a confessional statement made to a police-officer before the deponent has come into the custody of that police officer. 54 L.W. 136=1941 Mad. 765=(1941) 2 M.L.J. 209. The exact information received from the accused must be established before sec. 27 can be resorted to. 46 C.W.N. 180. The word "thereby" in "fact thereby discovered" in sec. 27 refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order that this may admissible against the accused, (1) the information must be the one given by the accused—the statement conveying the information must be his own statement in his own language, and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible. 46 C.W.N. 180. Sec. 27 is an enabling section providing an exception to the previous ones which exclude confessions made to or in presence of the police. If the conditions of the section are fulfilled, it allows a confession to be proved. I.L.R. (1936) N. 78=1936 N. 200. Sec. 27 is in the nature of a proviso relating to the previous sections which lay down the general rules as to the inadmissibility of confessions made in certain circumstances. Whether a confession to which sec. 27 applies was induced by promises or not is immaterial. The general ground for not admitting confessions made either to a police officer, or made under any inducement or made by persons while in custody is clearly the danger of admitting false confessions; but the necessity for this precaution disappears when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. (1936 N. 200, Foll.) I.L.R. (1937) N. 268=168 I.C. 962=1937 N. 220. Under sec. 27 so much of the information given by the accused as relates distinctly to the facts of the discovery in consequence of the information given by him may alone be proved, whether it amounts to a confession or not. Where the fact discovered was that the grave in which the corpse of the deceased was inferred was dug up with a spade produced by the accused, the only part of the information given by him which can be admitted is that relating strictly to the discovery of the spade with which the grave was dug. It is not possible to admit any statement by him that he murdered the deceased. 1937 M.W.N. 881. *See also* 1939 A.L.J. 732=1939 All. 685. Where facts are discovered by the accused himself combined with a statement, such a statement is not admissible under sec. 27. The Court must distinguish between cases where discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. While in the former case a statement of the accused leading to discovery is admissible, the statement in the latter case is inadmissible under sec. 27. 1940 M.W.N. 1238=52 L.W. 898=1941 Mad. 306; 1941 M.W.N. 956. The intention of the Legislature in enacting sec. 27 was that the minimum portion of a confession made to a police officer or of information given to him should be admitted into evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order to adequately explain such discovery. 170 I.C. 453=I.L.R. (1937) A. 710=1937 A. 485; 53 L.W. 567=1941 Mad. 658. The preamble in a confessional statement which has no relation to the discovery of the facts is not admissible under sec. 27. (1939) 2 M.L.J. 487=1939 M. 593. Sec. 27 refers to a fact being discovered; a fact means and includes, according to the definition in sec. 3, "anything, state of things or relations of things capable of being

NOTES.

perceived by the senses." 1940 M.W.N. 163. "*Leading to discovery*"—Statement leading to discovery not immediately but ultimately admissible. 1940 M.W.N. 163=1941 M. 290. Statement leading to discovery—What constitutes—Fact discovered not because of statement made but due to act of another—Statement not admissible. 1940 Mad. 744=(1940) 1 M.L.J. 758. *See also* 1941 M.W. N. 956. Where a confession is made by the accused while in police custody after he was arrested by the chaukidar and was being escorted under his control, its admissibility is not affected by the possibility of its having been made during the temporary absence of the chaukidar. Where a place is pointed out by the accused to a police officer as the place of occurrence and nothing is found there, the pointing out of the place is really evidence of a confession of his guilt and is therefore inadmissible under sec. 26. 195 I.C. 493=1941 O.W.N. 953=1941 Oudh 563. Where the information given by the accused to the police leads to the discovery of facts, so much of such information as relates to the discovery of the facts is admissible under sec. 27. The only portions given by the accused which can be admitted under sec. 27 are those which relate distinctly to the facts discovered thereby. But statements made by one accused involving another accused, cannot be admitted when they do not in any way relate to those facts. 1940 M.W.N. 764=52 L.W. 284. Before a confessional statement made by a person accused of an offence who is in the custody of a police officer may be proved against him, two conditions must be observed, firstly that some incriminating thing must be proved to have been found as the direct result of the information supplied by the accused and, secondly, it must be confined to that portion which refers exclusively to the thing found; in other words, when any incriminating object is proved to have been found as the direct result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in sec. 27 is a confession of the offence charged and not of anything else. I.L.R. (1937) Mad. 695=1937 Mad. 618=(1937) 2 M.L.J. 60 (F.B.). If an accused makes a statement which is admissible under sec. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. I.L.R. (1936) N. 78=1936 N. 200. *See also* 17 Mys.L.J. 158; 52 L.W. 981; 1941 A.L.J. 86. In regard to statements made by accused persons the Cr. P. Code does not, in sec. 162, alter the provisions of sec. 27, Evidence Act. There is no contradiction in the two sections as sec. 162 does not apply to statements by accused persons. 55 A. 463=1933 A. 440. *See also* 43 Bom.L.R. 157; I.L.R. (1940) Nag. 679=1940 N.L.J. 623; 1939 Pat. 577=1939 P.W.N. 300; 1941 P.W.N. 653; I.L.R. (1939) Mad. 947=(1939) 2 M.L.J. 455. Sec. 27 qualifies not only secs. 25 and 26 but also sec. 24 all three of which lay down general rules excluding confession and the same broad grounds underlie all the three. 45 C. 557. *See also* 6 A. 509; 11 B.H.C.R. 242; 9 L. 671; 1928 L. 476. *See also* 152 I.C. 998=1934 Cr.C. 643=1934 L. 417. The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by sec. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the imformation given. 1928 L. 476. *See also* 63 C. 1053=63 C.L.J. 232=1936 C. 316. Sec. 27 has nothing to do with the question whether the fact discovered is or is not relevant. 10 L. 283=1929 L. 344 (F.B.). Sec. 27 being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of secs. 25 and 26 and the safeguard provided in sec. 27 are not rendered nugatory by any lax interpretation. 34 C.W.N. 106=1930 C. 291. *See also* 173 I.C. 418=18 P.L.T. 964=1938 P. 60. As to the use that can be legitimately made of confession to police when direct evidence is given against the accused at the trial. 77 I.C. 890=1924 A. 207. It is open to the defence to check such evidence, *e.g.*, the consistency of an approver's story. 34 C.W.N. 106. A statement made by an accused to a police officer is inadmissible against a co-accused. 20 A.L.J. 178=65 I.C. 849. In construing sec. 27 the word "confession" does not necessarily mean a complete confession of guilt but means and includes any incriminating statement. 115 I.C. 1=1929 L. 338. *See also* 1941 Nag. 86. Statements made by an accused to a police officer in the circumstances provided for in sec. 27 have been treated as a matter of unquestioned practice in all the High Courts, as admissible in evidence notwithstanding that they have been made to an investigating officer during the progress of an investigation, and fall under sec. 162, Cr. P. Code. Both sec. 27 of the Evidence Act and sec. 162, Cr. P. Code, must be given effect to sec. 162, Cr. P. Code, having effect in every case except those to which sec. 27, Evidence Act, applies by way of exception or proviso. 1939 Pat. 577=18 P. 450=20 P.L.T. 420.

Per *Collister*, *J.*—Sec. 162, Cr. P. Code, contains provisions plainly and directly, and therefore specifically affecting sec. 27 of the Evidence Act *quod* statements made under that section by an accused person to a police officer in the course of an investigation. In other words, there is a 'specific provision to the contrary' within the meaning of sec. 1 (2) of the Cr. P. Code. I.L.R. (1940) All. 396=

NOTES.

1940 A.L.J. 241=1940 All. 263 (F.B.). *See also* 1939 N.L.J. 585. The provisions of sec. 27 of the Evidence Act have not been repealed by sec. 162, Cr. P. Code. Sec. 27, Evidence Act, embodies the special rule, while sec. 162, Cr. P. Code, is the general rule, and the latter rule does not derogate from the former. Therefore statements made by accused persons to the police after their arrest, and admissible under sec. 27 of the Evidence Act are admissible in evidence against them and are not excluded by sec. 162, Cr. P. Code. 50 L.W. 423=1939 Mad. 840=(1939) 2 M.L.J. 635. Per *Young, C.J., Tek Chand, Din Mohammad, Monroe and Ram Lall, JJ.* (*Dalip Singh and Bhide, JJ.*, dissenting).—Sec. 27, Evidence Act, is *pro tanto* repealed by sec. 162, Cr. P. Code, and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not be considered admissible in evidence. I.L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). The effect of the amendment of sec. 162, Cr. P. Code, in 1923 upon sec. 27 of the Evidence Act has been left open and not decided by the decision in 18 Pat. 234 and sec. 27 of the Evidence Act is still valid and applicable as before. I.L.R. (1940) Nag. 679=1940 N.L.J. 623. *See also* 43 Bom. L.R. 157. The words of sec. 162, Cr. P. Code, are wide enough to exclude a confessional statement made to a police officer in the course of investigation, irrespective of whether a discovery is made or not. But the provisions of sec. 27 of the Evidence Act, are quite independent of sec. 162, Cr. P. Code and the amendment of the latter in 1923 is not intended to abrogate or impair the effect of sec. 27 of the Evidence Act; hence a statement excluded by sec. 162 may become admissible under sec. 27 of the Evidence Act. 185 I.C. 310=1939 N.L.J. 585=1940 Nag. 66. *See also* 188 I.C. 311=44 Cr.L.J. 573; 44 Cr.L.J. 41.

APPLICABILITY OF SECTION.—Sec. 27 is a proviso to secs. 24, 25 and 26. Statement made to the police is admissible though the accused himself makes the discovery about which the statement is made. 12 Cr.L.J. 119=9 I.C. 718; 1930 C. 291 *See also* (1939) 1 M.L.J. 756 (P.C.). It must be strictly construed. 1930 C. 291; 10 O.W.N. 937=1933 O. 404. Secs. 161 and 162 of Cr. P. Code do not override the provisions of secs. 27 and 28 of Evidence Act. 5 P. 63=1926 P. 232. *See also* 4 R. 72=1926 R. 116; 55 A. 563; 35 P.L.R. 738=1934 L. 695. Confession to person in authority who holds out inducements to confess is not admissible even so far as it relates to the discovery of articles. 4 R. 72=96 I.C. 145. *See also* 41 Cr.L.J. 242=1940 Mad. 12. Where there is immediate connection between discovery and statement made to a police officer, the latter is admissible in evidence. 20 Cr.L.J. 305=50 I.C. 481. If the recoveries were made in consequence of the information, supplied by the accused, the statements made by them are admissible. 1923 L. 434. A statement is admissible in evidence under sec. 27, if as a consequence of it, there is a discovery incriminating the person making the statement. 72 P.L.R. 1916=33 I.C. 823. *See also* 16 Cr.L.J. 545=29 I.C. 817=11 P.R. 1915 (Cr.). The legislature has prescribed two limitations in order to define the scope of the information provable against the accused: (1) The information must be such as has caused the discovery of the fact, and (2) the information must "ralate distinctly" to the fact discovered. The requirements of both the conditions must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. 10 L. 283=115 I.C. 6 (F.B.). (9 L. 626=1928 L. 308, overruled; 1926 M. 638; 1928 P. 162, diss. from). *See also* 1929 L. 338; 1929 Sind 175; 1930 Sind 225; 151 I.C. 883=36 Bom.L.R. 384=1934 B. 233; 30 N.L.R. 269=150 I.C. 623=1934 N. 71; 28 S.L.R. 41=1934 Sind 159; 1933 N. 252. Under sec. 27, the information to be proved must relate distinctly to the fact thereby discovered. The word "distinctly" in sec. 27 is used in some sense other than the word "directly." It is meant to exclude certain things and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information. Even more important is the word 'discovered.' It is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer rests on the credibility of the statement of accused, but rests on the credibility of the witnesses who depose to the existence of that fact. The rest of the information is not admissible. 1929 L. 338=115 I.C. 1.

CUSTODY OF POLICE OFFICER.—"Custody," meaning of. *See* 18 L. 106; I.L.R. (1936) N. 78. Per *Bhide and Din Mahommad, JJ.*—"Police custody" does not necessarily mean custody after formal arrest and it also includes "some form of police surveillance and restriction on the movements of the person concerned by the police." It is open to an accused person to prove in every case that arises that he was actually in the custody of a police officer, although in the police diaries he was not shown to have been formally arrested. I.L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). In order that a statement under sec. 27 be admissible, the maker of the statement should be in the custody of the police, but that custody need not be a formal arrest. In the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Cr. P. Code, their presence with the police under some restraint amounts to the "custody" which is contemplated by the section. If a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible. 18 L. 106=1937 L. 620. When a person states that he has done certain acts which amount to an offence he accuses himself of committing the offence; and if he makes the statement to a police officer as such, he submits to the custody of the officer within the meaning of sec. 46 (1), Cr.

NOTES.

P. Code and is then in the custody of a police officer within the meaning of sec. 27, Evidence Act. 12 P. 241=1933 P. 149 (S.B.). Where a person had been suspected from the beginning itself and was treated as accused person and was not kept under much restraint as he could hardly have absconded. *Held*, that he was in custody of police and statements leading to discovery of things were admissible. 15 L. 310=1934 L. 150 (2); 34 P.L.R. 637=1933 L. 516. Even if an accused is not formally arrested when he gives information leading to discovery, if it is proved that he was arrested before he went to the spot from which the articles are recovered, the accused shall be deemed for all practical purposes as in police custody when giving such information. I.L.R. (1936) N. 78=1936 N. 200. Where a police officer, although he arrested a person charged with being in possession of cocaine after the finding of the cocaine with him, interviewed the accused and was with him for a considerable time and walked with him to the place where the accused pointed out the spot where the cocaine might be found, *held*, that the accused was in police custody at the time when he made the statement as to the spot where the cocaine could be found and his statement was admissible under sec. 27. 144 I.C. 74=1933 C. 148. Statements made by the accused to the *daroga* showing the place in the jungle where the occurrence in question, *viz.*, taking away a female and having sexual intercourse with her took place, cannot be admitted in evidence they being in the nature of a confession made of a police officer while in custody. Sec. 27 has no application and would not make the statements admissible. 143 I.C. 797=1933 C. 146.

Statement to police—Recording of—Duty of police.—It is not the duty of the police to decide what evidence is admissible and what is not, and a statement made by an accused person should not be mutilated. The duty of the police, if they desire to record a statement, is to record it as given and leave it to the Court to decide what evidence is admissible. The practice of police officers giving statements not made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars must be condemned. Such a second statement is inadmissible in evidence. It is the first statement of the accused, to whomsoever made, that leads to the discovery of a fact, if a fact is discovered. I.L.R. (1940) Mad. 254=1940 M.W.N. 860=1940 Mad. 710.

Information not leading to Discovery.—Statements leading immediately to the discovery of property are properly admissible. Other statements connected with the one thus made and immediately, but not necessarily or directly connected with the fact discovered are not admissible. 32 I.C. 136=13 A.L.J. 1077; 1930 B. 244. *See also* 53 L.W. 567=1941 M.W.N. 371; 1937 A.M.L.J. 18; 31 S.L.R. 494=1937 Sind 251. The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by police officers. 49 C. 167 =25 C.W.N. 788. Statements made by an accused person which are or may be provable under sec. 27 should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. It will be for the trial Judge who has such a record before him to decide how much of it is admissible under the section. I.L.R. (1937) M. 695=1937 M. 618=(1937) 2 M.L.J. 60 (F.B.). *See also* 171 I.C. 225=(1937) 2 M.L.J. 32.

Information from two Persons—Only that Leading to Discovery is Admissible.—Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. 64 I.C. 502=1932 L. 315. *See also* 1939 A.M.L.J. 56; 1938 M.W.N. 1272. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of sec. 27. (*Ibid.*) 1930 B. 244. Where two or more persons are alleged to have given certain information to the police which led to the arrest of the accused, it is only the information given first which is admissible under secs. 27 and 29. 17 Cr.L.J. 273=34 I.C. 993; 1927 L. 739; 1930 B. 244. Information by two persons which leads to the discovery of a fact is relevant and so much of the statement of each which relates to the fact discovered is admissible against both; statements of co-accused after the discovery are irrelevant. 17 Cr.L.J. 506=36 I.C. 474; 1930 B. 244. After one accused has made a discovery the other should not be asked to do the same. 36 I.C. 474.

Joint Discovery—Track Evidence.—Track evidence is of no value if the comparison is made 8 or 9 days after the affair. 15 Cr.L.J. 499=24 I.C. 587. Where more than one accused person in custody of the police point out this or produce that jointly, such an evidence of joint discovery is not sufficient for a conviction. 24 I.C. 587. Joint discoveries are not admissible at all against any of the accused unless it can be shown who first made the discovery. 116 I.C. 619=1929 L. 665.

Statement after Discovery—Pointing out Property—Value of.—A statement by accused not leading to discovery of property but made after discovery and production of the property is irrelevant. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by some one else. 13 Cr.L.J. 529=15 I.C. 801; 48 L.W. 780. When a material fact has already been discovered, the accused's statement while in police custody relating thereto is not admissible under sec. 27. 12 Cr.L.J. 35=9 I.C. 232; 36 P.L.R. 40=1934 L. 786. *See also* 48 L.W. 780=1938 M.W.N. 1118. The discovery previously need not be necessarily by the police officer. 152 I.C. 565=1934 L. 313. A fact known to the police cannot be re-discovered on the statement of an accused person so as to make such

NOTES.

statement or such incriminating conduct admissible under sec. 27. 1929 S. 250. *See also* 1929 N. 350. No portion of any statement made by the accused to any police officer during investigation is admissible under sec. 27 of the Evidence Act inasmuch as sec. 162 of the Cr. P. Code contains specific words affecting sec. 27 of the Evidence Act. I.L.R. (1940) All. 396=1940 A.L.J. 241=1940 All. 263 (F.B.).

INFORMATION LEADING TO DISCOVERY.—Though a person points out a place not his own where stolen property is concealed, the Court should not conclude that the person had received or retained it. 39 I.C. 330=1 P.R. (1917) (Cr.). Accused's knowledge of place of concealment does not prove that he concealed it. 1923 L. 238 (2). The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment. 1923 L. 238 (2).

ILLUSTRATIVE CASES—(*a*) EVIDENCE HELD ADMISSIBLE.—Where an accused person stated to the police that he had buried an article at a particular place, took the police to that place and delivered the article to them, the statement of the accused to the police is admissible under sec. 27 of the Evidence Act. 112 I.C. 55=29 Cr.L.J. 967. So also a statement that he buried the dead body at a particular place. 1930 L. 530. The discovery of ornaments at his house by accused is clearly a fact discovered. 45 A. 300=73 I.C. 62=1923 A. 352. The statement of the accused that he could point out a spot and that blood stains would be found there is admissible, but not that it was at that spot that he committed the crime. 14 Cr.L.J. 190=19 I.C. 190. If the accused produced the article himself, the fact that he produced it at a particular place may be proved, but the accompanying statement that he buried it there is inadmissible. 19 I.C. 190.

(*b*) EVIDENCE HELD NOT ADMISSIBLE.—A person accused under sec. 328, I. P. Code, pointed out during the police investigation a *dha'ura* tree and said that he had taken the fruit of it. The statement was inadmissible. 32 I.C. 136=13 A.L.J. 1077. On a trial for murder a witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried the body he said that he (accused) had done so. *Held*, that the accused's statement that he buried the body was not admissible in evidence. 55 I.C. 685=21 Cr.L.J. 349 (L.). The discovery of a person who is afterwards proved to be dacoit is not the discovery of a fact within sec. 27. 43 I.C. 111=14 N.L. R. 192.

MISCELLANEOUS.—The expression "fact" as defined in sec. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in sec. 27. 10 L. 283=1929 L. 344 (F.B.). The word "information" cannot be used as synonymous with the word "statement". The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by other person. 115 I.C. 1=1929 L. 338. A confession caused by some inducement from some person in authority is inadmissible in evidence. 14 Cr.L.J. 417=20 I.C. 401 (Bur.). There is no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under sec. 27 of the Act. If it has been induced, it is of no evidential value, and the Court would exclude it from consideration. 50 L.W. 435=1939 M.W.N. 873.

STATEMENT OF ACCUSED WHILE IN CUSTODY OF POLICE.—A husband assaulted his wife and his wife died as a result of it. The husband immediately went to the police station and reported that he went to the west facing room and finding his wife sitting, wounded her and she became senseless. On receipt of this information the police went to the house and found the corpse. *Held*, that the statement to the police was not admissible under sec. 27 of the Evidence Act as the husband was not, at the time of making the statement, a "person accused of an offence" not having been charged with any offence then. 7 P. 411=1928 P. 491. It is legitimate to record evidence that an accused person said: "I will point out certain property" if such statements lead to a discovery; but it is not legitimate to record as evidence that an accused said "I will point out certain property which I obtained as my share of the booty in the dacoity." 44 I.C. 967=19 Cr.L.J. 459. Where there is practically no evidence at all against an accused except an incriminating statement under sec. 27, the latter should be viewed with great caution and suspicion. 14 Cr.L.J. 190=19 I.C. 190. The statement of an accused that he buried the weapon in certain place is relevant but not the part of the statement that it was the weapon with which he had committed the crime. (*Ibid.*). A statement made by an accused may be proved under sec. 27 so far as it relates to any material facts discovered in consequence, even though the police were present when the statement was made. 69 I.C. 377=14 L.W. 418. To bring an information by accused under sec. 27 the information must have had the direct effect of leading to the discovery of the stolen property. Unless a confession is corroborated in material particulars and by independent testimony it should not be the basis of a conviction. 54 I.C. 479=11 L.W. 8. (*See also* notes under sec. 30, *infra*.) An accused gave information to the police in these words: "I shall produce the lathi with which I killed Ismail." It had been admitted as evidence under sec. 27. The lathi which the accused handed over had no marks of blood whatsoever. *Held*, that if the mere fact of the lathi having been handed to the police might be relied upon, for the purpose of introducing an alleged confession made by the accused to the police the provisions of sec. 26 would become nugatory. 1929 S. 175.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court been fully removed, it is relevant.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.

29. If such a confession is otherwise relevant, it does not become irrelevant, merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

NOTES.

Sec. 28.—Confessions to the Magistrate made soon after inducements held out by certain Zamindars sent by the police are inadmissible. 12 Cr.L.J. 119=9 I.C. 718. A confession by an accused in police detention as a suspect made in the immediate vicinity of the police to a zaildar could not be proved unless made to a Magistrate though the accused may not have been handicapped, as, to all intents and purposes, he was in police custody. 26 P.R. 1916 (Cr.)=34 I.C. 642.

Sec. 29.—The provisions of sec. 164 do not affect the provisions of sec. 29, Evidence Act, and therefore a confession cannot be excluded from evidence as irrelevant merely because all the provisions of sec. 164 were not carefully complied with. 10 O.W.N. 937=1933 O. 404. *See also* 1937 M.W.N. 1325. Statements made by the accused to a Magistrate when produced by the police for purposes of remand are admissible. 148 I.C. 1002=1934 R. 78. *See also* 1941 A.L.J. 86.

Sec. 30; SCOPE AND APPLICABILITY—"MAY TAKE INTO CONSIDERATION" points to the necessity of there being other evidence on record to which the statement can lend assurance. 1928 N. 213. *See also* 177 I.C. 494=47 L.W. 139=1938 M. 675. Under sec. 30, in order that a confession may be used against a co-accused, it is necessary that the admission or confession implicates the maker of the confession to the same extent as it implicates the co-accused. The confession must implicate the confessing person substantially to the same extent, as it implicates the person against whom it is to be used, in the commission of the offence for which they are both being jointly tried. 42 Bom.L.R. 938; I.L.R. (1941) Bom. 27=1941 Bom. 50; 1941 Mad. 267. Where a statement by an accused person implicates the other accused, it would require the strongest independent evidence if any reliance is to be placed upon it at all. Under sec. 30 such a statement can only be taken into consideration; it is not evidence against the other accused. 52 L.W. 898=1941 Mad. 306. Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused. 34 P.L.R. 259=1933 L. 167. Sec. 30 applies to a proceeding under sec. 110, Cr. P. Code, against a number of persons, one of whom has made a confession implicating other persons whose conduct is also the subject of an enquiry. 1934 A.L.J. 1170=1934 A. 927. *See also* 1936 S. 236; 17 L. 547=38 P.L.R. 1018; 1937 N. 17 (F.B.); 1937 B. 31; 1937 M. 321; 1937 C. 39; 1936 O.W.N. 671. A confession by a co-accused may be taken into consideration against another accused; confessional statements under sec. 27 come within the terms of sec. 30. But there must be admissible evidence to point to the co-accused's guilt. In assessing the probative value of the evidence, a co-accused's confession may be taken into consideration. But where the evidence against the co-accused is only that he was in the company of the other accused before the crime and after the crime, there is no sufficient basis to convict him. 52 L.W. 420 (2)=1940 M.W.N. 1045=1941 Mad. 238.

"SAME OFFENCE" means the identical offence and not an offence of the same kind. 32 C.W.N. 1904. *See also* 1937 Sind 218. A confession can be accepted by Court in part, after rejecting portions which are false. 6 O.W.N. 1017. *See also* 1930 M.W.N. 785. But *see* 1930 A. 192. In cases where the sole evidence against the accused is that of a retracted confession, such confession, if it is relied on, must be relied on as a whole and not only in part. 121 I.C. 550 (2)=1930 A. 192. Sec. 30 does not refer to statements made at the trial but the statements made before and proved at the trial. 1929 M. 285. Before sec. 30 of the Evidence Act can be applied it must be proved that a confession has been made by one of the persons who are being tried jointly for the same offence and that the confession affects the person making it as well as some other persons so jointly being tried. The section is new to the Indian Evidence Act as contrasted with

[1][*Explanation.*—" Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.][2]

LEG. REF.

[1] The explanation was inserted by Act III of 1891, sec. 4.

[2] *Cf. Explanation* 4 to sec. 108 of the Indian Penal Code (Act XLV of 1860).

NOTES.

the English Law and must be construed strictly. When once there is no such confession as affects the person making it any statement made by one accused cannot be treated as evidence against the co-accused or be taken as affording corroboration of the evidence of the approver. 1929 M.W.N. 698. It would be far too dangerous to consider that a confession of a co-accused amounts to evidence against a person. It is not stated under sec. 30 of the Evidence Act and it has long been settled law that a conviction cannot be based on the confession of a co-accused. 150 I. C. 1056=35 Cr. L. J. 1180.

"CONFESSION" means confession of the very offence for which the accused are being tried, not a confession of any offence connected with that offence nor of any other offence which may be disclosed by the evidence. 59 M.L.J. 471. A statement before the Court of the co-accused, where it is deprecating his own guilt, is a statement seeking to clear himself at the expense of the accused and as such is inadmissible under sec. 30. 152 I.C. 924=1934 C. 724. The word "confession" used in sec. 30 clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot therefore signify any matter which comes on the record at the end of the prosecution evidence, namely, answers to questions put under sec. 342, Cr. P. Code. Hence the statement made by a co-accused confessing, partially or wholly, his guilt when examined under sec. 342, Cr. P. Code, cannot be taken into consideration under sec. 30, Evidence Act, against the other accused. 190 I.C. 273=41 Cr.L.J. 886=1940 Nag. 287. The statement of an accused person which does not amount to a confession cannot be used against his co-accused. 42 P.L.R. 378. *See also* 11 O.W.N. 1012=1934 O. 418; 176 I.C. 530=1938 P. 352.

CONFESSION — ADMISSIBILITY AGAINST CO-ACCUSED.—A statement of an accused must amount to a confession before it can be considered against his co-accused under sec. 30. 35 M. 247=22 M.L.J. 490=14 I.C. 849; 40 C.L.J. 551. *See also* 9 P.R. 1911 (Cr.)=10 I.C. 340; 1925 Sind 116; 1924 B. 445=26 Bom.L.R. 614=75 I.C. 701; 1924 N. 27; 1924 A. 511; 1924 M. 805; 1925 C. 406; 1929 Sind 250. The confession made by a person can be taken into consideration as against persons who are being tried along with him; such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses. 3 L. 144=68 I.C. 113. *See also* 13 A.L.J. 337=28 I.C. 663=37 A. 247; 10 O.W.N. 688=1933 O. 355; 11 R. 4=1933 R. 57; (1937) 2 M.L.J. 60 (F.B.); 1941 Mad. 267; 1941 Bom. 50; 1940 M.W.N. 1238=52 L.W. 898; 185 I.C. 205; 1939 N.L.J. 442=1939 Nag. 295. The principle on which the confession of one accused is used against another is that self-implication is supposed to provide some guarantee of the truth of the accusation made against the other. Where the statement is exculpatory so far as possible, there is no such guarantee. Further, the confession to be admissible must be a confession of the offence for which the accused persons are tried and not of some other offence. 1939 N.L.J. 469=1939 Lah. 309. It is not quite clear as to what is the exact meaning of "*tainted evidence*"; whether it means that the person giving the evidence is tainted morally; or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, one cannot call this, tainted evidence, for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, therefore, it must be believed. In such case it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false or that some of the statements made therein are also false. The Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused. 1938 Rang.L.R. 30=174 I.C. 947=1938 R. 92. *See also* 1939 Rang. 402. Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them, it is incumbent on the prosecution to disclose the name of the officer who made the arrest and produce him or any other person who could speak to the circumstances under which the confession was made so as to enable the defence to ascertain by cross-examination what inducements were offered to the accused to make it and what generally were the circumstances that attended the confession. 36 M. 501=25 M.L.J. 518=40 I.A. 193 (P.C.). The confession of an accused in a dacoity case is not admissible in evidence against a co-accused in that case in a proceeding under sec. 110 of the Cr. P. Code. 61 I.C. 793=25 C.W.N. 239. The statement of an accused made after arrest and not amounting to a confession is not admissible

Illustrations.

(*a*) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said : " *B* and *I* murdered *C*." The Court may consider the effect of this confession as against *B*.

(*b*) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said : " *A* and *I* murdered *C*."

This statement may not be taken into consideration by the Court against *A*, as *B* is not being ointly tried.

NOTES.

in evidence against a co-accused either under sec. 10 or sec. 33 but only against himself. 46 C. 710=54 I.C. 53=30 C.L.J. 255.

TEST OF ADMISSIBILITY.—This section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. Before any statement made by one of the accused persons, tried jointly with the others can be taken into consideration against such others, it must fulfil two conditions: (*a*) it must be a confession of guilt affecting himself equally with the others; and (*b*) it must be proved against those persons who are jointly tried with him. The word "proved" means proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceedings previous to the trial. 1935 L. 35. Whether the confession of an accused can be used against his co-accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged. 60 I.C. 660=22 Cr.L.J. 260 (L.). *See also* 15 C.W.N. 592=38 C. 559; 50 B. 683; 9 N.L.J. 80=1926 N. 229; 178 I.C. 130=19 P.L.T. 801; 1938 Sind 94.

WEIGHT OF CONFESSION AGAINST CO-ACCUSED. —Self-implication is guarantee for truth of accusation against co-accused. 1930 A. 29. There is nothing in the terms of sec. 30 to suggest that a confession is not admissible in evidence against a person who is being jointly tried for the same offence with a man who has made the confession, if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The section only requires that it must affect both equally. 1938 A. 91=1937 A.L.J. 1253. Where an accused does not implicate himself in his statement, in respect of the offence of murder, but implicates himself in respect of the disposal of the dead body, such a statement is not admissible against the co-accused in respect of the offence under sec. 300, I. P. Code, but is only admissible in respect of the offence under sec. 201, I. P. Code. 1937 M.W.N. 1233. The confession of an accused should not carry the same weight as the evidence of the same person if he were examined as a witness. 21 I.C. 166=14 Cr.L.J. 566. The Court must, after the most careful consideration, decide whether the degree of proof prescribed by sec. 30 has been reached or not. 21 I.C. 166. A confession made by a co-accused must be regarded with suspicion. 65 I.C. 561=1922 N. 146. *See also* 72 I.C. 497=24 Cr.L.J. 385; 1939 Mar. L.R. 19 (Cr.). It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused, the statement will not be admissible, the principle being that there is no guarantee that the maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. 19 W.R. 67 (Cr.); 2 A. 444; 4 P.L.T. 505=75 I.C. 705; 72 I.C. 497=24 Cr.L.J. 385; 2 P.L.T. 125. A conviction founded solely on the confessions of co-accused cannot be sustained. It must be corroborated in material particulars by independent evidence. 21 I.C. 673=38 B. 156; 170 I. C. 201=1937 C. 433 (S.B.). Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed. 1930 N. 242 (F. B.). *See also* 7 O.W.N. 980=1930 O. 502; 146 I.C. 17 (2)=1933 N. 249.

CONFESSION—NECESSITY FOR CORROBORATION. —The Indian Statute differs from the English Law and the effect of the former need not be whittled down. The question of what corroborative evidence is sufficient must depend on the circumstances of each particular case. 119 I.C. 474=1929 M. 498. The confessions of a co-accused implicating his co-accused in the crime are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under sec. 30 of the Evidence Act along with such other evidence as there may be. While such a confession may help the Court to decide whether the other evidence is or is not credible, it cannot supply the place of positive evidence regarding the commission of the crime. 52 L.W. 258= 1940 M.W.N. 767=1941 M. 267. *See also* 1940 Rang.L.R. 104=1939 Rang. 402. When the substantive evidence is not sufficient to establish a *prima facie* case against the accused it is not permissible to use the confession of a co-accused under sec. 30 as if it were itself substantive evidence, which it is not. It may only be taken to lend assurance to any relevant evidence bearing on the accused's complicity in the crime. It can in no case be used to fill up the gap in the prosecution evidence. 188 I.C. 146=41 Cr.L.J. 553=1940 Nag. 230. The statement of a co-accused is admissible in evidence but it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. 1929 A. 928. Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver, it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony. 34 P.L.R. 1010=1933 L. 871. *See also* 19 P.L.T. 801=178 I.C. 130. Confessional statement of accused cannot be used in corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other

NOTES.

tainted evidence. 1930 N. 97. *See also* 144 I.C. 829=1933 R. 134. But *see* 11 R. 4=1933 R. 57. Confession of co-accused as against another accused stands on a lower footing than the evidence of an accomplice. 146 I.C. 1061 =1933 L. 956; and it is still worse where not only did the confessing accused retract their confession but when pardons are offered to two of them with a view to their giving evidence as accomplices, they refused to accept such pardon. 146 I.C. 303 (2)=1933 R. 320.

SESSIONS TRIAL AND MAGISTERIAL TRIAL—DISTINCTION: Per *Full Bench.*—In considering the question whether the confession of the co-accused who pleaded guilty can be used against the other co-accused under sec. 30, a distinction must be made between summons and warrant cases on the one hand and Sessions cases on the other. In Sessions cases if the accused pleads guilty the Court cannot try him but has forthwith to convict him. His conviction cannot be deferred so as to enable the Court to use his confession against his co-accused. But in warrant cases, it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against the other co-accused under sec. 30. 166 I.C. 582 and 587 =I.L.R. (1937) N. 315=1937 N. 17 (F.B.).

Secs. 30 and 114.—A confession of an accused person implicating a co-accused under sec. 30 cannot be considered as the same thing as "testimony of an accomplice" under sec. 113. Sec. 113 contemplates that the accomplice shall be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under sec. 30. Therefore an accused person cannot be convicted solely on such a confession made by a co-accused. 1928 N. 213=109 I.C. 801. *See also* 1929 L. 338; 38 Bom.L.R. 1122=1937 B. 31; I.L.R. (1941) Nag. 506. The evidential value of a confession made by a co-accused is not very high. But the confession receives confirmation when it leads to the arrest and identification of the other accused. I.L.R. (1939) L. 67. Where, however, there is apart from the confessions a body of evidence and circumstances enough to support a conviction if the evidence is accepted as free from untruth or exaggeration on serious mistake or distortion the Court can take the confessions into consideration and consider together the evidence, the circumstances and the confessions. 43 B. 739=51 I.C. 657. *See also* 4 R. 45=1926 R. 127. Where the corroboration consisted of statements of witnesses which though giving rise to suspicion were consistent with the innocence of the accused, *held,* that the corroboration fell far short of what is required to support a conviction. 42 C. 789=19 C.W.N. 584=28 I.C. 657. As to what amounts to corroboration, *see* 95 I.C. 938=1926 A. 603. A conviction based entirely on statements contained in confessions of co-accused persons is not sustainable. 11 I.C. 1001=12 Cr.L.J. 465. *See also* 17 Cr.L.J. 156 =33 I.C. 636; 73 I.C. 262=1923 N. 248; 1928 N. 213.

JOINT TRIAL.—In a warrant case, although the statement of a co-accused amounts to an unqualified confession, he need not be forthwith convicted and removed from the dock. The co-accused is still to be deemed to be jointly tried with the others and this confession can be used as against the others. A sessions case is to be distinguished from a warrant case for the purpose. 1928 L. 880. *See also* 1937 N. 17=I.L.R. (1937) N. 315 (F.B.). A statement made by one accused can only be used against another if provisions of sec. 30 of the Act are applicable. 20 A.L.J. 178=65 I.C. 849=1922 A. 24. As to joint trial, *see also* 45 A. 323=1923 A. 322; 2 Pat.L.T. 125. Persons, against whom proceedings are being jointly taken under sec. 117, Cr. P. Code, in one and the same enquiry cannot be said to be on their joint trial for the same offence within sec. 30. 41 A. 231= 49 I.C. 654. A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under sec. 110 of the Cr. P. Code. 22 C.W.N. 408=49 I.C. 649. *See also* 167 I.C. 162=1937 C. 39. When two persons are jointly tried, one for the offence of rape of a girl and the other for the abduction of that girl, they are not tried for the same offence. Consequently a confession made by one of them affecting himself and the other is not admissible in evidence against the other under sec. 30. 176 I.C. 560=42 C.W.N. 814 =1938 C. 479. A confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as he is concerned. 65 I.C. 561=1922 N. 146. Confessions recorded in the manner provided by the Criminal Procedure Code, even though made to Magistrates outside British India, if proved against the persons who made them, may be taken into consideration against others who are being tried jointly for the same offence. 69 I.C. 257=17 N.L.R. 113. Where one of the accused pleaded guilty and was examined at the end of the prosecution case, and declined to call any witnesses, the trial was a joint trial, so that his confession could be taken into consideration against the other accused. A conviction under sec. 456, Indian Penal Code, based on the confession of a co-accused who was being tried along with the prisoner under sec. 411, Indian Penal Code, is unsound and must be set aside. 20 I.C. 136=14 Cr.L.J. 376.

RETRACTED CONFESSION, NOT OF VALUE AGAINST CO-ACCUSED.—43 B. 739=51 I.C. 657. *See also* 1938 L. 252; 1938 P. 108=16 P. 612 =173 I.C. 507; 17 Mys.L.J. 238, and cannot be used against the maker and the co-accused. 1927 L. 765. The very existence of sec. 30 of the Evidence Act postulates that a confession of a co-accused may be used in cases where the evidence afforded lacks the requisite

31. Admissions are not conclusive proof of the matters admitted but they

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NOTES.

volume and certainty to insure conviction. It is wrong to state that when a confession is retracted, it has no value at all as against the co-accused. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—where a confession is self-inculpatory—in respect of the person who made it and the person implicated therein. There is no reason to hold that merely because a confession has been retracted in the Court of Session, it was involuntarily made. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not it is again not unnatural that persons who have made confessions should retract them under pressure and persuasion by their fellows who have not confessed. Retracted confessions must no doubt be used with caution but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or no. 193 I.C. 265=42 Cr.L.J. 363=1941 N. 145. The confession referred to in sec. 30 cannot be restricted to an unretracted confession and there is nothing to prevent a Court from convicting after considering the confession but the rules of practice of the High Courts in India are to be observed when exercising the discretion. 15 Bom.L.R. 975=21 I.C. 673=38 B. 156. Where there is no real corroboration of the retracted confession, the accused are entitled to the benefit of the doubt and must be acquitted. 16 Cr.L.J. 469=29 I.C. 101. *See also* 41 I.C. 155; 26 P.R. 1916 (Cr.)=34 I.C. 642; 5 P.L.R. 1915; 16 Cr.L.J. 157=27 I.C. 221; 5 P.R. 1911 (Cr.)=10 I.C. 857; 1938 L. 252. Extra-judicial confession by boys cajoled or frightened but retracted before the committing Magistrate does not prove a case against persons jointly accused with the boys. 14 P.R. (Cr.) 1911=12 I.C. 973. As to value to be attached to a retracted confession of a co-accused, *see* 152 I.C. 275=15 P.L.T. 711=1934 P. 586; 148 I.C. 8=1934 Pesh. 11; 148 I.C. 1064=1934 R. 30. A retracted confession requires strong corroboration in all material particulars. 72 I.C. 497=11 L.W. 474; 45 L.W. 93=1937 M. 321=(1937) 1 M.L.J. 750; 1937 M. 755. The weight to be given to a retracted confession depends upon the circumstances under which it is made and on the intrinsic value of the confession. 18 Cr.L.J. 774=41 I.C. 150; 19 I.C. 179=14 Cr.L.J. 179. Where a confession is made 14 days after arrest by the police but is retracted at the earliest opportunity before the trial Magistrate, its evidentiary value is negligible as against the co-accused. 1934 L. 718. The confession of one was admissible against the other because it was not self-exculpatory and the fact that the confession was subsequently retracted did not render it inadmissible but it merely diminished the weight to be attached to it. 32 C.W.N. 1004. A retracted confession of a co-accused cannot alone be sufficient evidence to justify a conviction, but if that confession is unrebutted it is admissible as a very strong piece of evidence. 114 I.C. 711=1929 O. 167. *See also* 1930 L. 667; 1930 O. 412; 1930 O. 335.

PLEA OF GUILTY.—The plea of guilty of one co-accused who is removed from the dock while the other alone is tried cannot be taken into consideration against that other. 38 C. 446=16 C.W.N. 49=12 I.C. 87. *See also* 15 P.R. (Cr.) 1911=12 I.C. 981. It is for the prosecution to establish their case; because an accused loses his head or gets frightened and does not tell the truth, he cannot on that account be convicted. 20 A.L.J. 178=1922 A. 24.

SELF-EXCULPATORY STATEMENTS.—Self-exculpatory statement of the wife to the effect that a white substance was administered on the assurance by her paramour that it would bring about good feeling did not amount to a confession and could not be used against the paramour as criminal conspiracy was not proved. 21 I.C. 378=18 C.L.J. 590; 9 N.L.J. 80=1926 N. 229. *See also* 1941 O.W.N. 722=1941 O.A. 483. A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but inadmissible as regards the latter. 1923 L. 293; 12 Cr.L.J. 562=12 I.C. 650. Confession of a co-accused must be of the very offence for which they are being tried. In a case of murder the confession of one accused that the co-accused committed the murder but that he helped him in throwing the body in a pit cannot be taken into consideration. 59 M.L.J. 479. A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused. 53 I.C. 691=20 Cr.L.J. 787. An accused's statement which does not incriminate him is not a confession and cannot be used against his co-accused. 16 Cr.L.J. 25=26 I.C. 329. *See also* 46 I.C. 842=19 Cr.L.J. 826; 45 A. 323=1923 A. 322; 59 I.C. 913; 14 Cr.L.J. 570=21 I.C. 171; 109 I.C. 351=1928 C. 416 (2); 1929 S. 250. Where a statement is volunteered by a co-accused to the effect that when he arrived on the scene of offence after hearing the cry of the complainant he noticed another accused in the act of assaulting the complainant, such a self-exculpatory statement is inadmissible in evidence. 1929 N. 350. *See also* 7 O.W.N. 980=1930 O. 506.

Sec. 31.—*See* 103 I.C. 34=1927 A. 659; 8 P. 776=1929 P. 245. What sec. 31 means is that an admission, unless it amounts to an estoppel is not conclusive as against the

Admissions not conclusive proof but may estop.

may operate as estoppels under the provisions hereinafter contained.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found etc., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

NOTES.

maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement. 1939 Rang.L.R. 97. Admissions are not conclusive proof, and though they may operate as estoppel, it is open to a party to correct an admission made by him if it is shown to have been made under a *bona fide* mistake and has not caused any prejudice to the other side. 1937 A.M.L.J. 86. Though admissions are not conclusive evidence of the matter admitted, where there is no rebutting evidence at all, the admissions are enough to establish the facts contained in them. 1941 O.A. (Supp.) 420= 1941 A.W.R. (Rev.) 461=1941 A.L.J. (Supp.) 89. An admission of a father is not binding on the son because he did not claim through the father. It cannot bind third persons. 34 C.W.N. 94; 12 L.L.J. 187. An admission made by a party is a very strong proof against him and the fact admitted must be taken to be true unless the person making the admission explains that it was made under circumstances which does not make the admission binding on him. Inference as to partition drawn from admission of parties. 134 I.C. 888=53 C.L.J. 222. *See also* 131 I.C. 903=8 O.W.N. 306 ; 1939 R.D. 299.

Secs. 32 and 33 : RELATIVE SCOPE OF.—Secs. 32 and 33, Evidence Act, give different instances where evidence is relevant. Sec. 32 makes relevant statements by a deceased person as to the cause of his death ; sec. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two distinct cases. It cannot be said that sec. 33 governs sec. 32. 1941 Rang.L.R. 258= 1941 Rang. 301. A previous statement by a person is not relevant when it is not covered by secs. 32, 33 and 145 of the Evidence Act unless it is an admission in which case only it becomes relevant under sec. 21 of the Act. 1941 A.W. R. (Rev.) 501=1941 R.D. 503=1941 O.A. (Supp.) 460.

Sec. 32.—Section should be very liberally construed. *See* 104 I.C. 209=1927 O. 278. Before statements can be admitted under sec. 32 it must be proved that the makers of these statements are either dead or for any other reason are not available as witnesses. 1933 R. 212. Sec. 32 speaks of statements both written and verbal, and a Court cannot refuse to admit oral evidence of a verbal statement which fulfils the requirements of the section, merely because the evidence offered is the testimony of a witness who is interested in the result of the litigation. 42 C.W.N. 359. There is a difference between the existence of a fact and a statement as to its existence. Sec. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence if a statement does not fall within sec. 32, it cannot be admissible even under sec. 11. 1934 A.L.J. 318=1934 A. 406 (F.B.). Generally speaking a declaration relevant under sec. 32 but not made by one in immediate expectation of death and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration. 35 Bom.L.R. 1021=1933 B. 479 (2). The value of the evidence admissible under secs. 32, 49 and 60 depends on the characters of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. [23 A. 37 (P.C.), Foll.] 1933 Sind 213.

SCOPE OF.—A previous statement which is not made in Court and at the trial can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case. 127 I.C. 850 =1930 L. 409. When the statement of a witness previously made is used as evidence under the provisions of secs. 32 and 33, then any other statement made by that witness can be used by virtue of sec. 158 for the purpose of contradicting that witness as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same. 1930 L. 409.

DATE OF BIRTH—CERTIFICATE OF GUARDIANSHIP IS NOT ADMISSIBLE.—As evidence of minority if it is neither a book nor a register nor a record kept by an officer in accordance with any law, but is a certificate as it professes to be, of which there is only one record and which is not a public record or register of any kind but is a document issued to a particular person giving him a kind of particular authority. 71 I.C. 336=38 C.L.J. 186.

As to relevancy of entries in *purohit's books* to prove date of death, *see* 26 Bom.L.R. 563= 46 M.L.J. 541 (P.C.).

Where the age of a witness is given in the paper containing the *deposition of the witness* and appears to have been recorded by the presiding officer, there is no reason either to presume that the presiding officer instead of following the obvious, and usual course of asking age of the witness should have put down the age

When it relates to cause of death;

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

NOTES.

merely by guesswork. Similarly the *entries in the registration endorsements* are made by the Sub-Registrar himself and the presumption is that he also would follow the obvious and correct course of asking persons their age instead of guessing it. 178 I.C. 959=1938 O. W.N. 1267=1939 O. 17.

Sec. 32 (1) : DYING DECLARATION WHEN ADMISSIBLE.—The recording of a dying declaration is a grave and solemn proceeding. The proceeding should be so conducted that the declarant is as free from personal influence in making his declaration as he would be if he were giving evidence in a Court of law. 152 I.C. 741=1934 A. 908. The dying declaration being the most important piece of evidence must be as exact and full as possible. 15 I.C. 308=22 M.L.J. 453. *See also* 1924 L. 12 ; 5 L. 205=1924 L. 581 ; 16 P. 593=1937 P.W.N. 897 ; 1937 M.W.N. 333. A statement intended to be proved as a dying declaration under sec. 32 need not be recorded by a Magistrate. Law does not require such statements to be made necessarily under expectation of death. 190 I.C. 322. The value of a dying declaration altogether disappears when parts of it have obviously been supplied to the dying man by other persons, whether interested parties or police officers. A "touched up" dying declaration has no value. 36 P.L.R. 24=1934 Cr.C. 1126=1934 L. 805. *See also* 1941 Pat. 409. A dying declaration which names only one person where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant, is the very strongest possible form of evidence. But where a large number of people are implicated, it is a very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted. 43 P.L.R. 598= 1941 Lah. 368. Statements by deceased as to the cause of his death are admissible, not only as against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death in cases in which the cause of that person's death comes into question. (35 I.C. 993 and 2 Weir 750, Foll.) 162 I.C. 491=1936 R. 187. The deceased had received numerous and very serious injuries on his head and it was very doubtful whether under such circumstance he would have been able to utter even a single word. There was no definite opinion of the doctor as to whether deceased would have been then able to speak. *Held*, that the evidence of the prosecution witnesses in respect of the alleged oral dying declaration of the deceased should be discarded. 8 Luck. 570=1933 O. 333. As to mode of proving dying declaration, *see* 6 L.L.J. 115=1924 L. 12. Statement must relate to the injuries by which death was caused. Sub-cl. (1) applies to the class of statement made by a dying declaration as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. 4 L. 481=1924 L. 253 ; 1929 S. 250. *See also* 29 N.L.R. 251 =1933 N. 136. Evidence Act makes dying declarations relevant facts as written statements of deceased or written records of verbal statements which the deceased makes and which becomes substantive evidence of the cause of deceased's death. 31 I.C. 359=16 Cr.L.J. 759 (M.). *See also* 160 I.C. 597=1936 R. 42. An oral statement of the deceased about the cause of his death may be proved by any one who heard it as well as by the person who recorded it. Under sec. 321, Cr. P. Code, it is not necessary that the Magistrate recording the confession should be called and be asked to refresh his memory by referring to statements of witnesses under sec. 159, Evidence Act. 31 I.C. 359=16 Cr.L.J. 759 (M.) [8 C. 211; 6 C.W.N. 72, Diss.] The rule as to the admissibility of evidence under sec. 32 (1) has worked ill in India. 4 L. 481=1924 L. 253. On trial for forgery one of the accused who had made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under sec. 32, Cl. (3). *Held*, that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made. 25 Bom.L.R. 248. Affidavit of a person who died subsequently and was not subjected to cross-examination is not admissible. *See* 1927 M. 507=52 M.L.J. 477. A dying declaration can be used as evidence even though the accused is not charged with the offence of homicide. 6 P. 747=1928 P. 162. Although the statement made by the deceased to the doctor just before his death is admissible in evidence as dying declaration, still in order to convict the accused of murder there must be independent corroboration of facts and circumstances to prove the offence. 1929 P. 249. A dying declaration made at the time when a person is in a precarious condition does not cease to be such and become inadmissible under sec. 32 of the Evidence Act merely because the declarant happens to linger for a few days more. 113 I.C. 177=1929 L. 64. Or because he was not aware that he was dying when he made it. 1935 L. 94=16 L. 589. First Information Report is admissible under sec. 32 (1) where it is the statement of a person who is since dead relating to the circumstances of the transaction which resulted in death. 1930 L. 450. Statement by deceased before Third Class Magistrate not competent to record statement under Cr. P. Code, sec. 164, is yet relevant under sec. 32 (1). 1930 L. 60. The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. 52 C.L.J. 425. Where the case for the prosecution depends upon the deathbed statement of a man who was admittedly kept back from hospital in order to be instructed about his statement and it is also shown that his

NOTES.

statement regarding witnesses to the occurrence was false, his declaration cannot be relied upon for convicting the accused named by him. 1930 M.W.N. 1211. *See also* 32 L.W. 940=59 M.L.J. 876. (A dying declaration is relevant evidence under sec. 32, but it is not entitled to any peculiar credit.) A statement falling under sec. 32 (1) may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. A statement by the deceased that he is proceeding to the spot where in fact he was killed later, or as to his reasons for so proceeding or that he had been invited by a particular person to meet him, or that he was going to such person would each of them be circumstances of the transaction, and would be so whether the person, was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The "circumstances of the transaction" must have some proximate relation to the actual occurrence, though, as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. The "circumstances" are of the transaction which resulted in the death of the declarant; it is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, the condition or the admissibility of the evidence being that "the cause of (the declarant's) death comes into question." 66 I.A. 66=43 C.W.N. 473=1939 P.C. 47=(1939) 1 M.L.J. 756 (P.C.). Where the statements are as to the circumstances of the transaction which resulted in the death of the person making them, they are admissible under sec. 32 (1), in a case in which the cause of that person's death comes into question, and it is immaterial that the person who made them, was not at the time when he made them under expectation of death. The nature of the proceedings in which the death comes into question also does not matter. It need not necessarily be a proceeding on a charge of murder or homicide. It may be even a civil action. 190 I.C. 849=1940 N.L.J. 459=1940 Nag. 340.

Under sec. 32 it is only statements made by the deceased as to the cause of his death or the circumstances of the transaction that resulted in his death which can be admitted. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death cannot be admissible. Statement by the deceased which provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed a relation of his in a civil suit which are in no way associated with the actual murder cannot be admitted under sec. 32 and must be excluded. Even if the accused does not object to such evidence, it must be excluded. At any rate it is the duty of Public Prosecutor to see that such wholly inadmissible evidence is not placed before the Court. 1940 M.W.N. 937=52 L.W. 495=(1940) 2 M.L.J. 715. *See also* 1941 P.W.N. 255=22 Pat.L.J. 327=1941 Pat. 362; 1941 Mad. 101; I.L.R. (1941) Nag. 110.

A statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. Such a statement does not necessarily require corroboration. It is not possible to lay down any hard and fast rule as to when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement. I.L.R. (1940) Mad. 158=1940 Mad. 196=(1940) 1 M.L.J. 124 (F.B.). *See also* 1940 M.W.N. 163. It is, no doubt, improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person. But in cases where the assailant has not been recognized, the Court must not ignore the possible temptation that there may be, if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated provided that the Court is fully satisfied that it is true. But before so acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. Special caution is needed in dealing with a dying declaration when the prosecution evidence shows signs of attempt to improve and develop it at successive stages, or when there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders. 194 I.C. 186. Where the statement in question was said to have been made months before the alleged murder, *held*, that it could hardly come within the terms of sec. 32. 174 I.C. 36=66 C.L.J. 196=1938 C. 125.

DYING DECLARATION—WHEN NOT ADMISSIBLE.—A statement by a dying person not about the circumstances of his death, but about a dacoity that was taking place at the time of his death is not admissible under sec. 32 (1) in a trial for the dacoity. Nor can those statements be admissible under sec. 32 (3) unless they would have exposed him to criminal prosecution. 20 I.C. 990=14 Cr.L.J. 510. A dying declaration which contradicts itself in its various parts is inadmissible. Even if it is admissible its evidentiary value is negligible. 108 I.C. 526. It is not safe to base a conviction on the dying declaration of the deceased, when the other evidence in the case is tainted and has to be rejected. 150 I.C. 819=11 O.W.N. 851 =1934 O. 405. *See also* 164 I.C. 139=37 Cr.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

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L.J. 990=1936 R. 324; 176 I.C. 683=1938 R. 282. A dying declaration which comes under sec. 32 (1) of the Evidence Act from the point of view of admissibility, should not be put on a different footing from any other piece of evidence, so far as the appraisement of its evidentiary value is concerned. It is always a question of fact as to whether it should be relied upon or not. Merely because a part of the statement is untrue, it does not follow that the rest of the dying declaration also should be discarded and disbelieved. If a tribunal finds that a part of it is concocted, it would decline to believe the rest of it without corroboration; but the Court or the jury is not debarred from accepting the rest. Declaration of this type ought to be corroborated. 40 C.W.N. 1377=1936 C. 793; 1938 R. 282; 1941 Mad. 290; 1941 Pat. 409.

Dying Declaration, Proof of.—160 I.C. 597=1936 R. 42. A statement of a deceased person recorded in the absence of the accused is not admissible under sec. 33. Nor is it admissible under sec. 32 (1) unless it is proved by the Magistrate who recorded it or by some one who heard it made. 20 I.C. 220 =14 Cr.L.J. 396. Where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record *seriatim* in his evidence if he is satisfied that it was correctly recorded; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question. 1941 Rang.L.R. 258=1941 Rang. 301. The dying declarations of a deceased person are admissible under sec. 32 (1). The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all. 176 I.C. 471=1938 Pesh. 33. A dying declaration recorded by a Magistrate is not evidence unless proved by the statement of the Magistrate though he is himself the committing Magistrate in the case. A Court cannot be beyond the rule that every statement placed on the record must be properly proved. Dying declarations are not covered by the provisions of Chap. XLI of the Cr. P. Code. 18 I.C. 883=14 Cr.L.J. 131. A dying declaration reduced to writing but not signed by the deponent is not admissible in evidence but must be proved by the oral testimony of the person who heard it. 23 I.C. 195=10 N.L.R. 19. Notes of police officer relating to a dying declaration are not admissible in evidence, unless signed by the deponent, but in testifying to it, he can refer to them to refresh his memory. (*Ibid.*) Where a statement is relevant under the provisions of sec. 32 (1), Evidence Act, it is not inadmissible by reason of the fact that the magistrate who recorded it was not competent to record of a witness under sec. 164, Cr. P. Code. 1941 Rang. L.R. 258=1941 Rang. 301. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made and that statement is not the document made by the Magistrate. 67 I.C. 577=1924 L. 12. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made. 1924 L. 12. *See also* 49 C. 358=71 I.C. 685; 1930 L. 450. The method of proving a dying declaration is by examining the person who recorded the statement as to what the deceased said or to examine some person or persons who were present at the time and heard the statement being made. Such a statement should go in as a whole or not at all. The Judge cannot admit portions of it; and opportunity should be given to cross-examine the person. 1930 C. 228. A dying declaration recorded by a Magistrate should be proved before it can be accepted as evidence and the fact that the Magistrate was the committing Magistrate makes no difference. 17 P.R. 1911 (Cr.)=14 I.C. 417. Dying declarations are not covered by Ch. XLI of the Cr. P. Code to enable them to be admitted without proof. (*Ibid.*) A dying declaration made after receiving extreme function should generally be believed to be true and acted upon. 12 I.C. 206=12 Cr.L.J. 528. *See also* 1941 Mad. 290. The questions and the signs made in reply by a person unable to speak, taken together might properly be regarded as a "verbal statement" made by a person as to the cause of the death within the meaning of sec. 32 and are therefore admissible in evidence. 49 C. 600 =26 C.W.N. 414=1922 C. 409. Gestures made before the death by the person murdered are admissible in evidence, but the opinion of the witnesses as to the meaning of such gestures is not evidence, the interpretation of the gestures being for the Court alone. 1 P. 401=71 I.C. 353. *See also* 38 Bom.L.R. 818; 173 I.C. 833=1938 P. 153. (Signs and gestures admissible in evidence.) It is safer to rely on the dying declaration rather than on the first information report, for a great sanctity is attached to the former as it is expected that the person who is on the verge of death will tell the truth. 178 I.C. 348=1938 O.W.N. 1103. An injured man who is waiting to be operated on should not be subjected to any-

or is made in course of business;

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

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thing like a third degree cross-examination, by the Magistrate who records his dying deposition; but the Magistrate should not content himself with merely recording the statement made by the injured man; he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. 176 I.C. 683=1938 R. 282.

SUICIDE.—The accused were charged under sec. 330, Indian Penal Code, with having, for the purpose of extorting a confession, caused hurt to one *R*, who committed suicide owing to the ill-treatment. *Held*, that ill-treatment was the cause though not the direct cause of the suicide and although the accused were not legally responsible for the suicide, the whole affair, ill-treatment, and subsequent suicide, being one transaction the statement of the deceased was admissible under sec. 32 (1). 20 P.R. 1916 (Cr.)=35 I.C. 998. Where a woman raped made a statement to her relative shortly after and committed suicide about three days after the occurrence, rape not being the cause of her death, her statement is not admissible under sec. 32 (1). 1930 M.W.N. 702. Statement in a will that one X left a certain house is not admissible to prove adverse possession. 80 I.C. 118.

CAPACITY OF VICTIM TO MAKE DECLARATION.—Where a deceased received a spear wound which penetrated the chest wall on the right side, went through the ribs, through the diaphragm, penetrated the right lobe of the liver, completely penetrated the whole liver and came out of the left lobe of the liver and then went through the stomach and finally through the ribs on the left side of the chest and through the chest wall. *Held*, that there was great difficulty in believing that the deceased could possibly have lived for two hours after receiving an injury of this description, much less could have been conscious. The probability of his ever living to make a dying declaration two hours later were too remote to be considered. 174 I.C. 973=39 Cr.L.J. 508=1938 L. 268. *See also* 174 I.C. 989=1938 L. 262.

Sec. 32 (2).—The expression "*in the course of business*" in sec. 32 (2) means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connection with a course of business, which suggests a series of acts of business; the section would therefore apply to an act or acts of a simple and private nature. 167 I.C. 30=44 L.W. 681=1937 M. 19. The expression "statement made in the ordinary course of business" in sec. 32 (2) means a statement made during the course not of any particular transaction of an exceptional kind, but of business or professional employment, in which the deceased was ordinarily or habitually engaged. 65 C.L.J. 603. Where it is proved that a writer of some accounts kept in the regular course of business is absconding and cannot be found, the entries in the accounts are relevant evidence under sec. 32 and sufficient to charge a person with liability. 1 L.W. 136=22 I.C. 627. Where the writers of the account books produced by a plaintiff are alive and in his service, but are not examined by him, the books cannot be said to have been duly proved as required by law, and are inadmissible in evidence. 152 I.C. 468=11 O.W.N. 1323. In case of death of attestors the written statement of deceased bond-writer as to signing by attestators is admissible. *See* 19 C.W.N. 1148=22 I.C. 654. Collection papers—Admissibility of. *See* 6 I.C. 369. "Court of business," meaning of. *see* 4 Bur.L.T. 185=11 I.C. 854; 13 C.W.N. 71=5 I.C. 376. *See also* 1941 Cal. 193. Value of an incomplete record of a deposition, *See* 22 M.L.J. 453. An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain date and had been refused by him is at best a record of statement by the peon and would be admissible either under sec. 32 (2) or sec. 33 of the Act if the requirements of those sections are complied with. Otherwise the post peon must be called to prove the facts relied on as being evidence of the endorsement. 19 C.W.N. 489=26 I.C. 962. Statement of the deceased's grandfather as to age—Admissibility of. *See* 38 B. 61=12 I.C. 551. *See also* 20 C.L.J. 302. A statement made by a father before a Government Tahsildar as to the age of his son is relevant to prove the age of the son. 9 M.L.T. 220=9 I.C. 324. (25 M. 183=11 M.L.J. 379; 20 C. 758, Foll.) A deposition made by a *Patwari* of a village in the course of the enquiry relating to the Revenue Settlement under the Bengal Regulation does not come under the provisions of sec. 32 of the Evidence Act and consequently inadmissible in evidence. 9 P.L.T. 679=1928 P. 429. Where Jama Wasil Baki papers were proved to be 45 years old, the Court might presume that the writer was dead at the time they were produced and that the same might be admissible in evidence under sec. 32 (2). 55 C. 1216. *See also* 1941 Cal. 41; 44 C.W.N. 993=1940 Cal. 524=I.L.R. (1940) 2 Cal. 559. The Zemindari papers can be used as independent evidence, provided they are brought within sec. 32 (2) of the Evidence Act by showing that the persons who prepared them are dead or cannot be found, but the weight to be attached to them must

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or against interest of maker ;

NOTES.

depend on circumstances. 11 P. 701. Chowhuddibandi or boundary papers of Zemindaries were filed by the zemindars in 1799 in pursuance of a duty. They are, therefore, admissible under sec. 32 (2), the persons making the statements contained in them being dead. 44 C.W.N. 935=1941 Cal. 193. A receipt executed by a deceased person who stood in the relation of cousin to the parties gave the boundaries of an adjacent plot. *Held*, that the document was admissible under sec. 32 of the Evidence Act as a statement made by a deceased person in the ordinary course of his business. 1928 O. 248. Entries made by the Amin in the *Khatian* and *chitta* must be taken to have been made in the ordinary course of business and admissible under sec. 32, sub-sec. (2). 55 C. 1070=1928 C. 448. Report submitted by a process peon who is dead regarding service of notice is admissible. 1933 P. 658. Evidence recorded under Fugitive Offenders' Act is admissible. 112 I.C. 673. Statements of living persons who had not been examined as witnesses are inadmissible. 5 O.W. N. 1111=1929 O. 113.

Sec. 32 (3): RECITAL AS TO OWNERSHIP.—Recitals in document relating not to suit land but to neighbouring land—Not admissible. 8 I.C. 268=1910 M.W.N. 668; 16 C.W.N. 252 =12 I.C. 149; 11 A.L.J. 139=18 I.C. 752. *See also* 99 I.C. 910=1927 C. 234. Part of statement against pecuniary interest—Entire statement, admissible. 42 C.W.N. 359. As to admissibility of recitals in documents between strangers regarding boundaries of lands, *see* 45 C.L.J. 55=1926 C. 948; 44 C.L.J. 582=1927 C. 230 and cases cited therein; 1928 C. 63; 1933 P. 636=145 I.C. 944; 152 I.C. 829=1934 P. 617; 30 L.W. 422 (not admissible). It is well established that a recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. This rule is subject to exceptions. Such a statement can, for instance, be admitted under sec. 32 (3), when it is contained in a document against the proprietary interest of the person making it, when the executant of the document is dead. So also when the executant of the document containing the recital as to boundary is himself a witness in the case, it can be admitted as a contemporaneous statement to corroborate his evidence under sec. 157. 1940 M.W.N. 80=51 L.W. 509=1940 Mad. 450. A road-cess return filed by a Hindu widow under sec. 95 of the Bengal Cess Act is admissible under this section. 18 C.L.J. 633= 22 I.C. 594.

STATEMENT AGAINST INTEREST.—What is, and its admissibility. *See* (1911) 1 M.W.N. 368= 11 I.C. 380; 100 I.C. 542=45 C.L.J. 138. *See also* 29 I.C. 607; 36 M. 19; 18 I.C. 989; 1929 N. 131. Under sec. 32 (3), in order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. An assertion in a deed of gift by the donor that the subject-matter of the gift is his property can by no stretch of reasoning be held to be a statement against the pecuniary or proprietary interest of the donor. 184 I.C. 246= 12 R.P. 235=20 Pat.L.T. 877. *See also* 53 L. W. 731=1941 Mad. 666=(1941) 1 M.L.J. 754. Sub-cl. (3) of sec. 32, read with the opening words of the section is to the effect that a statement made by a person who is dead is admissible in evidence when the statement is against his pecuniary or proprietary interest. (1941) 1 M.L.J. 754. The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely it was against his interest does not afford much guarantee of its truth. I.L.R. (1939) Kar. 573=183 I.C. 67=1939 Sind 145. A statement in a sale-deed by the executant that he was liable for a particular amount is a statement made against the pecuniary or proprietary interest. 30 N.L.R. 192=1934 N. 106. In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent, is admissible in evidence, as the admission of adultery would have exposed him to a criminal prosecution. 150 I.C. 445=1934 A. 618 (S.B.). An isolated piece of paper or memorandum made by a person who is dead, for his own information, about his property, which is not made by him in the ordinary course of his business and which is not one of a continuous series of acts, and which contains nothing against his pecuniary interest and does not expose him to a criminal prosecution or a civil suit, is not admissible under sec. 32. I.L.R. (1940) Kar. 334=191 I.C. 111=1940 Sind 173.

STATEMENT AS TO RELATIONSHIP.—Prior statement by mother that she was the concubine of alleged father—Admissibility in evidence. 10 I.C. 188. Admission of one co-plaintiff or co-defendant, evidence against other. 33 M.L.J. 180=44 I.A. 201=40 A. 159 (P.C.). Although under sec.32 (3) a confession made by a deceased conspirator after he had rendered himself liable to criminal prosecution is not admissible, yet when general evidence of the existence of a conspiracy of which the deceased was a member has been given, such a statement is admissible under sec. 10 of the Act. 33 C.W.N. 1015. The principle upon which a statement made by a dead person against his pecuniary or proprietary interest is regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But a statement made by the deceased widow in proceedings to or gives opinion as to public right or custom, or matters of general interest;

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or relates to existence of relationship;

(5) When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons as to whose relationship [1][by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

LEG. REF.

[1] These words were inserted by Act XVIII of 1872, Sec. 2.

NOTES.

obtain mutation of names in the register in favour of the adopted boy was not against her pecuniary or proprietary interest and was not admissible under sec. 32 (3) of the Evidence Act. 57 I.A. 14=1930 P.C. 79=58 M.L.J. 446 (P.C.). *See also* 14 R. 11=16 I.C. 387=1936 R. 5. A statement by a deceased member of an undivided Hindu family resident in Bengal that he is governed by the Mitakshara school of Hindu Law is admissible in evidence under sec. 32 (3), being a statement against his proprietary interest in properties possessed by him. It necessarily implies that his rights were limited by the rights of the other coparceners and that he had not the free and unrestricted power of disposal. 43 C.W.N. 395. *See also* 1939 Sind 145=I.L.R. (1939) Kar. 573. (Statement as to status in the will of the deceased). Where in a cancelled will the testator has made a statement in the interests of other persons, his sons, against his own interest it is admissible under sec. 32 (3). 1939 N.L.J. 421=1939 Nag. 274.

Sec. 32 (4).—Sec. 32 (4) allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge. In the case of the Mahants, even if they may have had knowledge by means of oral tradition handed down from Mahant to Chela, the opinion would be relevant but not particular facts. 12 L. 497=1931 L. 161. *See also* 16 P. 258=1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.) (Question of limits of a particular revenue *mahal* not in question of public right or general interest.) Statements of deceased persons as to the existence of a family custom are admissible in evidence under sec. 32 (4). 8 Luck. 445=1933 O. 246. Where the question related to the local usage relating to the deep stream boundary rule, one of the witnesses who was the Ziladar for 36 years stated that such custom prevailed from time immemorial, that he was told about it by the former Sarabarakar and a tenant, both of them, since dead. *Held*, that such evidence was admissible under sec. 32, Cl. (4). 146 I.C. 795=1933 A. 376. *See also* 1937 P. 463. (Custom of land tenure). Statement of deceased as to custom—Family custom made after controversy—Admissibility of. 42 C. 532=27 M.L.J. 373 (P.C.). Where the question was whether certain property was dedicated to a *wakf* and certain documents which related to the neighbouring lands and which contained recitals as to the character of the suit property were put in, *held*, that they were admissible in evidence under sec. 32 (4). 33 C.W.N. 439=1929 C. 533.

Sec. 32 (5).—Sec. 32 (5) only requires that the statement tendered in order to be admissible under it, must be one made by a person who had special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. These are the only two pre-requisites to the admission of the statement. It is not further necessary that the statement in question should also be relevant to the matter in issue in respect of which it was made. It is also immaterial whether it was made in a judicial proceeding or otherwise. 167 I.C. 346=1937 P.C. 101=(1937) 1 M.L.J. 646 (P.C.). *See also* 1939 A. 61. Recital in deeds how far evidence. 25 M.L.J. 373=19 I.C. 740. Illustration to sec. 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement. 25 M.L.J. 373. *See also* 163 I.C. 770=1936 O. 340. Witnesses should not be permitted by Court to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirements that the person making the statement had special means of knowledge. The evidence of a family bard as to the relationship of parties is *prima facie* inadmissible if it relates to events long before his birth, as it is hearsay. 176 I.C. 464=40 P.L.R. 162=1938 L. 303. *See also* 189 I.C. 325. Where the question at issue is whether a certain person died issueless, a statement of a deceased that that person died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether that person left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. The existence of any relationship within the meaning of sec. 32 (5) includes the non-existence of such relationship. If a statement relating to the existence of such relationship is evidence under that sub-section, any statement which implies that there is no existence of such relationship between two persons also comes under that sub-section. 191

or is made in will or deed relating to family affairs ;

(6) When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

LEG. REF.

[1]These words were inserted by Ac X /((of 1872, sec. 2.

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I.C. 674=1941 Pat. 205. Statements of witnesses in a prior suit regarding the adoption of a party cannot be admitted in evidence in the subsequent suit in respect of the same question of adoption as they cannot be said to have been made before the question in dispute was raised. 55 M. 40=1932 M. 198=62 M.L.J. 116; 49 L.W. 273=1939 Mad. 446=(1939) 1 M.L.J. 227. A statement by a deceased person that there was a marriage between him and a certain woman is admissible in evidence for the purpose of proving the legitimacy of his children under the provisions of sec. 32, sub-sec. (5) as a statement as to marriage. The doctrines of Mahomedan Law do not exclude evidence of this nature and the Evidence Act applies. 55 A. 139=1933 A. 329. Statement of deceased that his consent to adoption was purchased, how far evidence. 39 M. 12=18 I.C. 989; 160 I.C. 332=1936 C. 1. Statement of deceased members of a family regarding family history and seniority of members is admissible. 1 Luck. 97=1927 O. 278. *See also* 1941 Rang.L.R. 445=1941 Rang. 276. (Statement by a Burman Buddist that his property would go to a particular person). Evidence of a mirasi, who is a hereditary family bard, is admissible to prove pedigree. 58 I.A. 188=12 L. 336=60 M.L.J. 583 (P.C.). So also the evidence of a Hardwar purohit. 133 I.C. 874=32 P.L.R. 696. *See also* 176 I.C. 464=1938 L. 303. Entries in the books of the priests at a place of pilgrimage should be accepted with care. The production of books before the trial Court is essential, and the probative value of such entries is considerably reduced, if they are not placed before the trial Judge. 141 I.C. 622=1934 Pesh. 78. *See also* 39 P.L.R. 370=1937 L. 599. Statement as to commencement of relationship—If, and when can be admitted. 20 C.W.N. 122=21 C.L.J. 96=27 I.C. 739; 1941 Lah. 73. Fosterage is not relationship within this section. Hearsay evidence of fosterage is not admissible under the section to prove the case of fosterage. 24 I.C. 643. *Pedigree*—Admissibility. *See* 30 A. 510=5 A.L.J. 701=13 C.W.N. 1 (P.C.). *See also* 37 A. 600; 1931 O. 177=8 O.W.N. 349. It is the duty of the party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased so as to fulfil the requirements of sec. 32 (5). 1934 A. 117=151 I.C. 338. A pedigree in a Settlement Court is admissible in evidence upon proof that the person making the statement contained in the pedigree was dead and had special means of knowledge. 10 I.C. 199; 8 I.C. 728. *See also* 25 I.C. 823; 105 I.C. 26. A pedigree filed for purposes of preparation of khewat more than 30 years before, when there was no controversy in respect of it, is admissible under sec. 32 (5) when all the signatories to it are dead. 148 I.C. 1041=1934 O. 210. Pedigree table relied on in a suit of 1864 was held to be not admissible under sec. 32. 15 L. 688=1934 L. 283 (2). Statement as to relationship made by a dead member of the family who had special means of knowledge in respect of the relationship of the parties at a time before the question in dispute was raised is admissible to prove correctness of the pedigree. 1941 Lah. 73. A horoscope prepared *ante litem motem* by an astrologer, dead at the time of suit, whose handwriting had been proved by a near relation of his and who used to prepare horoscope for others in the village and consequently must be taken to have special means of knowledge of the date of birth of a party is admissible. 36 C.W.N. 838. *See also* 174 I.C. 756=1938 C. 43. A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is inadmissible in evidence. 38 M. 166=24 M.L.J. 517=19 I.C. 452; 174 I.C. 756=1938 C. 43. A settlement pedigree can be admitted in evidence either under sec. 32 (5) or under sec. 35. If the settlement pedigree is one signed by the members of the family, it would be admissible under sec. 32 (5) as statements of deceased persons as to relationship since such statements would be considered to be of these persons having special means of knowledge. It must, however, be proved that statements were made by them at a time when there was no dispute as to the pedigree set up. If, however, the pedigree is not signed by the members of the family, but is prepared by the settlement officer himself after proper enquiry and bears his signature, it can be admitted under sec. 35 of the Act, as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties. 4 Luck. 39=1929 O. 129. *See also* (1937) 2 M.L.J. 772 (P.C.). Before a pedigree or table of relationship can be admitted in evidence, it must be shown that it is a statement made by a person having special means of knowledge and made before the question in dispute had arisen. 43 Mys.H.C.R. 21=16 Mys.L.J. 137. Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under sec. 32 (5), in a charge under sec. 368, I. P. Code. 120 I.C. 81=1929 S. 250. A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the estate. 1929 S. 250. *See also* 165 I.C. 523=1936 O.W.N. 1167=1936 or in document relating to transaction mentioned in section 13, clause (*a*) ;

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

NOTES.

O. 170. But *see* 4 S.L.R. 225=10 I.C. 967 (25 M. 183; 20 C. 758; 24 M.L.J. 49, Foll.). An entry in the scholars' register made by the father, since deceased, as to his son's age would be admissible. 5 O.W.N. 1111=1929 O. 113; 165 I.C. 523=1936 O. 170. So also statements of deceased's father as to approximate date of birth of his son. 165 I.C. 523=12 Luck. 606 =1937 O. 170. The words "relating to the existence of any relationship" are wide enough to include statements about the birth and death of relatives which events either commence or terminate the relationship. A statement in a guardianship petition made by a person's aunt that he was born on a certain day and that she was his aunt is admissible in evidence as it relates to the existence of relationship. 20 C.L.J. 621=28 I.C. 595. Statement as to age of adopted son by adoptive mother—Admissibility. 149 I. C. 781=1934 A.L.J. 318=1934 A. 406 (F. B.). A statement put in during the inam enquiry by a vakil on behalf of certain inamdars though not signed by them may be presumed to be authorised and is admissible as evidence of the genealogical table contained therein. 55 M. 40=1932 M. 198=62 M.L.J. 116. Statements of deceased relatives, servants, and dependents are admissible, for proving family relationship. In every case it is a question of fact if the person who made the statement had special means of knowledge. 55 M. 40. Statements after dispute arose are not admissible. *See* 25 A.L.J. 861. On this clause, *see also* 22 A.L. J. 657=46 A. 665=1924 A. 575. A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence. 3 Luck. 416=1928 O. 233; 3 Luck. 326=1928 O. 307. *See also* 1939 Sind 145. Where the statement of witness giving the pedigree is found to be inadmissible under sec. 32 (5), but he deposes to facts which establish such treatment as is contemplated by sec. 50, it should be admitted to that extent. 151 I.C. 338=1934 A. 117. Statement made in suit in which the issue was the same. *See* 7 P. 90=1928 P. 113. Though a person cannot claim a title under an unprobated will, he can rely upon a statement contained therein indicating the relationship of the parties. 7 P. 733=1928 P. 459. The English Law with regard to evidence or matters of pedigree differs in some respects from the Indian Law. Under the Indian Law only such evidence will be admissible which consists of (1) statements by a deceased person regarding relationship who had special means of knowledge when the statements were made before the question in dispute was raised, and (2) like statements in a will or deed relating to the affairs of the family when made before the question in dispute was raised. 110 I.C. 428 (2)=1928 P. 539. *See also* 163 I.C. 770=1936 O. 340. Under the English law the admission of hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. The Indian law as laid down in sec. 32 is not so strict. 1934 A.L.J. 318=1934 A. 406 (F.B.).

Sec. 32 (5) and (6): "Family Pedigree."—Meaning of. 1 Luck. 700. As ordinarily understood, a pedigree is an ancient family record handed down from generation to generation and added to, as a member of the family dies or is born; but a statement drawn upon a particular occasion, for a specific purpose, by a member of the family, is not a pedigree in the sense in which it is used in sec. 32 (6) and has to be treated as a mere declaration made by the person who made or adopted it. 16 Mys.L.J. 137=43 Mys.H.C.R. 21. As to the presumption of genuineness of pedigree tables, *see* 105 I.C. 81; 1928 N. 20. Where there are a number of pedigrees put in by the direct ancestors of parties to the case and they are always the same, a fact which cannot be due to chance. There is a design in the way they are prepared and that design can only have been to give the correct order. 178 I.C. 950=1938 O.W.N. 1267=1939 Oudh 17. Entries in *Panda's* register or note books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication. 15 I.C. 625 [30 A. 510; 35 I.A. 166=18 M.L.J. 424=13 C.W.N. 1 (P.C.)]. *See also* 178 I.C. 950=1938 O.W.N. 1267=1939 O. 17. Pedigree— Admissibility— Proof of — Person making the statement not known. *See* 37 A. 600 =13 A.L.J. 817=30 I.C. 505. *See also* 30 A. 510 (P.C.); 8 I.C. 728; 21 I.C. 274; (1937) 2 M.L.J. 772 (P.C.). Objections to the admissibility of evidence taken at a late stage in litigation are not to be encouraged. The proper time to object is at the trial when the evidence is tendered. 37 A. 600=13 A.L.J. 817; 30 I.C. 505. *See also* 30 A. 510 (P.C.); 8 I.C. 274. Statements of deceased mortgagor in mortgage deed admissible to prove relationship. 29 I.C. 974. *Pandah's bahis* are admissible under sec. 32 (5) and (6) and sec. 90 only if evidence is led to prove the identity, signature and handwriting of the writer. The mere fact that such bahi is old is no justification for admitting it either under sec. 32 (5) and (6) or under sec. 90. 190 I.C. 597=1940 Lah. 245. A purohit's statement regarding relationship is admissible only if it comes within the four corners of sec. 32 (5) and (6) or under sec. 50 of the Act. 190 I.C. 597=1940 Lah. 245.

Sec. 32 (7).—Statements of facts contained in a will executed by a Hindu coparcener to the effect that the properties dealt with in the will are his self-acquired properties are admissible in evidence under sec. 32 (7) to prove the character of the properties. But or is made by several persons and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(*a*) The question is, whether *A* was murdered by *B*; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by *B*; or

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A's* widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(*b*) The question is as to the date of *A's* birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended *A's* mother and delivered her of a son, is a relevant fact.

(*c*) The question is, whether *A* was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended *A* at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d*) The question is whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e*) The question is, whether rent was paid to *A* for certain land.

A letter from *A's* deceased agent to *A* saying that he had received the rent on *A's* account and held it at *A's* orders, is a relevant fact.

NOTES.

being a self-serving statement it will require and justify scrutiny in the light of other evidence in the case. I.L.R. 1937 M. 1012=45 L.W. 422=1937 M. 538. *See also* 1939 Sind 145. The recital in a deed of gift to the effect that the executant and her husband have made a gift of certain properties to the daughters as stridhanam at the time of her marriage and that she was executing a formal conveyance in pursuance of the oral directions of her husband is admissible in proof of the earlier gift in a case covered by sec. 32. 61 M.L.J. 887. *See also* 162 I.C. 999=1936 P. 315; 1940 M.W.N. 983=52 L.W. 440 (Statement as to age of testator written in will by scribe at the instance of persons present at the time—and not by testator—not relevant). Where the validity of an adoption made by a person who had two aurasa sons affected with leprosy is in question, the statement contained in the registered deed of adoption setting out that fact as the ground for the adoption is admissible in evidence under this clause. 54 M. 576=61 M.L.J. 19. Statements made before the sub-registrar by the deceased attestors to a will are admissible under sec. 32 (7) taken with sec. 158, but not under sec. 33, of the Evidence Act. 1933 M.W.N. 1148. *See also* 165 I.C. 785=1936 O.W.N. 1203=1936 O. 133 (Statement as to separation and partition among brothers). A statement of a deceased person contained in a deed of family settlement to the effect that after the death of his father a partition was effected amongst the brothers is a statement which is not admissible in evidence under sec. 32 (7) or under any other provisions of the Act to prove separation. The statement is obviously in the interest of the person who made it, and he, if alive, could not have made use of such an admission in his favour nor could his sons do so. 165 I.C. 785=1936 O.W.N. 1203=1937 O. 133. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 8 Luck. 445=1933 O. 246. Where the permanent character of a tenancy is in issue and the tenancy would be transferable only if it were permanent, every transaction of transfer will be relevant under sec. 13 (*a*) of the Evidence Act as a transaction by which such permanent right was asserted. Statements supporting such permanent right made by dead persons in the documents evidencing these transactions would, therefore, be admissible under sec. 32 (7). 45 C.W.N. 590.

Secs. 32 (2) and 34.—The term "*book*" as used in secs. 32 (2) and 34 of the Evidence Act implies a collective unity of sheets even at the time that the entries come to be made. It connotes an intention that it should serve as a permanent record. But beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A number of sheets of paper stitched into a book before the entries have begun to be made, each entry covering both the sheets, *i.e.*, the entry beginning on the left page and running on into the right page, and kept by a creditor as an account of his cash receipts and disbursements is a "book" within the meaning of secs. 32 and 34, judged by the standards prevailing amongst Indians who keep private books of account not meant for trade purposes. Entries in such a book are admissible in evidence under sec. 32 (4); and the entries to be admissible need not necessarily be against the pecuniary interest of the persons making the entries. 44 L.W. 467=1936 M. 871.

(*f*) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g*) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(*h*) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(*i*) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(*j*) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased Banya in the ordinary course of his business, is a relevant fact.

(*k*) The question is, whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

(*l*) The question is, what was the date of the birth of *A*.

A letter from *A's* deceased father to a friend announcing the birth of *A* on a given day, is a relevant fact.

(*m*) The question is, whether, and when, *A* and *B* were married.

An entry in a memorandum-book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

(*n*) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of the crowd of spectators on these points may be proved.

Relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated.

33. Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

NOTES.

Sec. 33 : CONSTRUCTION.—Sec. 33 must be very strictly construed. 31 I.C. 354=17 Bom. L.R. 590. Affidavit of person who died subsequently and who was not subjected to cross-examination is not admissible. 1927 M. 507=52 M.L.J. 477.

CONDITIONS OF ADMISSIBILITY OF EVIDENCE—Per *May Oung, J.*—The power given by sec. 33 requires to be exercised with great care and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. The Court must also in the judgment or preferably in a separate order, record the reasons for doing so. 1 R. 512=76 I.C. 817=1924 R. 209 ; 1930 C. 756. *See also* 25 O.C. 142=74 I.C. 860=10 Lah. 837 ; 1929 L. 542. Under sec. 33 before a certain evidence given by a witness in a judicial proceeding can be admitted in a subsequent judicial proceeding, it must be established that the questions in issue were substantially the same in the first as in the second proceeding. It is not necessary, however, that any specific issue need have been raised regarding any particular matter in issue between the parties, but the matter must have been in issue between them. 49 L. W. 273=1939 Mad. 446=(1939) 1 M.L.J. 227. *See also* 1939 Rang. 225. The fact that the counsel for accused gave his consent does not make any difference. 1929 L. 542. The provisions of this section are not in any way affected by sec. 350 of the Cr. P. Code. 101 I.C. 483=1927 L. 332 (5 L. 115, Doubted). Death of witnesses before completion of cross-examination—Admissibility of deposition in evidence. 25 A.L.J. 775=50 A. 113. *See also* 31 C.W.N. 908. On this section, *see also* 1924 A. 85 ; 1925 R. 89. It is the duty of the Court to satisfy itself that the presence of the witness cannot be obtained without an amount of delay or expense with it considers unreasonable before the statement of the witness in a previous judicial proceeding can be admitted. The mere statement of the public prosecutor to that effect is not sufficient. There must be independent evidence *prima facie* the consent of the accused or his counsel is presumptive evidence of the absence of prejudice. 28 M.L.J. 329=28 I.C. 518=39 M. 449. *See also* 1930 C. 756 ; 1930 L. 1041; 1929 L. 542 (the consent of the accused counsel is immaterial). But where a witness available before Magistrate whose whereabouts not known at the sessions trial—Evidence tendered before Magistrate can be taken into account. 33 C. W.N. 918=1929 C. 765 ; 35 C.W.N. 143 (witness absconding). Evidence taken in trial for dacoity is not admissible in a trial under the Arms Act. 36 I.C. 480=10 Bur.L.T. 121. Evidence taken before Magistrate without jurisdiction is inadmissible in a subsequent trial before competent Magistrate. 7 L. 396=97 I.C. 752=1926 L. 582. As to statement made before enquiring Magistrate, *see* 1926 P. 58. *See also* 35 P.L.R. 75=1934 L. 212 ; 1934 C. 766.

ILLUSTRATIVE CASES.—No proceeding is a 'judicial proceeding' within the meaning of the

Provided—

that the proceeding was between the same parties or their representatives in interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

NOTES.

section if it is conducted by a Court which has no jurisdiction to undertake it. 54 M. 561=61 M.L.J. 120. Where the Munsif, after the examination of a witness, returned the plaint subject-matter was above his pecuniary jurisdiction, the evidence of the witness so examined is not admissible in evidence in the subsequent trial before the Sub-Judge even though the witness died in the interval and so could not be examined afresh. 54 M. 561. As the person against whom proceedings have been instituted under sec. 476 of the Criminal Procedure Code has no right to cross-examine witnesses during that enquiry, the evidence of witness in that enquiry, who is not forthcoming at the trial started on the result of such inquiry, is not admissible under sec. 33. 34 I.C. 969=17 Cr.L.J. 249=18 Bom.L.R. 284 ; *also* evidence given in proceedings under sec. 145, Cr. P. Code, by one defendant for another. 30 C.W.N. 254=93 I.C. 115=1926 C. 705. The deposition of a material witness which was relied upon by the Judge in his summing up the jury, who resided within the jurisdiction and could be procured without unreasonable expense and delay is not to be admitted under sec. 33 as justice requires that such a witness should be examined in the presence of the accused. 31 I.C. 354=17 Bom.L.R. 590. A mere statement of a police officer that a witness is a man of another district and cannot be found is not a sufficient ground for the reception of evidence under sec. 33. 41 C. 601=26 I.C. 161. At a sessions enquiry an approver was examined in chief but the accused were not asked then and there to cross-examine him and did not in fact dare to cross-examine and he died before trial in the Court of Sessions. *Held*, that it was doubtful whether his evidence was admissible under sec. 33 and that in any case its value was small. 18 I.C. 406=17 C.W.N. 230. Consent of parties to treat evidence in another case as evidence in the case—Legality. *See* 1914 M.W.N. 930 ; 1927 M. 1107=104 I.C. 518. *See also* 17 C.W.N. 230=18 I.C. 406. In the absence of proof of the circumstances mentioned in the section the importing in bulk in a civil suit of deposition of witnesses recorded in a criminal trial is a serious irregularity. 39 B. 441=29 M.L.J. 34=42 I.A. 135 (P.C.). *See also* 106 P.R. 1915. Where the interests are identical and then the object of litigation is to advance a common claim, evidence given in former judicial proceedings can be received in evidence under this section in a subsequent proceeding even against persons not parties to the previous litigation. 28 M.L.J. 669=24 I.C. 519. Suit to enforce registration of will—Judgment based on evidence adduced before the registering officer and treated as evidence in the suit by the consent of parties—Judgment unsustainable. 41 M. 731=34 M.L.J. 526=46 I.C. 849. *See also* 35 M.L.J. 657=42 M. 103. Neither the findings nor the evidence in ejectment proceedings in Revenue Court are admissible in a civil suit to recover possession by a person ejected in consequence of the proceedings in the Revenue Court. 106 I.C. 313=1928 L. 43. Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings and so statements made therein as to the existence of a custom are not admissible in a subsequent civil suit between the parties. 4 A.W.R. 1208=1935 A. 187. *A* and *B* were jointly tried. The depositions of witnesses in previous criminal proceedings between *B* and the complainant are not admissible even with the consent of the accused's counsel. 1928 R. 284. In a warrant case until the stage provided for in sec. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible under sec. 33. 1929 Cr.C. 669=1929 C. 822. But *see contra* 1935 N. 8. Reservation by Committing Magistrate of cross-examination of witness *suo motu*—Evidence cannot be admitted in Sessions Court. 1930 Sind 54=120 I.C. 524. Evidence recorded for the purposes of proceedings under the Fugitive Offenders Act is admissible under secs. 32 and 33 in proceedings under Penal Code against the same accused. 1928 Sind 161.

Sec. 33, Proviso.— Object—" Representative in interest"—Meaning of. 60 I.A. 336=1933 P.C. 202=65 M.L.J. 479 (P.C.). The term "representatives in interest" in the proviso to sec. 33 of the Evidence Act would include persons who have derived title from another. It also includes persons having the same interest in the subject-matter of the litigation and comprises all persons on whose behalf, though not in their names or as representing them, the previous litigation was carried on. In other words, all persons whose rights are litigated *bona fide* by a person virtually on behalf of a class, though they themselves are not *eo nominees* on the record, will be considered in the eye of law as representatives in interest of the previous litigant. 16 Mys.L.J. 77=43 Mys.H.C.R. 113. The words "representatives in interest" mean that the parties in the second proceeding in which evidence is tendered must be the representative in interest of the parties in the first proceeding, or in other words

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant.

34. [1] Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

LEG. REF.

[1] *Cf.* Sec. 240, Companies Act (VII of 1913) and Sch. I, O. VII, R. 17, Civil Procedure Code, 1908. As to admissibility in evidence of certified copies of entries in Bankers' Books, *see* sec. 4 of the Bankers' Books Evidence Act, 1891.

NOTES.

should be persons who derive their title through or claim under them or, shortly are their privies. Sec. 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same or similar. 102 I.C. 713=1927 M. 733. The term "representatives in interest" includes "privies in estate" (as) partners and joint contractors. 5 P. 777. The phrase "representative in interest" may not for all purposes be synonymous with the expression "persons claiming under" in sec. 11 of the Civil Procedure Code. 55 M. 40=62 M.L.J. 116. In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under sec. 33, regard must be had to the state of affairs when the evidence is sought to be admitted. Where the defendant in a subsequent suit was the natural son of the plaintiff in previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person, held the depositions in the previous suits were not admissible. 51 M. 893=55 M. L.J. 894 (F.B.). A deposition on which there was no opportunity at all to cross-examine, is not admissible under sec. 33. 39 L.W. 34 =1934 M. 100. Sec. 33 does not require that the adverse party should have actually exercised his right to cross-examine the witness. It is enough if he had the opportunity to cross-examine on the occasion. (8 C.W.N. 838, Ref.) 151 I.C. 683=1934 P. 413. The true reading of sec. 33 is that the adverse party in the first proceeding had both the right and the opportunity of cross-examining and not "the right or opportunity to cross-examine." 57 I.A. 14=52 A. 1=58 M.L.J. 446=1930 P.C. 79 (P.C.). Where the party was not allowed to cross-examine in a prior proceeding the previous statement is not admissible in the later suit. 58 M.L.J. 446.

EXPLANATION.—The inquiry before the Coroner, although it may be a judicial proceeding is not a proceeding between the prosecutor and the accused and therefore the deposition of a witness taken in an enquiry before the Coroner cannot in the event of the death of the witness, be taken into account at the trial before the High Court. 35 Bom.L.R. 1020=1933 B. 479 (1).

PROCEDURE.—Before the evidence of a person who cannot be found can be admitted under sec. 33, there must be a finding by the Court that reasonable exertion had been made to find him. The mere report of the process-server that the witness cannot be traced is insufficient for enabling the Court to base its finding upon such evidence. 1939 M.L.R. 12 (Cr.). It cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under sec. 33. Difference between English and Indian conditions regarding facilities for obtaining qualified doctors pointed out. 31 C.W.N. 908=1927 C. 679. "Where an entry appears in a book of account it comes both under sec. 32, cl. (2) and sec. 34 of the Evidence Act. The only material difference as between an entry relevant under sec. 32 (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not." Per *Mukerji, J.*, in 55 C. 1167=32 C.W.N. 580.

Sec. 34: BOOKS "REGULARLY KEPT IN THE COURSE OF BUSINESS"—MEANING OF.—14 Cr. L.J. 262=19 I.C. 534. As to what constitutes "regularly kept" accounts and as to the effect of irregularity in keeping accounts, *see* 95 I.C. 128=1926 N. 407; 138 I.C. 716; 9 O.W.N. 932. *See also* 4 B. 576; 13 C.L.J. 139=8 I.C. 81; 13 I.C. 678; 7 I.C. 1011. Sec. 34 cannot be read as meaning that there should be independent evidence, besides the entries in books of account, that such and such articles valued at such and such amount were supplied on such and such date. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in the entries actually took place. In the case of transactions which are numerous and which extend over some length of time it is not reasonable to expect independent evidence to be given to prove each and every particular transaction. In such case the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books would not be enough. There must be some evidence to corroborate those entries. The evidence of the person who wrote the account books and in whose presence the transactions took place would be the best corroboration. Since he cannot possibly have independent recollection of the various transactions, he may, as provided in sec. 159 of the Evidence Act, refresh his memory by referring to the account books. But, it is not necessary for him to prove that such and such articles valued at specific amounts were supplied on specified dates. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect would be the same. Where however, the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon

Illustration.

A sues *B* for Rs. 1,000, and shows entries in his account books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence, to prove the debt.

NOTES.

to prove those particular transactions. Mere general evidence to prove that the account books were regularly kept is not enough. 20 Pat. 273=22 Pat.L.T. 383=1941 Pat. 430. The rule that plaintiff's own statement on oath in support of entries can be sufficient to support the entries in his Bahies so as to fix the defendant with liability is applicable only if it is found that the plaintiff's books are regularly kept in the course of business and free from any doubt. It is essential that entries of all the available Bahies (*e.g.*) Rokar, Pakki and Kachi, Nakal and Khata relating to the money claimed should be filed along with the plaint. The tendency on the part of creditors to base their claim solely on entries in Khata Bahi is to be strongly deprecated. 1939 M.L.R. 216 (Civ.). It is only the account books that are properly kept that are admissible in evidence as relevant. 51 A. 519=27 A.L.J. 115=1929 A. 170. A book of account may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transactions take place. 38 C.W.N. 861. Account prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence. 51 M. 291=45 M.L.J. 703. It is a matter of intrinsic evidence as to whether the books in question were books of account and kept regularly in the regular course of business. The only limitation imposed by the statute is that the statement, contained in the account books "shall not alone be sufficient to charge any one with liability." The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability. 51 A. 864=1930 A. 38. *See also* 1930 A.L.J. 987; 1936 O.W.N. 582; 16 Luck. 36. Entries in account books unless corroborated not sufficient to fasten liability. 1930 A.L.J. 987. Proof of accounts, *see* 100 I.C. 853=1937 N. 177. Under sec. 34, the production of account books alone is not enough to make a person liable. But it is a question of fact as to how much evidence is required to create the liability when taken together with books of account. Every case shall have to be decided on its own merits. In a case where the witness, who produces the account books, is reliable and has personal knowledge, the Court may accept his statement as enough proof combined with the books of account. In cases however in which the witness is not reliable at all, the Court would require more proof. 1937 Pesh. 103. If in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of sec. 34 are fulfilled. 35 P.L.R. 539. Mere production without more of account books, does not prove anything. There must be proof, not only of the books, but of each entry and item of account. 23 L.W. 272=1926 M. 955. *See also* 1927 L. 903; 1930 A.L.J. 987; 1933 L. 384=34 P.L.R. 46; 176 I.C. 99=1938 A.L.J. 449=1938 A. 353. Where the plaintiff produces account books and deposes that they are regularly kept and are correct, and he is not cross-examined on the point, his testimony supported by the account book is legally sufficient to establish his claim. 1933 L. 212=145 I.C. 157. "Account" implies reckoning and totalling and balancing. Where these are not done there is no account. 1933 L. 212. *See also* 10 N.L.R. 44=23 I.C. 193. Books of account, if no balances have been struck in them may be inadmissible under sec. 34, but they are however admissible under sec. 32 (2) as entries or memoranda, made by persons who are dead, in books kept in the ordinary course of business. 30 N.L.R. 192=1934 N. 106. "Books" mean sheets of paper permanently bound. Unbound sheets are not books of account. 15 Cr.L.J. 241=23 I.C. 193. It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate, without coming to a specific finding that the books produced were as a matter of fact fabricated and without giving reasons therefor. 14 P.L.T. 61=1933 P. 145. Where a number of blank spaces are left in the *rokar bahi* in different places, the conclusion by the Court that it is unreliable is fully justified. 41 P.L.R. 295.

RELEVANCY OF ENTRIES IN BOOKS OF ACCOUNT.—*See* 5 M.I.A. 432; 4 Beng.L.R. (P.C.) 31; 13 M.I.A. 365; 16 Luck. 36; 3 N.W.P. 308; 5 W.R. 242. Such books can be used to refresh memory of witness. 29 C. 774. Such entries are relevant though not sufficient by themselves to charge a party with liability. 16 A. 161; 18 A. 92; 1 M.I.A. 47=5 W.R. (P.C.) 29. They would be good corroborative evidence. 23 W.R. (P.C.) 27. Such entries must be corroborated by other evidence in order to find a liability upon. 22 W.R. 549; 23 W.R. (Cr.) 27. Such entries need not be made by or at the dictation of a person who had a personal knowledge of the truth of the fact stated. 1 B. 610. Entries in account books are relevant as admissions against the party even when the entries are written by his agent. 38 C.W.N. 861. The noting of the items in an account book kept regularly by a *munim* in whose presence the money was not paid is no evidence. 1923 L. 431 (1). As to what constitutes being kept in the regular course of business, *see* 4 B. 576. Although the actual entries in books of account are relevant, the book itself is not relevant to disprove an alleged transaction by the absence of any entry concerning it. 10 C. 1024; 30 C. 24. But *see contra* 1924 N. 22 in which it was held that the absence of an entry in an account book is relevant fact admissible in evidence. (4 C.W.N. 207, Relevancy of entry in public record made in performance of duty.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant, in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

NOTES.

Foll.) *Jama-wasil-baki* papers—Admissibility of. *See* 5 W.R. 243; 7 W.R. 533; 27 C. 118; 32 C. 582; 46 C.L.J. 253=1927 C. 855. *Jamabandi* papers—Admissibility of. *See* 6 B. L.R. App. 62; 14 W.R. 473; 9 W.R. 451; 1 N.W.P. App. 65; 22 W.R. 256; 22 W.R. 207; *Ibid.* 540; 23 W.R. 456; 20 W.R. 142 (171); 1928 P. 429 (are in the nature of account books and admissible). As to zamindari papers, *see* 19 Pat. 398=1940 Pat. 622. Where a number of blank spaces are left in the *rokar bahi* in different places, the conclusion by the Court that it is unreliable is fully justified. 184 I.C. 858=41 P.L.R. 295=1939 Lah. 412. *Jaibaki* papers, not admissible, unless party sought to be bond was shown to have agreed thereto. 9 W.R. 274. As to *Bahi* entries, *see* 41 P.L.R. 373=1939 Lah. 438.

OBJECTION TO ADMISSIBILITY.—An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complied with the requirements of being kept regularly and in the ordinary course of business. 1932 L. 417=33 P.L.J. 745. *See also* 1940 O.W.N. 555=1940 Oudh 385. Where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of trial. 32 I.C. 665=17 Cr.L.J. 73 (M.). Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident. 1928 P.C. 39=54 M.L.J. 208 (P.C.). As to the effect of failure to produce account books, *see* 176 I.C. 675=1938 N. 254.

Secs. 34 and 35.—BATWARA KHASRA is admissible. 1932 P. 447. (39 I.C. 491, Foll.); 15 P. 584. *Batwara* papers, *see* 1923 C. 261; 59 I.C. 963. Purohit's books—Entries in purohit's books as to the relationship of the pilgrims are admissible in evidence. 30 P.L.R. 1922. *Ism-navasi* papers, *i.e.*, returns submitted by the police in respect of lands held by *Ghatwals* are admissible. 9 W.R. 158; 8 B.L.R. 504; 14 M.I.A. 259; 8 W.R. 232. Settlement *behari* and *awar gha* papers how far admissible, *see* 9 W.R. 239. As to entries in Settlement Register, *see* L.R. 5 A. 116 (Rev.); 1936 L. 114. As to *hastabood* papers, *see* 9 W.R. 105. As to *Kanungo* papers, *see* 7 W.R. 533; 2 W.R. (Act X Rul.) 13; 8 W.R. 517. Record-of-right and *jamabandi* papers. 31 N.L.R. (Supp.) 202=163 I.C. 179=1936 N. 71. *Sarikam* papers. 1936 P. 400. *See also* 1936 P. 142. As to *hat chitta* books, *see* 1 Jur. (N.S.) 358. As to *Hudabandi* papers, *see* 55 C. 1167=1928 C. 854. Register of pargana watandars. 39 Bom.L.R. 288. Entry in the register of powers of attorney. 43 C.W.N. 907. As to income-tax papers held admissible against and not in favour of the person whom they may concern, *see* 9 W.R. 275. As to *hawazima* papers, *see* 2 B.L.R. App. 37. *See also* 6 M.I.A. 88. An entry made a considerable time ago by the patwari in village papers, would be treated as an entry in a public document maintained in the course of business. 1939 R.D. 325=1939 A.W.R. (B.R.) 277. As to Bankers' Books *see* Bankers' Books Evidence Act (XVIII of 1891). As to books of Post Office Savings Bank, *see* Act I of 1893.

Sec. 35: SCOPE.—*See* 43 Bom.L.R. 432=1941 P.C. 21 (P.C.). An entry in an official record is admissible if it states a relevant fact. It is not necessary for the admissibility of the entry that it should relate to a fact known to the public officer recording it. 27 S.L.R. 101=1933 Sind 317. As to admissibility of statement contained in public document, *see* 1925 P.C. 170=50 M.L.J. 120 (P.C.). Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is admissible. 1930 A. 26. The words "an entry" in sec. 35 of the Evidence Act are not intended to apply to the *opinions of public officers* based on or inferences drawn from the allegations made before them in the course of inquiries conducted under sec. 202, Cr. P. Code, or under O. 26, C. P. Code. 1934 L. 890. *See also* 165 I.C. 626=1936 L. 37. Upon the question whether a talukdar was a convert to Islam or was a chief of a Rajput clan, it is permissible and important to prove that the fact of such conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publications. 1939 O.L.R. 553=183 I.C. 662=44 C.W.N. 66=1939 P.C. 249 (P.C.). A book of copies of communications sent by the Collector to various subordinate officers, maintained in the Collector's office, that being the prevalent official practice is itself an official register within the meaning of sec. 35 of the Act, and a public document under sec. 74. A certified copy of such a document is clearly inadmissible in evidence, and should not be rejected as being a copy of a copy. 1939 M.W.N. 841. An entry in the register of powers-of-attorney maintained by the registering officer under the Registration Act, is undoubtedly relevant under sec. 35 to prove the contents of the power of attorney. The abstract of the power which appears in the entry is made by the Sub-Registrar in the discharge of his official duty, and the Court is entitled to presume its correctness. 43 C.W.N. 907=70 C.L.J. 5=1939 Cal. 569.

LETTERS PASSING BETWEEN OFFICIALS BEFORE FINAL DECISION IS REACHED—ADMISSIBILITY.—The very wording of sec. 35 conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the

NOTES.

information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character; and in so far as they do not incorporate the result of personal inquiries they are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter. Hence letters which have passed between the various officials cannot be admitted under sec. 35 so as to make the remarks made therein as legal evidence in the case; and if the final conclusions arrived at are recorded in the settlement papers, those are the only documents which can be admitted in evidence. 38 P.L.R. 748=1936 L. 37. *See also* 1939 M.W.N. 841.

ILLUSTRATIVE CASE-LAW.—Entries in public records consequent upon a decree are admissible under sec. 35. 16 P. 258=18 P.L.T. 257=41 C.W.N. 577=1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.). The depositions of witnesses in an heirship inquiry under sec. 71 of the Bombay Land Revenue Code are inadmissible as substantive evidence relating to title but they might be used as corroborating or contradicting the witnesses examined in the case. 35 Bom.L.R. 118=144 I.C. 442=1933 B. 126. So also family traditions recorded by settlement officer. 163 I.C. 770=1936 O. 340. R. 72 of the Madras Registration Rules requires the Registrar to place on record a summary of the evidence taken by him when enquiring under sec. 41 (2), Registration Act, into the execution of a will or authority to adopt. This summary would be admissible, *quantum valeat*, under sec. 35, Evidence Act. 1933 M.W.N. 1148. Where a deposition of a witness had been recorded in the ordinary way, that record and not an abstract of the evidence in the judgment, is the proper evidence of the statement, but where the Court has acted upon an oral admission and recorded in its judgment which constitutes the only official record of it, it is admissible in evidence under sec. 35. 1933 M. 184=142 I.C. 548; 40 L.W. 310. The report of a Municipal overseer as to when the construction of *chaija* took place is inadmissible in evidence. 26 I.C. 670=12 A.L.J. 740. As to Municipal register of births and deaths, *see* 159 I.C. 190=1936 A.L.J. 404=1936 A. 218; 1939 R.D. 80=1939 A.W.R. (B.R.) 4; 1940 Mad. 285. Where the copy produced is that of an entry in the register of births and deaths kept by the Circle Registration Officer under para. 306 of the Police Regulations, it is a copy obtained from a public office and is a copy of a public document within the terms of the Evidence Act and is hence admissible in evidence. 1940 R. D. 6=1940 A. W. R. (B. R.) 15=1940 A.L.J. (Supp.) 1. Municipal register containing entries as to ownership of property. 163 I.C. 867=1936 L. 965. A recital in the order of a President of a Union Board is not admissible under sec. 35 or sec. 13 unless such President has been examined with regard to the fact mentioned in his order. 131 I.C. 654=1931 M. 487. A letter of the Government of India in which *Anaesthesine* is included in the list of recognised preparations is not admissible in evidence. 42 I.C. 166=32 P.W.R. 1917 (Cr.). The Municipal register in which births and deaths are registered is admissible in evidence as it is kept by a public servant in the discharge of his duties. 148 I.C. 418=11 O.W.N. 416=1934 O. 167; 177 I.C. 517=1938 C. 120; 1939 A.W.R. (B.R.) 4. *See also* I.L.R. (1937) N. 382=1937 N. 264; 54 L.W. 411=175 I.C. 263=1938 A. 242. An entry made in a choukidar's register of births and deaths is not admissible in evidence if it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law. 22 O.C. 250=54 I.C. 166; 23 L.W. 688=95 I.C. 1005=1926 M. 985 (Birth register). The *Hathchita* of the *Chaukidar* containing the date of birth of a person is admissible in evidence to prove the age of a person though the entry mas made by the *defadar*, the *chaukidar* being illiterate. 14 P.L.T. 441=1933 P. 273. Register of information at pargana watandars. 39 Bom. L.R. 288. Entries in village crime book. I.L.R. (1937) N. 315=1937 N. 17 (F.B.). Entries in public record consequent on a decree are admissible. 16 P. 258=41 C.W.N. 577=1937 P.C. 69 (P.C.). *See also* 1939 P.W.N. 577=1939 Pat. 591. Police records. 1937 N. 17 (F.B.). Entry in death register proved to be prepared in a somewhat casual way is of little value. 1930 C. 636. Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of a particular person in a case in which there is much conflicting evidence as to his religion. 1934 M. 630=67 M.L.J. 389. An entry in the scholars' register made by the father since deceased as regards his son's age is admissible under sec. 35 of the Evidence Act as one made in a public register made by a public servant in the discharge of his official duty. 114 I.C. 801=1929 O. 113; 28 N.L.R. 127=152 I.C. 1042; 12 Mys.L.J. 133=39 Mys. H.C.R. 406. School certificates duly prepared according to authority are admissible in evidence 149 I.C. 660=1934 N. 44. Evidentiary value of entry as to age in School Register, and the same in Birth Register, compared. 14 L. 473=34 P.L.R. 820=1933 L. 601. *See also* 164 I.C. 751=38 P.L.R. 69=1936 L. 598; 194 I.C. 824=1941 Cal. 41=I.L.R. (1941) 1 Cal. 234; 148 I.C. 418; 1934 O. 167; I.L.R. (1938) 2 C. 457=42 C.W.N. 855=1938 C. 641: Per *Mukherjea, J.*—A school register containing an entry as to the age of a student is undoubtedly admissible in evidence to prove his age but much value cannot be attached to it if it is not clear on whose statement the age was recorded. 1941 Cal. 41=72 C.L.J. 208; 1941 Pesh. 38. The entries as to the age of pupils in the High School registers though they might have been merely copied from the Secondary School registers are admissible

NOTES.

under sec. 35, as entries made by a public servant in public a or official register in the discharge of his official duty. Whether he had any special means of knowledge so as to make the entry relevant under sec. 32 (5) of the Act does not affect the admissibility of the entry under sec. 35 though it may affect its value. Sec. 35 stands by itself independently of sec. 32 (5). 186 I.C. 613=1940 N.L.J. 150 =1940 Nag. 217. *See also* 1941 Pesh. 38. An employee in a school other than a Government or a State school is not a public 'servant and any entry in its register made by him is not one made in a public or official register by "a public servant" in the discharge of his official duty. Hence entries in registers of schools other than Government or State schools are not admissible in evidence under sec. 35. (1935 Oudh 41 R.); 1940 Rang.L.R. 481=191 I.C. 21=1940 Rang. 191. *See also* I.L.R. (1941) 1 Cal. 234. *See* 112 I.C. 834 as to admissibility of settlement pedigree. The family pedigree which accompanied a statement by certain members of the family in an inam enquiry of 1865 and two of which were enclosures to reports by the Collector to the Board of revenue under the Court of Wards Act are relevant and admissible under sec. 35 in a later proceeding. 55 M. 40=139 I.C. 684=62 M.L.J. 116. *See also* 1939 R.D. 20=1939 A.W.R. (B.R.) 127. A statement made by the father of the child in the Vaccination Register, which is given three years after the birth of the child is not admissible under sec. 35 of the Evidence Act for the purpose of proving the paternity of the child. 1929 M.W.N. 696. Entry of records in native State. *See* 99 I.C. 307=1927 B. 11=28 Bom. L.R. 716. Mutation register, *see* 1 Luck. 529; 1926 O. 594. The entry in a survey record or *khewat* raises a presumption that the particulars recorded therein were right but such presumption may be rebutted. 13 P. 589=39 C.W.N. 41=1934 P.C. 182=64 M.L.J. 450 (P.C.). *See also* 1933 P. 671. Survey register. 98 I.C. 166 =1926 R. 204; 31 C.W.N. 419=1927 C. 345; 40 C.W.N. 821. Admission of parties recorded in settlement proceedings. 12 Pat.L.T. 929. A *Khasra Pamaish* prepared under the orders of Government is relevant under sec. 35. 40 P.L.R. 298=1938 L. 751; 1938 L. 440. A *batwara khesra* is not a public document within the meaning of sec. 35 of the Evidence Act; but if it had been prepared under the provisions of the Estates Partition Act by the Deputy Collector in the discharge of his official duty it is admissible as a public document. 7 P. 85. *See also* 1938 P. 333=170 I.C. 187; 1937 P. 463; 18 P.L.T. 464=171 I.C. 732=1937 P. 567; 40 P.L.R. 693=1938 L. 440. *Butwara* record is not conclusive evidence but merely evidence under sec. 35, Evidence Act, as an official record. It is of weak evidence when it conflicts with the record of rights. 61 C. 302=38 C.W.N. 268=1934 C. 488. As between *Thakash map* and *Revenue Survey map*, the latter is more accurate and should be relied on to determine boundaries. 96 I.C. 1027=1926 P. 385. *See also* 1937 P. 463; 17 P. 120=1938 P. 81 (S.B.) (Appraisement record). Where the Thak and revenue survey maps differ and the Thak map agrees with the local landmarks, the Thak map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis. 73 C.L.J. 47; 1939 P.W.N. 700=1939 Pat. 591 (Decision in settlement proceedings); 1937 P. 561 (Road cess return); 1939 R.D. 325 (Patwari papers); 30 C.W.N. 689=1926 C. 862 (Record-of-rights); 1926 N. 161 (*Parepatraka*); 1929 L. 328 (Katardhar paper); 1920 C. 290 (Map prepared for the purpose of partition); 1926 O. 88; 1930 O. 97; 1929 O. 134. *See contra* 1928 C. 893 (Guardianship certificate). *See also* 1934 A.L.J. 318=1934 A. 406 (F.B.). Remarks made by survey officer at the time of inspection of a village. 2 Luck. 4=98 I.C. 876. *See also* 43 Bom.L.R. 432=1941 P.C. 21 (P.C.) (answers to questions given in Wilson's Manual). A canal *parcha* is very good evidence of possession and is admissible to prove khas possession. The canal authorities grant *parcha* for irrigation of the land to those persons whom they find in possession of land and the *parcha* has therefore great evidentiary value. 1941 P.W.N. 428. Entries in revenue documents are not conclusive but their importance in a case for possession cannot be denied. 8 R. 556=1931 R. 40. As the law does not require valuation to be given in the register of record-of-rights the entries as to valuation are irrelevant and therefore inadmissible under sec. 35. 146 I.C. 152=1933 N. 310. A *register of rent suits* would be admissible in evidence under sec. 35 of the Evidence Act as written by a public servant in the discharge of his official duty. 71 C.L.J. 504=1940 Cal. 539. Where a hand written *pedigree is prepared under a form prescribed by rules framed under the Court of Wards Act*, it is admissible in evidence under sec. 35. 189 I.C. 757=1940 A.W.R. (H.C.) 300=1940 All. 353. A *process-server's report* of the giving of possession of property in execution is a public record of an official act, and is admissible in evidence without his being called as a witness. 42 P.L.R. 288=1940 Lah. 312. *Prescription register* in Government hospitals is admissible though handwriting of the entry is not proved. 1 Luck. 203=103 I.C. 512=1927 O. 310. Entry in *wajib-ul-arz* is admissible in proof of custom—Admissibility does not depend upon verification of *wajib-ul-arz* by proprietors. 1927 O. 608. *See also* 101 I.C. 820=1 Luck. 73. An entry as to ownership in "*fard baghat*" is admissible, but is not admissible when it does not appear who made the entry. 14 R.D. 444. An entry in Mouzawari Register is admissible as regards title to land. 58 C. 858 =60 M.L.J. 142=35 C.W.N. 173=1931 P.C. 1 (P.C.). *See also* 1937 P. 463 (Sifton's Settlement Report). Report of Government Offices, nature of. 13 P. 517. Police records of levy of punitive tax—Value of, as record of title. 1934 L. 885. *Khasra Paimash* of Municipality—Value of, as record of title. (*Ibid.*) Discrepancy between Gangetic Survey Map and later Cadestral Survey Map—Preference. 1933 P. 671. *Panchnamas*, containing confession, how to be used. 144 I.C. 772=1933 Sind 220. *See also* 1939 M.W.N. 465. First information report taken down by police officer—Admissibility and

Relevancy of statements in maps, charts and plans.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of [1][any Government in British India,] as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

LEG. REF.

[1] Substituted by A.O., 1937.

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use of. 11 Mys.L.J. 475=39 Mys.H.C.R. 75; I.L.R. 1937 N. 315=1937 N. 17 (F.B.) (Entries in village crime note books). Judgment not *inter partes*. 9 N.L.J. 215=1927 N. 19; 18 M. 73. Entry in order sheet that notice has been served. 1933 P. 658. *Report by Process peon* who is dead regarding service of notice. 1933 Pat. 658; 191 I.C. 45=42 P.L.R. 288=1940 Lah. 312 (Process-server's report as to giving possession in execution of decree). The Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case, evidence of the fact in another case when the parties are not the same. A recital therefore in a judgment not *inter partes* of a relevant fact is not admissible in evidence in another litigation, though the judgment may be used in evidence in certain circumstances as a fact in issue or as a relevant fact or possibly as a transaction. 121 I.C. 509=1930 L. 237. Any entry in a register of previous convictions where the conviction is relevant is admissible under sec. 35 and can be proved by a certified copy under sec. 65 of the Act and upon it accused might be asked if he admitted the conviction. On this section, *see* 1922 C. 654; 1925 A. 79; 1924 R. 135. Report of Kanungo on criminal complaint is admissible. 1 Luck. 259=1927 O. 323. *See also* I.L.R. (1937) N. 315=1937 N. 17 (F.B.); 1936 R. 479 (Patwari papers). Statement as to relationship made by Kanungo Settlement Officer if admissible. 3 Luck. 326=1928 O. 307. Official reports—Facts stated in —Reports valuable and in many cases the best evidence. 55 I.A. 45=55 C. 403=54 M.L.J. 397 (P.C.). But the opinion as to nature of estate—Partible or impartible is not conclusive. (*Ibid.*)

The following are examples of books registers and registered records in India which come within the purview of this section:—Log books (*see* secs. 103-108, Act I of 1879 and secs. 280-285 of the Merchants Shipping Act 17 & 18 Vict., c. 104); Marriage registers, *see* secs. 28, 32 and 54 and Schedules III and IV, Act XV of 1872; 14 & 15 Vict., c. 40; Act XV of 1865 (Parsees); and Act III of 1832; sec. 44, Act V of 1865; sec. 6 and Schedule of Act Registers directed by Part XI of the Indian Registration Act, 1908; Registers of printing presses; newspapers and books published in India, Act XXV of 1867; of Copyright Act, Act XX of 1847; Act III of 1914 of new inventions, designs, patterns, etc.; Sec. 11, Act XV of 1859; Act XIII of 1872 of literacy, scientific and charitable societies, Act XXI of 1860; of joint stock companies, etc., under the Indian Companies Act VI of 1882 (9 A. 366); of British ships, sec. 4, Act X of 1841; 17 & 18 Vict., c. 104; registers prescribed by the various Municipal Acts, Proceedings of Registered Companies and Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto of vessels on the river Indus, Act (1 B.C.) of 1863. Record-of-right; sec. 14 of the Punjab Land Revenue Act XXXIII of 1871, and secs. 94-106 of the North-Western Provinces Land Revenue Act XIX of 1873; the settlement record prescribed by Cl. 9; sec. 9, Bengal Regulation VII of 1822; Registers of Chakeran lands, W.R. 1864, 358; Quinquennial registers in the Bengal Presidency, 7 W. R. 14; Registers of tenures under the Chota Nagpur Tenure Act II of 1869 B.C., 19 C. 21; Register of Mahomedan Marriages Act I of 1876 (B.C.); 10 C. 60; Revenue registers in the Madras Presidency, 15 M. 19; Rennels Maps; 191 I.C. 824; 72 C.L.J. 320=1941 Cal. 193; 1941 Cal. 520; Khewat entry. 1926 O. 427; Register under the Bengal "Land Registration Act" VII (B.C.) of 1876. Entry is no evidence of title though it may be of possession. 8 C. 853; 9 C. 401; 12 C.L.R. 12.

Sec. 36.—Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made (30 I.A. 44, followed). 68 C.L.J. 293. *See* 77 I.C. 1048; 7 C.L.J. 415=2 I.C. 648. Where the Thak and revenue survey maps differ and the Thak map agrees with the local landmarks, the Thak map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis. 73 C. L.J. 47. As to evidentiary value of *thak map*, *see* 31 C.W.N. 472=1927 C. 403; 68 C.L.J. 293. As to reliability of Rennel's map, *see* 56 C.L.J. 369. The maps of Rennel published in 1914 were withdrawn and the sale of copies printed in 1914 were stopped under orders of Government. They are, therefore, not admissible in evidence. 72 C.L.J. 320=1941 Cal. 193 =44 C.W.N. 935; 191 I.C. 824. So far as river surveys and road surveys are concerned, Rennel's maps (1769-71) are scientific and accurate ones, only the village sites shown in his map are approximate. Rennel's maps can be made the basis for adjudication of land revenue. 197 I.C. 5=1941 Cal. 520. Maps prepared under Calcutta Survey Act. 31 C.W. N. 419=102 I.C. 370=1927 C. 345; 68 C.L.J. 293. Entry in Revenue Survey Map, *see* 98 I.C. 166=1926 R. 204; 1928 P. 36=8 P.L.T. 817; 68 C.L.J. 293. *Ex parte* statements in survey maps should be regarded not as primary proof but merely corroborative proof—but if they relate to distant times or no direct evidence is

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the [1][Central Legislature], or of [2][any other legislative authority in British India constituted by any laws for the time being in force or in a Government notification or notification by the Crown Representative appearing in the official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact.]

[3][* * * * * *]

Relevancy of statements as to any law contained in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

How much of a statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

Judgments of Courts of Justice, when Relevant.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

LEG. REF.

[1] Substituted for "Governor-General of India in Council" by A.O., 1937.

[2] Substituted by *ibid.*

[3] Last para. of sec. 37 which was added by Act V of 1899 has been omitted by Act X of 1914, Sch. II as being unnecessary.

NOTES.

available, their value assumes greater proportion. 113 I.C. 703. Site plan prepared for a case has very little probative value on question of title. 1930 A. 26. An entry in the current settlement record carries with it a strong presumption of correctness unless it is rebutted. 22 Pat.L.T. 699=1941 Pat. 260.

Secs. 36 and 83: PROOF OF MAPS.—A map which is not a published map generally offered for public sale nor one made under the authority of Government, is not within sec. 36. It is on the contrary within the provision of sec. 83, that maps made for the purposes of any cause must be proved to be accurate. 16 P. 258=41 C. W. N. 577=1937 P. C. 69=(1937) 2 M.L.J. 631 (P.C.). *See also* 1941 Cal. 193=44 C.W.N. 935. Where the diara operations extend over a very wide area and the diara map is not prepared with reference to any particular survey trijunction of certain mouzahs named, the presumption of correctness of the diara map is in no sense rebutted by the mere fact that that particular trijunction has not been located. 1937 C. 574.

Sec. 39.—Sec. 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by secs. 24, 25 and 26, Evidence Act, has not been removed by sec. 27. 10 L. 283=1929 L. 344 (F.B.). Only pertinent and not all recitals in the admitted document are admissible in evidence. 1930 A. 299. Although the entries in books of account are relevant to the extent provided by this section, yet such a book is not by itself relevant to raise an inference from the absence of any entry. 3 I.C. 291 (10 C. 1024; 7 C.L.R. 256; 30 C. 231 at p. 247, Ref. and Foll.).

Sec. 40.—*See* 18 Bom.L.R. 185=41 B. 1. Sec. 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before. 6 C. 171, held no good law in view of. 23 C. 533 (P.C.); 19

Relevancy of certain judgments in probate, etc., jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [1][order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [1][order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [1][order or decree] declares that it had been or should be his property.

LEG. REF.

[1] The words "order or decree" wherever they occur in the section were inserted by Act XVIII of 1872, sec. 3.

NOTES.

A. 277 (P.C.) and 25 C. 522 (P.C.); 33 C.W.N. 795=1929 C. 374 (F.B.). The actual decision and the findings arrived at in a previous judgment cannot be used as evidence to decide the points which are at issue in a different case except in cases coming under secs. 40 to 42. 1933 P. 690. Sec. 40 does not lay down that the judgment must prevent the Court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the Court from taking cognizance of the suit so far as it relates to some of the parties thereto, then also sec. 40 would apply. Accordingly a judgment passed in a previous suit against some of the defendants is admissible in evidence under the section in a subsequent suit filed against them as well as others. 45 C.W.N. 420. As to evidentiary value of judgments, *see* 19 S.L.R. 376; 43 C.L.J. 135=1926 C. 698 (decision in previous rent suit admissible); decision as to age in guardianship proceedings—Admissibility in suit by ward for property, *see* 7 I.C. 505; as to admissibility of decision of Probate Court upholding adoption, 38 B. 272; judgment of Probate Court on question of status, *see* (1910) 1 U.B.R. 61=10 I.C. 987; 8 P.L.T. 510; judgment of Probate Court—Effect—Refusal to grant probate. *See* 38 B. 309=16 Bom.L.R. 5. The decision in prior proceedings under sec. 9, Specific Relief Act, is admissible in evidence in a later suit for possession between the same parties. 60 C. 1171=37 C.W.N. 1148 =1933 C. 923. As to relevancy of judgment not *inter partes*, *see* 97 I.C. 282=1926 P. 577; 93 I.C. 321=1926 Sind 161; 72 C.L.J. 320= 1941 Cal. 193, and notes under sec. 13. It is relevant though not conclusive. 8 P. 783=1929 P. 739. *See also* 1938 Sind 198 (Binding nature of finding of fact in previous judgment).

Secs. 40-43.—Decree for confirmation of possession not conclusive proof of actual possession. 15 P. 336=165 I.C. 289=1936 P. 537. *See also* 19 N.L.J. 285.

Sec. 41.—On this section, *see* 2 M.H.C.R. 276; 14 M.I.A. 367; 6 B. 703; 7 W.R. 338 (F.B.). The section applies to the foreign judgments of a competent Court no less than to domestic judgments. Secunderabad is for the purpose of insolvency a foreign Court and an order of adjudication passed by the Court at Secunderabad is operative in British India. 54 M. 727=61 M.L.J. 774. *See also* 43 L.W. 75=1936 M. 197. A declaration of a legal right is a different thing from a declaration of a legal character. The word "character" means status, it is something more than a mere right. The declaration of a person's right operates as against a particular person or group of persons against whom the right is claimed, whereas a man's status is something which defines his position not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. To say that a person is not a partner of a firm is not to declare his status or legal character, it is merely to declare his position with respect to the particular firm. Therefore, a finding of the Insolvency Court that a certain person is not a partner of the insolvent firm does not confer upon or take away from him any legal character within the meaning of sec. 41 and hence is not a judgment *in rem*. 190 I.C. 537=1940 Cal. 225.

JUDGMENT IN REM AND IN PERSONAM.—There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas in a judgment *in personam* the point, whatever it may be, which is adjudicated upon

NOTES.

(it being as to the status of the *res*), is conclusive only between the parties or privies. 22 S.L.R. 105=1928 Sind 121.

JUDGMENT IN REM.—No Court can pronounce a judgment *in rem* outside the state in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such state. Where the Court of a state gives a judgment affecting the status of a person domiciled within its territory, such judgment is treated by the comity of nations as analogous to a judgment *in rem* and as such binding all the world over. There is no rule of law under which, by the comity of nations, the Courts of one country are bound to accept as conclusive, on a quesion as to its own law and in a matter upon which it is called upon to adjudicate, the judgment of a foreign Court. There is no rule of international law which requires a British Indian Court to accept the judgment of the Supreme Court of His Brittanic Majesty, Alexandria, as the law of domicile of a deceased, which is the domestic law of British India, as binding outside the limits of that Court's jurisdiction. Sec. 41 of the Evidence Act cannot be read as going further than the rule of international law applicable elsewhere. The section clearly deals with what are known as judgments *in rem* though that expression is not used in the section. The words "competent Court" in sec. 41 mean the Court of any country which is competent to pass a judgment *in rem.* I.L.R. (1938) B. 529=1938 B. 394. *Wadia, J.*—In order to be a judgment *in rem* binding on the world, there must be a finding on status which is not only the foundation of the judgment but is necessary for it. It cannot be conclusive if it relates to a matter which need not have been controverted or which was not material or which only came collaterally into question or which was only incidentally cognizable. The only judgment *in rem* as to status absolutely is the judgment pronounced not only according to the law of domicile but by the Court of domicile. I.L.R. (1938) B. 529=40 Bom.L.R. 571=1938 B. 394. *See also* (1939) 1 M.L.J. 499. No judgment except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction upon any matters indicated in sec. 41, can have the effect of a judgment *in rem* and therefore a judgment holding that *A* is not the adopted son of *B* is not conclusive against the whole world. 26 A.L.J. 797=1928 A. 395. In order that declaration of title to specific thing should have the conclusive character as against the whole world, it is not enough to show that under the judgment of the Insolvency Court, one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not an absolute declaration but only made against a specified person; so it is not conclusive proof of title to a debt. 54 M. 601 =1931 M. 541=61 M.L.J. 229 (S.B.). The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in sec. 41 do not include the state of being a partner. 22 S.L.R. 105=110 I.C. 730 (2). A decree granted by a Court not exercising matrimonial jurisdiction, in a suit under sec. 42 of the Specific Relief Act, that the plaintiff in that suit was no longer the wife of the defendant is not a judgment *in rem* to which sec. 41 of the Evidence Act will apply. Such a decree is one which falls under sec. 43, Specific Relief Act. 36 Bom.L.R. 1021. So also a division in a suit for restitution of conjugal rights. 11 R. 198=1933 R. 250. So also an order in lunacy. 56 M. 904=1933 M. 624=65 M.L.J. 279. But it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. 65 M.L.J. 279. A judgment *inter partes* in a heirship proceeding is not a judgment *in rem* so as to be binding on a stranger. 1933 B. 126=35 Bom.L.R. 118. Decision as to custom—Relevancy. *See* 40 P.L.R. 29=1938 L. 309.

PROBATE AND ADMINISTRATION.—Judgment in Probate Court is a judgment *in rem* and binding on all parties and is final. 9 P. 698. As to the finality of order granting letters of administration on condition of appellant executing bond, *see* 43 C.W.N. 824. A judgment of the Probate Court is inadmissible in evidence in a proceding under sec. 193, Penal Code, for perjury committed in a testamental suit. 76 I.C. 417=1924 C. 104; 8 P.L.T. 510=1927 P. 61; 5 Mys.L.J. 107. Grant of probate of will, value of, as proving execution of will. 5 P. 777. As to the legal effect of grant of letters of administration, *see* 4 R. 251 =1926 R. 202. Such grant is no bar on matters not in issue in administration proceedings. 1924 C. 104.

The decision of the Admiralty Court restoring the certificate of an officer of a ship which had been suspended is a judgment *in rem* so far as the status and certificate of that officer is concerned. The decision is not binding on a person who was not a party to that suit. 1939 Sind 349.

ORDER OF INSOLVENCY COURT.—An order adjudicating a person as an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem,* but the grounds on which the order is based have no such effect. 110 I.C. 730 (1)=1928 Sind 121. Refusing to adjudicate a person a bankrupt is not a judgment *in rem. See* 46 M.L.J. 589= 1924 M. 622. So also order vacating order of adjudication against one partner. 1928 Sind 121. But an order of adjudication is a judgment *in rem.* 46 M.L.J. 589. A foreign judgment declaring that a person is the adopted son of a Hindu widow is binding on the Courts in British India in a suit relating to immovable property in British India belonging to that widow. It is true that the judgment of the foreign Court declaring the party to be the adopted son is not a judgment *in rem* under sec. 41, but inasmuch as the Courts of British India recognise the validity of the declaration of status by a foreign Court in a matter of succession to movable property in British India, because the personal law applies, the same should be recognised in a matter of succession

Relevanscy and effect of judgments, orders of decrees, other than those mentioned in sec. 41.

42. Judgments, orders or decrees other than those mentioned in sec. 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies.

The existence of a decree in favour of the defendant, in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

NOTES.

to immovable property where the law requires the personal law to be followed. Treating the personal law as the *lex situs*, the Courts of the country of domicile are best able to decide questions of status. The comity of nations treat such a declaration by a Court affecting the status of a person domiciled within its territory as being analogous to a judgment *in rem*. 49 L.W. 287=1939 M.W.N. 180=(1939) 1 M.L.J. 499. *See also* I.L.R. (1938) B. 529.

Sec. 42.—On this section, *see* 23 C. 533 (P.C.); 25 C. 522 (P.C.); 19 A. 277 (P.C.) and 1929 C. 374 (F.B.); 163 I.C. 924. When a question of status is in issue, judgments and orders between the parties in mutation proceedings, succession certificate cases, rent suits for possessions, etc., are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden. 1924 N. 387. A judgment in which a custom has been judicially recognised is admissible as evidence of the custom. 3 S.L.R. 5=1 I.C. 937 (16 A. 379, R.). Previous judgment relating to wakf property is relevant in a suit bearing on the property though not between the same parties. It is true that it is not conclusive proof but it can be used to add to the probative value of the evidence led in the suit. 36 P.L.R. 106. Judgments are not under sec. 42, relevant evidence of the facts mentioned in them. 1940 R.D. 402=1940 A.W.R. (B.R.) 214. The probative value of a finding in a previous suit between the parties depends upon the nature of the finding and of the issues involved in that suit and in the subsequent suit. 19 Pat. 172=185 I.C. 685=1940 P.W.N. 317=21 Pat.L.T. 577=1940 Pat. 341. The judgment of a Criminal Court and the depositions of the witnesses therein are inadmissible in evidence in a civil suit, to prove the liability of defendants. 106 P.R. 1915=32 I.C. 18. *See also* 117 P.R. 1912=16 I.C. 491. On a question as to the caste of a particular family, evidence of members and decisions in previous litigation are relevant. 93 I.C. 705=1925 M. 497. A previous judgment is relevant under sec. 42 for the purpose of proving a custom. 190 I.C. 35=1940 Pesh. 31. Judgments not between parties are inadmissible. *See* 12 A.L.J. 837=25 I.C. 30. *Also* 4 I.C. 997 and 8 I.C. 897; 25 B. 433 (a copy of a judgment of a Swiss Court was held inadmissible against third party).

Sec. 43.—168 I.C. 109=1937 P. 86. Illustrations where a judgment in a previous suit not *inter partes* is not admissible as evidence of an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission. 20 C.W.N. 648=30 I.C. 821. *See also* 101 I.C. 774; 41 Bom. L.R. 561=I.L.R. (1940) Nag. 699. An order of the Board of Revenue is not evidence in a case before the High Court but the latter should not make decree in dissonance with a decision of the Board without fully considering and giving all weight to the reasons advanced in the making of that decision. 3 P.L.J. 188=43 I.C. 393. A judgment in land registration proceedings is no evidence of the facts mentioned therein, more particularly when the proceedings were not between parties to a subsequent suit, in which the judgment is sought to be admitted in evidence. 16 P. 84=167 I.C. 152=17 P.L.T. 769=1937 P. 73. As to judgment in guardianship proceedings, *see* 1941 M.W.N. 237=(1941) 1 M.L.J. 492. A judgment is not admissible to prove the truth of the fact which it states, nor is any fact stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. But in cases where the right of a party has already been concluded by previous judgment, that fact can be proved by the production of the judgment, since the existence of that judgment itself is relevant. 1938 N.L.J. 466. Though the recitals and findings in a judgment not *inter partes* are not admissible in evidence, such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed. 44 C.W.N. 935.

QUESTION OF LIABILITY—DECISION OF CIVIL COURT.—Where a person is charged with criminal breach of trust as regards certain items and the question of civil liability about the same items has been determined by a competent Civil Court, the judgment of that Court would be the best evidence of the civil rights

Illustrations.

(*a*) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C*.

(*b*) *A* prosecutes *B* for adultery with *C*, *A's* wife.

B denies that *C* is *A's* wife, but the Court convicts *B* of adultery.

Afterwards *C* is prosecuted for bigamy in marrying *B* during *A's* lifetime. *C* says that she never was *A's* wife.

The judgment against *B* is irrelevant as against *C*.

(*c*) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

A afterwards sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C*, the judgment against *B* is irrelevant.

(*d*) *A* has obtained a decree for the possession of land against *B*. *C*, *B's* son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

[1][(*e*) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.]

[1][(*f*) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.]

44. Any party to a suit or other proceeding may show that any judgment,

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LEG. REF.

[1] Illustrations (*e*) and (*f*) were added by Act III of 1891, sec. 5.

NOTES.

of the parties and hence a relevant fact. 41 B. 1=33 I.C. 633=18 Bom.L.R. 195.

ADMISSIBILITY OF JUDGMENT "INTER PARTES."—*See* 1 C.W.N. 146; 7 P.R. 1895 (Cr.); 11 B. H.C.R. 90; 9 C.P.L.R. 8. Previous judgment in main suit—Admissibility in subsequent execution proceedings. 1934 R. 212. Where all the persons who are parties to a present case were parties to a former litigation, the judgment in the former proceedings is certainly evidence of what were the points in issue between the parties in that suit and of what was the result of the suit. 168 I.C. 109=1937 P. 86.

ADMISSIBILITY OF JUDGMENT NOT "INTER PARTES."—In a suit to contest a notice of ejectment the only evidence of a lease was a judgment in a suit not *inter partes*. *Held*, that the lease could not be held binding between the parties to the ejectment suit. 54 I.C. 574. On this section, *see also* 9 C.P.L.R. (Cr.) 8; 9 Bom.L.R. 1134; 72 C.L.J. 320=1941 Cal. 193; 9 C.W.N. 402; 1939 R.D. 162=1939 A.W. R. (B.R.). 161 (Rent suit). Previous judgment not *inter partes* though not *res judicata* is valuable proof of title and admissible in evidence. 101 I.C. 774. Findings in previous judgment are not admissible. 96 I.C. 998=27 Punj.L.R. 544. *See also* 16 P. 84=1937 P. 73. Judgments in previous suit as regards the value of entries in revenue papers are admissible. 7 L.R. 10 (Rev). Judgment of Criminal Court not admissible in subsequent suit for damages. 2 R. 549=1925 R. 143. Judgment in civil suit giving rise to criminal trial—not legally admissible in a trial for the offence. 6 C. 247. Record and judgment in a trial in which the principal was convicted of breach of the peace, if admissible against surety. *See* [25 C. 440, Diss.] 32 P.R. 1903 (Cr.); 12 Cr.L.J. 404=11 I.C. 588. It is not satisfactory to examine an expert witness on commission and not in presence of the accused. The evidence of an expert has always to be carefully weighed but when given on commission its value is considerably reduced. 108 I.C. 369=1928 L. 533. Suits not *inter partes*—Finding of fact in one of—Admissibility in evidence of, in another in which that fact is in issue. 56 M.L.J. 562=56 I.A. 119 (P.C.). In a suit for damages for malicious prosecution, the judgment of the Criminal Court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The grounds upon which that acquittal was based are inadmissible. 56 M. 641=1933 M. 429=65 M.L.J. 146. *See also* 41 Mys.H.C.R. 283. Sec. 43 excludes all judgments as irrelevant in a former suit if they are not *inter partes* unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of the judgment may be relevant but not the decision of the judge or the opinion expressed by him. It is immaterial if the defendant in both cases is the same and the decision of the Privy Council in 22 C. 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. (56 I.A. 119, Ref. to.) 34 C.W.N. 1113. *See also* 59 C.L. J. 320=1934 C. 788. The decision of an Income-tax Officer holding that an assessee was separate from his joint family and had separate grain business is a mere opinion of that officer and is irrelevant in a civil suit involving a dispute as to whether a particular item of property is his separate property or joint family property. 19 N.L.J. 287.

Secs. 43-44.—Judgment appointing guardian for minor is not open to attack collaterally. 1941 M.W.N. 237=(1941) 1 M.L.J. 492=53 L.W. 352=1941 Mad. 569.

Sec. 44.—Principle of sec. 44 cannot be extended to cases of gross negligence. 64 I.A. 17=I.L.R. 1937 M. 263=(1937) 1 M.L.J. 113 (P.C.). (45 M.L.J. 324, overruled). Sec. 44 would apply in any proceeding, civil or criminal, if the decree sought to be challenged is

Fraud or collusion in obtaining judgment, or in competency of Court, may be proved.

order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting [1][or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [2][or in questions as to identity of handwriting] [1][or finger impressions] are relevant facts.

LEG. REF.

[1] The words "or finger impressions" were added by Act V of 1899, sec. 3 (1) and as to whether these words include thumb impressions, *see* discussion in Council, *Gazette of India*, 1898, Part VI, p. 24.

[2] The words "or in questions as to identity of handwriting" were inserted by Act XVIII of 1872, sec. 4.

NOTES.

proved by the adverse party. It cannot be said that it applies only in a suit for revocation. A judgment in a probate suit is no doubt a judgment *in rem*, but it can be contested on the ground of fraud or collusion. A stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. Under sec. 44 it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside ; he may show in suit or proceeding in which it is set up against him that it was obtained by fraud. It would be open to a party offering evidence of forgery of a will to prove that the probate decree was obtained by fraud if it were set up against him by the other side, instead of admitting the probate and the title of the executor. I.L.R. (1940) Bom. 403=42 Bom.L.R. 231=1940 Bom. 131. Sec. 44 empowers Courts to ignore orders issued by Courts without authority. 57 B. 456=35 Bom.L.R. 630=1933 B. 398. Collusive decree binds parties thereto and their representatives. It is not a nullity. 101 I.C. 765=1927 A. 494. Judgment—Validity of adoption—Evidence of. 1924 P. 298. Applicability and scope of section. *See* 34 A. 150=13 I.C. 80 ; 18 C.L.J. 264=21 I.C. 938 ; 6 I.C. 98 ; 37 B. 563=20 I.C. 530. Under this section a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a fresh suit to set it aside. 30 I.C. 63. *See also* 1 L.W. 208 ; 18 C.W.N. 601 ; 93 I.C. 385=1926 C. 1. Entry in record of rights—Procured by fraud—Separate suit to set aside—Necessity for. *See* 18 C.W.N. 27. A party cannot plead his own collusion to avoid a decree to which he was himself a party. 6 N.L.R. 177=8 I.C. 1179. *See also* 1927 A. 494. Right of stranger to a decree affecting his right to show in a subsequent suit that the decree was invalid on the ground of fraud—Maintainability of subsequent suit without setting aside decree. *See* 21 C.W.N. 594=40 I.C. 607. Where the existence of certain evidence was stoutly denied and was afterwards discovered, it is ground for setting aside decree. 29 Bom.L.R. 1046=1927 B. 510. The plea that a decree passed by a native Court was made without jurisdiction is open to the objector under sec. 44 and can be raised at any stage of the proceedings unless there is a bar of *res judicata* or any rule of equitable estoppel against him. 1931 A.L.J. 652=1931 A. 689. Sec. 44 does not enable an individual creditor to bring a suit for his benefit alone to set aside a transaction contained in a decree on the ground of its being a fraudulent transfer or preference. I.L.R. (1940) Bom. 526=190 I.C. 606=42 Bom.L.R. 486=1940 Bom. 289.

Secs. 45 and 46 : EXPERT EVIDENCE.—Who are experts. *See* 32 C. 759. The fact that an expert is not acquainted with the characters of the language and can neither read nor write them wil not make him incompetent as an expert in handwriting. 160 I.C. 264=1936 A.L.J. 317=1936 A. 165. How differs from ordinary evidence. *See* 3 N.L.R. 1. When evidence. 1924 N. 183. The *basis* of the expert's opinion should be placed before the Court. 56 A. 428=1934 A. 273. Value of experts' opinion when one expert is contradicted by another. 34 P.L.R. 788 (2)=1933 L. 885. But depositions of expert witnesses as to the result of their opinions and as to the effect of them, does not come within the domain of expert evidence at all. 1933 P.C. 26=64 M.L.J. 193 (P.C.). Value to be attached to such evidence, *see* 11 Bom. 89 ; 29 Cal. 32 ; 15 Cal. 589 ; 34 P.L.R. 719=1933 L. 561. Expert evidence not based on well-defined inexorable laws of nature cannot be taken as decisive—Especially when there is direct evidence opposed to it. 96 I.C. 641=1926 L. 313. *See also* 29 O.C. 1=1925 Oudh 497. As to admissibility of opinion evidence of persons not experts. *See* 18 P.R. 1915 (Cr.) ; 12 P.R. 1915 (Cr.) ; 1930 A. 587 (not admissible). As to Government experts, *see* 147 P.L.R. 1912=13 Cr.L.J. 563. The opinion of the *Imperial Serologist* is entitled to great weight. 34 Cr.L.J. 1009=1933 O. 265. Validity of conviction based on expert evidence. 2 A.L.J. 444 ; 39 C. 245 ; 39 M. 169=22 M.L.J. 270 ; 18 P.W.R. 1912. "Expert"—Meaning of. *See* 1930 A. 587. The evidence of an expert witness has to be tested like that of any other witness, for even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the results of his examination as evidence in

Such persons are called experts.

NOTES.

Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications. 1940 Lah. 505. Generally speaking, it is not permissible to call a witness to explain to the Court what a document means unless such witness is an expert under the Evidence Act. It is for the Court to ascertain what the document means though, no doubt, a witness may suggest methods by which an intelligent meaning can be given to the document. I.L.R. (1939) Bom. 434=41 Bom.L.R. 548=1939 Bom. 339. The opinion of an expert that one document has been typewritten on the same machine as another document is not admissible under sec. 45 of the Evidence Act. The Court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same machine but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself. 1935 A. 162. But evidence as to the fact that the typewriters used in the typing of the various exhibits have certain defect which are clear from the typing of these exhibits can be competently given by an expert who has had an opportunity of examining the documents, though the Court is entitled to draw its own conclusion as to the source and authorship of the documents from the whole evidence in the case. 1933 A. 498. *See also* 1933 A.L.J. 799=1933 A. 690. Where the expert is not examined and the other party has had no opportunity of cross-examining him, the report of the expert cannot be admitted in evidence. 141 I.C. 767=1933 P. 159; 1935 A. 142. But where the lower Court had based its decision on the opinion of the handwriting expert though he had not given sworn testimony in support of the report, *held*, that the objection to the evidence being received could not be taken for the first time in revision. 35 P.L.R. 109=1934 L. 230. *See also* 11 P. 782=1932 P. 352. Where the so-called "expert witnesses" give no data in support of their opinions their evidence should be rejected. 1931 L. 364. *See also* 131 I.C. 771=1931 P.C. 189 (P.C.). The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood stains and the of Chemical Examiner, which are made admissible in evidence by themselves—the opinion of an expert must be given orally and a report merely or certificate by him cannot possibly be evidence. Unless he goes into the witness-box and gives oral evidence, there can be no cross-examination of the expert at all. The opinion of the Director of Agriculture is certainly the opinion of an expert, but the evidence, being only documentary is clearly inadmissible. I.L.R. 1937 M. 764=1937 M. 407=(1937) 1 M.L.J. 341. Telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts and the expert evidence of those witnesses is entitled to very considerable weight if they hold diploma in telephony and engineering and also have great experience. 184 I.C. 36=12 R.S. 83=1939 Sind 245. Though a doctor is in a better position to form an opinion about the age of a person than a layman, his statement is no more than an opinion and could not amount legal proof of the age of the person concerned. 1939 A.L.J. 980=1939 All. 708.

ILLUSTRATIVE CASES—COMPARISON OF HANDWRITING.—To make the evidence of a handwriting expert admissible, it is not necessary that the handwriting should be actually compared in Court. It is enough if the documents admittedly in the accused's handwriting are shown to him in open Court and he expresses his opinions thereon. 16 Cr.L.J. 703=30 I.C. 751 (M.); 16 C.W.N. 812=39 C. 606. *See also* 2 A.L.J. 444; 39 C. 245; 2 Weir 759 (Sub-Registrar not expert. 2 Weir 760). A comparison of handwriting is to be used with great care and caution and especially in a criminal case when a large quantity of apparently different handwriting is under comparison. 39 C. 606=16 C.W.N. 812; 1926 P. 575 (thumb-impression); 29 C. 1; 1925 O. 413. *See also* 45 C. 60=21 C.W.N. 1076=42 I.C. 484. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution. 49 C. 235=26 C.W.N. 113=65 I.C. 774. There is no doubt that a comparison of handwriting is something hazardous and inconclusive, and should be made with care and caution in the light of assistance that may be available in the shape of expert evidence or arguments on behalf of parties concerned, or otherwise ensuring a right decision. No hard and fast rule could possibly be laid down as to the best method of arriving at a proper conclusion on the question of similarity of handwriting. The rejection even *in toto* of an expert's opinion would not exonerate the Court from the duty of coming to an independent finding on the question of an authorship of handwriting; the Court has to examine the opinion and come to its own decision. The most important things are to examine the general characteristics, formation of letters, fixed pen habits and mannerisms, and discern the identity of the writer. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual charac-

NOTES.

teristics and idiosyncracies which have been embodied in technical language of experts. 169 I.C. 977=38 Cr.L.J. 818=1937 C. 99 (S.B.). The evidence of persons acquainted with the handwriting of a person by whom the document is supposed to be written is admissible, though they are not experts. 18 P.R. 1915 (Cr.)=28 I.C. 722. *See also* 147 P.L.R. 1912=15 I.C. 979; 7 P.L.T. 507=1925 P. 787. In the case of a disputed handwriting or signature a Court is not incompetent to use its own eyes for the purpose of deciding whether certain handwritings or signatures placed before it it are similar or not. A Court should not be deprived of the function for which it exists, namely, of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence, but the opinion of the judge is the decision in the case. A judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of the case. I.L.R. 1937 N. 382=20 N.L.J. 139. Value of expert opinion as to signature in *language which expert cannot read or write.* 1933 P. 559. *See also* 1936 A.L.J. 317=1936 A. 155. In a case of forgery the only chief evidence being an expert's examination of the forged documents as compared with the other documents alleged to be in the handwriting of the accused, the other documents must be strictly proved to be in his handwriting. 36 M. 159=22 M.L.J. 270. A mere statement therefore by a witness that it is in the handwriting of the accused is no evidence if he is not able to say how long ago they were written. 36 M. 159. In arriving at a conclusion of the authorship of the forged document, the expert should show marked peculiarities in the handwriting of the accused, which are re-produced in the forged document and when the writing has no such peculiarities, the comparison is of no consequence and cannot be relied on. Also the fact that the disputed samples are put separately from the standard ones for the examination lessens its usefulness. 36 M. 159. A conviction cannot be based on an expert's comparison, if it is not supported by corroborative evidence. 36 M. 159. Where the statement of a person does not show that he is an 'expert' in the art of handwriting, his evidence can be ruled out as being inadmissible. 31 Punj.L.R. 109=1930 L. 336. Where a handwriting expert was privately consulted by a party before he was produced in Court and he was produced as his opinion was favourable to that party much importance cannot be attached to his evidence. 39 P.L.R. (J. & K.) 54.

FINGER-PRINT.—If a finger-print expert has not been cross-examined as to the grounds of his opinion and as to the test to which he had put a particular finger-print, the weight to be attached to such witness's evidence cannot be diminished by applying to it, considerations to which the witness's attention was never directed. 21 Cr.L.J. 257=55 I.C. 273 (P.); 35 C.W.N. 863=1931 C. 441. *See also* 97 I.C. 335=1926 P. 575; 30 C.W.N. 373=1926 C. 531. A court is not bound to accept the evidence of an expert, such as a finger-print expert, even though there are no special reasons for not accepting it. The expert, however, must be given an opportunity of explaining to the Court the reasons for his opinion, as it is only after hearing the expert's reasons and elucidation that the Court would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory. 53 L.W, 396=(1941) 1 M.L.J. 475. The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general, it cannot be the basis of conviction unless it is corroborated, by other evidence. 1936 A.L.J. 317=1936 A. 165. If in a case of denial of the execution of a document the direct evidence of the witnesses is of a very unsatisfactory nature, the Court can rightly rely on the opinion of a finger-print expert. 42 P.L.R. (J. & K.) 343. Conviction based on the sole testimony of finger-print expert though not safe yet legal. 1928 P. 129=6 P. 305. It is going too far to say that the Court must insist upon corroboration of the evidence of a finger-print expert. On the other hand, the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court cannot hold him guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks, which is a question of fact on which the Court can, and should with the assistance of the expert, satisfy itself; and secondly on the point which is one for expert opinion, whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics identical in the finger-prints of two persons as are found in the case, and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hestitate in accepting the opinion. 60 B. 187=38 Bom.L.R. 160=1936 B. 151. Where the defendant is illiterate and the genuineness of a paper said to have been executed by him in dispute and the decision of the question depends upon the genuineness of the finger-print the parties should be allowed if they want to examine experts. 141 I.C. 767=1933 P. 159. It is quite clear that the science, if it could be so called *of foot prints* has not yet progressed very far. But there is no doubt whatever that evidence of similarity of the impressions of the foot, shod or unshod, given by a foot-print expert is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better

Illustrations.

(*a*) The question is, whether the death of *A* was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(*b*) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

NOTES.

qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court, and from his evidence the Court draws its own conclusion. 1937 M.W.N. 874=46 L.W. 477=1937 M. 951.

FOOT-PRINT EXPERT. *The opinion of a foot-print* expert should not be taken as conclusive. The Judge must form his own opinion with regard to the identity of the foot-prints. It is not proper for a Judge to be guided in such matters entirely by the evidence of an expert. The expert's opinion is valuable but it must be supported by statements of facts, the accuracy or otherwise of which can be verified by the Judge. 1940 M.W.N. 761=52 L.W. 198=1941 Mad. 88. *See also* 1942 Sind 11 cited under S. 57, *supra*.

THUMB-IMPRESSION.—The question of identity of thumb-mark is a question of fact and the evidence of the expert is only a guide to the discretion of the Court. 9 Mys.L.J. 444. If the *finger-prints* are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure a foundation for a conclusion and it may be a better one than any based on direct evidence. There is nothing in the so-called science of finger-print or the qualifications of an expert in it which need deter a Court from applying its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. 46 M. 715=69 I.C. 374 ; 9 P.R. (Cr.) 1914=27 I.C. 203. If a Court wishes to admit in evidence a report of a thumb-impression expert, then the Court should insist on the production of the expert as a witness in the case in order that his examination and cross-epamination be conducted in open Court and unless this is done, the report does not by itself become evidence in the case. 1935 A. W.R. 76=1935 A. 142. Taking thumb-impression of accused in Court for purpose of comparison is legal. 50 M. 462=53 M.L.J. 597.

PALM IMPRESSIONS are akin to finger-impressions and expert evidence relating thereto should on the whole be admitted rather than excluded to be weighed by the Court and the jury for whatever it is worth. 52 B. 223=1928 B. 158.

PHOTOGRAPHS.—Where the question of legitimacy arises, photographs of the putative father and son to prove resemblance are admissible. 13 I.C. 678=15 C.L.J. 621. (On appeal 47 I. C. 513=45 C. 878). As to admissibility of photographs in evidence, *see* 131 I.C. 771=1931 P.C. 189 (P.C.).

Secs. 45 and 49 : GAMBLING.—Gambling cannot be considered to be either an art or a science within the meaning of sec. 45 so as to entitle a police officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain harmless documents such as slips, which he calls betting slips are instruments of gaming. It may be that under sec. 49 a police officer might give evidence that he had had a long experience amongst people who indulged in *satta* gambling in a particular district, and from that experience supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But he is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean. 39 Bom.L.R. 613.

TECHNICAL WORKS.—Technical works cannot be used to refute an expert witness's opinion unless the passages to be used are put in cross-examination to the witness for him to explain them if he can. 22 C.W.N. 745=46 I.C. 593 [23 C. 1 (P.C.), Ref.].

OPINION ON MEDICAL MATTERS.— Expert medical opinion of a Surgeon who conducted *post mortem* examination is relevant. 12 I.C. 93 =12 Cr.L.J. 485. A doctor's opinion on the point of a person's age is entitled to greater weight than that of any other person. 10 O. W.N. 1274=1934 O. 32.

TRADE MARK.—Similarity of trade-mark is a matter for the Court. 49 A. 92=99 I.C. 353.

FOREIGN LAW.—Expert opinion on matters of foreign law. *See* 92 I.C. 112=1926 M. 218. Expert opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law. 123 I.C. 600=1930 M. 146. The evidence of translators or interpreters of Hindu Law texts is not admissible. 12 P. 359=1933 P. 306.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a*) The question is, whether *A* was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time is relevant.

Opinion as to handwriting when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of *A*, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B's* clerk, whose duty it was to examine and file *B's* correspondence. *D* is *B's* broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C* or *D* ever saw *A* write.

48. When the Court has to form an opinion as

NOTES.

Sec. 47.—*See also* Notes under secs. 45 and 46. As to sufficiency of evidence, *see* 1934 N. 204. Where a witness deposes that a certain document is in the handwriting of the accused, the degree of his acquaintance with that handwriting will affect the value, though not the admissibility of his evidence. 1936 A.L.J. 317 = 1936 A. 165. When a witness says that a particular document is in the handwriting of a certain person whom he knows, it is evidence of a fact. The fact that the witness does not also say that he knows and is acquainted with the handwriting of the person concerned does not render that evidence inadmissible. That is legal evidence of the handwriting of that person. The witness need not say in the first instance that he knows the handwriting. It is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he is not satisfied with the testimony of the witness as it stands. Nor would the fact that the document is not before the Court render such evidence inadmissible. 178 I.C. 324 = 1938 P.W.N. 403 = 1938 P. 497. Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed, so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence, even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied, the onus of proving it is on the party relying on its genuineness. 64 I.C. 234 (P.). As to admissibility of opinions of persons not experts, but acquainted with the handwriting of the persons concerned, *see* 18 P.R. 1915 (Cr.) ; 12 P.W.R. 1915 (Cr.) ; 18 B. 66 ; 22 C. 313 ; 28 I. C. 722 = 16 Cr.L.J. 338 ; 147 P.L.R. 1912 = 15 I.C. 979 ; 16 C.W.N. 812 ; 29 O.C. 1 = 1925 O. 413. It is not impossible for a person unable to read and write certain characters to know and to recognise and prove the handwriting of another in those particular characters, if he had had the occasion to see the latter write. 4 A.W. R. 676 = 1934 A. 990. When a question has to be decided as to the person by whom any document was signed or written, then according to sec. 47 the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. But the section contemplates only the production of the original document and not a copy of it. 1939 R. D. 105 = 1939 A.W.R. (B.R.) 167.

Sec. 48.—*See* 1937 P. 463. *The answers to the questions given in Wilson's Manual* are clearly admissible under sec. 48, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence, if it existed. They are also ad-

Opinion as to existence of right or custom, when relevant.

to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Opinion as to usages, tenets, etc., when relevant.

49. When the Court has to form an opinion as to

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed, by conduct as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

NOTES.

missible under sec. 35 of the Act, as entries relating to a relevant fact contained in what may be regarded as a public record made by a public servant in the discharge of his official duty. I.L.R. (1941) Lah. 154=43 Bom.L.R. 432=1941 P.C. 21 (P.C.).

Secs. 48 and 49.—Where all that the Court has to ascertain is the rate of interest chargeable on hundis as is fixed by usage, the evidence of three persons familiar with that usage is sufficient particularly when it stands uncontradicted on the record. 1932 L. 582. *See also* 39 Bom.L.R. 613. The words "usages of any body of men" in sec. 49 do not cover inferences or conclusions that may be drawn on the basis of past experience. 13 P.R. 1914 (Cr.)=20 I.C. 625 On this section, *see also* 7 I.A. 63=5 C. 744 (P.C.) ; 23 C. 427 ; 26 C. 148 ; 49 I.C. 743 ; 39 Bom.L.R. 613. As to proof of custom opinion of persons likely to know of its existence are admissible. 8 O. W.N. 6. And the weight of their evidence would depend on their position and character and of the persons on whose statements they have formed their opinion. (*Ibid.*) *See also* 1933 Sind 213. A living witness may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased persons but it must be the expression of independent opinion based on hearsay and not repetition of hearsay. 8 Luck. 445=10 O.W.N. 268=1933 O. 246. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 1933 O. 246.

Where a deed of gift contains an agreement transferring one ghumaon of land to the donee and also relinquishment of reversionary rights by a reversioner, the deed, although it is inadmissible in evidence, for want of registration so far as the gift is concerned, can be admitted in evidence under sec. 49 for the collateral purpose of proving the relinquishment of reversionary rights. 1939 Lah. 414.

Sec. 50.—Difference between English and Indian Law. 91 I.C. 462=1926 M. 475. Sec. 50 is limited to opinion as expressed by conduct and there is no provision in the Act making general reputation receivable in evidence as in English Law. 1926 M. 475. The evidence of witnesses that a certain man and a woman were regarded as man and wife by the members of the community does not come within the purview of sec. 50, not being an opinion expressed by conduct as to existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, and there is no other statutory provision under which the evidence can be let in to prove marriage. 1933 A. 130=143 I.C. 815. *See also* 1937 S. 126= 31 S.L.R. 71. On a question of the legality of the form of marriage, conduct of parties is admissible. 93 I.C. 705=1925 M. 497. Proof of paternity in case of a person claiming as illegitimate son. *See* 27 M. 32. In case of adultery and enticing away a married woman, fact of marriage must be strictly proved. 5 C. 566 (F.B.) ; 13 C.L.R. 125 ; 5 A. 233 ; 20 A. 166 ; 17 Bom.L.R. 75 ; 100 I.C. 535=1927 O. 140. The doctrine that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives and an estimate is to be formed as to whether on the whole these relatives prefer the tie of con-

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.

Illustrations.

(*a*) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b*) The question is, whether *A* was the legitimate son of *B*. The fact that *A* was always treated as such by members of the family, is relevant.

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT.

In civil cases character to prove conduct imputed irrelevant.

52. In civil cases the facts that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

NOTES.

cubinage to that of marriage is a wrong doctrine regarding proof of marriage. The evidence on this subject should not be allowed as it is without competence. 56 I.A. 201=10 L. 725=1929 P.C. 135=57 M.L.J. 366 (P.C.). Where the statement of witness giving the pedigree is found to be inadmissible under sec. 32 (5), but he deposes to facts which establish such treatment as is contemplated by sec. 50, it should be admitted to that extent. 151 I.C. 338=1934 A. 117. Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what was the attitude of the alleged adoptive parent is towards the claimant. A mere statement that an opinion was held by the witnesses or other persons does not come within the scope of sec. 50, the only provision of Evidence Act, under which evidence of repute is admissible. 1936 R. 518. *See also* 1940 Rang. 181.

Sec. 51.—The Excise Sub-Inspector is an expert in his own department, and is able to distinguish liquors, but the Court should under sec. 51 ascertain the grounds on which his opinion is based, so as to test it. 1935 Cr.C. 80=1935 N. 13. Chemical Examiner's report—He was not examined as witness—Contents of report. 144 I.C. 357=1933 A. 394.

Secs. 52-54 : SCOPE—ENGLISH AND INDIAN LAW.—The wording of sec. 54 of the Evidence Act is no doubt wide but the object clearly is to lay down that evidence of bad character including a previous conviction is as a rule irrelevant to help to establish an accused person's guilt but that is not to lay down that it may not be taken into account in passing sentence. (39 B. 326, Foll.) ; 52 M. 358=56 M.L.J. 595.

ADMISSIBILITY OF EVIDENCE.—General evidence of bad character cannot in the first instance be given against accused. 7 W.R. 7 (Cr.) ; 6 W. R. 92 (Cr.) ; 59 I.C. 560=2 L.L.J. 658. Unless evidence has been given that he has a good character in which case it becomes admissible. But the section does not apply to cases in which the bad character of the person is itself a fact in issue. 1928 O. 430. *See also* 1930 B. 157. Such evidence not generally admissible to prove commission of offence. 1 C.W.N. 146 ; 1928 O. 215. But *see also* 27 C. 139. But if the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved *aliunde*, the evidence of bad character is admissible. Evidence of previous conviction is admissible not as proof of bad character but as evidence to prove habit and association. 9 Luck. 22=1933 O. 355. Proper object of proof of previous conviction is to determine amount of punishment if the accused be found guilty of offence charged. 11 B.H.C.R. 90. *See also* 32 M. 526 ; 1928 O. 215.

USE OF PREVIOUS CONVICTION.—Where a previous conviction is relevant with reference to the question of the applicability of sec. 562, Cr. P. Code, and also on the question of punishment, it may be taken into consideration in giving punishment after the accused is found guilty. 39 B. 326=26 I.C. 995. On this point *see also* 5 C. 768 ; U.B.R. (1908) 2nd Qr. Evidence 1=8 Cr.L.J. 411 ; U.B.R. (1892-1906) Vol. I, 82 ; 26 P.W.R. 1910 ; 14 Bom.L.R. 934=16 Cr.L.J. 83 ; 7 P.R. 1895 (Cr.) ; 1886 A. W.N. 47 ; 5 Bom.L.R. 1034 ; 14 C. 74 ; 2 Weir 760 ; 28 P.L.R. 313=1927 L. 549.

ILLUSTRATIVE CASES.—The fact that an accused is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for a charge under sec. 401, I. P. Code. 13 P.R. 1914 (Cr.)=26 I.C. 625. *See also* 60 I.C. 331=5 P.L.J. 706. In a proceeding under sec. 110, Cr. P. Code, a list of crimes which a Police Officer has suspected the accused to

In criminal cases, previous good character relevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

Previous bad character not relevant, except in reply.

[1][54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation (1).—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation (2). A previous conviction is relevant as evidence of bad character.]

Character as affecting damages.

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In Ss. 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, [2][except as provided in section 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

LEG. REF.

[1] This section was substituted for the original section by Act III of 1891, sec. 6.

[2] These words and figures were inserted by Act III of 1891, sec. 7.

NOTES.

have committed, is inadmissible to establish the reputation of the accused. 13 I.C. 102; 62 I.C. 543=22 Bom.L.R. 1274. The past history of a gang of dacoits would be significant only if an offence under sec. 400, Penal Code, has been made out. 13 I.C. 279=16 C.W.N. 69. Statement by a prosecution witness in a prosecution for riot that he had brought a case under sec. 107, Cr. P. Code, against some of the accused who had been bound down, is admissible not for proving the bad character of the accused but as part of the *res gestae*, the events which had transpired before and which led up to the riot with which the accused were charged. 17 I.C. 565=40 C. 367. As to evidence of conduct as affecting character, *see* 25 S.L.R. 55=1927 Sind 28. *See* 1928 L. 647 as to the value of past good character.

Sec. 54.—Evidence of bad character of accused is admissible to prove the motive for crime. 5 P. 63=93 I.C. 884; 1928 O. 430. S. 54 does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases. I.L.R. (1941) Kar. 308=1941 Sind 173. In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime, before the jury, the intention of sec. 54 is not infringed and evidence pointing to directly similar conduct is admissible. Sec. 54 refers to specific evidence of bad character not confined to acts similar to the crime, which was being investigated which may influence the jury on the question of motive which is dealt with in the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried. 1936 C. 469. A statement elicited from a prosecution witness in a sessions trial by way of cross-examination, as to the opinion of another witness about the bad character of the accused, does not amount to evidence of bad character, when the statement was not elicited for the purpose of proving what sort of character the accused bore but with the collateral object of showing that the other witness was resiling from the evidence which he gave before the committing Magistrate, and the admission of that statement does not, therefore, contravene the provisions of sec. 54. I.L.R. (1939) 1 C. 337. *See also* 1939 P.W.N. 627=1940 P. 14.

Sec. 54, Expl. 1).—*See* 7 O.W.N. 862=1930 O. 455.

Sec. 55.—*See* 10 C.W.N. 522=3 C.L.J. 349; 2 C.P.L.R. 198; 41 I.C. 696; 1932 N. 158.

Sec. 56: JUDICIAL NOTICE—NOTORIOUS FACTS. Judges are entitled to take judicial notice of any notorious fact without requiring actual positive evidence. 24 M.L.J. 211=18 I.C. 257. A Court can take judicial notice of facts transpiring in Court. 121 I.C. 337.

Sec. 57: SECTION NOT EXHAUSTIVE.—The list

(1) [1][All Indian laws ;]

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed ;

(3) Articles of war for Her Majesty's Army [2][Navy or Air Force] ;

(4) the course of proceeding of Parliament and [1][of the legislatures established under any laws for the time being in force in British India.]

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(*i*) the Parliament of the United Kingdom of Great Britain and Ireland ;

(*ii*) the Parliament of Great Britain;

(*iii*) the Parliament of England ;

(*iv*) the Parliament of Scotland ; and

(*v*) the Parliament of Ireland ;

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established, by the authority of the [1][Central Government or the Crown Representative] : the seals of Courts of Admiralty and Maritime jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in Biitish India ;

LEG. REF.

[1] Substituted by A.O., 1937.

[2] These words were substituted for the words "or Navy" by S. 2 and Sch. I of the Repealing and Amending Act (X of 1927).

NOTES.

given in this section of the facts of which the Court shall take judicial notice of is far from complete ; and Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as in Bengal, lists of landholders who have not made road cess returns (Beng. Act IX of 1880, Sec. 19) ; in Madras, by-laws framed by the Commissioners of Police (Mad. Act III of 1866, sec. 4) ; in Bombay, notifications in the Gazette (Bom. Act X of 1866, sec. 4) ; in Oudh, the list of talukdars and grantees published by the Chief Commissioner (Act I of 1868, sec. 10) (Whiteley Stokes' Vol. II, p. 837). *See also* 1937 P. 463 (Sifton's Settlement Report). In 10 C.L.R. 469, the Court refused to take judicial notice of the seal of a Kazi or Sudr Amin whose appointment said to have been made about 1820, was not proved. Though Courts take judicial notice of judgments, it does not follow that all statements of facts contained in judgments must be taken judicial notice of. 19 S.L.R. 576=1926 Sind 161. The Courts cannot take judicial notice of theft on Railways. 1928 L. 837. The Court can take judicial notice of the fact that "the present political movement" is in fact a movement prejudicial to the public safety or peace. 36 C.W.N. 1158.

REGISTERED LETTER.—Court may take judicial notice of the fact that a registered letter takes at least 24 hours longer than ordinary letter. 99 I.C. 622=1927 A. 215.

CUSTOM OF RIGHT OF PRIVACY.—In Oudh, *see* 13 O.L.J. 512. *See also* 93 I.C. 332=1926 O. 352. As to judicial notice of the existence of a local custom, *see also* 91 I.C. 583=1926 O. 101.

SIGNATURE OF A GAZETTED OFFICER.—The Court can take judicial notice of the signature of gazetted officer of the British Government and therefore the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved. The applicability of the sub-section is not contingent on the exhibition of a copy of the *Fort St. George Gazette* containing a notification of his appointment as such officer. 44 M.L.J. 557=72 I.C. 515=1923 M. 600. As to judicial notice of power-of-attorney given under seal of notary public, *see* 41 Bom.L.R. 530 =I.L.R. (1939) Bom. 347. Honorary Magistrate's signature is taken judical notice of only when made in his official capacity. 5 I.C. 537. Courts take judicial notice of attestation and signature of such Registrar. 105 I.C. 422. As to signature of Justice of the Peace, *see* 1 Beng. L.R. 15 (Cr.). Judicial notice of Agra division records being destroyed during the great Indian Mutiny. *See* 22 A. 224. For cases where appropriate books were referred to, *see* 17 A. 456 (P.C.) ; 12 C.L.R, 86 ; 22 C.W.N. 745 ; 32 C. 1 (P.C.) ; 1 B. 369. Law Reports, 23 C. 289 ; 12 C.L.R. 86 ; 10 C. 140 ; 24 A. 445 ; 15 B. 452 (457) ; Medical works, 12 C. L.R. 86 ; 10 C. 140 ; 14 A. 445 ; 15 B. 452 (457); 23 C. 604 (608). Mill's History of India, Mill's Political Economy. Harrington's Analysis, Sanads, Treaties. *See* 3 W.R. (Act X Rul.) 29; 7 B.L.R. 63 ; 15 W.R. (Cr.) 25 ; 15 M. 241. As to other histories (as) Menon's History of Travancore, *sea* 12 M. 495. Books dealing with custom of communities by public-officer. 49 A. 848 (Production of a gazette is sufficient proof of Court notification). 1928 A. 355. Before any judicial notice could be taken of any passages in books relating to an alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had any special knowledge of the alleged tradition or the tradition is a repetition of that given in the history. 1937 L. 529.

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in [1][any Official Gazette];

(8) the existence, title and national flag, of every State or Sovereign recognised by the British Crown;

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) the territories under the dominion of the British Crown;

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons;

(12) the names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it;

(13) the rule of the road [2][on land or at sea.]

In all these cases[3] and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse, to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Facts admitted need not be proved.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Inserted by Act XVIII of 1872, sec. 5.

[3] For an additional case, *see* Civil Procedure Code, 1908, S. 84 (2).

NOTES.

Sec. 58.—Section applies to criminal trial as well as criminal cases. 91 I.C. 233=27 Cr. L.J. 57=1926 O. 245. *See* Rat. 769; 5 B. 143; U.B.R. 1907, Evid. 1; 6 M.I.A. 521 (proof of will); 6 B.L.R. App. 49 (proof of documents not disputed); 1924 R. 155 (Partition admitted—Unregistered deed—If admissible). Admission made in course of examination—No necessity to prove. *See* 8 Bur.L.T. 18. Mortgage unregistered—Effect of an admission. *See* 6 Bur.L.T. 131=20 I.C. 666. When an agreement sued upon is admitted by the defendant proof of it is dispensed with. A Court cannot dismiss a suit based on an admitted document on the ground that the document was not sufficiently stamped. 4 Bur.L.T. 171=11 I.C. 810. Admission of mortgage in written statement—Proof of loss of original or contents of certified copy—Not necessary. 1934 L. 898. Admission of mortgage in pleadings—Attestation by one witness—No proof required. *See* 4 Bur.L.T. 182=11 I.C. 850. *See also* 20 N.L.J. 21=169 I.C. 323; 13 N.L.R. 121; 42 B. 352=20 Bom.L.R. 354=45 I.C. 555; 42 M. 41=35 M.L.J. 555. Sec. 58 cannot be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration. 1935 Pesh. 12. In spite of waiver of proof by an admission under sec. 58 of the Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it, unless apart from the note, there is an independent cause of action for the loan. 1933 M. 117=64 M.L.J. 79. Suit on promissory note—Defendant admitting execution and pleading discharge—Promissory note subsequently discovered to be insufficiently stamped—Objection to suit—Sustainability. 1932 M. 693 =63 M.L.J. 303. Fact alleged in plaint and not denied in written statement may be established as admission. *See* 4 Bur.L.T. 26=9 I. C. 470. Pleader consenting to admit inadmissible evidence in criminal case—Conviction on such evidence—Propriety. 28 M.L.J. 329. Accused's pleader admitting possession of cocaine—Court acting on the same is irregular. 30 Bom.L.R. 646=52 B. 686=1928 B. 241.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents may be proved by oral evidence.

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

NOTES.

Sec. 59.—Proof by oral evidence (*a*) of adjustment of accounts. *See* Beng.L.R. (Supp. Vol.) (F.B.) 3; (*b*) of payment of money. 1 A. 442. Value of documentary evidence. When there is conflict of oral evidence, *see* 4 M.I.A. 403; 2 Beng.L.R. (P.C.) 8. *See also* 1 M.I.A. 43.

Sec. 60: SCOPE OF SECTION.—*See* 12 Beng. L.R. (App.) 18; 1924 R. 363. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 8 Luck. 445=1933 O. 246. *See also* 41 C.W.N. 1103. As to persons, who can give opinion evidence, *see* 25 M. 209; 23 A. 37. As to evidence of admission, *see* 5 M. 239; 4 L.B.R. 121; 2 Weir 762. Where, on a charge of plying a car for hire without permit, the constables only deposed to what a passenger told them (and that passenger was not examined). *Held*, such evidence was excluded by sec. 60 of the Evidence Act. 1933 M.W.N. 1424. When hearsay relevant evidence. *See* 6 Bom.L.R. 762; 52 M.L.J. 376 (P.C.); 24 L. W. 227; 41 C.W.N. 1103 (evidence of family tradition).

As to statement by person as to what another reported to him, how far evidence, *see* 97 I.C. 785=1926 M. 1003. Circumstantial evidence not excluded. 1927 C. 498.

Reliance on text-books without expert evidence. *See* 22 C.W.N. 745; 38 M. 466.

Certified copy of translation of judgment. 4 I.C. 579. The value of the evidence admissible under secs. 32, 49 and 60 depends on the character of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. 1933 Sind 213.

Secs. 60 and 67: PRIOR STATEMENTS—MODE OF PROOF.—Ss. 60 and 67 deal respectively with the proof of oral and written statements. These two sections do not lay down that such statements can be proved only by calling in the deponents themselves as witnesses. 1941 R.D. 503=1941 O.A. (Supp.) 460.

Secs. 60 and 118.—Evidence of statements made by a child to other people, or of conduct amounting to a statement, is not admissible in a criminal trial, when such child is not examined as a witness by reason of incompetency to depose. I.L.R. (1941) 2 Cal. 180.

Sec. 61.—The fact that the man producing a document used the same to settle disputes between the villagers, and that before him the document was in the possession of his father, does not make the document a true copy of the

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation (1).—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation (2).—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary evidence.

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained[1];

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

LEG. REF.

[1] *See* sec. 76 *infra*.

NOTES.

original (chitta). 49 C.L.J. 546=1929 C. 459.

Sec. 62.—One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest. 1930 L. 371. To bring document under Expl. II to sec. 62, the whole document, together with the signature thereto, if any, must be made by one uniform process. Where a letter together with several copies are prepared by one process, namely, typing on a typewriter, and one of them alone is afterwards signed separately, but the rest were only initialled, it cannot be said that the signature on the one and the initials on the rest have been made by one uniform process. The copies therefore cannot be held to be a primary evidence of the letter. 1937 M. 806=(1937) 2 M.L.J. 381.

Sec. 63.—The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in a very clear case of miscarriage. 55 B. 103=32 Bom.L.R. 1385=1931 B. 105. Counterfoils of original receipts are admissible only on proof of loss of originals. 39 P.L.R. 702=1937 L. 370.

COPY OF A COPY is not evidence. 7 A. 738. But it may be admitted in evidence by consent of parties. 1928 M. 1255. Proof of copy being correct copy is no proof of the original (*i.e.*) of its execution, genuineness, etc. 22 W.R. 208. Secondary evidence—Absence of evidence of comparison with original—Objection on scope of —When to be taken—Copies admitted in appeal without objection—Objection in second appeal—Competency. 17 P.L.T. 709. *See also* 45 C.W.N. 654=1941 Cal. 506. Newspaper copy of a letter not proved to have been written by the accused is not evidence. 8 A.L.J. 302=10 I.C. 832. Secondary evidence of a document which has not been proved to have been written by accused or even existed, cannot be admitted. A copy of a newspaper publishing a defamatory letter cannot be used as secondary evidence to prove a letter which has not been found or even proved to have existed. 10 I.C. 832. A copy of a copy, in the absence of proof of comparison with the original is not good secondary evidence of the original, in the absence of consent. 48 L.W. 650=(1938) 2 M.L.J. 883.

Cl. (3).—*See* 1924 N. 375; 20 L.W. 719. A printed copy of the depositions of a party to the former suit made in English, which depositions came up to the Madras High Court in 1900 on appeal, is admissible in evidence, as it is the practice of the Madras High Court since 1900 after Government Press took up the printing of the High Court papers, that before giving the final order for striking off, it would be compared with the original. (1927 P. 61, Rel. on.) 115 I.C. 147=1929 M. 187. Sec. 63 is exhaustive of the meaning of 'secondary evidence.' An 'abstract translation' which does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of its terms, is inadmissible. 39 P.L.R. 602=1937 L. 370.

An uncertified copy of a deposition can be used as secondary evidence only if it can be regarded as a copy made from or compared with the original. Where the man who is alleged to have made the copy is dead and so also is the man who compared it with the original, and their signatures only have been proved by a clerk who was acquainted with their handwriting, it cannot be accepted as evidence as it is not

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b*) A copy, compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power—

NOTES.

sufficiently proved that it was made from or compared with the original. 73 C.L.J. 159=45 C.W.N. 654=1941 C. 506.

Cl. (5).—*See* 22 A.L.J. 864=80 I.C. 939=1924 A. 792. Survey and Settlement Report which was based on a jamabandi, the original of which was not produced and which itself was not exhibited in evidence, cannot be treated as secondary evidence of the contents of the jamabandi statement under cl. (5), S. 63 or under any other section of the Evidence Act. (1928 P. 284, reversed.) 32 Bom.L.R. 515=59 M.L.J. 731=1930 P.C. 45 (P.C.).

"PERSON WHO HAS SEEN," meaning of.—Evidence that witness saw the document and heard it read out if admissible. *See* 54 I.A. 61=5 R. 18=52 M.L.J. 376 (P.C.). Under the section the evidence of the contents of a document must be given by a person who had seen those contents, *i.e.*, who had read the document. The evidence of a person not knowing the language of the document is inadmissible. 12 R.D. 500=112 I.C. 310.

Sec. 65: APPLICABILITY.—Secondary evidence should not be allowed unless the circumstances are a sufficient justification under the Evidence Act, for reception of secondary in lieu of primary evidence. 1933 P. 468. An income-tax return is not a document or a public record of a private document within the meaning of S. 74 and so S. 65 does not apply. 56 B. 324=34 Bom.L.R. 236.

Where a party has taken all the necessary steps for the production of an original document but the document is not produced by the person in whose possession it is, he being alleged to be in collusion with the opposite party, the former is entitled to offer secondary evidence as to the contents of the documents in question. 22 P.L.T. 200.

Cl. (a).—Effect of section. *See* 49 A. 78=24 A.L.J. 964. Any secondary evidence is admissible here. 16 I.A. 125=16 C. 753 (P.C.). "Produce" means only procure the production or give it in evidence. 1930 A. 550. A statement of a witness abstracted in a judgment is not even secondary evidence of the statement and cannot be made use of in lieu of the original statements itself. 53 M. 952=60 M.L.J. 14. It is doubtful whether a copy of a list attached to a plaint obtained from some record in the Revenue Court is admissible in evidence. 7 O.W.N. 1079=14 R.D. 664. Secondary evidence is necessary before any presumption under S. 90 can be made. 1930 A. 550. Oral evidence cannot be given to prove the contents of a letter which was neither produced nor called for. 26 C. 53. The copies of the letters from the accused to his co-conspirators which were intercepted and re-posted are admissible in evidence. It is not necessary that the prosecution should go through the formalities of making a formal application to his associates to produce the original letters. 1933 A. 498. Where a lease deed is in the possession of the defendants, and they failed to produce it though summoned twice to do so, secondary evidence of the same is admissible. L.R. 3 A. 8 (Rev.). Where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under S. 65 (*c*) and S. 66, proviso (2). 32 Bom. L.R. 1435=1931 B. 33; 34 P.L.R. 929=1933 L. 945. Certified copy of a registered deed is sufficient proof when the original of that deed is in the possession of the opposite party. 1928 A. 394. Also when the original is filed in another Court and could not be got without delay. 1930 C. 479. Where the original of a document cannot be admitted in evidence on the ground of privilege under S. 124 no secondary evidence of its contents can be given. 1937 M.W.N. 746=1937 M. 807=(1937) 2 M.L.J. 381. Under S. 65 (*a*) secondary evidence of the contents of an *income-tax return* would not be admissible. The Income-tax Officer is subject to every process of the Court. 1939 M. 546=(1939) 1 M.L.J. 791. *A profit and loss statement and a statement showing the details of net income filed by an assessee in support of his return of income* furnished under S. 22 of the Income-tax Act, are public documents with reference to S. 74 of the Evidence of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it ;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(*d*) when the original is of such a nature as not to be easily movable ;

(*e*) when the original is a public document within the meaning of section 74 ;

NOTES.

Act of which certified copies would be admissible under S. 65 (*e*) of the Evidence Act. There is nothing in S. 54 of the Income-tax Act which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document. It would be putting an unwarranted restriction on the words "documents forming the act or records of the acts" in S. 74 (1) of the Evidence Act to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents, which he has himself called for or which have been admitted to the record for the purposes of the assessment. I.L.R. (1940) Mad. 450=1940 M. 768=(1940) 2 M.L.J. 257 (F.B.). But *see also* I.L.R. (1940) M. 329=50 L.W. 815=1940 M. 161 ; 1940 C. 187=43 C.W.N. 1169.

LOST DOCUMENT.—If it is found that a document has been lost, secondary evidence may be given and whether proof is sufficient in a case is a question of fact. L.R. 4 A. 201 (Rev.). Agreement to relinquish unregistered but enforceable under the doctrine of part performance —Secondary evidence of its contents may be given if it is lost. 1929 R. 181. Loss of original of documents produced merely as evidence should be proved. 122 I.C. 751. Entries in Patwari's list made after inquiry and inspection of receipts are only secondary evidence and they are inadmissible unless the conditions laid down in this section are satisfied. 12 R.D. 398=111 I.C. 843. S. 65 (*c*) is not inapplicable to the case of previous conviction and secondary evidence could be admissible to prove previous convictions in cases where the records of the previous trials and convictions have been destroyed and are not available. But a mere conviction slip is not such secondary evidence. I.L.R. (1941) Kar. 308=1941 S. 173. On this clause, *see also* 5 P. 777, referring to 6 M. 80; 27 C. 639 (P.C.) ; 24 L.W. 227 ; 105 I.C. 502 ; 8 P.L.T. 510=1927 P. 61 (Original of public document destroyed—Secondary evidence admissible); 1926 O. 161 (Original telegram destroyed). *See also* 1937 R.D. 119 ; 14 I.A. 71 ; 8 W.R. 38 ; W.R. (1864) 301 (Decree destroyed during mutiny) ; 22 W.R. 303 ; 5 C. 885 ; 7 C. 98 ; 6 C.L.R. 199 (Document destroyed by fire) ; 1937 R.D. 119 ; 11 P. 569=138 I.C. 419=1932 P. 157 (Record room burnt during mutiny). As to evidence of search before document can be considered to be lost, *see* 19 C. 438 ; 49 I.C. 1006. Document—Lost in Court—Secondary evidence admissible. 144 I.C. 812=1933 L. 782. As to value of lathandi papers a secondary evidence of certificate of sale, *see* 21 W.R. 333. A compromise filed in a rent suit may be proved by producing a certified copy as the compromise so filed is a part of public record. L.R. 1 A. 132 (Rev.). *See also* U.B.R. (1909) 4th Qr. Evi. 19 (Supplementary survey records) ; 1 P.R. 1914 (Cr.) ; 15 Cr.L.J. 344 ; 5 P.R. 1903 (Cr.). Certified copies of registered deeds. 103 I.C. 752=1927 L. 817. Secondary evidence of a compulsory registrable but unregistered deed is not admissible in evidence. 101 I.C. 839=1927 N. 214. Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public records of private documents, within S. 74 (2). 45 C. 169=21 C.W.N. 1161 (F.B.). The mere fact that a document which is required by law to be attested was admitted in evidence without objection by the defendant, does not absolve the plaintiff from establishing that it had been duly executed and attested. 42 C.W.N. 1055=1938 C. 702. Secondary evidence of a document should not be rejected on appeal merely on the ground that the loss of the original has not been satisfactorily proved. 15 I.C. 625. Secondary evidence admitted without objection, not to be excluded on appeal. 29 M.L.J. 307=19 C.W.N. 929 (P.C.). *See also* 14 I.C. 539 ; 32 P.L.R. 696=1931 L. 722 ; 14 L. 473=1933 L. 601. Where a suit is brought on certified copies of documents and the loss of the document is not proved the suit must be dismissed as no secondary evidence is admissible in the circumstances. 23 I.C. 886. Where the plaintiff has suppressed the documents in his possession, he could not be permitted to establish their contents by secondary evidence. 1933 M. 451=64 M.L.J. 676. *See also* 1937 N. 116=169 I.C. 834. The defendant pleaded that the original was not lost but had been suppressed because it contained an endorsement of payment, *held*, that as the pleading of the defendant amounted (*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence[1];

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [2][or to his attorney or pleader], such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

LEG. REF.

[1] *Cf.* The Bankers' Books Evidence Act (XVIII of 1891), S. 4.

[2] These words were inserted by Act XVIII of 1872, S. 6.

NOTES.

to an admission of execution, of a document, the plaintiff could maintain the suit on its copy without proving the loss of the original. 11 A.L.J. 734=20 I.C. 955; 11 A.L.J. 731=21 I.C. 81. Where in a suit for redemption, it is proved that in *wajib-ul-arz* predecessors in title of the defendants admitted in writing the existence condition and also the contents of the original S. 65 (*b*) applies. 148 I.C. 1172=1934 A. 529. Order granting letters of administration with copy of will annexed, if public document—Certified copy, if admissible. *See* 19 C.W.N. 1068 =30 I.C. 690. Certified copy of probate in Australia—Secondary evidence. *See* 11 I.C. 261. Copy of award admissible when original in possession of party not subject to process of Court. 1917 P. 241. A certified copy of a robokari is admissible in evidence. 29 C.W.N. 742=46 I.C. 689. Contents of document called for but not produced—Court bound to receive secondary evidence. *See* 49 I.C. 507. Mortgage deed executed in England comprised properties situate in India—Loss of deed before registration—Secondary evidence may be given. 1928 P. 134=7 P. 99. Document lost—Copy of, bearing endorsement by deceased predecessor of party that it was a copy of original—Admissibility. 56 M.L.J. 730 (P.C.).

The *statement contained in the debtor's application to the Debt Conciliation Board* cannot be regarded as an admission within S. 65 (*b*), Evidence Act. It is a statement under S. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount; on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything. 1941 N. 95=1941 N.L.J. 134.

LOST DOCUMENT INSUFFICIENTLY STAMPED.—Inadmissible in evidence, as no duty or penalty can be levied on a lost document. But proof of title by independent evidence is not barred. 4 Mys.L.J. 194.

Secs. 65 and 66.—The only purpose of a notice under Ss. 65 and 66 of the Act is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents. Secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce the original document in reasonable time and under S. 66 the Court has absolute power, when it thinks fit, to dispense with a notice under these sections. 63 I.A. 85=40 C.W.N. 226=70 M.L.J. 206 (P.C.).

Sec. 65 (g).—*See* 6 M. 8; 5 C. 568.

Sec. 66.—Section is mandatory. 31 C.W.N. 215=1927 C. 102. Secondary evidence of deeds of sale of houses adjacent to the suit house can be given in order to prove title only when the person in possession of those documents fails to produce them in spite of notice given to him. Where no such notice is given secondary evidence in the form of copies of the original document should not be admitted. 11 L.L.J. 401. *See also* 123 I.C. 197 (omission to give notice is a fatal objection to the admission of secondary evidence). Where a pardanashin woman is living with her brother, service of summons on him instead of the woman herself would constitute such notice as is required by S. 66 and if that brother is expressly named in the summons as the person upon whom it might be served, it is only a technical irregularity. 27 A.L.J. 1091=1929 A. 680. No doubt under S. 66 a notice to produce the document must

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1) when the document to be proved is itself a notice ;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) when the adverse party or his agent has the original in Court ;

(5) when the adverse party or his agent has admitted the loss of the document ;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

68. If a document is required by law to be attested, it shall not be used as

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NOTES.

previously have been given to the party in whose possession or power the document is before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, *e.g.*, where the Court in its discretion thinks it fit to dispense with it ; the objection should however be raised at the time of the reception of the evidence and no objection should be allowed to be taken in appellate Court as to the admissibility of secondary evidence which was admitted in evidence in trial Court without any objection. 163 I.C. 408 (2)=1936 R. 277.

Sec. 66, Proviso.—6 P. 102. It is doubtful if a *pro forma* defendant who is not interested in suit property or in the decision of the case is not an "adverse party" within the meaning of Proviso, cl. (2). 118 I.C. 663=1929 A. 680. Certified copy of mortgage deed may, for proper reasons, be admitted without notice to produce the original. 97 I.C. 348=1926 P. 512. *See* 9 C. 939 ; 2 M. 295. Where a party alleges that no facts are adduced by the opposite party nor any facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original document is in possession or control of the party taking the objection and he fails to produce it, proviso, cl. 2, S. 66 applies and notice to the party to produce the original is not necessary as by the nature of the case the party must be held to be knowing that he would be required to produce it. 161 I.C. 465=1936 P. **129**

Sec. 67.—*See* 22 W.R. 390 ; 21 W.R. 429 ; 11 B. 690 : 12 B.L.R. App. 18. The definition of "sign" in the General Clauses Act, S. 3 (52) has no application to term "sign" as used in S. 67, Evidence Act. 1934 A. 390. Thumb marks are not exempt from the provisions of S. 67. 40 L.W. 277=1934 M. 558. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. 37 C. 467=14 C.W.N. 1114. Proof of document by examination of writer. *See* 19 C.W.N. 1148 =22 I.C. 654. Handwriting may be proved by circumstantial evidence under S. 67 which prescribes no particular kind of proof. The execution or authorship of a document is a question of fact and may be proved like any other fact. 1933 A.L.J. 799=1933 A. 690. The identity of the machine on which two letters have been type-written would not by itself show that the writer of the two is one and the same person. Such a conclusion may be drawn from additional evidence, *e.g.*, internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee. 1933 A. 690. *See also* 37 C. 467= 14 C.W.N. 1114. The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of "proved." That definition of the word "proved" must be read along with S. 67. S. 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. 1928 A. 303. *See also* 1941 A.W.R. (Rev.) 461=1941 O.A. (Supp.) 420. Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution. So where one attesting witness was dead and the other turned hostile, proof or admission of his handwriting is sufficient. 1930 M. 770=125 I.C. 231. *See also* 57 M. 662=1934 M. 365=66 M.L.J. 712.

Sec. 68.—*See* 104 I.C. 622 ; 45 C.L.J. 577. If S. 68 was intended to express that a document required by law to be attested should not be used as evidence *for any purpose* until one attesting witness at least had been called, then the words "for any purpose" would have found a place

Proof of execution of document required by law to be attested.

evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

[1][Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.]

LEG. REF.

[1] Proviso added by Act XXXI of 1926.

NOTES.

in the section. Those words are not in the section and therefore it has to be concluded that this was not the intention of the framers of the Act. There is no reason why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. 1939 A. L.J. 142=I.L.R. (1939) A. 366=1939 A. 269. The fact that *one of the attesting witnesses, has turned hostile,* is no sufficient ground to excuse the party producing the document from his duty of calling the said witness. It is always open to him to cross-examine that witness with the permission of the Court. 1941 O. 89=1940 O.W.N. 1077. A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness. 193 I.C. 41=1940 N.L.J. 437=1940 N. 382. Under S. 68 what is necessary is that an attesting witness, if available, should be called in evidence. It is wrong to think that a mortgage deed can be proved only by an attesting witness. If the latter is unable to prove it, there is no bar to its being proved by other evidence. 193 I.C. 161=1941 O.W.N. 249=1941 O. 284 ; 1941 O.W.N. 1298=1941 O.A. 983 ; 1941 R. 122.

SCOPE OF PROVISO.—*See* 149 I.C. 1109 (1) =1934 L. 282. S. 68 has no application to the Punjab and there is no law which requires sale-deed in the province to be attested. 10 L. 447=114 I.C. 62 ; 1928 L. 148. The change in the meaning of the word "attested" effected by S. 2 of Act XXVII of 1926 as amended by Act X of 1927 is retrospective in operation and the person who identifies the executant of a document before Sub-Registrar can be an attesting witness. 30 N.L.R. 62=152 I.C. 1007 =1934 N. 1. The amendment of S. 68 by Act XXXI of 1926 is a provision relating to processual law and not to substantive law and therefore must be taken to be retrospective in its operation. 1929 M. 881=57 M.L.J. 588 ; 1933 M.W.N. 141=37 L.W. 677=1933 M. 432 ; 144 I.C. 49=1933 M. 612. The words "Indian Registration Act, 1908," occurring in proviso to S. 68 could not be interpreted so as to confine the application of the proviso, only to documents registered according to the provisions of that particular Registration Act and not of any previous Registration Act. 178 I.C. 198=1939 P. 47. Where a defendant in a suit on a mortgage pleads that the contesting defendant does not admit the execution and completion of the document sued on, nor is receipt of any consideration of the same admitted, and further it is recorded by the trial Judge that the pleader for the defendant in question 'hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client.' In such a case the contention that the execution of the mortgage had not been 'specifically denied,' could not be accepted, and it must be held that in fact the execution has been specifically denied. 43 C.W.N. 669 =181 I.C. 216=1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.). The section does not apply to account books which do not require attestation. 1930 A. 37. A document which purports to be a mortgage but is not a mortgage owing to non-compliance with the provisions of S. 59 of the Transfer of Property Act regarding attestation is not a document which is required by law to be attested within the meaning of S. 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested. [32 M. 410 =19 M.L.J. 584 (F.B.), Foll.] 54 M. 163=60 M.L.J. 56 ; 146 I.C. 694=1933 S. 257. Where the execution of a registered mortgage deed is not denied by the mortgagor, it is not necessary to call the attesting witnesses of the deed to prove it. 165 I.C. 404=1936 O.W.N. 1113 =1937 O. 149. To prove a deed of gift, the production of a witness, who identified the donor and attesting witnesses and who was personally known to the Sub-Registrar, and an entry in favour of the donee in the village records are sufficient. 60 I.C. 234. The proper way of proving an entry in the Register of Motor Vehicles would be either that the Register itself should be produced by a proper official or a duly authenticated copy of the material part of the register placed before the Court. A mere statement by the Commissioner of Police made in answer to a letter written by the Corporation, without his being called or the register produced, cannot be accepted in proof of the ownership of a car. 36 C.W.N. 1147. A writer who signs his name in token of being the scribe of a mortgage deed does not attest the deed merely by subsequently seeing the mortgagor affix his signature. 6 N.L.R. 152=8 I.C. 1119. "Execution" of mortgage deed—Meaning of. *See* 69 C.L.J. 454. Attestation by mark—Illi-

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terate witness—Effect of. *See* 12 A.L.J. 1114=26 I.C. 84. Executant of document or party to transaction not an "attesting" witness. 14 C.W.N. 1046=7 I.C. 735. A writer of a deed who has not signed it as witness but has as a matter of fact been a witness of execution is a competent attesting witness. 146 I.C. 694=1933 S. 257. The certificate of admission of execution endorsed by the registering officer upon a document registered by him could not be used as an admission of execution within the meaning of S. 70. 13 N.L.R. 197; 18 S.L.R. 282=93 I.C. 660=1926 S. 88. *See also* 38 I.C. 605=1936 A. 712=1936 A.L.J. 1262. Where the execution of a document is admitted or not denied it is not necessary to prove the attestation. 42 I.C. 91 (Under the present amendment want of specific denial dispenses with proof by attestor). 14 R.D. 494; 1936 O.W.N. 1113=1937 O. 149; 1936 O. 270=161 I.C. 605=17 R.D. 70; 1934 A.L.J. 817=1934 A. 507. *See also* 1933 L. 378. If any of the defendants to a suit denies that any of the alleged executants executed the deed the plaintiff must produce one of the marginal witnesses to prove the document. 140 I.C. 115=1932 A.L.J. 207=1932 A. 320. *See also* 1936 A.M.L.J. 54. Executant of a mortgage deed, admission by, whether binds others not admitting. 44 C. 345=20 C.W.N. 1044. Mortgage, proof of—Only one attesting witness called, sufficient proof. 39 A. 24=15 A.L.J. 164. Where though a person purports to be an attesting witness and is called at the trial for the purpose of proving the execution of a mortgage deed, but his evidence has not been accepted as evidence upon which any reliance could be placed in such case, the contention that the provisions of S. 68 had been complied with and that no further evidence of due execution and attestation of the mortgage was necessary, cannot be accepted. 43 C.W.N. 669=1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.).

PRACTICE.—Attestation being a mixed question of law and fact cannot be raised for the first time in second appeal. 97 I.C. 611=1926 M.W.N. 559. Where in spite of the best efforts of the plaintiff, the attesting witness could not be served with summons and by the time of the appeals the witness was dead. *Held*, that, whether under the amendment to S. 68 or S. 69, it was open to the plaintiff to prove the document by other means. His own evidence held in the circumstances sufficient for the purpose. 144 I.C. 89=1933 M. 612. No doubt only one attesting witness need be called, if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses. 1941 R. 122. Where the executant of a mortgage deed, the writer of a deed and the attesting witnesses have all died, having regard to the new definition of attestation in S. 3, T. P. Act, and to the varied mode of proving a registered document as amended by. S. 68, Evidence Act, it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. 1929 S. 235. No attempt to prove attestation of mortgage-deed—Document cannot be used as evidence. 1929 A. 389. Execution of mortgage deed not specifically denied—Need not be proved. 30 Bom.L.R. 565; and examination of attesting witness is not necessary. 1927 P. 403. *See also* I.L.R. (1937) A. 723. It is not the law that a plaintiff in a suit on a mortgage bond should call all the attesting witnesses to the bond who are alive before he can take advantage of S. 71. It is incumbent on the plaintiff to call at least one witness, and if that witness denies or does not recollect the execution of the document, then the execution may be proved *aliunde*. Whatever the English law may be Ss. 68 to 71 do not necessarily state it. 173 I.C. 983=19 P.L.T. 234=1938 P. 301. *See also* 1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.); 181 I.C. 572. Defendant admitting execution of mortgage deed but denying attestation—Duty of plaintiff to prove due attestation. 1936 A.L.J. 297=1936 A. 169. Where on the production of a certified copy of a registered deed of gift, the party challenging it does not specifically deny that it is the copy of the deed, according to the proviso to S. 68 the production of attesting witnesses to prove execution and attestation of the deed is not essential. 1939 L. 414. Where execution of a document is not denied, the execution and attestation of the document can be proved by other evidence, and it is unnecessary to call any of the attesting witnesses. 190 I.C. 413=1940 R. 184. *See also* 1941 R. 122. Where the defendant not only denies the execution of the suit mortgage deed but also states in his written statement that it is not genuine, the execution of the mortgage is "specifically denied" and the proviso to S. 68, Evidence Act, becomes applicable and it is incumbent upon the plaintiff to produce at least one of the attesting witnesses. 1941 O. 89=1940 O.W.N. 1077. A deed of relinquishment is not a document required by law to be attested; so it can be proved by the unchallenged evidence of the alleged writer thereof. 14 L.R. 466 (Rev.)=17 R.D. 637. A document executed in England and requiring to be attested under the English law but not requiring to be attested under Indian iaw, relating to property in India may be proved only by proving the signature of the executant. 7 P. 520=111 I.C. 57=1928 P. 304. The proviso to S. 68, Evidence Act, only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under S. 59, T. P. Act. 11 R. 26=1933 R. 6 (1929 P. 422, Diss.). The word "execution" as used in the proviso to S. 68 of the Evidence Act in the case of mortgage bonds which the law requires to be attested by witnesses means and includes all the series of acts which would give validity to the instrument *qua* mortgage, *i.e.*, the word 'execution' used in that section not only means signing by the borrower but the attestation of the sig-

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

NOTES.

nature by the witnesses as required by S. 59 of the T. P. Act. If, therefore, in a suit on a mortgage bond the defendant admits the signature but denies the attestation, it must be taken that he denies the execution of the mortgage bond and this denial requires the plaintiff to prove the mortgage bond by examining one of the attesting witnesses, if available. I.L.R. (1937) 1 C. 507=41 C.W.N. 306. *See also* 43 C.W.N. 1025=1939 C. 688. The word 'execution' as used in the proviso to S. 68, Evidence Act, in the case of a mortgage bond means and includes not only the signature of the executant, but the whole series of acts or formalities which are necessary to give the document validity as a mortgage deed, like attestation, etc. 1940 O.W. N. 1077=1941 O. 89. *See also* 43 C.W.N. 1025 =1939 C. 688.

Secs. 68 and 70.—The execution contemplated in S. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. In the case of document required to be attested, there can be no execution unless there has been a signing by the executant in the presence of the attesting witnesses, and execution is not complete unless the deed is attested by two witnesses. If a question of attestation is put in issue, it is incumbent on the the plaintiff to prove that the document has been duly attested before S. 70 can be relied on, and the plaintiff is not relieved of the obligation of calling an attesting witness under S. 68 of the Act. A statement by the executant that when he signed the deed there were no alterations or erasures and there were no attesting witnesses to the document, etc., is not an admission of execution at all, but a denial of execution. 46 L.W. 610=1938 M. 43=I. L. R. 1938 M. 523.

Secs. 68 and 72.—The definition of bond in S. 2 (5) of the Stamp Act is not exhaustive, nor is it proper to infer from the definition in an Act which deals with stamp matters only that it means that such a document is required by law to be attested. Therefore it is S. 72 which applies to the case of a bond and not S. 68, and examination of the attesting witnesses to prove execution is not necessary. 188 I. C. 638= 1940 N.L.J. 70=1940 N. 240.

Sec. 69: MORTGAGE—PROOF OF IN CASE OF —DEATH OF ATTESTING WITNESS.—*See* 24 A. 615=10 A.L.J. 217; 11 N.L.R. 9=27 I.C. 866; 35 A. 364=11 A.L.J. 379. Where a mortgage deed was produced regularly signed and attested and it was proved that the signature of all attesting witnesses who were dead were in their handwriting, and that of the mortgagor was in his handwriting, *held*, that there was a presumption of its due execution and it lay upon the other side to rebut it. 39 A. 112=15 A.L.J. 167. *See also* 41 I.C. 171. Admission of execution recorded in registration endorsement is not admissible to prove execution. 20 O.C. 18=38 I.C. 605. *See also* 13 N.L.R. 197; 1928 N. 244. It must be proved that "no attesting witness can be found." The party must ask the Court to exhaust all processes of the Court as by adopting the procedure in O. 16, r. 10, C. P. Code, for the arrest of the witness and for the attachment of his property. 7 P. 312=1928 P. 356 (Ruling before the amending Act XXXI of 1926).

Sec. 70.—*See* I.L.R. (1938) M. 523=1938 M. 43. The admission here spoken of does not include admissions made before the suit and sought to be proved by witnesses in the suit. 27 C. 190. As to admission of execution before Sub-Registrar, *see* 18 S.L.R. 282=93 I.C. 660 =1926 S. 88. *See also* 38 A. 1=13 A.L.J. 881 =30 I.C. 376; 7 N.L.R. 85=11 I.C. 689; 47 I.C. 9; 46 L.W. 610. The "admission" contemplated under S. 70 of the Evidence Act is an admission made for the purpose of or having reference to the suit, made either in the pleadings or during the course of the trial. The admission of execution contained in some other document such as a power-of-attorney cannot be availed of for the purpose of dispensing with the citation of the attesting witness. 46 L. W. 610. Where a mortgagor merely does not admit the execution or attestation of the mortgage document and puts the mortgagee to proof, such as by saying that the validity of the mortgage, if any "is not admitted," the plea is not one of specific denial of the execution or attestation of the document. In such a case proof of one attestation is quite sufficient. It is only in a case where there is not only a want of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove attestation of two witnesses. I.L.R. (1937) A. 723 =1937 A.L.J. 710=1937 A. 646. Section applies only to document which is duly attested. 5 R. 461=1927 R. 233. Where there is admission of execution in the written statement, but the attesting witness called stated the mortgagor did not sign the deed in his presence, *held*, that the document must be taken to have been proved. *See* 84 I.C. 558=1926 P. 295. As to effect of admission of execution by pardanashin lady, *see* 30 C.W.N. 364=5 P. 58=1925 P. C. 203 (P.C.). Where in a mortgage suit the defendant stated in her written statement that she executed the bond but did so under a misrepresentation as to its contents, *held* (per Mitter, J.), that under those circumstances, S. 70 applied and that the admission was sufficient proof of the exe-

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of signature, writing or seal with others admitted or proved.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

NOTES.

cution of the mortgage deed. (Contra, *Jack, J.*) 1929 C. 441.

ADMISSION—MEANING OF.—S. 70 applies only to an admission made in the course of the proceedings in which the attested document is produced. 1928 N. 244. Admission of execution at the registration of the document is no admission under this section. 1928 N. 244.

Sec. 71.—S. 71 is applicable only where the attesting witness 'denies or does not recollect the execution of the document.' Their Lordships were doubtful whether the description would be applicable to the case of a witness whose evidence was considered unreliable but were willing to assume that the discrepancies were due to deficient recollection. It was held on the fact that even assuming that it would be legitimate in the above circumstances to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving its due execution and attestation, the plaintiffs had failed to prove the material facts necessary to comply with the provisions of the T. P. Act. 43 C.W.N. 669 = 1939 P.C. 117 = (1939) 2 M.L.J. 762 (P.C.). S. 71 of the Evidence Act cannot be construed as meaning that the evidence of the executant of a deed required by law to be attested is not admissible unless the attesting witnesses denied or did not recollect the execution of the document. There is nothing in the Evidence Act which precludes a party from adducing as a witness to the execution of the deed any person who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. The section, while permitting the evidence of the executant of the deed in certain circumstances does not have the effect rendering his evidence or that of other witnesses inadmissible in different circumstances. 1937 A.L.J. 161 = 1937 A. 273. S. 71 has no application to a case where the attesting witnesses are not before the Court. If, therefore, the plaintiff takes out summons on one of the attesting witnesses and the witness does not appear in Court, that is not enough to let in further evidence under that section. In such a case it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally or physically the plaintiff can avail himself of the provisions of S. 69 of the Act. 69 C.L.J. 454 = 43 C.W.N. 1025 = 1939 C. 688. The 'other evidence' referred to in S. 71 cannot refer to the statement of witnesses who had seen the attesting witnesses sign in the presence of the executant. It only means any evidence that may be considered satisfactory by the Court seized of the matter. 1941 A.M.L.J. 75. The word 'execution' in S. 71 not only means signing by the executant but it means and includes attestation as well. If, therefore, an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence as laid down in the section. This other evidence includes his own evidence as well, although he is the grantee of the instrument. 43 C.W.N. 1084. Under S. 50 of the Indian Succession Act (X of 1865) witnesses must sign their names and not merely off their marks. *See* 3 B. 382; 11 C. 429; 5 C. 738. But initials will be sufficient. 15 M. 261. A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. 48 I.C. 724. *See also* 5 O. L. J. 667 = 48 I. C. 538. Where in a mortgage suit the plaintiff called one of the attesting witnesses then alive and when that witness resiled he proceeded to prove the document by other evidence, *held*, that there was a full compliance with the provisions of Ss. 68 and 71 of the Act. S. 71 has no application to a case where the attesting witnesses are not before the Court. If, therefore, the plaintiff takes out summons on one of the attesting witnesses and the witness does not appear in Court, that is not enough to let in further evidence under that section. In such a case it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally, or physically the plaintiff can avail himself of the provisions of S. 69 of the Act. 69 C.L.J. 454; 33 C.W.N. 248 = 1929 C. 188. Mortgage suit—Two out of four witnesses dead—Third turning hostile—Fourth witness summoned but refusing to depose—Admissibility of other evidence to prove attestation. 1929 C. 441.

Sec. 72.—*See* 1940 N.L.J. 70 = 1940 N. 240.

Sec. 73: MEANING OF TERMS.—"Purports" means "alleged". 14 Bom.L.R. 310 = 15 I.C. 649. *See also* 35 M.L.J. 698 = 48 I.C. 68. History of the section. *See* 1 M.H.C.R. 160 at 166, 167. Section based on and follows English Law. *See* 1914 M.W.N. 240. Procedure under the

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[1][This section applies also, with any necessary modifications, to finger-impressions.]

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents :—

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[1] Words in brackets were added by Act V of 1899, S. 3 (2).

NOTES.

section. Rat. 452. Value of evidence afforded by comparison of handwriting, *see* 14 I.C. 741 ; 10 C. 1047 ; 37 C. 467. Question of comparison is different from question of admissibility. 53 C. 372=92 I.C. 442=1926 C. 139. The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it. 120 I.C. 335=1930 N. 27. But *see* 152 I.C. 1042. Although in a case where there is a serious conflict of evidence as to the genuineness of a signature, it would be unsatisfactory and dangerous to stake a decision on the correct determination of the genuineness of a signature by mere comparison with admitted signature without any expert advice or evidence of microscopic enlargements ; in a case where there is no conflict of evidence, the Court is entitled to form its own opinion after comparing the signatures on the documents produced in Court and the admitted signatures. Such procedure is expressly contemplated by S. 73. 17 P. 15=19 P.L.T. 432. Although the law allows a Judge to compare a disputed signature with an admitted signature, he ought not to attach much weight to such comparison. 1939 A.M.L.J. 34. Danager of resting decision solely on comparison of handwriting. *See* 16 A. 157 (P.C.). *See also* 56 B. 304=1932 B. 406=34 Bom.L.R. 598. Where a signature is denied, the only safe way to prove that the alleged signature is really the signature of the person who denies it, is to produce some signature admittedly made by the same person at about the same time as the disputed signature was allegedly signed. 1940 A.M.L.J. 2. Data for arriving at a conclusion. 62 I.C. 882. As to thumb-impression, *see* 17 Cr.L.J. 316=35 I.C. 492 ; 1 R. 759 (F.B.) ; 1924 R. 115. Modes in which handwriting can be proved. 37 C. 467=14 C.W.N. 114. An anonymous writing ascribed to a particular person may be compared with a genuine signature. 14 Bom.L.R. 310=15 I.C. 649 (37 C. 467, Dist.). Court ordering accused to make thumb-impression for purpose of comparison—Accused refusing to do —Adverse inference against accused, validity of. *See* 6 P. 623.

Sec. 74 : CONSTRUCTION OF SECTION.—*See* 20 M. 189. Schoolmaster is an Executive Officer of Government under S. 74 (1) (*iii*). 28 Bom.L.R. 1225=50 B. 716=1927 B. 11 ; 12 Mys.L.J. 133=39 Mys.H.C.R. 406. A public document is one prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document. 1928 L. 640. A survey and settlement report prepared by an Assistant Superintendent of Survey being a public document is admissible in evidence. 1941 P. 260.

THE FOLLOWING ARE PUBLIC DOCUMENTS.—Municipal proceedings. 19 A. 293. But *see also* 30 I.C. 643=16 Cr.L.J. 659 (C.). Settlement record, with history of district attached to it. 1924 L. 639. *See also* 1941 P. 260. Canal jamabandi papers. L.R. 3 A. 386 (Rev.). Loan register in public debt office in Bank of Bengal. 31 C. 284. Orders of Inam Committee. 39 Bom.L.R. 288. Parchas distributed to cultivators. 19 Cr.L.J. 886=47 I.C. 82 (P.). Items of entry in Register of inventions. 4 A.L.J. 11. *District Gazette*, 3 U.P.L.R. (B. R.) 30. *Dakhalnamah* is public document. 1927 A. 52. *Dakhaldihani* (document purporting to transfer possession under orders of Court). 1941 R.D. 867=1941 A.W.R. (Rev.) 907. Crop cutting *report of Revenue Officer*, under Bengal Tenancy Act. 8 P.L.T. 74=1927 P. 167. *See also* 7 P.L.T. 761=1926 P. 436. As to Government Survey plan, *see* 10 I.C. 653 ; 22 P.L.T. 699=1941 P. 260 (survey and settlement report). Records of acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. 105 I.C. 353. *See also* I.L.R. (1937) B. 464=1937 B. 307 ; 1941 O.A. (Supp.) 807=1941 A.W.R. (Rev.) 933 (Certified copies of extracts from patwari's Records). Certified copies of confessions by accused would be admissible under S. 74 as evidence to prove the act of the Magistrate recording the confession. Where there are no irregularities and the statement was taken in accordance with law, then, under S. 80 of the Act, there would be a further presumption that the circumstances under which it was stated to have been taken were true. The copies would not be sufficient to prove the identity of the accused. 1933 A.L.J. 1551 (F.B.). Preliminary order under S. 144, Cr. P. Code—Police report and reference from Health Officer referred to therein—Copies of—Right of accused to. 12 Mys.L.J. 197=39 Mys.H.C.R. 172. Report in form B under S. 173, Cr. P. Code, is public document. 7 Mys.L.J. 231. Also deposition of witnesses. 5 P. 777=8 P.L.T. 510 ; 14 C.L.J 578. *See also* 19 C.W.N. 1068 (Letters of Administration) ; 18 C.W.N. 644=23 I.C. 529 (notice issued under S. 117, Cr. P. Code) ; 18 I.C. 250 (pedigree filed before Settlement Court) ; 35 A. 165 (return of village officer on reference by Political Agent). As to deposition of witnesses taken in Court, *see* 5 P. 777=101 I.C. 289=1927 P. 61 ; 1933 R. 212. An order sheet in a case is a public document being the record of an act of a public judicial officer and the

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country;

(2) public records kept in British India of private documents.

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. [1]Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the

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[1] A village officer in the Punjab has been declared for the purposes of this Act to be a public officer having the custody of a public document. *See* Pun. Land Rev. Act XVII of 1887, S. 151 (2) (P. & N.W.F. Code).

NOTES.

presumption is that it is genuine. It would require evidence and not mere suggestion that it has been fabricated to justify its rejection. 1937 P.W.N. 119=1937 P. 534. As to income-tax returns, *see* 52 L.W. 159=1940 M. 768=(1940) 2 M.L.J. 257 (F.B.); I.L.R. (1939) 2 C. 394=43 C.W.N. 1169=1940 C. 187; 50 L.W. 815=1939 M. 546=(1939) 1 M.L.J. 791.

THE FOLLOWING ARE NOT PUBLIC DOCUMENTS.—The *order of assessment* is not a public document in view of S. 54 of the Income-tax Act. 34 Bom.L.R. 236. Returns filed with Registrar of Joint Stock Companies. 21 C.W.N. 1161. Printed proceedings of Municipality (by themselves). 30 I. C. 643=16 Cr.L.J. 659. Letter of an Executive Officer. 1 P.R. 1914. *See also* 1939 M.W.N. 841. Notice under S. 107, Cr. P. Code. 18 C.W.N. 644. *Dakhalnamah.* 25 I.C. 529. A letter to the Collector forwarding the proceedings of a public meeting held at a certain place is not a public document. 143 I.C. 367=1933 C. 312. *Teiskkhana* register. 23 C. 366. Document merely with rubber stamp initials of public officer, but not signed by him. 3 U.P.L.R. (Br.) 53. *See also* 50 C. 135=26 C.W.N. 878; 71 I.C. 239; 1922 C. 298. A report by a village Nikha Khawan to the Mohavir in a central office informing him of the objection to an entry of marriage in the village register by the former husband of the woman is not a public document within S. 74 and no secondary evidence of its contents can be given under S. 5 of the Act. 1 P.R. (Cr.) 1914=23 I.C. 696. So also a statement prepared by patwari. 1930 A. 712. A purchase slip granted in the course of survey proceedings is not a public document. 19 Cr.L.J. 886=47 I.C. 82 (P.). So also a letter to the Collector by the president of a public meeting forwarding the proceedings of that meeting. 55 C.L.J. 558. *See also* 1933 C. 312. As to proof of public documents, *see* 56 P.L.R. 1903=5 P.R. 1903 (Cr.). Private documents (as) Kobalas, conveyance leases, etc., filed in Courts or public offices how proved. 22 W.R. 355; 14 I.A. 71=14 C. 486. As to proof by copy of compromise petition, *see* 25 W.R. 68. As to proof of judgment, plaint and written statement, *see* 10 B.L.R. App. 31. Plaint is not a public document. 7 P.L.T. 267=1926 P. 180; 93 I.C. 650=1926 N. 339. As to proof of Municipal proceedings, *see* 30 I.C. 643=16 Cr.L.J. 659. Civil Surgeon's report to a Magistrate as to the age of a person is not expert opinion and not a record of his "act." 1 Luck. 733=1928 O. 155. So also a circular issued by Director-General of Posts and Telegraphs as to future issue of certain kind of stamps is neither "a record of an act" nor "an act." 115 I.C. 509 (1)=1929 M.W.N. 193. Letters received from the Controller of Military Accounts in reply to warrant of attachment is a public document and does not require proof. 1928 O. 438. Departmental enquiry by Magistrate in his executive capacity is not judicial inquiry and statements recorded therein are not evidence taken on oath. Such statements, therefore, are not public documents, and S. 163 can be applied to such statements. 1930 C. 370=58 C. 96.

Secs. 74 and 76.—Entry in register of powers-of-attorney—Maintained by Registering Officer—Admissibility. *See* 43 C.W.N. 907=70 C.L.J. 5=1939 C. 569.

Secs. 74 and 77.—A certified copy of the entry of registration of a deed is admissible in evidence under Ss. 74 and 77 as proof of the entry but not of the contents of the deed. 177 I.C. 517=1938 C. 120.

Sec. 76.—The contents of a document can be satisfactorily established by producing a certified copy. I.L.R. (1938) N. 333=176 I.C. 315=1938 N. 152. Undoubtedly under S. 76, a copy of a talukdari sanad to be certified should be sealed whenever the keeper of the records of the Government of India is authorised by law to make use of a seal. But if there is no evidence to the effect that he is so authorised, the Court cannot make such a presumption when other necessary formalities have been duly carried out. Accordingly a copy of a sanad which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence. 172 I.C. 882=1938 O.W.N. 67=1938 O. 69.

Secs. 76 and 77: CONSTRUCTION.—*See* 30 M. 466=17 M.L.J. 471. In order to be admissible copies must be duly certified. *See* 4 I.C. 929=87 P.L.R. 1909. Plaint is not a public document. 7 P.L.T. 267=1926 P. 180. The Khasra Girdawaris, are public documents. 151 I.C. 786 (1)=35 P.L.R. 405=1934 L. 698. Although an income-tax assessment order is a public document within the meaning of case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents.

78. The following public documents may be proved as follows :—

(1) Acts, orders or notifications of the [1][Central Government] in any of its departments, [2][or of the Crown Representative] or of any Provincial Government or any department of any Provincial Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government [2][or, as the case may be, of the Crown Representative] :

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or Abstracts, or by copies purporting to be printed [1][by order of the Government concerned] :

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's printer :

(4) the acts of the Executive or the proceedings of the Legislature of a foreign country,—

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Inserted by *ibid.*

NOTES.

S. 74 of the Evidence Act, the assessee has no right to inspect it, and has, therefore, no right to demand a certified copy of it under S. 76 of that Act. Accordingly a copy of that order obtained from the Income-tax Department is not under S. 77 of that Act a certified copy which may be produced in proof of the contents of the original order of assessment. 1940 C. 187=I.L.R. (1939) 2 C. 394=43 C.W.N. 1169. But *see also* 52 L.W. 159=1940 M. 768=(1940) 2 M.L.J. 257; 50 L.W. 815=(1939) 1 M.L.J. 791. Where a document purports to be a copy given by a public officer having the custody of a public document, but does not bear a certificate as required by S. 76 of the Evidence Act and is not supported by the Evidence of the person who prepared it, is inadmissible in evidence. 1941 O. 77=1940 O.W.N. 999.

Sec. 77.—In proof of the fact of a statement made in a correction of papers case and an application made in execution no better evidence could be produced than the production of certified copies taken from the judicial files. Formal proof of signatures on the application is not necessary; still less is any further proof necessary in case of the statements. 1941 R.D. 793.

Sec. 78.—Section not exhaustive. *See* 1936 C. 316. Presumption as to authorised text of Indian Acts, *see* 1927 P. 142; 97 I. C. 316; as to Government order and notification in Official Gazette, *see* 53 M.L.J. 603. Proof of Acts of the Indian Legislature. 93 I.C. 566=1926 M. 65. Reference to the District Gazetteer, in order to elucidate the history of a family, is admissible under S. 78. 3 U.P.L.R. (Bur.) 30. *See also* 170 I. C. 392=39 P.L.R. 491 (Wajib-ul-arz). An extract from a newspaper about a Government notification is inadmissible in evidence. A copy of the Government Gazette should be produced. 1930 A.L.J. 1535=1931 A. 12. With respect to the existence of certain tauzi numbers reliance was placed on a report published by Government and this report was filed by the party relying on it but was returned by the Court thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57 of Evidence Act. There was a reference to this report in the judgment of the Court, *held*, that the Court should have regarded the report as a public document under S. 78 of the Act and admitted it formally in evidence and marked it as an exhibit, inasmuch as the report could be proved by "any document purporting to be printed by order of Government" under S. 78 of the Act. 1937 P. 334=170 I.C. 61. Order of Government affixed with Government seal, *see* 1936 C. 316. Notification not published in Government Gazette as required by law cannot be proved under this section. 1937 Pesh. 52=170 I.C. 772.

by journals, published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some [1][Central Act] :

(5) the proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in British India, or by any officer in any [2][Indian State] who is duly authorized thereto by the [2][Central Government or the Crown Representative] to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumption as to documents produced as record of evidence.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine ; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

LEG. REF.

[1] The words 'Central Act' were substituted for the words "public Act of the Governor-General of India in Council" by A.O., 1937.

[2] Substituted by *ibid.*

NOTES.

Sec. 78 (5).—Printed proceedings of Municipality themselves would not be sufficient legal proof unless they answer the description of a printed book purporting to be published under the authority of the committee as required by S. 78. 30 I.C. 643=16 Cr.L.J. 659 (C.). *See also* 17 C.W.N. 531=18 I.C. 651.

Sec. 78 (6).—As to records of a German Court, *see* 14 C.L.J. 375=15 C.W.N. 1053.

"DIPLOMATIC AGENT" includes Resident of Hyderabad. 1927 B. 11=50 B. 716. Admissibility of attendance and leave register kept at Native State. *See* 1926 O. 29.

Sec. 79.—A copy of a letter of sanction, headed rom the Chief Secretary to the Government of Bengal and signed by an officer for the Chief Secretary, cannot be regarded as a certified copy under S. 76. 50 C. 135=26 C.W.N. 878=1922 C. 298. As to proof of certificate of visitors of lunatic asylum, *see* 63 C. 425.

Sec. 80 : PRESUMPTION OF GENUINENESS when raised, *see* 10 A. 174 ; 15 M. 63 ; 2 Weir 794 ; 12 C.W.N. 845 ; 18 C. 129. As to the nature and extent of presumption under the section, *see* 93 I.C. 978=1925 L. 605 ; 94 I.C. 985=1926 O. 489. Presumption of genuineness of a document does not include the presumption that the document was printed or published by the particular person by whom it purports to have been published. 36 M. 457=22 M.L.J. 73.

SCOPE.—S. 80 of the Act does not deal with the question of the admissibility of documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done. 50 C.L.J. 106=1929 C. 617 (F.B.). The evidentiary value of the statement of a witness

Presumption as to gazettes, newspapers, private Acts of Parliament and other documents.

81. The Court shall presume the genuineness of every document purporting to be the London Gazette, or [1][any official Gazette, or the Government Gazette] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

82. When any document is produced before any Court, purporting to be

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LEG. FEF.

[1] Substituted by A.O., 1937.

NOTES.

in another judicial proceeding as to the age of a person is very little. (*Ibid.*) Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain if it is capable of explanation. 12 L.L.J. 161. The presumption mentioned in S. 80 could not arise in a case where the statement of a person as to the cause of his death is recorded by a magistrate not authorised by law to record it, and it has to be proved. But where it is recorded as authorised by law, it is not necessary that it should be proved by the magistrate who recorded it, when the statement is not made in the presence of the accused. All that is required is that there must be proof of the identity of the person who made the statement. 1941 Rang.L.R. 258=1941 R. 30. If a person whose dying declaration is recorded by a Magistrate in hospital dies subsequently, the statement made by him in hospital can only be proved by the Magistrate who has recorded it or some one else who heard that statement. But when that person survives and gives evidence at the trial his statement is admissible in evidence for the purpose of corroborating or contradicting him. It is not necessary that the recording Magistrate should be called as witness to prove the statement. A statement recorded by a Magistrate under S. 164, Cr.P. C., in the course of an investigation is evidence in a judicial proceeding, which under S. 80 of the Evidence Act can be proved without calling the person recording the same. 1941 P.W.N. 622.

ILLUSTRATIVE CASES.—A statement not read over to or corrected by the witness in accordance with law is not admissible against the person making the same. 13 Cr.L.J. 569=15 I.C. 985. *See also* 21 Cr.L.J. 500=56 I.C. 160; 142 I.C. 653=1933 C. 190. As to depositions before Commissioners, *see* 63 P.L.R. 1900. A deposition not read over to the witness in the presence of the presiding officer does not prove itself under S. 80. 18 N.L.R. 192=68 I.C. 36=1923 N. 39. Presumption under S. 80 can be raised if the deposition is read over by the witness himself in Court. 46 C. 895=50 I.C. 660=23 C.W.N. 661; 93 I.C. 978=1925 L. 605. (*See also* C. P. Code, O. XVIII, r. 5). The absence of a certificate by the Judge at the foot of the deposition of its having been read over, etc., does not deprive it of the presumption under S. 80. 46 C. 895=50 I.C. 660. The presumption under S. 80 that the circumstances under which a document appears to be taken are true, applies to a dying declaration to which a certificate is appended by the Magistrate who recorded it, that it was read over to him and declared to be correct. 40 B. 97=31 I.C. 361=17 Bom.L.R. 881. *See also* 17 Cr.L.J. 23; 9 P.R. 1900 (Cr.); 11 Bom.H.C.R. 247; 152 I.C. 249=1934 A. 340. Under S. 80 confession by any prisoner or by any accused taken in accordance with law and purporting to be signed by the examining Magistrate shall be presumed to be so made. The officer who recorded the confession may be examined as a witness. 38 I.C. 1005=2 P.L.J. 80. Though a confession duly recorded by a Magistrate may be presumed to be voluntary and as such admissible, such admissibility is subject to the restrictions imposed by S. 24. 61 C. 399=38 C.W.N. 659=1934 C. 636. The statement of an accused person recorded by a Magistrate in a Native State is inadmissible unless the Magistrate himself deposes to it in person. 24 I.C. 169=16 Bom.L.R. 261. Confessions recorded in Indian Native States can be used in British India under the provisions of S. 80, and they may be accepted as admissible for prosecution in British India. I.L.R. (1938) A. 875=1938 A. 625. The recital in a judgment of a statement made by the witness is not the same thing as a record of the deposition of the witness. Nor can such recital be accepted as evidence under S. 80. 2 Cr.L.J. 500=56 I.C. 660 (P.).

Sec. 81: LEGISLATIVE ASSEMBLY—REPORTS OF DEBATES.—The reports of debates in the Legislative Assembly can only be evidence of what was stated by the speakers in that Assembly, and are not evidence of any facts contained in the speeches. 153 I.C. 1=41 L.W. 665=1935 P.C. 34 (P.C.). Reports and Gazetteers are not strictly evidence of the truth of all the statements contained in them although they may be read for what they are worth. 44 C.W.N. 873. Presumption as to genuineness does not include presumption that it was printed and published by the person mentioned in it. 36 M. 457=12 I.C. 961. Presumption as to genuineness of the specimen, *see* 120 I.C. 798=1930 L. 371.

Sec. 82.—As to presumption in case of printing and publishing a newspaper, *see* 36 M. 457=12 I.C. 961. Documents admissible under English Law in English Court are relevant. *See* 22 C. 491. Chittas. *See* 2 I.C. 513; 19 C.W.N. 1068.

Presumption as to document admissible in England without proof of seal or signature.

a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Presumption as to maps or plans made by authority of Government.

83. The Court shall presume that maps or plans purporting to be made by the authority of [1][any Government in British India] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to powers of attorney.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the [2][Central Government], was so executed and authenticated.

LEG. REF.

[1] The words within brackets were substituted for the word "Government" by A.O., 1937.

[2] Substituted by A.O., 1937.

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Sec. 83.—*See* 22 W.R. 519; 5 C. 287; 5 C. 822=6 C.L.R. 519; 19 C. 741; 23 C. 335; 18 C. 224; 25 W.R. 179. *Chittas* made by Government for private use in connection with presumption proceedings are not. Maps and plan prepared by patwari is not in discharge of their official duty—Accuracy—Presumption—Statements contained in—Relevancy. 16 P. R. 1913=18 I.C. 799. A plan, the accuracy of which has not been established by evidence in accordance with S. 83 can be admitted in evidence when both parties had relied on it before the local Commissioner and no objection was taken that it had not been proved to be accurate. 190 I.C. 689=1940 L. 309. A map prepared by private arrangement by a District Collector for the settlement of the silted bed of river does not fall within purview of this section. 19 I.C. 572; 17 C.L.J. 642=16 I.C. 747. Maps and survey plans prepared by Government—Admissibility of in evidence. 10 I.C. 653; 18 P.L.T. 464 (Municipal Survey Map). Thak maps—Evidentiary value of maps more than 30 years old—Presumption—Map prepared by Collector in private capacity. *See* 16 C.W.N. 317=14 C.L.J. 578. The Thakbust map which preceded the revenue survey was intended to guide the revenue surveyor who was supposed to put in the estate boundaries to be bound in the Thakbust maps. The value of the records of the Thak survey and of the revenue survey and also of the collectorate papers is not uniform. 67 C.L.J. 495. *See also* 21 P.L.T. 873=1941 P. 118. Value of survey map as evidence pointed out. Boundaries in cadastral survey taken into account in determining a question of title. 1933 P. 671. Great weight should always be given to the accuracy of survey maps. They are not conclusive but in the absence of evidence to the contrary, they will be presumed to be accurate. 44 C. 328=38 I.C. 379=43 I.A. 303 (P.C.). *See also* 1933 P. 555. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible, and would be valuable evidence as to the state of things at the time they were prepared. 44 I.C. 247.

Sec. 84.—*Cf.* Act XVIII of 1875 (Law Reports).

Sec. 85: SECTION IS MANDATORY.—*See* 33 C. 625=9 C.W.N. 986; 16 C. 776. The provisions of S. 85 are mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power of attorney have been duly fulfilled. But S. 85 is not exhaustive, for there are different legal modes of executing a power of attorney. Under S. 57 (6) of the Evidence Act, the Court

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the [1] [Central Government] [2][in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records.

[3][An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, Cl. (40) of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the [1][Central Government] in and for the country comprising that territory or place.]

Presumption as to books, maps and charts.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution, etc., of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

LEG. REF.

[1] Substituted by A.O., 1937 for "Government of India."

[2] Substituted by Act III of 1891, S. 8 for 'resident in'.

[3] Substituted by Act V of 1899, S. 4.

NOTES.

shall take judicial notice of *inter alia*, all seals of notaries public. Where a power of attorney is given under the seal of a notary public, the Court must presume its proper execution before and authentication by the notary public. I.L.R. (1939) Bom. 295=41 Bom.L.R. 530=1939 B. 347. Mere registration is not in itself evidence of execution. 17 C. 903. But *see* 14 C. 176, Diss. As to what is sufficient proof of power of attorney, *see* 21 M. 492; 1936 A.L.J. 684=1936 A. 475.

Sec. 86.—S. 86 does not exclude other proof. *Held*, therefore, that a document purporting to be a copy of a deposition in a Court in Cutch was admissible in evidence though not certified by the Political Agent of Cutch in a manner which fully satisfied the requirement of Ss. 76 (*a*) and 86. *Held*, that the fact that the certificate as to the document being a "true copy" was given by a higher officer than the trial Judge was really an additional reason for accepting its authenticity. 30 Bom. L.R. 1519=1929 B. 24.

SCOPE OF SECTION.—*See* 27 C. 639. Section mandatory. *See* 5 L. 105=1924 L. 493. Presumption of certified copies of German Court. 15 C.W.N. 1053=14 C.L.J. 375. Presumption of certified copies of other foreign States. *See* 14 C. 546; 27 C. 639.

Sec. 87.—*See* 21 C.L.J 637. A history of a particular sect prepared by an Extra Assistant Settlement Officer, during the second settlement, does not form part of the settlement record and has no presumption of truth attached to it, but may be of some value if it was prepared when there was no dispute. 1934 L. 1=154 I.C. 375.

Sec. 88.—TELEGRAM—PROOF THAT IT EMANATED FROM GOVERNMENT.—The sanction of Local Government to prosecute a person for an offence under S. 134-A, Penal Code, communicated by telegram, must be proved to have emanated from the Government. The Court is forbidden by the express provisions of S. 88 to make any presumption as to the person by whom the telegram was sent. 42 M. 885=37 M.L.J. 81. *See also* 4 I.C. 240=10 Cr.L.J. 520; 21 I.C. 274; 91 I.C. 690=1926 B. 71; 13 P.L.T. 802=1933 P. 96.

Sec. 89.—Where a party produces an unstamped copy of an instrument by way of secondary evidence the Court may, in the absence of contrary evidence, presume that the original was stamped. 1932 M.W.N. 432. In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in

Presumption as to documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

NOTES.

the mortgagee's bahi and called upon the defendant to produce it. The defendant denied that he possessed any such bahi. The plaintiff's evidence showed that the entry was made in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it. *Held*, that no presumption under S. 89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper, no question of presumption arose in such case.1938 L. 90.

Sec. 90.—PRESUMPTION—WHEN ARISES.—Under S. 90 documents more than thirty years old coming from proper custody prove themselves, but there is no presumption that the contents of the documents are true. 40 Bom.L.R. 1262 =I.L.R. (1939) Bom. 97=1939 B. 59. The presumption under S. 90 with regard to documents 30 years old arises in the case of copies as well as originals. *If the copy is proved to be a true copy, a presumption may be made in favour of the genuineness of the original.* 46 M. 92; 6 O.W.N. 880=1929 O. 483 (2); 152 I.C. 861=11 O. W.N. 1435; 30 N.L.R. 155=1934 N. 67. But *see also* 162 I.C. 527=1936 O.W.N. 619= 1936 O. 298; 1937 R.D. 133; 41 P.L.R. 376 =1939 L. 458; 20 N.L.J. 209. *See also* 17 Mys.L.J. 510; 1939 L. 458; 1940 M. 273; 1940 A. 74. The presumption contained in S. 90 cannot apply to a copy that is not itself 30 years old. 1940 N.L.J. 437=1940 N. 382. *See also* 1939 L. 458; 1939 L. 273. The presumption under S. 90 is a rebuttable one to be made at the discretion of the Court. It is based on the rule of expediency, and unless the surrounding circumstances satisfy the Court that the document tendered has been produced from proper custody, it would be unsound to admit the document. The Court must insist on a satisfactory account of the origin of the possession being given by the party relying upon the document. The custody may not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The soundest policy even upon the rule of expediency necessitates circumspection and scrutiny in the examination of the surrounding circumstances before raising the presumption. The Court must therefore examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the document should naturally have been. 40 Bom.L.R. 202. S. 90 confers no right on any party to compel the Court to draw a presumption as regards any document purporting to be thirty years old and produced from proper custody. 175 I.C. 361=40 Bom.L.R. 202= 1938 B. 257. When a document is suspicious on the face of it as when an important word is erased and re-written presumption under S. 90 does not arise. 95 I.C. 261=1926 A. 537. Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute *prima facie* title. 56 C.L.J. 369. The Court is not bound to make the presumption merely because of the alleged age of the document. 31 Bom.L.R. 1279; 110 I.C. 415. The Court "may presume." The section does not say that the Court *must presume* the document to be genuine. 7 Mys.L.J. 57; *See also* 175 I.C. 594=1938 A. 345; 40 P.L.R. (J. & K.) 51. The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is lost. 1929 A. 561. As to presumption of genuineness of pedigree tables, *see* 105 I.C. 81. Where a person executes a will and deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant on being identified by two persons, a presumption under S. 90 as to execution arises. The presumption however does not cover the question of disposing mind. 1933 L. 53: 145 I.C. 241. Presumption not drawn by trial Court—Appellate Court refusing to draw inference—Genuineness of documents decided on evidence—Proper. 108 I.C. 412. Court may presume genuineness of signature authenticating a copy. 56 I.A. 146=1929 P.C. 115 =56 M.L.J. 730 (P.C.). As to the extent of presumption regarding old documents, *see* 6 L.L.J. 97=75 I.C. 57; 82 I.C. 487; 77 I.C 472; 1924 A. 869=22 A.L.J. 857; 41 P.L.R. 108. S. 90 does not involve any presumption that the contents of a document more than 30 years old coming from proper custody are true. The presumption is only as regards due

NOTES.

execution. 17 Mys.L.J. 510=45 Mys.H.C.R. 57. Presumption contained in this section has to be applied with great deal of caution. 31 C.W.N. 215=1927 C. 102. The Court should be very careful about raising any presumption under S. 90 in favour of old deeds of *shankalap* which never saw the light of day until they were produced during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. (9 O.W.N. 379, relied on.) 164 I.C. 494=1936 O.W.N. 768. *See also* 166 I.C. 930=1937 O.W.N. 179; 11 C. 539; 39 P.L.R. 370; 27 C. 740; 98 I.C. 1021=1927 C. 229; 1929 A. 561; 138 I.C. 513=1932 O. 227. *See also* 1940 L. 245 (*Pondah's bahis*]. S. 90 does not provide for any presumption regarding anonymous documents the writer of whom is not known. But an objection that the document should not be admitted without proof as to the writer of the document must be raised at the earliest stage, and cannot be permitted to be raised for the first time in second appeal. 50 L.W. 527=1939 M.W.N. 946=1939 M. 926 =(1939) 2 M.L.J. 593. S. 90 cannot be relied upon for the proof of a document which does not purport to be in any person's handwriting or to be signed by any known person. 53 L.W. 634=(1941) 1 M.L.J. 759=1941 M. 602. If a copy more than 30 years old is produced from proper custody, the signatures authenticating the copy may be presumed to be genuine; but the production of a copy is not in itself sufficient to justify any presumption of due execution of the original. 1941 L. 400. No presumption of genuineness in case of document bearing no signature. 164 I.C. 494=1937 O. 448; 166 I.C. 930=1937 O. 353; 41 P.L.R. 108=1939 L. 285; (1941) 1 M.L.J. 759; or in the case of a copy of a lost document. 162 I.C. 56=1936 A.L.J. 161=1936 A. 298, especially when such copy is not in itself 30 years old. 1936 L. 788; *see also* 1937 L. 920 =20 N.L.J. 209. No presumption under S. 90 can be raised on the basis of the certified copies when the originals are not forthcoming 41 P.L.R. 377 (2)=1939 L. 273. *See also* 1941 O.W.N. 669=1941 O. 433; 1941 Pesh. 89; 1941 L. 400. A copy purporting to be more than 30 years old and produced from proper custody may be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, when that copy contains a statement that it is a true copy and contains the signature of the author of the original. In such a case the Court is entitled to presume the genuineness of the signature on the copy under S. 90. 1939 M.W.N. 841. If a plaintiff in a suit for possession does nothing more than produce a certified copy of the original sale deed in his favour which was more than 30 years old, he would not succeed in establishing his title to the property. But where such a plaintiff produces other evidence including that of one of the identifying witnesses of the executants of the old sale deed it can be held that the evidence is sufficient to prove the due execution of the sale deed in question. 1939 A.L.J. 1023 =1940 A. 74. As to presumption of genuineness of seal affixed to old document, *see* 164 I.C. 494=1936 O.W.N. 768. *Jama Wasil Baki* papers seventy years old—Presumptions as to. *See* 45 C.L.J. 129. Presumption under the section is not one which the Court is bound to make. It is in the Court's discretion; notwithstanding this section Court may require an old document to be proved in the ordinary manner. 104 I.C. 219=1927 C. 870; 51 C. 135=81 I.C. 493; 31 Bom.L.R. 1279. The presumption of execution of a document extends also to the mark put on the document in dictating that the document was signed by the executant by a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary. 58 C. 686=1931 C. 596; 148 I.C. 1172=1934 A. 529. Presumption of genuineness includes presumption of executant's authority. 58 C. 686. But *see also* 162 I.C. 56=1936 A.L.J. 161=1936 A. 298; 97 I.C. 292=24 A.L.J. 920; 1927 A. 765; 1925 A. 1. Presumption of genuineness only dispenses with proof, but the question of evidence is not affected thereby. 95 I.C. 261=1926 A. 537. Where the deed did not even purport to be signed by the executant and his mark was not proved by the person attesting the same, *held*, that the Court could refuse to presume that the document was genuine. 110 I.C. 415=5 O.W.N. 424. Deed signed on behalf of executant—No presumption can be raised as to authority to sign being given. 162 I.C. 56=1936 A.L.J. 161=1936 A. 298. S. 90 only gives the discretion to Courts to dispense with proof as to the execution of a document. It raises no presumption whatever as regards the accuracy of the plan and cannot be used as to dispense with formal proof of the contents of the documents as required by law. 111 I.C. 361. *See also* 1937 N. 43.

"DULY EXECUTED AND ATTESTED."—The words "duly executed and attested" merely mean execution and attestation according to law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it is hardly a question of execution. 5 Luck. 526=1931 O. 103. Where a deed is executed by a pardanashin lady, the onus of proving the validity of the transaction is on the transferee. 5 Luck. 526. *See also* 10 O.W.N. 147=1933 O. 170. Where a party tendering a documen is unable to say who prepared or signed it, or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof. (3 P.L.J. 306, Rel. on.) 1937 R.D. 88. Presumption can be raised in the case of school *register* 30 years old. 163 I.C. 81=1936 L. 104. When a Registrar makes his endorsement on the back of a document, he is simply carrying out his statutory duties under the Registration Act and makes the signature *alio intutio* and is not purporting to attest the document. And though the endorsement shows that the Registrar received from the executant a personal acknowledgment of his signature, in the absence of evidence that the Registrar signed in the presence of the executant, no presumption can possibly be made under S. 90, that the signature of the Registrar was affixed in the presence of the executant or that the document was duly attested, even if

Illustrations.

(*a*) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(*b*) *A* produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c*) *A*, a connection of *B*, produces deeds relating to lands in *B's* possession which were deposited with him by *B* for safe custody. The custody is proper.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant, or of any other disposition

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NOTES.

the document is over 30 years old. 61 C. 525=38 C.W.N. 753=1934 C. 772. Apart from S. 90 the Court can make a presumption of fact about the valid execution of a will from a certified copy of the will obtained from the Registration Office, if such presumption is justified by the proved facts and circumstances of the case. 172 I.C. 882=1938 O.W.N. 67=1938 O. 69. The period of 30 years, under S. 90 of the Act, is to be reckoned not from the date upon which the deed is filed in the Courts but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes subject of proof. (5 C.L.R. 135, Foll.) 63 I.A. 85 =40 C.W.N. 226=1936 P.C. 15=70 M.L.J. 206 (P.C.); 169 I.C. 402=39 P.L.R. 340.

PROPER CUSTODY.—Whether "custody" is proper is a question of fact. 126 I.C. 19. As to proper custody, *see* 94 I.C. 814; 1926 C. 370; 164 I.C. 494=1936 O.W.N. 768. Where a document is written 55 years ago by a licensed stamp-vendor and comes out from proper custody it can claim the benefit of S. 90. 1934 L. 885. As regards the question of possession it is for the Court, to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper it can raise the presumption. Where the lower Court draws the presumption after considering the circumstances of the case the High Court will not interfere in second appeal. 32 P.L.R. 626=134 I.C. 296. *See also* 38 P.L.R. 322; 152 I.C. 861=11 O.W.N. 1435; 1933 L. 347=142 I.C. 13=34 P.L.R. 356; 1938 A.M.L.J. 63; 1939 O.W.N. 1= 1939 O. 96. And where the appellate Court is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption. 145 I.C. 147= 1933 A.L.J. 907=1933 A. 443. Where a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died, it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions are permissible to fill in the details which have been obliterated by time. 30 N.L.R. 192= 148 I.C. 1033=1934 N. 106. In cases where documents more than 30 years old are being produced only as instances of a particular custom and not as foundation of title, such documents may be admitted in evidence irrespective of the fact whether they come from proper custody or not. 1939 L. 152.

Sec. 91.—SCOPE AND APPLICABILITY.—Where the terms of a contract have been reduced to writing at the same time as it is made, the document only, or if permissible, a secondary evidence of its contents can be the only evidence available to prove the document under S. 91 the parties are debarred from adducing oral evidence to prove such contract. 22 Pat.L.T. 666; 33 M. 413=11 Cr.L.J. 716; 13 R.D. 685; 5 P.L.T. 45=1940 P. 245. S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also S. 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter. Even if there were no provisos to Ss. 91 and 92, there is nothing in either section to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract. 63 I.A. 126=59 M. 446=1936 P.C. 70=70 M.L.J. 232 (P.C.). Ss. 91 and 92 do not apply to a will as it is neither a contract, nor a grant nor a disposition of property until the death of the testator makes it operative. S. 92 (4) does not prevent the revocation of a registered will by an unregistered document 1938 M.W.N. 699=1938 M. 616=(1938) 1 M.L.J. 444. The provisions of S. 91 are not applicable to a permission granted by a Municipal Committee. 120 I.C. 221=1930 N. 130. Having regard to the terms of S. 91, what the Court has got to do is to find out the real contract between the parties. 1928 M. 459. The term "in proof of such matter" must carry with it the term "in disproof of it," because if evidence were to be admitted on one side, it would have to be admitted on the other. Therefore, a Court which allows evidence to prove that a payment endorsed on a promissory note had not been made, violates the provisions of S. 91 of the Evidence Act. 1935 A.L.J. 304= 1935 A. 58.

ILLUSTRATIVE CASES.—Admissibility (I) of oral evidence to prove deposition of witnesses. Rat. 334; (*ii*) deposition not read over to witness. 13 Cr.L.J. 569; (*iii*) deposition of accused. 6 C. 762=8 C.L.R. 292; 54 P.R. 1887 (Cr.); 21 M.L.J. 411=9 I.C. 262; (*iv*) admission of guilt in departmental enquiry. 36 A. 222; (*v*) Confession to Magistrate—Proof by oral evidence. 9 M. 224=2 Weir 125; 35 A. 260; 14 Cr.L.J. 211; 11 A.L.J. 286; 10 B.H.C.R. 166; (*vi*) Search list—Proof of. 2 Weir 766. *See also* 21 M.L.J. 281; (*vii*) Previous convictions—Proof of. 28

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exceptions.—(1) When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer the writing by which he is appointed need not be proved.

(2) Wills [1][Admitted to probate in British India] may be proved by the probate.

Explanations.—(1) This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

(2) Where there are more originals than one, one original only need be proved.

(3) The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

LEG. REF.

[1] Substituted by Act XVIII of 1872, S. 7.

NOTES.

C. 689; (*viii*) Warrant; it should be produced in a case of assault of process-server. L.B.R. (1872—1892) 572. A statement made by an accused at a departmental enquiry is not within S. 91, as it is not required by law to be reduced to the form of a document. Such confession can be proved at the time of the prosecution. 35 A. 222=25 I.C. 321. The confession of an accused made to a Magistrate holding an enquiry is a matter which must be reduced to the form of a document within the meaning of S. 91. 35 A. 260=19 I.C. 307. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. 67 I.C. 577=1924 L. 12. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. 1924 L. 12. The record by Court of deposition is the only evidence admissible of the statement alleged to have been made by the witness and if it is not shown to have been read out to the witness he can't be convicted of perjury. 42 M. 561 =36 M.L.J. 296. S. 91 even if it covers a deposition merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. 74 I.C. 445=1923 O. 119. Where a deposition is not taken in accordance with S. 360, Cr. P. Code, it is inadmissible in evidence and other evidence is shut out by S. 91. 18 Cr.L.J. 966=42 I.C. 326. S. 91 has no application to matters entered in a special diary under S. 172 of the Cr. P. Code. Oral evidence is admissible to prove statements made to the police by witnesses who heard them made. 18 Cr.L.J. 1022=42 I.C. 766. Unregistered sale-deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence. 98 I.C. 940=28 Punj.L.R. 88. *See also* 100 I.C. 153; 98 I.C. 448; 92 I.C. 1028=1926 M. 402 (partition deed); 95 I.C. 584=1926 M. 872 (sale-deed); 103 I.C. 281=1927 M. 830; 30 C.W.N. 254=1926 C. 705. Where the rent note is one that requires registration and has not been registered, it is inadmissible not only to prove the terms of the contract but also to prove the fact that it contained all the terms of the contract. There is no bar, therefore, under S. 91 to the reception of other evidence consisting of an entry in the record-of-rights to prove the nature of the tenancy. 58 B. 419 =150 I.C. 555=36 Bom.L.R. 359=1934 B. 194. *See also* 1938 O.A. 785=1938 O.W.N. 1080; 1939 A.M.L.J. 148. An unregistered patta cannot be admitted in evidence in a suit for possession of land for the purpose of proving the plaintiff's title. Nor can the plaintiff be allowed to prove his title by the production of rent receipts or by the general circumstances of the case. S. 49 of the Registration Act and S. 91, Evidence Act are a bar to such proof, and the plaintiff is not entitled to prove his title and his right to recover possession in that way. 18 P.L.T. 1012. Ejectment suit—Permanent occupancy claimed in defence —Compromise not stamped or registered—Decree merely dismissing suit—*Held*, that the compromise was not admissible to prove the recognition of occupancy rights. 14 L.R. 513 (Rev.)=17 R.D. 660. *See also* 1940 N.L.J. 85=1940 N. 116. Lease by public auction of agricultural land for 7 years—Defendant's bid accepted and he continued in possession for 4 years—Plaintiff's suit in ejectment alleging subsequent agreement of lease for one year in writing. *Held*, that as it was an agricultural lease, it could be made orally, that the oral lease became complete on the acceptance by

Illustrations.

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d*) *A* contracts, in writing, with *B*, for the delivery of indigo upon certain terms.

The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e*) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

NOTES.

the selling officer of the defendant's bid, that the document which came into existence subsequently did not supersede the oral lease, that the auction list and *muchilika* having been suppressed by the plaintiff, he could not be permitted to establish their contents by secondary evidence and that the plaintiff was not entitled to the relief prayed for. 1933 M. 451=64 M.L.J. 676. Document of lease—Want of registration—Oral evidence to prove relationship of parties. Not admissible. 148 I.C. 558=1934 L. 743. Where a lease-deed is inadmissible in evidence being unregistered, the tenancy can be proved by other evidence as by the doctrine of part-performance. 105 I.C. 172; 111 I.C. 358. But *see* 1930 L. 675. Where a party institutes a suit for the recovery of money due upon the basis of a promissory note, he must produce that promissory note or give a satisfactory explanation as to why he is unable to produce it, and in the absence of such explanation he is not entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same document upon which both the promissory note and the receipt were inscribed. Courts should refuse to exercise their powers in favour of a litigant who is deliberately concealing important material and relevant information. 151 I.C. 123=1934 A. 837. When a contract is wholly ontained in a Promissory note, *i.e.*, where it forms the substance of the contract with all its terms, S. 91 would preclude proof of the contract otherwise than by the document itself. 1936 N. 225; 1936 Pesh. 146; 1937 A. 439=1937 A.L.J. 235. If such Promissory note is inadmissible for any reason , the contract cannot be proved by any extraneous oral evidence, nor can money be recovered as money had and received, *i.e.*, as a debt independently of the Promissory note. 1936 N. 225. But where the P. note is executed in satisfaction of a *pre-existing liability* the inadmissibility of the P. Note by reason of its being insufficiently stamped does not preclude proof of the pre-existing liability by oral evidence. 1936 N. 225. When however, the loan is contemporaneous with the execution of an inadmissible P. Note, the debt can be proved by oral evidence independently of the P. Note *only* if the parties intended at the time of the execution of the P. Note that it was collateral to an oral contract by way of giving security for the loan or making conditional payment of the debt, antecedent or contemporaneous. 1936 N. 225. *See also* 1936 A.M.L.J. 37. If, in such a case the defendant repudiates the P. Note as being merely a colourable document, and neither party relies on the document as embodying the substance of the contract, S. 91 does not apply, and the P. Note can be used as corroborative evidence on the point of the actual payment of the money. 1936 N. 225. In any event, the plaintiff would be prevented from claiming interest as per terms of the P. Note and interest at best can be allowed only under S. 73, Contract Act, by way of damages. 1936 N. 225. *See also* 1936 A.M.L.J. 37. Where a pronote turns out to be inadmissible for want of proper stamp duty it is open to the party who has lent money on terms recorded in the note to recover his money by proving orally the advance of the loan. 1933 N. 57 (2)=144 I.C. 175=29 N.L.R. 131; 139 I.C. 298=1932 O. 235 (F.B.). *See also* 25 A.L.J. 102; 103 I.C. 634=1927 A. 503; 1937 A.L.J. 360=1937 A.W.R. 322. *Held by the Full Bench* (*Stodart, J. dissenting*), that the answer to the question whether a person who has lent money on a *P. Note, which is inadmissible in evidence owing to defect in the stamping* can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security or by way of conditional payment or if the note does not embody all the terms of the contract the true nature of the transaction can be proved. But if the promissory note embodies all the terms of the contract, no suit on the debt will lie as S. 91 of the Evidence Act and S. 35 of the Stamp Act bar the way. The fact that the execution of the P. Note is contemporaneous with the borrowing cannot, however, exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. I.L.R. (1938) 2 M. 933=1938 M. 785=(1938) 2 M.L.J. 189 (F.B.). Although a loan and a promissory note for the loan form part of the same transaction a suit will lie on the original consideration. If there is a loan, that itself gives a cause of action, and the fact that there is a loan can never be a term of the contract contained in the promissory note, it is therefore open to the creditor to prove that there was a loan independently of S. 91 of the Act. It does not matter whether the loan was made at the same time as the promissory note which is the evidence of it or whether it is not properly stamped and therefore inadmissible in evidence. 40 Bom.L.R. 174=175 I.C. 540=1938 B. 286. But *see* 53 A. 114=1931 A. 183 (F.B.); 144 I.C. 130=1933 A. 280; 152 I.C. 370=1934 A.L.J.

NOTES.

1185; 147 I.C. 443=1934 A. 271; 146 I.C. 751. *Also* 140 I.C. 117; 95 I.C. 704; 1922 L. 307. Where the debt and execution of the pronote are contemporaneous, the debt can be proved only by the note and where it is insufficiently stamped the plaintiff cannot apply by amendment to convert his suit into one on the original consideration. 139 I.C. 361=1932 M. 687; 140 I.C. 193=1932 M.W.N. 1260=67 M.L.J. 595; 1934 L. 606. But *see* 9 P.L.T. 471; 134 I.C. 254=1931 A. 560; 95 I.C. 847 =1926 B. 357; 67 M.L.J. 912; 12 R. 500= 1934 R. 389 (F.B.); 1933 P. 584; 141 I.C. 767 =1933 Pat. 159; 12 Pat. 862=14 P.L.T. 651 =1933 P. 575 (F.B.). In cases where a P. Note is given in payment for goods sold and delivered, the presumption would be that the Note is given as conditional payment for the goods sold and delivered. In such cases, when the note is inadmissible as being unstamped, the original debt can be availed of by the seller for the purpose of recovering the amount due to him, irrespective of the P. Note. Per *Chief Justice and Pandrang Row, JJ.* (Cornish, *J.*, contra).—Where the P. Note is part and parcel of the transaction of loan, and itself contains all the terms, it must, in the absence of evidence to the contrary, be taken to be the contract, and no contract *aliundi* can be proved. 59 M. 268 =1936 M. 179=70 M.L.J. 267 (F.B.). *See also* 1937 A.L.J. 360; 169 I.C. 780=1937 A. 439. P. Note for debt—Debt barred by limitation on date of note—Absence of specific recital that the promisee is to pay such barred debt—Oral evidence to connect promise to pay with prior loan, if admissible. 63 C. 759. P. Note executed by co-sharer to another at partition to equalise share and as term of partition—Suit on—Oral evidence of terms of partition—Unregistered partition lists—Admissibility. (1937) 1 M.L.J. 676. The mortgagor of occupancy holding is not debarred from proving his title to the holding although the mortgage deed, being not registered, was not receivable in evidence and other evidence to prove the nature of the transaction was not admissible. 1932 A.L.J. 101=140 I.C. 42= 1932 A. 259. But *see* 137 I.C. 31=1932 L. 276. Where prior oral agreement was held inadmissible—Written statement regarding indent transactions—Proof of usage at variance with the terms of contract—Admissibility. 54 C. 549. Lease silent as to place of payment of rent—Evidence is admissible to prove subsequent agreement as to the place. 23 N.L.R. 26. Document embodying only some terms of contract, oral evidence of other terms are not inconsistent with written terms is admissible. 1930 A. 615. Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence. 53 A. 114=1931 A. 183 (F.B.). Where a mortgage deed is alleged to have been executed and registered, oral evidence to prove the transaction is inadmissible. 14 L.R. 148 (Rev.)=17 R.D. 241. Where the mortgage deed is clear and unambiguous and actually applies to existing facts, parol evidence is admissible. 147 I.C. 633=1934 A. 100 (2). Endorsement of payment of mortgage bond not registered—Admissibility of oral evidence to prove payment. 100 I.C. 129. Mortgages executed in favour of creditor—Debtor if can subsequently ask for taking of accounts regarding amounts covered by mortgage. 31 C.W.N. 179=1926 P.C. 129 (P.C.). As to secondary evidence of contents of mortgage document, *see* 5 R. 650. Where a gift has been effected by an instrument, only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. 104 I.C. 229=1927 O. 278. Bond silent as to interest—Oral evidence to prove agreement to pay interest is admissible. 100 I.C. 794=1927 N. 195. Where a mortgage was alleged to be in writing but the same was proved by circumstantial evidence, such as recitals in deeds referring to the mortgage extracts from account books and by a transfer of a share of the mortgage, *held*, that the written mortgage not having been proved, the circumstantial evidence was not rendered inadmissible by S. 91 of this Act, or S. 49 of the Registration Act. *Held also* that there being no prejudice, the plaintiff could abandon the written mortgage and contend that it was unwritten. 30 Bom.L.R. 1277=1928 B.484. In order to explain a decree one can look at the judgment and at the pleadings; where however the point of doubt is not determinable from them the Court may permit oral evidence to be adduced in order to correct the misleading descriptions in the decree. 147 I.C. 23=35 P.L.R. 20=1934 L. 181. Award effecting out-and-out partition —Extrinsic evidence to show that some members remained undivided—Admissibility of. 55 M.L.J. 132. P. Note executed by co-sharer to another at partition to equalise share and as term of partition—Suit on—Oral evidence of terms of partition—Unregistered partition lists—Admissibility. *See* (1937) 1 M.L.J. 676. Where an unregistered partition deed is relied upon by the defence in a partition action, though the deed may be inadmissible in evidence, being unregistered, that does not prevent any other evidence being admissible to prove merely the factum of separation in order to defeat the plaintiff's claim. 177 I.C. 682=1938 P.W.N. 799=1938 P. 603. Family arrangement reduced to form of document inadmissible for want of registration. Evidence relating to contents of document is admissible. 26 A.L.J. 952 (F.B.). Partition deed inadmissible in evidence—Oral evidence is admissible to prove fact of partition. 34 P.L.R. 1033=1933 L. 194; 144 I.C. 312= 1933 N. 270; 145 I.C. 833=1933 R. 249; 12 Mys.L.J. 236; 6 R. 337=1928 R. 196. Joint and several liability of executants under a P. Note —Oral agreement splitting up the liability into several and divisible liability of each can be proved. 27 L.W. 820=1928 M. 173. P. Note—Suit on original consideration permissible when debt is provable apart from P. Note. 26 A.L.J. 416. When there has been an oral sale of property worth less than one hundred rupees by payment of the price and delivery of possession, the fact that some time later an unregistered sale deed is passed on to the vendee does not prevent evidence of the oral sale being adduced. 44 L.W. 949= 1937 M. 265. *See also* 19 Pat.L.T. 489. Where

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting., varying, adding to or subtracting from, its terms :

NOTES.

the terms of a contract originally made by parol are reduced to writing, S. 91 applies and oral evidence is not admissible. 28 L.W. 234=1938 M. 546. But where a contract of marriage is not signed by either of the contracting parties but is in the nature of a memorandum prepared by a nikah-khwan belonging to the Shariah Department of Musal it is open to one of the parties to prove by other oral or documentary evidence that he or she had been married and also the terms. 1934 L. 705. Although a wakf may be created by word of mouth once the terms of the dedications have been put in writing, the document itself or secondary evidence of the same should be tendered. 8 P. 484=1929 P. 410. An agreement to refer to arbitration is not a contract, grant or other disposition of property and so S. 91 does not apply to it. 116 I.C. 853=1929 A. 415. Bill of exchange or hundi does not necessarily embody whole contract between parties. If it embodies the whole contract, other evidence to prove the terms cannot be allowed. 51 A. 530=1929 A. 254. Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. 115 I.C. 147=1929 M. 187. Where the mortgage deed provided compound interest, oral agreement to pay simple interest cannot be proved under Ss. 91 and 92. 27 A.L.J. 866=119 I.C. 92. Where property is conveyed by an unregistered sale deed, though the document cannot be relied upon for the purpose of establishing title, it may be referred to for the purpose of understanding the nature of the contract between the parties and to prove delivery of possession. To such a case S. 91 does not apply. 10 P.L.T. 449=1929 P. 620. *See also* 1937 N. 116. Even though a contract in writing was signed only by a certain party, oral evidence could be added to show that another person was also a party to the arrangement or was bound by it. 159 I.C. 1005=43 L.W. 218=1936 M. 5.

Secs. 91 and 92.—S. 91 only excludes oral evidence as to the terms of a written contract. S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. There is nothing in either section to exclude oral evidence to show that there was no agreement between the parties and therefore no contract. Oral evidence is, therefore, admissible to show that a document executed by a party was never intended to operate as an agreement, but was a sham or fictitious document brought into existence solely for the purpose of creating evidence about some other matter. 1938 A. 132=1937 A.L.J. 1352. *See also* 174 I.C. 309=1938 M. 320=(1938) 1 M.L.J. 236. Where an endorsement of payment has been made on the back of a bond and it does not specify whether it was towards principal or interest, Ss. 91 and 92 would stand in the way of the admission of any oral evidence to show that the payment was in fact made towards interest. 1939 O.W.N. 201=14 Luck. 456=1939 O. 142.

Sec. 92.—The Court in considering whether oral evidence can be given or not has to look to the Evidence Act and the equitable considerations which have influenced the English Courts in like cases have no application in this country. 35 Bom.L.R. 1197=1934 B. 39. Per *Young, C.J.* S. 92 clearly refers to a contract, grant or other disposition of property entered into by agreement between the parties to the document. It cannot refer to a decree which is imposed upon one of the parties by force *majeure.* There is no mutuality about a decree which is passed in accordance with the wishes of one party and contrary to the wishes of the other. The section cannot, therefore, bar the setting up of an oral contract to operate as an adjustment of a decree. 1941 L. 149=43 P.L.R. 192=I.L.R. (1941) L. 383 (F.B.). All that S. 92 excludes is oral evidence to contradict, vary, add to or subtract from the terms of a contract which has been reduced to writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. 177 I.C. 6=1938 N. 335 (F.B.). Prior correspondence to vary terms of mortgage deed inadmissible. 1933 L. 1094. *See also* 12 Mys.L.J. 11. But where a letter was sent by mortgagee, acting as agent of mortgagor, and containing the scope of the security and the terms, *held,* it was admissible. 148 I.C. 721=1934 R. 61. Where most of the *sanads* are in a stereotyped form, in any particular case, the intention of the parties could be ascertained by reference to the terms of the settlement embodied in the correspondence. 150 I.C. 635=36 Bom.L.R. 158=1934 B. 145. Where a usufructuary mortgage is reduced to writing but is unregistered no other evidence of its terms could be given because of S. 92. 1938 N.L.J. 123. Oral evidence to vary or modify the terms of an agreement in writing is not admissible. 137 I.C. 285=1932 M. 218. But oral evidence is admissible to prove that an agreement in writing was in fact no agreement at all but was only a sham or nominal transaction, not intended to be operative. It is therefore, open to a widow to prove that an agreement purporting to provide for her maintenance was never intended to be given effect to or acted upon but was in fact brought about with the sole object of securing an acknowledgment from her of the undivided status of her husband by the insertion of a recita

NOTES.

to that effect as a preamble to the deed of maintenance. 36 L.W. 817=63 M.L.J. 707. Ss. 91 and 92 only apply when the document on the face of it contains or appears to contain all the terms of the contract. 56 B. 180=34 Bom.L.R. 26=1932 B. 151. S. 92 is applicable only to parties to instrument and their representatives. *See* 10 A. 421 ; 25 A. 337 ; 2 C.L.J. 338 ; 42 B. 512 ; 1930 A.L.J. 724 ; 1928 O. 472 ; 6 R. 376 ; 1930 A.L.J. 926 ; 1932 O. 168 ; 36 Bom. L.R. 158=1934 B. 145 ; 38 C.W.N. 1004=1934 C. 821 ; 1939 R. 139=1939 Rang.L.R. 622. *See also* (1937) Rang.L.R. 13 ; 1940 M.W.N. 19. Statement of fact in a written instrument, if open to contradiction. *See* 1 Luck. 160=3 O.W.N. 248=1926 O. 273. S. 92 applies only as between the parties to a transaction and those claiming under them respectively. 1940 M.W.N. 19=1941 M. 345. Section is not applicable to strangers, *i.e.*, persons not parties to the contract. 104 I.C. 736 ; 1937 Rang.L.R. 13=1937 R. 220. The words "between the parties to any such instrument" in S. 92 refer to the parties who on the one side and the other came together to make the contract or disposition of property, and do not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. 1941 P. 211=194 I.C. 739. It does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. 6 R. 741=1929 R. 86. Where in a case of a mortgage with possession, the deed provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, evidence of a subsequent oral agreement for delivery of possession of the property to the mortgagor on payment by him of a portion of the mortgage-money is no doubt, inadmissible under S. 92 of the Evidence Act. But this does not preclude the Courts from coming to a finding on the question of fact whether the mortgagor's possession of the property was unlawful or by consent of parties. 1936 O.W.N. 1086=1937 O. 1. *See calso* 15 Mys.L.J. 237. It merely prescribes a rule of evidence. It does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. 107 I.C. 658=1929 N. 91. Where the wording of the contract is capable of different interpretations, the Court is justified to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. S. 92 has no reference to the interpretations of the terms of a contract. 55 C. 808. It is perhaps a moot point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous but if there is doubt then it is permissible. I.L.R. (1938) N. 604=178 I.C. 293=1938 N. 434. The rule that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. [(1842) 1 Dr. & War. 353, Foll.] 108 I.C. 418=1928 P. 225. Oral evidence of intention of parties is inadmissible. But evidence under S. 92 (*b*) regarding the attendant circumstances is admissible. 1929 M. 807. *See also* 171 I.C. 702=1937 R. 142. Evidence to prove that some executants of the P. Note signed in the capacity of surety only is inadmissible under S. 92. Even where the contention is that one of the debtors signed as surety to the knowledge of the promisee, evidence to prove it is not admissible ; and when in spite of such agreement or suretyship as between executants, they sign the document as co-debtors, the agreement amongst the co-debtors cannot affect the right of the promisee. (1927 R. 199, Rel. on.) 1937 R. 82. *See also* 1942 O.W.N. 63=1942 A.W.R. (C.C.) 58. Where there was an expressly alleged fraud, such as that the promisee induced the surety to sign as executant or that he promised not to sue him except as such, then proviso (1) to S. 92 would come into operation. (1924 R. 360, Expl.) 1937 R. 82=168 I.C. 477. It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity. (1927 M. 911, Ref.) 144 I.C. 95=1933 M. 516. Section does not apply to decrees. *See* 91 I.C. 705=1926 C. 643 ; 53 M.L.J. 533. *See also* 6 R. 573 (oral agreement varying or effecting settlement is not barred). Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible for the purpose of interpreting the decree as S. 92 does not govern decrees. 165 I.C. 429=1937 L. 168. There is nothing to prevent a person arrayed on the same side to give evidence to vary terms. 54 I.C. 962 ; 1 Bur.L.J. 160. Section applicable only when the written instrument contains the whole of the terms 6 C. 328 ; 76 I.C. 215. But oral evidence may be admitted to prove that there was no agreement at all. 7 M.H.C.R. 189 ; 1933 L. 222=145 I.C. 689 ; 171 I.C. 481=1937 O.W.N. 1058. As regards admissibility of oral evidence and to prove acts, conduct and intention of parties varying contract. *See* 22 A. 149 (P.C.) the leading case. *See also* 42 Mys.L.J. H.C. 257 ; 25 M. 7 ; 8 C.W.N. 101 ; 34 B. 59 ; 56 C. 201=1929 C. 437 ; 1937 R. 142=171 I.C. 702 ; 22 A. 149. Oral evidence inadmissible to prove that two documents executed and registered on same day are part and parcel of one transaction. 103 I.C. 399=1927 A. 696. Oral evidence may be admitted that consideration did not pass. 45 A. 679 ; 44 A. 53. *See also* 94 I.C. 371=1926 S. 202 ; 92 I.C. 187=1926 O. 301. S. 91 or 92 of the Evidence Act does not bar evidence to show that a certain receipt was a fictitious document in the sense that no money was paid. 1934 A. 1068=153 I.C. 611. That a sale deed is only a mortgage. 34 B. 59 ; 35 B. 231 ; 17 C.W.N. 1053; 106 I.C. 18=1928 M. 459 (contemporaneous agreement not in writing not admissible). 1928 N. 182. That an apparent mortgage deed was really intended to be different. 7 P.L.T. 293 ; 1925 B. 501 ; 5 R. 644. That a mortgage with possession was intended to operate only as a simple mortgage. 165 I.C. 510 (Pesh.). As to scope of section, *see* 38 C. 893 (P.C.). Oral evidence can be given by the petitioner, suing *in forma pauperis*, to prove that he was personally present when the petition was

NOTES.

presented by his counsel or that he himself presented the petition, and that a note contrary to that by the Judge is wrong. 36 P.L.R. 100 =1934 L. 452 (1). As to application of section to criminal cases. *see* 11 Cr.L.J. 738=8 I.C. 952. Oral evidence as to representation of intention to deliver goods not embodied in pronote. *See* 13 I.C. 386=4 Bur.L.T. 99. Where by mistake of parties the duration of a lease was wrongly entered in the written instrument, evidence can be let in to prove the real intention of the parties. L.R. 4 A. 302 (Rev.). *See also* 1938 N. 259. The making of a pro-note by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given. 13 Bur.L.T. 239=64 I.C. 33. Oral evidence to prove that a pro-note was executed only as security is admissible. 107 I.C. 510. *See also* 49 A. 464=25 A.L.J. 305; 1932 N. 62=28 N.L. R. 325. There is no reason in S. 92 why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved. 44 M.L.J. 53=71 I.C. 61=1923 M. 184. Intention of parties—Fraud—Oral evidence to prove—Representation of intention on which the deed is silent. 13 I.C. 389=13 Cr.L.J. 50. *See also* 1938 N. 604. As to admissibility of oral evidence to prove extension of time in respect of the date of performing contract, *see* 18 S.L.R. 320. *See also* 1934 R. 316. Oral evidence regarding a verbal agreement whereby the time of repayment is extended and the mode of repayment is changed, ought to be excluded. 1930 A. 721 (F.B.) (oral agreement to extend time for mortgage inadmissible); to explain meaning of words used in document. 93 I.C. 193=1926 N. 301; agreement varying terms of sale deed in respect of easement (latrine). 96 I.C. 276; as between lessor and lessee. 24 A.L.J. 548=1926 A. 445. Proof of condition precedent to sale deed taking effect. 5 R. 636. But *see* 1930 A.L.J. 1066. Where oral evidence to show that the document was not to take effect forthwith as mentioned in the document was held inadmissible, oral evidence to prove discharge of debt admissible. 30 C.W.N. 710= 1926 C. 906; 42 C.L.J. 582=1926 C. 170; 44 C.L.J. 449=1926 C. 27. But *see* (1938) 2 M.L.J. 469 (P.C.) *contra* (discharge by part-payment and partly by remission). *See also* 6 R. 191; 1930 A. 721 (F.B.), that one of the two co-executants of a P. Note was only a surety. 35 Bom.L.R. 1197=1934 B. 39; 1933 L. 965; 92 I.C. 667 =1926 S. 156; a plea of *benami*, 1939 R. 139 (Plea of agency). *See* 95 I.C. 512=1927 R. 94. But *see* 1937 R. 82 (where it was held that evidence that a person jointly executed a pro-note as surety only was inadmissible under this section); oral evidence of surrounding circumstances. 104 I.C. 736. Evidence of conduct of parties to prove partition. 92 I.C. 1028 =1926 M. 402. *See also* I.L.R. (1938) N. 604 =178 I.C. 293=1938 N. 434. Relinquishment of interest by mortgagee. 48 A. 705. Oral evidence to prove that mortgagee agreed to charge lower rate of interest (or receive less. 62 M.L.J. 224=100 I.C. 54) than that entered in the deed is inadmissible. 95 I.C. 1019 =1926 O. 273. *See also* 53 M.L.J. 863. An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible under S. 92 (4) of the Evidence Act. But a discharge by paying less is admissible. 136 I.C. 317=1932 M. 141; 30 L.W. 293=1929 M. 794; 30 Bom.L.R. 1455=1928 B. 522; 1930 A. 721; 6 R. 91 (F.B.); 9 L. 597. *See also* 1930 N. 235 (calculation of reduced rate of interest immaterial). *See* on this point 54 M. 889=61 M.L.J. 556. Sale deed—Whether oral agreement to resell can be proved. *See* 105 I.C. 482=1927 R. 314. Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment-debtors is not inadmissible by reason of S. 92. *See also* 1929 C. 437=56 C. 201; 1929 A. 79. Mortgagor and mortgagee—Intended sale of mortgaged property to mortgagee—Settlement as to money due under mortgage—Proof of. 11 O.W.N. 254=1934 O. 115. *See also* 1937 R. 142. In a case of joint purchase in the name of several persons, parol evidence is admissible to prove tenancy in common. 1929 P.C. 72=56 M.L.J. 643 (P.C.). So also to prove that a lease in the name of one member was in fact on behalf of the entire joint family. 133 I.C. 897. The section does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the *terms* of the document. 7 R. 292=1929 R. 240; 28 S.L.R. 266; 1933 A.L.J. 1364=1933 A. 576. *See also* 1939 M.L.R. 12 (C.); 169 I.C. 1002 =41 C. W.N. 734=65 C.L.J. 225. In a suit on a P. Note executed in respect of the amount due under a prior P. Note *plus* the amount of costs incurred in a suit on the prior P. Note, the defendant is entitled to adduce evidence to prove that he had paid some amount towards the prior note and that to that extent his liability under the renewed note should be proportionately reduced. S. 92 is not a bar to the consideration of this question. 40 L.W. 706=67 M.L.J. 650. Cash loan can be proved to be rent due. 5 R. 822. Document in favour of two persons—Oral evidence to prove one of them alone is entitled to the amount is admissible. 1929 N. 91. When a loan has been taken and is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was and especially when he document is silent on the point. By such oral evidence the terms of the document are not varied. 70 C.L.J. 201. Oral evidence is admissible to prove that a debtor under a Hundi, upon which the suit is based, compounded with his creditors including the payee under the hundi by agreeing to pay them 12 annas in the rupee in full and final settlement of their claims. 1929 S. 153. P. Note can be proved to be conditional. 50 A. 754=1928 A. 289. A pre-emptor who was not a party to the sale deed could adduce oral evidence to show the intention of parties. 1928 O. 472=4 Luck. 68. *See also* 1938 A.L.J. 668; 1938 N. 604. It is not open to a party to a registered sale-deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale-deed that in spite of a certain property, belonging to the vendor, being entered

NOTES.

in the sale-deed, title to it would not pass to the vendee. 118 I.C. 589=1929 A. 578 (2). Where a document is on the face of it a registered mortgage-deed it is not open to any of the parties to plead or to lead oral or circumstantial evidence to show that the transaction was other than what it appears to be. 1933 L. 104. Where the surrounding circumstances are not so compelling as to lead inevitably to the conclusion that there had been an inadvertent misdescription of property in a mortgage deed in suit and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document, the mortgagees are barred by the provisions of Ss. 92 and 94 from showing that the intention of the parties was different from what appears from the terms of the mortgage deed itself. I.L.R. 1938 A. 494=1938 A.L.J. 477=1938 A. 364. Evidence to prove that a surety bond was executed under a mistake is admissible. 1929 R. 262. Persons who have in terms signed a bond as principals are prohibited by S. 92 from adducing oral evidence to show that they signed only as sureties. 1939 A.M.L.J. 84. Oral evidence to prove a subsequent agreement relinquishing portion of rent reserved under a kabuliat is inadmissible. 56 C. 201=1929 C. 437. Where a gift of the remainder which was invalid under the Mahomedan Law was sought to be validated by evidence as to the consent of the donee of the life estate to such an arrangement, such oral evidence is clearly inadmissible. 108 I.C. 637=1928 M. 613. Maintenance grant by Hindu husband in favour of wife—Condition as to chastity imposed by Hindu Law—Same not mentioned in deed—Enforcing condition as to chastity whether amounts to violation of the provisions of S. 92, Evidence Act. 9 P.L.T. 397. Registered mortgage deed—Contemporaneous written varthamanam providing for payments towards mortgage deed is admissible. The varthamanam is not compulsorily registrable under S. 17 (*b*) of Registration Act. 27 L.W. 47=1928 M. 382. Where a lease from month to month is registered, a subsequent oral agreement which modifies the contract of the lease is not admissible in evidence. 1939 P. 428. Though a contemporaneous oral agreement, between the parties to a conveyance, of re-purchase cannot be proved as between the parties, it can be proved if one of the parties is not actually a party to the conveyance. 6 R. 376=11 I.C. 832=1928 R. 244. *See also* 5 R. 836. Sale-deed registered—Recital in, that vendee should as part-consideration for the sale, discharge mortgage debts of the vendor—Oral evidence to show that the recital was false and the liability intended to remain with vendor is inadmissible. 1928 O. 148. *See also* 1939 P. 142. Ordinarily the title to immovable property transferred by sale passes on the registration of the sale deed although it may sometimes happen that the parties agree that title shall not pass until the consideration is completely paid. In contracts of sale there are recitals of the receipt of the purchase money as well as terms providing for the passing of the property. The strictly contractual part, that is to say, the arrangement as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms as mentioned in S. 92. The question when the property is to pass is a matter of contract. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms then the terms must remain the sole criterion of the intention of the parties, and evidence cannot be introduced for the purpose of showing that the contract means something other than what it expresses in unambiguous terms. 17 P. 318=1938 P. 505. An oral agreement between the endorser and the endorsee of a negotiable instrument that the endorsee will recover the amount of the instrument from the drawer only is admissible under proviso 2. 105 I.C. 747=1928 S. 50. In a suit on pro-note oral evidence to prove that money had been borrowed by both the defendants and that defendant having "witness" before his signature, was one of the executants and not a witness, is admissible. 1930 A. 709. In a suit for recovery of rent, held that oral evidence to prove the rescission of the registered lease was inadmissible. 1933 L. 278=145 I.C. 176. Wrong description of name in deed is a latent ambiguity and parol evidence is admissible. 1931 O. 54. Mistake—Palpable error—Equity, if sanctions admission of evidence to expose error. *See* 1938 N. 259. The word "fraud" used in the proviso is wide enough to include a fraud on the registration law. Thus a party can show that an item was fictitiously put in. Scope of proviso discussed. 1933 A.L.J. 926. Document silent as to interest of two joint transferees—Evidence of subsequent conduct is admissible. 1930 M. 690. In case of a clerical mistake, it can be proved by parol evidence under S. 92. 1930 A. 387 (1). Mortgage deed—Interest agreed to be paid at one per cent per month—Words "per cent" omitted inadvertently—Admissibility of oral evidence—Evidence Act, S. 93, is not applicable as there is no patent ambiguity. 7 O.W.N. 14=1930 O. 95. Where a bond declares that money is to be repaid with interest at a certain rate, an oral contract to the effect that no interest is to be paid but the person is to be in possession of a certain piece of land and to pay himself the interest out of the usufruct cannot be proved. 122 I.C. 894 (2)=1930 A. 440. *See also* 1936 A.M.L.J. 107. Oral evidence may be let in to prove an agreement to pay interest though there is no mention of such an agreement in a balance struck in the creditor's book. 1932 L. 652. It is not open to a party to a document to prove by oral evidence, a variation in the amount of consideration of the document though it is open to him to prove want of consideration or failure of consideration or a difference in kind of consideration. A vendor cannot adduce oral evidence to prove that the consideration for the sale was that stated in the sale-deed plus an undertaking by the vendee to discharge an existing mortgage on the property. 1930 M. 659=58 M.L.J. 240. *See also* 189 I.C. 423=

Provisos.—(1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure][1] of consideration, or mistake in fact or law.

LEG. REF.

[1] The words in brackets in proviso 1 were substituted by Act XVIII of 1872, S. 8.

NOTES.

1940 C. 379; 174 I.C. 309=1938 M. 320=(1938) 1 M.L.J. 236. Suit on money bond—Provision for repayment in cash—Plea that payment should be made by medical services to be rendered—Not open—Evidence to prove plea not admissible. 1936 A.M.L.J. 107. Extraneous oral evidence is inadmissible especially when the terms of the bond are clear. The parties must be presumed to know the difference between interest on interest and compound interest and if they deliberately choose to use one expression they cannot be permitted to prove that they meant the other. 1931 N. 25. Acknowledgment is not a document contemplated in S. 92. It is neither contract, grant nor disposition of property nor analogous to any of them. 26 N.L.R. 320. Oral promise made at the time of acknowledgment of a contract of loan is admissible. 26 N.L.R. 320. The law is well settled that to prove an acknowledgment of liability oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given. It is equally settled that in construing such a writing it is legitimate to look to the surrounding circumstances. 45 C.W.N. 208. A contract of simple money debt is not one required by law to be reduced to the form of a document. 26 N.L.R. 320.

Sec. 92, Prov. 1.—The statement of law in Amir Ali's Evidence that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible, is too wide and must be qualified by the express provisos 1 to 3 to S. 92 of the Act. 49 A. 680=1927 A. 422. Proviso 1 to S. 92, has no application in a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing. Where a person transfers certain property by a deed of gift, it is not open to him to say that when he gave the property he did not do it. The donor is not himself entitled to have the deed set aside on the ground that his intention was that it should operate on his death, especially so when there is no evidence that the donor, giving away practically the whole of his property wanted to retain any sort of control after the date of gift. 171 I.C. 702=1937 R. 142. Where in a printed form of a P. Note after mentioning, the interest payable, there is an omission to state that it is—per cent. oral evidence can be let in to show what was the agreement between the parties and it is a case to which proviso 1, to S. 92 applies. 1939 A.W.R. (H.C.) 171=1939 A.L.J. 196; 1939 A. 308. The wording of the proviso (1), S. 92 and especially the use of the words 'such as' clearly show that the illustrations are not meant to be exhaustive. 1939 N.L.J. 33=1939 N. 20. The mistakes contemplated by proviso (1) to S. 92 are genuine and accidental mistakes, just as a misdescription of the property. 184 I.C. 585=1939 Pesh. 41. There is nothing in proviso (1) to S. 92 to suggest that the facts which may be proved under that proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded by way of defence only. The validity of every contract depends on the presence of *animus contracendi* the intention to contract. When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification on the ground that the written instrument does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such case is to rectify, not the contract, but the document embodying it, and put that document into such a form as to carry out the contract which the parties really entered into. When there is unilateral mistake the position is different because in that case there is, in fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intended something else, and if any relief can be granted, it must be rescission. 41 Bom.L.R. 191=I.L.R. (1939) B. 149=1939 B. 151. Under S. 92, Proviso 1, oral evidence is admissible to prove that the khasa numbers of the land sold were wrongly entered in the sale-deed particularly when both the vendor and the vendee admit that a mutual mistake of fact had crept into the sale-deed. 188 I.C. 813=42 P.L.R. 222=1940 L. 236. Where in a suit on mortgage bonds which stipulated for payment of compound interest, the defendant alleged that at the time of the execution of the bonds, he was persuaded to sign them only on the plaintiff's promising not to enforce that stipulation. *Held*, that such evidence would be admissible under the first proviso to show that the signature to the document was obtained by fraud at the inception, *e.g.*, that the plaintiffs had always intended to enforce the stipulationand obtained the defendant's signature by misrepresenting their intention at that time. But evidence that plaintiffs at some later date, sought to enforce the stipulation is not evidence sufficient to prove that they had such an intention when the document was signed. 61 C. 344=1934 C. 564. Though a document says there was consideration and states exactly what it was, a party may contradict that and show that there was none or that it has failed. Though a document sets forth that the consideration has fully passed and though a party to the document admits that by signing it, nevertheless he can turn round later on and contradict the document and show that he did not receive anything at all. In the same way there is no

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

NOTES.

reason why the other party should not be allowed to show that the consideration was paid in full, not in cash, but in kind. 1939 N.L.J. 33=1939 N. 20. *See also* (1938) 1 M.L.J. 236. Where under a kabuliyat two *hals* of land were settled with a tenant at a certain rate, a separate oral agreement that one of the *hals* would be given rent free is not admissible in evidence, although evidence that the kabuliyat was not intended to be acted upon at all would be admissible under proviso (1) of S. 92. I.L.R. (1938) 1 C. 48=176 I.C. 972=1938 C. 356. Plea of want of consideration may be proved in a suit on P. Note. 108 I.C. 158; 1934 A. 496=148 I.C. 1124. Where a plaint makes no claim for rectification regarding the rate of interest contained in the mortgage instrument, the proviso 1 to S. 92 does not empower a plaintiff suing on an unambiguous unreformed and registered deed to lead evidence to show that by a mistake a term has been omitted from the deed. 54 M. 973=61 M.L.J. 437. *See* on this proviso 59 C. 1111=1932 C. 708; 139 I.C.221=34 Bom.L.R. 971; 140 I.C. 104=1932 P. 332; 56 B. 180 =137 I.C. 478; 35 C.W.N. 279. An obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. The validity of a document may be challenged on the ground of the illegality of the transaction. 19 P. 424=188 I.C. 859=1940 P.W.N. 878=1940 P. 573. Under S. 92, proviso (1), it is open to a Life Insurance Company to prove facts which show that the contract of insurance was illegal. The company, is therefore, entitled to prove facts showing that the insurance was really effected by the assignee of the policy for his own use and benefit and not for the use and benefit of the assured. 42 P.L..R. 801=1941 L. 33.

Sec. 92, Prov. 2.—A separate oral agreeement on a distinct and collateral matter, although a part of the same transaction would come within proviso (2) of S. 92, if the original instrument is silent on the point which is the subject matter of the agreement. 41 C.W.N. 1053= 1937 C. 619. The parties to a conveyance are not in view of the second proviso to S. 92, prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance and the vendor cannot be prevented from attempting to prove that there was such an agreement. 18 Pat. 318= 181 I.C. 184=1939 P. 411. Where a *sir* land had been mortgaged by the proprietor who afterwards sold the equity of redemption, he cannot be allowed to give oral evidence of a separate agreement to give up exproprietary rights. 14 L.R. 425 (Rev.)=17 R.D. 500. Oral evidence is admissible to prove a collateral agreement regarding lessee's right of pre-emption. 138 I.C. 774=1932 P.C. 231=63 M.L.J. 408 (P.C.). *See also* 1935 A. 322 (agreement for interest); 1939 A. 248=1939 A.L.J. 46.

Sec. 92, Prov. 3.—It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract. Where a P. Note is, by its express terms, payable on demand that is, at once, the obligation under the note attaches immediately. A collateral oral agreement not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the P. Note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of S. 92. 40 Bom.L.R. 1075=1938 P.C. 198=(1938) 2 M.L.J. 469 (P.C.). S. 92, Proviso (3) presupposes that in a case to which it could be applied the contract, grant or other disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder. 41 Bom.L.R. 1263. The words "any obligation" mean any obligation whatever under the contract, and not some particular obligation which the contract may contain. 1932 C. 328=59 C. 106. As to scope of the proviso, *see ibid. See also* 1932 L. 549=33 P.L.R 712. As regards scope and applicability as to the meaning of the term 'condition precedent,' *see* 33 Bom.L.R. 490; I.L.R. (1939) Kar. 523 =1939 S. 299; 41 Bom.L.R. 1263. Where money is not advanced as a simple loan unconditionally upon the P. Note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. 34 P.L.R. 470=1933 L. 456. In a suit on a P. Note an agreement suspending the coming into force of the contract contained in the P. Note constituting as it does a condition precedent within the meaning of proviso 3 to S. 92 of the Evidence Act, may be proved. Where the defendant in the suit pleads that the note executed by him which is sued on was only a receipt for the earnest-money for a contract of purchase by the plaintiff, that the purpose of the receipt of money has been wrongly stated in the P. Note, and that it was not intended to attach any obligation to the instrument as such, he is entitled to adduce oral evidence in support

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

NOTES.

of such plea. S. 92 does not bar oral evidence to prove the same. 1939 P.W.N. 200=20 P.L.T. 514=1939 P. 495. Plaintiff who purchased certain properties in Court auction subject to a mortgage in the defendant's favour agreed with third parties to sell some of them with the knowledge and consent of the defendant who agreed in writing to accept piecemeal payments from the plaintiff and to release the lands which plaintiff agreed to sell to the third parties. Plaintiff having sued for specific performance of the agreement, the defendant pleaded an oral agreement that the release deed was only to be given when the entire mortgage debt had been discharged, and that he was bound to give it if called upon by the plaintiffs after such discharge and not before. *Held*, that the arrangement set up by the defendant was not a " condition precedent to the attaching of any obligation " within the meaning of proviso (3) and hence the oral arrangement could not be admitted in evidence. 44 L.W. 749=71 M.L.J. 599. *See also* 44 L.W. 629=1936 M. 841=71 M.L.J. 522.

Sec. 92, Prov. 4.—There is no law in India whereby a release of mortgage should be in writing and registered. A contract of release between the mortgagor and the mortgagee may require writing under S. 92 (4) of the Evidence Act and may require registration under the Registration Act. But the case is different when the contract to release is between the mortgagee on the one hand and a stranger who purchases the property released after the contract. Such an oral release is valid. 40 L.W. 942=68 M.L.J. 91. *See also* (1937) Rang.L.R. 13 (where a second mortgagee was held not entitled to plead the bar under this section of proof of oral agreement between mortgagor and first mortgagee to release some items of his mortgage from the mortgagee). This proviso bars proof of oral agreement by lessor to release lessee from his liabilities under the personal covenants contained in a registered lease. 60 B. 394=38 Bom.L.R. 34=161 I.C. 57=1936 B. 88. *See also* 1937 O.W.N. 477=1937 O. 341. Where a mortgage deed contains a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt should be payments endorsed on the mortgage deed itself, it does not preclude the parties from adducing other evidence to prove discharge. It is open to the mortgagor to rely on evidence other than the endorsements on the mortgage bond in support of his plea of discharge. S. 92 does not bar such evidence. 192 I.C. 861=1941 P. 248. *See also* 196 I.C. 645. But *see* 1940 P. 49. Though it is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage, still when in the registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. 187 I.C. 63=21 P.L.T. 437=1940 P. 49. Oral agreement between one of several mortgagors and mortgagee for redemption of his share thereunder. Payment can be proved. 112 I.C. 559=1928 M. 1050. Mortgage suit for sale—Defendant pleading subsequent oral agreement to accept six shops worth Rs. 95,000 and 7,000 cash in full satisfaction of mortgage—Agreement is not admissible. 1929 A. 615. But *see* contra 44 L.W. 944=71 M.L.J. 850. (Case law reviewed.) A distinct oral agreement between co-mortgagors made subsequent to the execution of the mortgage deed should, in order to be admissible under this proviso, be in writing. 137 I.C. 285 =1932 M. 218. An alleged oral agreement that a registered deed of sale should be null and of no effect until the agreement of re-purchase has been executed by the vendee cannot be proved under the provisions of prov. (4), S. 92. 1933 R. 310. The expression " oral agreement " as used in proviso 4 of S. 92 is wide enough to include all unwritten agreements whether they are oral or they are implied from acts and conduct of the parties. But evidence of conduct is admissible to show that as between the parties the particular term was never intended to be acted upon or enforced. Evidence of conduct is also admissible to prove an estoppel or waiver. 1929 P. 717. A document purporting to be a sale-deed was presented for registration. The executant denied that he had executed a sale deed and stated that he had merely agreed to execute a mortgage deed. After some dispute the parties agreed that the transaction should be treated as a mortgage and made statements to the Sub-Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage-deed. *Held*, that proviso 4, to S. 92 did not prevent the successor-in-interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale. 145 I.C. 697 (1)=1933 L. 318. When the document is in terms a possessory nortgage, evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties is inadmissible under S. 92. 60 I.A. 273=14 L. 466=65 M.L.J. 150 (P.C.). Where the subsequent oral agree-

(6) Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(*b*) *A* agrees absolutely in writing to pay *B* Rs. 1,000 on the 1st March, 1873. The fact, that at the same time an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(*c*) An estate called "The Rampore Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B* upon certain terms. *A* was induced to do so by a misrepresentation of *B's* as to their value. This fact may be proved.

(*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words: "Bought of *A* a horse for Rs. 500." *B* may prove the verbal warranty.

(*h*) *A* hires lodgings of *B*, and gives a card on which is written—"Rooms, Rs. 200 a month." *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the term verbally.

(*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.

NOTES.

ment relates merely to the mode of payment of mortgage-money, evidence with respect to it is admissible. But if it is not merely an agreement as regards the mode of payment but an alteration of the mortgage itself, such as changing the original mortgage which was without possession into a usufructuary mortgage, it is not admissible. 110 I.C. 261. Subsequent to a registered mortgage parties entered into a contract by which the property was to be put in possession of the mortgagee for 5 years and the mortgage debt was to be deemed discharged. *Held*, that the contrcat to let and the letting into possession for 5 years operated as a discharge of the obligation and in no way offended the provisions of S. 92. 162 I.C. 53 (2)=1936 M. 380. An oral agreement by the executant of a P. Note, that, instead of money being paid, payment shall be made in the form of a transfer of land cannot be proved under S. 92 (4). 151 I.C. 398=1934 R. 228. *See also* 1937 R. 521. Oral evidence to prove satisfaction of a claim is admissible. 6 R. 191=1928 R. 144; but not to prove an oral agreement modifying terms of reference of a registered agreement referring matter to arbitration. 135 I.C. 230=1932 A. 154. A.C.I.F. contract is not required by law to be in writing; if it is not registered, it can be legally varied by an oral agreement modifying its terms. 34 P.L.R. 266=1933 L. 453. Where an oral agreement is made by two partners to dissolve the partnership earlier than originally agreed to in their registered agreement, the oral agreement and any payment made in accordance therewith is admissible in evidence. 136 I.C. 874=1932 N. 42. Plaintiff executed a sale deed to the defendant which was registered. On the same date the defendant executed an agreement to re-convey the properties to the plaintiff which was not registered. The sale deed itself did not contain any reference to the agreement. Plaintiff having sued for specific performance of the agreement, objection was raised to the use of the unregistered agreement under S. 92 (4) of the Evidence Act. *Held*, that no objection under S. 92 (4) could arise. 1934 M. 703=67 M.L.J. 635. *See also* 179 I.C. 172 =1939 P. 142.

Sec. 92, Prov. 6.—This proviso does not apply where the document is clear and unambiguous in its terms. 1939 Sind 200=I.L.R. (1939) Kar. 530. Oral evidence is admissible to show the real nature of the transaction evidenced by the document as, for instance, that a document though styled a gift is really a will. 117 I.C. 907 (2)=1929 L. 875 (2); but not a sale into mortgage. 1928 M. 459; 1928 N. 182; 1925 B. 501=49 Bom. 662; *see also* 1939 S. 200=I.L.R. (1939) Kar. 530. Where there is no ambiguity which needs explanation and terms of document are quite clear evidence to explain, the terms of the deed should not be allowed. 164 I.C. 463=1936 L. 508. *See also* 18 Mys.L.J. 196=45 Mys..H.C.R. Rep. 109; I.L.R. (1939) Kar. 530=1939 S. 200. Where the terms of a written contract are perfectly clear the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract in accordance therewith does not arise. 184 I.C. 585 (2)=1939 Pesh. 41. Sale-deed to a dancing-girl—Contemporaneous oral agreement that it was to take effect as maintenance arrangement is not admissible. 31 L.W. 516=1930 M. 547.

(*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a*) *A* agrees, in writing, to sell a horse to *B* for Rs. 1,000 or Rs. 1,500.

Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to *B*, by deed, "my estate at Rampur containing 100 bighas." *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to *B*, by deed, "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

NOTES.

Sec. 93: GRANT.—Opinions and intention of Government officers not legitimate materials for construing a grant. *See* 29 M.L.J. 289. Kabuliyat—Oral evidence to explain—Interest—Rate of prior transactions—Custom. *See* 41 C. 349=18 C.W.N. 582. *See also* 22 I.C. 844. Patent ambiguity—Hand note—"Interest at 2½ per cent."—Evidence admissible to show what the rate of interest was per mensem. 14 C.W.N. 1100=14 C.L.J. 97; 62 I.C. 702. But *see also* 19 C.L.J. 66=41 C. 342. Ambiguity—Oral evidence as to contents of documents—Specific Relief Act, S. 31. *See* 130 P.L.R. 1910=8 I.C. 554. Evidence as regards identity of property leased admissible. 20 A.L.J. 377. Where language is defective, oral evidence inadmissible. 1921 M.W.N. 519. *See also* 80 I.C. 944; 162 I.C. 797=1936 P. 275. Where two deeds on their face appear to be separate transactions, another agreement which was not evidenced by any writing cannot be proved to show that the deeds though apparently two separate transactions, were agreed to be treated as one. 175 I.C. 831=1938 P. 242.

Sec. 94: DOCUMENT CLEAR AND UNAMBIGUOUS.—Section does not apply in case of misdescription. 104 I.C. 736. As to oral evidence of one not a party to document, *see* 57 P.L.R. 1915; 16 O.C. 213=21 I.C. 429. Where the language of a document like a deed of compromise is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation. 40 I.C. 491. Contemporaneous circumstances and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed and legal construction can be put on it. 195 I.C. 242=1941 O. 507. Sale deed—Language plain—Mistake in boundaries—Area described correctly—Extrinsic evidence—Admissibility. 150 I.C. 363=36 P.L.R. 61. On this section, *see* 3 Bom.L.R. 768; 1925 M.W.N. 325; 38 A. 103; 41 M.L.J. 475; 1939 A.W.R. (H.C.) 173. Oral evidence to show that one of the executants of a bond signed it only as a surety is not admissible. 5 R. 168 =1927 R. 199. S. 94 does not prevent a party to a document from proving that both the parties to the document were under a mistake of fact as to the contents of the document when they signed it. 122 I.C. 493=1930 L. 446. Where in the case of a sale-deed it is not the seller alone who is trying to get out of the bargain but the seller and the purchaser both agree that the intention was to enter into the deed land bearing different khasra numbers, and that the mistake was mutual, it is open to the parties to produce evidence to show what was intended to be sold and purchased. S. 94 is not applicable in such circumstances. 188 I.C. 813=42 P.L.R. 222= 1940 L. 236.

Sec. 95.—Though the sale-deeds containing recitals that the property belong to the vendors is not admissible under S. 13, they are admissible under Ss. 95 and 96 to explain the expression used in the documents that property is the vendor's family property. 1914 M.W.N. 779= 26 I.C. 747. Release deed conditional—Extrinsic evidence of claim released admissible. *See*

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a*) *A* agrees to sell to *B*, for Rs. 1,000 " my white horse." *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(*b*) *A* agrees to accompany *B* to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sindh was meant.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to *B* " my land at *X* in the occupation of *Y*." *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

Evidence as to meaning of illegible characters, etc.

98. Evidence may be given to show the meaning of illegible or not commonly intelligble characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to *B*, " all my models." *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

NOTES.

20 M.L.J. 383=6 I.C. 758; 21 I.C. 69. Original documents in possession of defendant—Document referred to in plaint but not produced—Secondary evidence admissible. *See* 37 I.C. 794. Contract—Construction—Offer kept open 'until' and 'up to' a certain date—Oral evidence inadmissible to explain. 22 C.W.N. 416=44 I.C. 305. Where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given. 61 C. 890=1934 C. 569. Transfer by mortgagee of mortgaged property—No mention in deed that only mortgage rights were intended to be sold —Latent ambiguity to remove which evidence can be given. 118 I.C. 682=1927 N. 267. Under Ss. 95 and 98 evidence can be allowed to show interest is payable monthly when document is silent. 1933 L. 144. Where just prior to the expiration of three years from the date of the previous pro-note, the defendant executed another receipt, for the amount already received, evidence is admissible to show that the receipt referred to the original consideration. 9 O.W.N. 1024.

Sec. 96.—If the language of a document directly describes two sets of circumstances but cannot have been intended to apply to both, evidence may be given to show to which it is intended to apply. 10 Bur.L.T. 245. P. Note bearing both English and Malayalam dates—Inconsistency—Evidence as to date of note—Admissible. *See* (1941) 1 M.L.J. 502=53 L.W. 449=1941 Mad. 587.

Sec. 97.—Latest ambiguity—Mortgage deed —Ambiguity in the description of land—Evidence *aliundi* to clear up ambiguity is admissible. 43 I.C. 731. *See also* 57 I.C. 2; 58 I.C. 67; 18 B. 283; 30 M. 207.

Sec. 99.—This section is merely an enabling provision. 27 M. 329. Evidence by strangers to show real nature of transaction is admissible. 8 I.C. 501; 28 A. 473; 23 L.W. 664=1926 M. 744; 1928 C. 253. (persons not claiming through settlor can show the wakf was illusory).

Saving of provisions of Indian Succession Act relating to wills.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865)[1] as to the construction of wills.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

LEG. REF.

[1] *See* now the Indian Succession Act (XXXIX of 1925).

NOTES.

Sec. 101.—As to meaning of "burden of proof" and the rules governing it, *see* 145 I.C. 413=1933 R. 211; 1939 A.W.R. (B.R.) 71 =1939 R.D. 216. When all evidence is in question, burden of proof has little or no importance in appeal. 103 I.C. 166; 1929 R. 183. *See also* 162 I.C. 247=1937 R.D. 170; 1936 L. 1016; 52 L.W. 57=1940 P.C. 93 (P.C.); 1940 L. 336; 1939 M.L.R. 244 (Civ.); I.L.R. (1940) Kar. 235 (P.C.); 63 M.L.J. 694=37 C.W.N. 71=1932 P.C. 228 (P.C.); 60 C. 1158 =37 C.W.N. 1001=1933 Cal. 900; 29 N.L.R. 298=1933 N. 379. The burden of establishing case rests on the party who asserts the affirmative. 35 C. 1051; 9 W.R. 192; 41 P.L.R. (J. & K.) 21; 1939 M.L.R. 86. Where a will is propounded, the *onus probandi* is on the party who propounds the will. He must prove that the will was duly executed and that it was in existence at the date of the death of the testator. 57 C.L.J. 8=1933 C. 449. Applies to probate cases. 39 C. 245.

MARRIAGE.—In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. 1939 M.L.R. 244 (Civ.). *See also* I.L.R. (1940) Kar. 235. Where a person accepts the burden of proof and undertakes to discharge it, he cannot be allowed to turn round and say that he has been wrongly treated in the matter of burden of proof. 1939 M.L.R. 244 (Civ.). The burden would lie on any party who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed, the marriage itself was void. 56 A. 428=1934 A.L.J. 1129=1934 A. 273. *Benami*—Onus of proof. 1933 R. 393. Appeal—Error of lower Court—Onus on appellant. 10 O.W.N. 201=1933 O. 142. Fraud—Burden of proof. 12 P. 359=1933 P. 306. As to burden of proving knowledge of party defrauded, *see* 143 I.C. 84=1933 C. 339. Party alleging that a contract is conditional must prove the condition. Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorised by creditor to receive payment. 49 M. 435=53 I.A. 84=51 M.L.J. 570 (P.C.). The onus lies on the creditor to prove that the acknowledgment to pay a money debt was made within time; and it would be contrary to the provisions of Ss. 101 to 104 to require that the burden lies on the defendant who acknowledged the liability. 1932 A. 199 =53 A. 963. Defendant thinking that suit is barred by limitation—It is for defendant to establish facts that lead to support his plea—Limitation. 1934 P. 44. When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant, and proof of long occupation at a fixed rent does not satisfy that onus. 46 M.L.J. 546=51 I.A. 83=47 M. 337 (P.C.). [16 C. 224 (P.C.); 43 M. 567 (P.C.) Ref.] *See also* 1930 M.W.N. 874; 146 I.C. 1002= 1933 A. 825. Where an alleged adoption was questioned after an interval of more than fifty-five years, the onus lies on the plaintiff to disprove adoption and although the defendant was bound to prove his title as adopted son, every allowance for an absence of evidence to prove such fact must be favourably entertained. 55 M. 40=1932 M. 198=62 M.L.J. 116. Where the right of sisters is challenged on the ground that they are excluded in the presence of collaterals, the onus of proving the existence of collaterals is on those who challenge the sister's right. 10 O.W.N. 424=1933 O. 231. Where a recorded tenant files a suit to eject a recorded sub-tenant the onus of proof lies on the latter to prove that the relationship of landholder and tenant did not exist between the parties. L.R. 2 A. 39 (Rev.). Agreement for sale with one but sale to another. Burden of proving *bona fides* is on vendee. 1926 L. 580=96 I.C. 175. As to evidence of conduct and probabilities *see* 75 I.C. 733=1923 L. 436. Suit on lost mortgage bond—Denial of execution by defendant—Alternative plea of payment does not relieve plaintiff from proving loss. 49 A. 78

Illustrations.

(*a*) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.

(*b*) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts.

NOTES.

Easement—Ejectment suit—Onus. *See* 105 I.C. 560. Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. 56 I.A. 248=52 M. 549=57 M.L.J. 1 (P.C.). The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative the party who avers a title cannot be absolved from proving it. [9 W.R. 190 (F.B.), Foll.] 114 I.C. 113=13 R.D. 480 =1929 O. 204; 60 C. 1253=37 C.W.N. 1174. In a suit for possession of land the plaintiff has to prove that the land lay within his holding and it is not for the defendants to prove that it lay outside. 56 C. 805=33 C.W.N. 227= 1929 C. 325. *See also* 42 P.L.R. 294=1940 L. 311. Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority. 1928 P.C. 152=55 M.L.J. 88 (P.C.). Where a mortgage deed contains an admission of receipt of consideration before the Sub-Registrar, the onus is upon the mortgagor to disprove this admission. 109 I.C. 149. *See also* 1939 M.L.R. 118; 1939 M.L.R. 86. When there is an affidavit of the peon serving the notice, of proper service thereof, the party who impugns the fact ought to prove that there was no service. 1928 C. 722. In a suit against a Railway Company for non-delivery of goods the Railway must first prove loss of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the Railway or its servants, etc., according to the terms of the risk-note. 1928 L. 774. Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature. 9 L. 224=1928 L. 432. *See also* 1929 R. 183; 56 C. 805=1929 C. 325; I.L.R. 1940 Kar. (P.C.), 235. 1934 L. 936; 1934 Pesh. 134; 1934 L. 542=45 P.L.R. 462; Where the evidence is conflicting, the party on whom the onus lies does not necessarily fail as in the case where no evidence is led on either side. 123 I.C. 612=1930 P. 134. Plaintiff sued on basis of lease in his favour for plot in dispute—Land recorded as defendant's ancestral holding—Onus lies on defendants to prove that it was part of their ancestral holding. 1930 P. 149 (1). Party accepting burden of proof in trial Court—If can complain in appeal. 1934 L. 1019. *See also* 1939 M.L.R. 244 (Civ.). Wrong view as to burden of proof—Interference in second appeal. 152 I.C. 441=1934 N. 253.

Secs. 101 and 102.—It is on the person who asserts that a transfer is in contravention of S. 12 of the C. P. Tenancy Act, that the burden of proving it lies, for it is his application that would fail, if no evidence at all were given. 1938 N.L.J. 474. *See also* 1939 M.L.R. 149. Where in a suit for money lent, the plaintiff admitted that he kept a day book but the same was not produced. *Held* that the plaintiff on whom lay the onus of proof should produce the best evidence available and in case such evidence was not produced, he must suffer the consequences. 41 P.L.R.J. & K. 21.

Secs. 101, 105-106.—Per *Dunkley, J.*—The phrase "burden of proof" is used in two distinct meanings in the Indian Evidence Act, *viz.*, the burden of establishing a case and the burden of introducing evidence. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. This principle is enacted in S. 101 of the Evidence Act, and in this section the term "burden of proof" is used in the first of its meanings, namely, the burden of establishing a case. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by provisions of S. 105 and its closely allied section, S. 106. In S. 105 the phrase "burden of proof" is clearly used in its second sense, namely, the duty of introducing evidence. The way of the accused under S. 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception in the Penal Code, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt. The conclusion, therefore, is that if the Court either is satisfied from the examination of the accused and the evidence adduced by him or from circumstances appearing from the prosecution evidence that the existence of circumstances bringing the case within the exception or exceptions placed by the accused has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of the minor offence. 14 R. 666=1937 R. 83 (F.B.). *See also* 1941 A.L.J. 619=1941 A. 402 (F.B.). The test is not whether the accused has proved beyond all reasonable doubt that he comes, within any exception to the Indian Penal Code but whether in setting up his defence he has established a reasonable doubt in the case of the prosecution and has thereby earned his right to an acquittal. Per *Goodman Roberts, C.J.*, 14 R. 666=1937 R. 83 (F.B.).

On whom burden of proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(*a*) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts was left to *A* by the will of *C*, *B's* father.

If no evidence were given on either side, *B* would be entitled to retain his possession.

Therefore the burden of proof is on *A*.

(*b*) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies.

If no evidence were given on either side, *A* would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

NOTES.

Sec. 102.—The section embodies a test as to which party would be successful if no evidence at all were given. 3 A. 85; 162 I.C. 21=1936 P. 243; 38 P.L.R. 427. In criminal cases the onus of proving beyond reasonable doubt the guilt of the accused is on the prosecution. 56 I.C. 849=24 C.W.N. 619. Execution of document admitted—Onus on executant to prove that he did not understand its terms even if he is illiterate. 1926 L. 692. *See also* 147 I.C. 591=1934 A. 226. The burden of proving that a suit is barred under O. 2, r. 2, C. P. Code, is upon the defendant. 102 I.C. 31 (20 C. 716, Foll.). In a suit for ejectment, even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title-deed on which he relies as having given him a title superior to that of the defendant is a valid one. 28 L.W. 82=1928 M. 840. When once the execution of a document is proved, if a party alleges circumstances that would make the document not binding on him, it is for him to prove such circumstances. 116 I.C. 143; 39 P.L.R. 42. Onus is on him to prove want of consideration. 1930 L. 65. Though as between parties to a document the admission of proof of execution would shift the onus on to the party denying consideration yet a person who is not a party to the document in question cannot be held liable on alleged receipts of payments unless there is evidence to prove that the money was actually paid. 1935 L. 14. It is for the person claiming the benefit from the disposition of property by the pardanashin lady to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. 1931 P.C. 100=61 M.L.J. 94 (P.C.).

Secs. 102 and 105.—SCOPE OF BURDEN OF PROOF ON THE PROSECUTION AND ACCUSED.—The burden of proving the existence of circumstances bringing the case within the 'exception' or 'proviso' is no doubt cast on the accused by S. 105, but this does not in any way absolve the prosecution of the burden laid on it by S. 102. The burden of proof, so far as the entire 'proceeding' is concerned, remains on the prosecution, even though the burden of the 'fact in issue' pleaded by the accused is cast upon him. Hence it is manifest that even in cases to which S. 105 applies the prosecution has to prove the guilt of the accused. 1941 O.A. (Supp.) 885 (1)=1941 A.L.J. 619=1941 A. 402 (F.B.). *See also* 1937 R. 83.

Sec. 103.—Where a party claims an exception to the general provision of the law, the onus lies on him to prove that the exception applies. 12 R. 55=1934 R. 90. Where it has been admitted or proved that an admission of passing of consideration has been made in the document, the burden of proving want of consideration rests on the person asserting the same. 104 I.C. 173 [1935 L. 471 (F.B.); 1927 L. 272, Foll.] 1926 L. 682. *See also* 12 L. 546=1931 L. 419; (1941) 1 M.L.J. 257 (Burden of proof under S. 14, Limitation Act—Good faith—Proof of). Where it is established that the consideration for the bond is different from that recited in the bond, the onus shifts on the plaintiff to prove affirmatively that the bond was executed by the defendant for the full consideration. 1939 M.L.R. 12 (C.). Agreement to sell immovable property—Subsequent registered sale—Right of first vendee to specific performance—Onus. 61 I.A. 115=13 P. 242=66 M.L.J. 255 (P.C.). Partition list proved—Onus to prove jointness is heavy on party alleging it. 1928 M. 865. Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased persons to prove that those properties belonged to him at the time of his death. 1929 S. 182. Where a suit by a purchaser of property for possession is contested by the person in possession on the ground that plaintiff's vendor had no title to the property, the onus is on plaintiff to prove that his vendor owned the suit property. 146 I.C. 445=1933 R. 174. When a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also, *prima facie* that no nearer heirs are alive. 151 I.C. 338=1934 A. 117. Where once a mortgage has been admitted the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale. 57 I.A.

Illustrations.

(*a*) [1]*A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) *A* wishes to prove a dying declaration by *B*. *A* must prove *B's* death.

(*b*) *A* wishes to prove, by secondary evidence, the contents of a lost document. *A* must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances of bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

LEG. REF.

[1] *Sic* in the Act as published in the *Gazette of India*, 1872, Pt. IV, p. 1, there is no illustration (*b*).

NOTES.

86=11 L. 199=1930 P.C. 91=59 M.L.J. 53 (P.C.).

Sec. 104.—Letter posted is presumed to have reached addressee. 8 P.L.T. 633=1927 P. 305. *See* 1929 C. 459.

Sec. 105.—PRINCIPLES OF THE SECTION.—*See* 20 A. 459; 11 C.W.N. 1085; 1905 A.W.N. 2; 25 Cr.L.J. 1077; 1925 N. 37; 14 R. 666 =1937 R. 83. Even in a case to which S. 105 applies an accused may rely upon an exception in his defence and fail to prove it, and yet be entitled to an acquittal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. 1939 S. 209=194 I.C. 474. "Burden of proof" has two meanings: (1) the burden of establishing a case, and (2) the burden of introducing evidence. 14 R. 666 =168 I.C. 193=1936 R. 83 (F.B.). (Burden of proof in criminal cases). Burden of proof that case comes within exceptions of the Penal Code. *See* 6 A. 220; 1898 A.W.N. 209. *See also* I.L.R. (1940) Kar. 249=1939 S. 209; 1940 P.W.N. 795. The rule laid down in S. 105 of the Evidence Act is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included. 43 Bom.L.R. 519. It is for the accused to prove the facts essential for the purpose of bringing his case within any of the exceptions. 144 I.C. 420=1933 R. 142. *See also* 165 I.C. 458 =1936 O.W.N. 1013. Even though the accused denies *in toto* the facts alleged, if it appears from the evidence for the prosecution that there are reasonable grounds for holding that the case falls within one exception, the presumption enacted in the last line of S. 105 of the Evidence Act does not arise at all. The burden is on the prosecution to establish guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record there appears a reasonable doubt as to whether the case falls within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted or convicted only of the minor offence, as the case may be. 14 R. 666=1937 R. 83 (F.B.). Exceptions not pleaded in Court below cannot be allowed to be raised in appeal. 21 A. 121; 23 C. 604; 3 A.L.J. 652; 17 B. 573; 8 I.C. 259; 8 C.W.N. 714; 7 A.L.J. 438; 4 P.W.R. 1910 (Cr.). Proof of right of private defence. 1 C.L.R. 60. An accused setting up a plea of self-defence in answer to a charge of murder has the burden on him to prove it. In the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence, although the accused is shown to have had severe injuries on his person after the crime. 52 L.W. 884=1941 M. 280=(1940) 2 M.L.J. 1018. Per *Young, C. J.*—There appears in some quarters to be the opinion that where an accused person has admitted participation in a fight, in which one of the other party is killed or injured, but pleads that he acted in the exercise of the right of self-defence, it lies heavily upon him under all circumstances to prove under S. 105 of the Evidence Act, the facts necessary to establish his plea. It must be remembered that in the vast majority of such cases in this country the accused persons are usually the only persons who could appear as witness in their own self-defence and they are barred from doing so by the law of procedure. The Courts, therefore, must be prepared to take their statements into consideration. In a case where the prosecution evidence is wholly unreliable and there is no other evidence to suggest that that part of their statements in which

Illustrations.

(*a*) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on *A*.

(*b*) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(*c*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on *A*.

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

NOTES.

they put forward the plea of self-defence is not correct, the Court has no other alternative but to accept their statements and act upon them. 43 P.L.R. 144=1941 L. 333.

BURDEN OF PROOF IN SPECIAL CASES.—As to grave and sudden provocation, *see* L.B.R. (1893-1900) 257; private defence. 11 C.L.R. 234; 1904 A.W.N. 113; 1930 O. 438. Fact of marriage. 1939 A.W.R. (H.C.) 811. That game is a mere game of skill, *see* 13 Cr.L.J. 270 =23 I.C. 484; as to possession of excess quantity of liquor, *see* 2 I.C. 543; shifting burden of proof, Rat 820; 4 C. 124.

ILLUSTRATIVE CASES.—Plea of insanity to be proved by the accused. 21 A.L.J. 776=77 I.C. 236=1924 A. 186 (2); 1935 O.W.N. 53. General exceptions under Penal Code—Onus lies on accused. But this does not mean that the accused must lead evidence. 45 A. 329=1923 A. 327 (2). *See also* 29 Bom.L.R. 713=1927 B. 436; 98 I.C. 707=1927 A. 119; 1939 S. 209 I.L.R.(1940) Kar. 249. The *burden of proof in a criminal trial* is always on the prosecution, and it is only shifted on to the accused in so far as the latter may set up the existence of circumstances bringing his case within any of the exceptions. The mere fact that the defence theory is rejected will not prove the guilt of the accused. 11 O.W.N. 1224=1934 O. 485. *See also* 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.); 165 I.C. 458. Per *Collister, J.*—The onus is certainly on the Crown to prove all the facts which constitute the elements of the offence, and if there is any reasonable doubt left in the mind of the Court as to whether these facts have been established the accused person is entitled to the benefit thereof; but this general onus is subject by statute, to the special onus which S. 105, Evidence Act imposes on the accused person, and when the Legislature has enacted specific provisions in the Evidence Act as to what amounts to proof or disproof, the Court will not be justified in falling back upon the general principle that the Crown must prove the prisoner's guilt. So far as Courts in India are concerned, the law of evidence is embodied in the Evidence Act and the Courts in India are strictly bound by its provisions when considering the question of onus of proof and its discharge. 1941 A.L.J. 619=1941 A. 402 (F.B.). If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. 45 A. 329=1923 A. 327 (2). *See also* 1941 A.L.J. 619=1941 A. 402 (F.B.); 3 L. 144=68 I.C. 113 =1922 L. 1. The rule laid down in S. 105 is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included. 42 Cr.L.J. 783=43 Bom. L.R. 519=1941 Bom. 273. Exemption from criminal liability—Unsoundness of mind. When unsoundness is pleaded as a defence to a criminal charge, the burden of proof rests on the accused. 50 I.C. 991=23 C.W.N. 621; (1940) 2 M.L.J. 1018 (plea of self-defence). Gambling—Proof that it is a game of mere skill—Onus on the accused. 23 I.C. 484=15 Cr.L.J. 276 (C.).

SEC. 106: SCOPE OF SECTION.—Per *Niamatullah, J.*—S. 106 of the Evidence Act contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else, and has no application to cases, where the fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others—if they happened to be present when it took place. It cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. Per *Allsop, J.*—S. 106 obviously refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts especially within his knowledge which would render the evidence for the prosecution nugatory. 1936 A. 833= 1936 A.L.J. 1124. Section applies only to parties to the suit. 37 C.W.N. 657=1933 P.C. 87=64 M.L.J. 413 (P.C.); 38 P.L.R. 427. *See* 14 R. 666=1937 R. 83. S. 106 was never intended to be used to place upon the accused the burden of proving their innocence. S. 106 is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution, but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. S. 106 does not enable the Judge to say to the jury that the accused must explain this and that he must

Illustrations.

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b*) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket on is him.

NOTES.

satisfy him on this point or that or be found guilty. 1939 S. 209=I.L.R. (1940) Kar. 249. The burden of proof referred to in S. 106 is that of introducing evidence merely. This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain he ought therefore to be found guilty. 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.). The burden of proving facts peculiarly within the knowledge of any person is on that person. *See* 9 W.R. 190; 1 P.L.J. 168; 47 M. 800; 20 I.C. 600=6 Bur.L.T. 129. *See also* 2 R. 549=1925 R. 143; 1942 N. 39; 1939 M.W.N. 883; 40 C.W.N. 938 (knowledge of plaintiff's right in design and user by defendant in trade-mark suit). It is the duty of a party who has certain facts relating to his case within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to cross-examination by the other side. 139 I.C. 712=33 P.L.R. 906. Where a party does not go into the witness-box to support his allegations regarding facts which are within its special knowledge there arises a strong presumption against him. 138 I.C. 525=33 P.L.R. 207. A party's failure to go into the witness-box raises a strong presumption against the truth of his or her case. The fact of a party being a pardanashin lady is not a sufficient cause for not getting into the box in as much as she could get herself examined on commission. 187 I.C. 317=1940 O.W.N. 375 =1940 O. 266. S. 106 of the Evidence Act cannot be utilised to help persons who are representatives of other parties and who step into their shoes. 30 L.W. 968. Where the question is whether plaintiff is authorised by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due authority is available. it is sufficient to discharge any burden on the plaintiff under S. 106. 65 I.A. 106=I.L.R. (1938) L. 63=1938 P.C. 73=(1938) 1 M.L.J. 359 (P.C.).

ILLUSTRATIVE CASES.—When the goods are solely under the control of the bailee, the fact as to when loss, destruction or deterioration occurred is a matter specially within his knowledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must be on him. 1932 A.L.J. 788=1932 A. 584. Where an instrument hired by a person was for all practical purposes in his exclusive possession, it is for him to explain how it came to be damaged. It is for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. 184 I.C. 36=1939 S. 245. Where a person accused of lurking house-trespass by night pleads in defence that he had a specific intention in entering the house, *i.e.*, to carry on a love intrigue in secret and not intimidate, insult or annoy, the onus of proof is on him. 49 I.C. 103= 40 A. 221; 37 A. 395=29 I.C. 67. *See also* 22 C. 164; 22 C. 591; 23 M. 152; 23 A. 124; 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.). Employing girl as prostitute—Onus is on accused to show absence of intention—Penal Code, S. 373. 71 I.C. 232=1922 C. 539. The presumption under S. 106 is very weak as compared to the presumption of innocence when the trial is one for murder. If an accused after a case has been proved against him withholds evidence in disproof, inferences unfavourable to him may be drawn. 43 I.C. 241=19 Cr.L.J. 81=21 C.W.N. 1152. An accused person is always entitled to hold his tongue; but when the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain the absence of an explanation must be considered in determining whether the possibility should be disregarded or taken into account. 43 I.C. 605=19 Cr.L.J. 189. *See also* I.L.R. (1940) Kar. 547=1939 S. 209. The burden of proving the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge does not lie on the mortgagee. 115 I.C. 451=1929 A. 209. In a suit for mesne profits, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. (47 M. 800 and 24 A. 475, Ref.) 38 L.W. 714=1933 M. 825. Though in cases alleging negligence against a public body the burden of proving negligence lies on the plaintiff, yet the provisions of S. 106 must be borne in mind. The fact that the burden of proving negligence may be on the plaintiff does not necessarily preclude the burden of proving any particular fact being upon the defendant public body. 1940 S. 254. Bailment—Hire of elephant for term of one year—Death of elephant before expiry of period of hire—Claim to damage—Negligence of bailee—Burden of proof. *See* 45 L.W. 158. *See also* 184 I.C. 36=1939 S. 245. Defendant intermixing his articles with those of plaintiff—Proportion of intermixture—Burden of proof. 15 P.L.T. 702 =1934 P. 492. Where a person is charged with having been a member of an association declared unlawful by the Government under the Criminal Law Amendment Act, the burden of proof is not on the accused to prove that he discontinued his membership. It is for the prosecution to prove that he continued to be a member even subsequent to the notification by Government. The Act imposes no obligation on the member to do anything specific to terminate the membership and so there is no question of there being anything especially within the knowledge of the accused. 33 Bom.L.R. 90=55 B. 484. As to burden of proof in the case of material alteration of documents, *see* 25 A. 580 (F.B.); 7 M.

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. [1][Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [2][shifted to] the person who affirms it.

109. When the question is whether persons are partners, landlord and

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[1] Substituted by S. 9 of Act XVIII of 1872 for "when"

[2] Substituted by *ibid* for "on"

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302 ; 9 M. 399 ; 12 M. 239 ; 7 C. 616 ; 12 C. 313 ; 7 B. 418.

Sec. 107.—Presumption of life or death—Minor not heard of for some months—Mother appointed guardian. *See* 1 I.C. 465. Death—Presumption of—Inheritance depending on proof of person surviving female—Onus—Date of death. *See* 19 M.L.J. 502=2 I.C. 977. *See also* 11 I.C. 202. I.L.R. (1939) Kar. 509=1939 S. 234. There is no presumption as to death at any particular time. 4 O.W.N. 1074 (53 I.A. 24). *See also* 165 I.C. 586. It depends upon the circumstances of each case whether a Court would not make a presumption that a person last heard of within seven years is alive, even assuming that a Court may make such presumption. 37 M. 440=23 M.L.J. 443.

Sec. 108.—When a person has not been heard of for seven years, there is a presumption that he is dead. There is no further presumption authorised by the Evidence Act. L.R. 3 A. 393 (Rev.) ; 1930 A. 427 ; 1941 O.A. (Supp.) 906=1941 A.W.R. (Rev.) 1125. 14 R.D. 672 (not heard of for 40 years). When the Court has to determine the date of the death of a person who has not been heard of for a period of not less than seven years, there is no presumption under S. 108 of the Evidence Act that he died at the end of the first seven years, or at any particular date. It is the duty of the person who asserts death to prove the date of death. [5 P. 312 (P.C.), Rel. on.] 165 I.C. 586. *See also* I.L.R. (1938) B. 155=40 Bom. L.R. 147=1938 B. 228. S. 108 is a proviso to S. 107. The rule in S. 108 supersedes the rules in Hindu and Mahomedan Law. 43 M.L.J. 725 ; 2 Beng.L.R. 134 ; 9 Luck. 401=1934 O. 41. There can be a presumption and inference of death irrespective of S. 108. 103 I.C. 329=1927 A. 687. The rules as to presumption of death contained in this section would govern the case of a Mahomedan who was missing for more than seven years. (7 A. 297, Foll.) The only presumption which is enacted by this section is that the party is dead at the time of suit, but there is no presumption as to the precise time of his death. 32 P.L.R. 704=1931 L. 582 (F.B.) ; 11 C.L.J. 580 ; 6 I.C. 244 ; 8 A. 614 ; 23 B. 296 ; 35 C. 25 ; 54 I.C. 186 ; 100 I.C. 833=1927 L. 284 ; 22 N.L.R. 175=100 I.C. 446=1927 N. 104 ; 1928 O. 13 ; 53 I.A. 24 ; 1930 A. 427. Where in order to succeed in a suit it is necessary for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence either direct or circumstantial. 1932 A. 365=1932 A.L.J. 175 ; 11 O.W.N. 793=1934 O. 298 (F.B.). Where two brothers die in the same catastrophe and it is not known as to who died first, there is no presumption either of survivorship or of contemporaneous death. In such cases the plaintiff must prove his assertion. Two brothers died in a fire and the widow of one of them sought to succeed to the entire properties on the ground that her husband being the younger of the two must be deemed to have survived the other. *Held*, there was no such presumption in the absence of direct evidence and that the onus of proving it lay upon her. 9 Luck. 461=1934 O. 101. This section raises a presumption of death at the end of a continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The party on whom the burden of proving the life of the absentee lies cannot get rid of that burden by admitting the absentee's death at some subsequent time. 8 I.C. 55 ; 35 C. 25 ; 37 C. 103 ; 33 C. 173 (P.C.). (8 Bom.L.R. 226, Ref.). No presumption as to the death of a person at a particular time—Person relying on fact bound to establish it by evidence—No presumption that a person died leaving no heirs. 33 M.L.J. 295=42 I.C. 241 ; *see* 38 P.R. 1918=45 I.C. 73 ; 21 O.C. 143=46 I.C. 80 ; 1930 A. 427. Where a person is not heard of for seven years, there is no presumption that he died after the expiry of seven years from the time when he was last heard of. The presumption is only that he is dead at the time when the dispute arises. 115 I.C. 626. The entry of *mafrur* does not connote "decease" and because a person has not been heard of for many years it does not mean that the death can be presumed to have occurred at a convenient time for the computation of the twelve years. The Court can however presume that death occurred seven years prior to the date of dispute. 13 R.D. 385. A wife, who left her husband and is in the keeping of another, is not one of the persons who would naturally hear from him if he were alive. 117 I.C. 209=1929 N. 127.

Sec. 109 : CONSTRUCTION.—"Have been acting as such"—Single instance—If sufficient. 40 L.W. 810. Continuance—Presumption of. *See*

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to ownership.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

111. Where there is a question as to the good faith of a

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18 C.W.N. 33=22 I.C. 383. When it is shown that the person in possession before the defendant was a tenant of the plaintiff at one time, it is for the defendant to show when the tenancy ceased and possession became adverse to the plaintiff. 28 M.L.J. 361=27 I.C. 804; 26 B. 410; 7 C.L.J. 202. Tenant for a year—Holding over —Presumption. *See* 39 I.C. 125. Where there is an admission that parties stood in the relation of principal and agent, the burden of proving that they have ceased to stand to each other in that relationship is on the party who alleges such cessation of relationship. 1935 L. 49. Where a tenant at will admits the tenancy, S. 109 comes into operation and there is a presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist. 173 I.C. 222=1938 S. 16. On this section, *see also* 89 I.C. 674=1927 N. 99.

Sec. 110.—Admissibility of oral evidence to prove factum of gift under an unregistered lease. 4 I.C. 314. Inquiry at mutation by Revenue Officer—If relevant. *See ibid.* Where in a suit against the Secretary of State for declaration of the plaintiff's title to a certain vacant site, the plaintiff proved his possession for over 30 years, *held*, that the burden of proving that the plaintiff was not the owner was upon the defendant and that the mere classification of the land as village site by the Government had no legal effect whatsoever except on assertion of title. 33 M. 173=20 M.L.J. 71. Plaintiff is not bound to prove adverse possession for sixty years to establish his title as against the Secretary of State for India in Council. (*Ibid.*) By virtue of S. 110 a person in possession is deemed to be owner until the contrary is shown. 41 P.L.R. 123. *See also* 45 Mys.H.C.R. 57=17 Mys.L.J. 510. Onus on the party out of possession—Shifting of onus. *See* 4 Bur.L.T. 159=111 I.C. 777. Presumption from judicial possession—Suit against Government, *see* 6 S.L.R. 210=19 I.C. 565. In the case of a boundary dispute between the parties the possession of the disputed land is an important element to be taken into consideration in determining the dispute. 1941 C. 632. S. 110, no doubt, enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions, must yield to proof. Where therefore title is proved or assumed, the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between S. 110, Evidence Act, and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner. 1938 M.W.N. 244=47 L.W. 438=1938 M. 193. The onus laid on a party by S. 110 is discharged by his showing that the possession enjoyed by the other party rests on a basis inconsistent with a right of property. 172 I.C. 981=1938 P.C. 87 (P.C.). "Possession"—Meaning of—Suit for possession of house site in village—Plea by Government that it is a passage—Failure to prove—Plaintiff proved to have tethered cattle stored grass and built *otli*—Effect of —If warrants inference of title—Burden of proof—Not thrown on defendant (Government). 39 Bom.L.R. 216=1937 B. 193. A plaintiff who has omitted to sue under S. 9 of the Specific Relief Act, when first dispossessed, is not debarred when the summary relief under that section has become barred by limitation, from relying, in a suit for ejectment, on this section. As soon as he has proved that the defendant has dispossessed him, the onus is thrown upon the latter to prove his title. 2 P.L.J. 61; 38 I.C. 797. Where nothing else is known, the person in possession of property is presumed to be owner. 45 I.C. 217. Where plaintiff is in possession alleging ownership onus of proving that he is not owner lies on defendant. 103 I.C. 36. But where defendant is in possession the onus is on plaintiff. 10 L.L.J. 488. The mere fact that defendant claimed rent could not defeat the presumption of title arising in plaintiff's favour from the fact that the plaintiff had possession when the suit was instituted. 36 P.L.R. 64=1934 L. 324. Under this section it is presumed that a woman has power to dispose of all property which was in her possession at the time of her death. 1927 O. 618. Prior peaceful possession is *prima facie* evidence of ownership under S. 110, Evidence Act, and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for ejectment against another who has no title to the land in dispute. 118 I.C. 680 (1). Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established. 119 I.C. 701=1929 N. 318. *See also* 1936 P. 602.

Sec. 111.—Sec. 111 relates to transactions entered into by persons *between whom* there is fiduciary relationship. 165 I.C. 597=1936 O.W.N. 1106=1937 O. 56. *See* 78 I.C. 850

Proof of good faith in transactions where one party is in relation of active confidence.

transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Birth during marriage conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage has no access to each other at any time when he could have been begotten.

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=1925 O. 18; 8 N.L.R. 150=17 I.C. 363; 36 C. 493=2 I.C. 553; 25 A. 358; 30 M. 169 (F.B.) (Donor and donee); 18 C. 545 (P.C.) (Agent and principal); 11 M.I.A. 551; 20 A. 447 (Husband and wife); 1926 N. 414 (Deed by pardanashin lady). As to whether the presumption in favour of purda woman should be extended to every illiterate and ignorant woman, *see* 10 Mys.L.J. 217. Person in position of active confidence—Burden of proving *bona fides* of transaction is on him. 1933 L. 861. S. 111 has no application except as between parties to the transaction itself. It does not apply where the sole dispute on the pleadings is not one of the *bona fides* of any particular transaction, but is one as to the real nature of the transaction itself. When a question which is entirely outside one of good faith and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, it does not mean that the method of impugning it should be different or the things to prove should in any way be varied. 1938 R. 412. Where a pleader who was engaged by a judgment-debtor in an execution proceeding advances money to him to pay off the decretal amount and takes a mortgage on the judgment-debtor's property in favour of his son, thereby securing a long term and profitable investment for his money, in view of the fiduciary relation existing between the pleader and his client it is incumbent on those seeking to enforce the mortgage to prove the utmost good faith on the part of the pleader in persuading his client to execute the mortgage. As the pleader knows that the onus of supporting his transaction would rest upon him, he must preserve the evidence which would be required to support it, if he desires that it should be upheld. Pleaders who deal with their clients must take care not only that the transaction is fair, but that they are in a position to prove that it was fair. 1936 O.W.N. 1033=164 I.C. 945. *See also* 1940 O.A. 910 (P.C.). Where the fact of undue influence was not seriously disputed the burden lies on him who desires to show that no undue influence was used and the transaction was made in good faith. 1934 A.L.J. 817=1934 A. 507. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position to domination has used the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. 10 L. 761=1929 L. 369.

Sec. 112: PROOF OF PATERNITY OF CHILD.—The effect of S. 112 is that where a child is born during lawful wedlock, that child will have to be assumed to be the child of the man who was at the time the husband of the mother, unless it is shown that they had no opportunity of sexual intercourse in consequence of which the child could have been begotten. Every assumption is to be made in favour of legitimacy of a child born in lawful wedlock, and the onus of proving non-access or illegitimacy is on the party alleging the same. The law requires in such cases the positive proof of a negative fact, that is, non-access as between the parties to the marriage, and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The fact of non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character, but unless such evidence is forthcoming, it will not be possible for any Court "to believe it to be probable that there was no access." An entry in the birth register containing the name of the mother only does not warrant the inference that the child born is not illegitimate. An entry in the birth register may be relevant under S. 35 of the Evidence Act to show the date of birth, but the question as to how far the fact that the name of the mother and not that of the father was given by the informant would bear on the question of the child's legitimacy, even if it is assumed to be relevant, depends largely on the means the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant is a stranger, who did

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not know the father, the statement, even if relevant, would be wholly unimportant, and the entry would be of no value when the informant is not examined and no explanation is given for his non-examination by the party relying on the entry in support of his plea of illegitimacy. 54 L. W. 411. S. 112 can have no application to a case where the maternity of a person is in dispute and not his paternity. 188 I.C. 1=52 L.W. 57=72 C.L.J. 263=1940 P.C. 93 (P.C.). In proceedings under S. 488, Cr. P. Code, an admission of paternity of an illegitimate child by the alleged putative father is irrelevant in view of the clear wording of S. 112, Evidence Act, if the applicant mother fails to prove that she and her husband had no access at the time when the child could have been begotten. 1941 M.W.N. 1037=(1941) 2 M.L.J. 693. As to presumption of legitimacy from marriage in the case of Mahomedans, *see* 1936 A. 528. The word " access " means no more than opportunity of intercourse. 12 R. 243=1934 P.C. 49=66 M.L.J. 288 (P.C.). *See also* 54 L. W. 411; (1941) 2 M. L. J. 693. The burden of showing that parties to marriage had no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child. 66 M.L.J. 288 (P.C.). The parties to marriage were in touch with each other, residing for a short period in reasonable proximity, the wife being in the house of a relative of the husband. There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility. *Held*, that if the child could have been begotten during this period, his legitimacy was undeniable. 66 M.L.J. 288 (P.C.). Nature of presumption under the section explained. 1934 M. 310=66 M.L.J. 279. *See also* 1934 M. 318=66 M.L.J. 283. The terms of S. 112 must be given their due effect, and any evidence to the effect that a wife has been leading an improper life, even if the Court should be prepared to accept it as true, will not rebut the presumption enacted in that section. A statement by the husband that a child in the womb of his wife was not his child and must have been procreated by somebody else is not entitled to any weight; nor does it amount to such proof, even assuming it to be true, as will displace the effect of S. 112. The fact that the parties are governed by the Mahomedan Law makes no difference, so far as the application or effect of the presumption under S. 112 is concerned. The fact that under that law there may be a divorce of a wife by the husband making oath accompanied by an imprecation as to his wife's fidelity, and that if he denies the parentage of the child with which the wife is then pregnant, it will be bastardised, cannot override the presumption enacted in S. 112. 1937 M.W.N. 957. *See also* 1937 L. 266. The presumption under S. 112 applies quite irrespective of the fact whether the mother was married or not at the time of the conception. 1937 L. 784. In a divorce case where the paternity of the infant is in question, neither husband nor wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock. 39 P.L.R. 262=1937 L. 176. S. 112 merely requires proof to the satisfaction of the Court that the parties had no access to each other, not that there was no possibility of access. A finding that there was no access is a pure finding of fact. 150 I.C. 306 =1934 N. 124. As to when the presumption is rebutted, *see* 1937 R. 67. A statement by a deceased person, merely containing an assertion that child born to his wife during the continuance of a valid marriage between them is not his child is not sufficient under S. 112 to establish illegitimacy of the child, when it is not established that the husband had no access to his wife during the period in which the child could be begotten. 1937 L. 266. A child born during the continuance of a valid marriage is deemed to be legitimate and it throws on any person who is interested in making out the illegitimacy the whole burden of proving it. The presumption regarding legitimacy cannot be rebutted by circumstances which only create doubts and suspicions. 39 P.L.R. J. &. K. 51. *See also* 54 L.W. 411. Where the question of paternity is one of evidence only, the case is governed by S. 112 and not by the personal law of the parties. 26 I.C. 996=16 Cr.L.J. 84. A legal presumption in favour of legitimacy will arise only if it is proved that there was a valid and lawful marriage between the parents of the person whose legitimacy is in question. But the burden of proving such a lawful marriage is on the person who claims to be legitimate, and if he does not establish that, he cannot rely on the presumption so as to shift the burden of proving the contrary on to those who allege illegitimacy. 1935 O.W.N. 25=1935 O. 80. The presumption of legitimacy created by S. 112 can be rebutted only by proof of non-access leaving no room for doubt. If the husband has had access, the wife's adultery will not justify a finding of illegitimacy—Proof of impotence would be equivalent to proof of non-access. 26 I.C. 996; 16 Cr.L.J. 84; (1914) 11 U.B.R. 23; 10 I.C. 389=(1911) 1 M.W.N. 312; 77 P.R. 1911=12 I.C. 946; 22 I.C. 409. *See also* 1 Luck. 71; 5 Mys.L.J. 249. Where the legitimacy of a person is challenged in a suit, a mere finding to the effect that the husband after the marriage, remained outside for long periods, that on his return from one of these periods of absence, he found cause to be dissatisfied with the conduct of his wife and denied his paternity of the child born to her, is not sufficient to meet with the requirements of S. 112. In order to fulfil the requirements of S. 112, it is necessary to prove that during the period there was no occasion for the wife to meet her husband. 1937 L. 266. A statement by a deceased person, merely containing an assertion that a child born to his wife during the continuance of a valid marriage between them is not his child is not sufficient under S. 112 to establish illegitimacy of the child, when it is not established that the husband had no access to his wife during the period in which the child could be begotten. 1937 L. 266. As to burden and nature of proof to prove non-access, *see* 1932 M. 39=61 M.L.J. 878; 1932 M. 44=61 M.L.J. 874. Where a married woman claimed maintenance from the petitioner on the ground that he was the putative father of her minor children, *held*, that as the evidence did

Proof of cession of territory.

113. A notification in the *Official Gazette* that any portion of British Territory has [1][before the commencement of Part III of the Government of India Act, 1935,] been ceded to any Native State, Prince or Ruler,[2] shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

LEG. REF.

[1] Inserted by A.O., 1937.

[2] *See* for example *Gazette of India*, 1873, Pt. I, p. 2.

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not establish non-access to the woman of her own husband who live in the vicinity no order for maintenance can be passed. 1932 M.W.N. 1217. Where the parents married in 1897 but the wife deserted the husband in three months thereafter and lived with a paramour near her husband's village and the evidence was that all through she had been living with her paramour and there had been no kind of access between the husband and the wife, it was held that the presumption as to the legitimacy of a son born in 1901 was, in the circumstances, rebutted. 1934 M. 318=66 M.L.J. 283. Competency of discharged co-accused to testify in the case. *See* 9 Cr.L.J. 370; 4 L.B.R. 362. A child born 11 months after marital intercourse between its parents had ceased is illegitimate. 38 M. 466=25 M.L.J. 594 (F.B.). *See also* 27 M.L.J. 580=26 I.C. 61. Where there is an acknowledgment by parents as son by repute and habit for a long time, the burden is on the other side to disprove the presumption of paternity by other reliable evidence. 102 I.C. 713=1927 M. 733; 34 P.L.R. 914=1933 L. 520. As to applicability of section, *see* 48 A. 625; 7 L. 368; 49 M. 553. Word "valid" in section means flawless, and hence presumption will not apply in case of 'fasid' marriages under Mahomedan Law. 1926 O. 231. Difference between English and Indian Law. 28 Bom. L.R. 607. As to proof needed to establish paternity, *see* 1926 M. 1130. Child born nine months after death of father presumed to be legitimate. 123 I.C. 550=1930 P.C. 139 (2)= 58 M.L.J. 708 (P.C.). In order to disprove legitimacy it must be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Where the evidence showed that the father was living in another place and nothing more was proved, *held*, that the presumption under S. 112 of the Evidence Act applied and that there is no question of divorce under those circumstances. 1929 M.W.N. 696. A son was born to a Mahomedan wife 419 days after her husband's death. *Held*, that the period of gestation was so extraordinarily unusual as to be suspiciously improbable and rebutted all assertions of mother's chastity. 120 I.C. 495=1930 L. 97.

Sec. 114: SCOPE OF SECTION.—S. 114 includes, but is not limited to the presumption of 'regularity.' 160 I.C. 332=1936 C. 1. The effect of S. 114 is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the subject. 151 I.C. 473=1934 C. 719 (F.B.). *See also* 164 I.C. 385=1936 R. 332; I.L.R. (1937) M. 299=(1937) 1 M.L.J. 543=1937 M. 182. Presumption and inference, difference between. *See* 25 A.L.J. 833. S. 114 applies not only to civil but also to criminal cases. 187 I.C. 127= 41 Cr.L.J. 401 (2)=1940 S. 42. Presumption as to ordinary course of business. Where a Judge signs a decree, the presumption is that he has satisfied himself that it had been prepared in accordance with the judgment. 10 O.W.N. 884=1933 O. 466. If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was posted on a conspicuous part of the Court house, the initial presumption is what is not mentioned therein was not done. 41 P.L.R. 149=1939 L. 284. If an official act has been proved to have been done, it must be presumed to have been regularly done. 182 I.C. 982=20 P.L.T. 677=1939 P. 364. Where sums are paid before the presiding officer of the Court at the time when a receipt was given for them, the presumption under S. 114 of the Act is that the ordinary course of business was followed in the case in question. 1923 L. 566. The mere statement by appellant's counsel that these sums are not always paid at the time when the receipts are given was sufficient to throw the onus on the prosecution of proving that the plea was wrong. 1923 L. 566. Where the appearance of a legal practitioner had been noted by the Judge in his own handwriting but the legal practitioner denied his appearance, such denial being neither supported by the record, nor proved by any independent evidence. *Held*, that both on principle and authority it is the record made by the presiding Judge that is conclusive on the point and not what the practitioner chooses to state after four years. 12 Mys.L.J. 311=39 Mys.H.C.R. 461. School-leaving certificate issued by foreign State—Presumption of correctness. 99 I.C. 307=1927 B. 11. Where sons are recorded as jointly owning lands the presumption that their father owned it

Illustrations.

The Court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

(*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(*c*) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(*d*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

(*e*) that judicial and official acts have been regularly performed ;

(*f*) that the common course of business has been followed in particular cases ;

(*g*) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;'

(*h*) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(*i*) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

NOTES.

cannot be raised. 8 L. 30. Adoption ceremonies—Person enjoying status of adopted son for nearly 50 years—Presumption. 1937 L. 626. In a suit for redemption of an old mortgage where the original mortgagor is dead, and there is a lack of evidence owing to lapse of time presumptions are permissible to fill in gaps in the evidence which has been obliterated by the passage of time. 171 I.C. 174=1937 N. 43. The mere fact of marriage raises no presumption with regard to any property standing in the name of a wife that the beneficial interest, must be in her husband. Before any such presumption can arise there must be some evidence adduced to indicate that the property did not really belong to the wife, but in fact to the husband though standing in the name of the wife. 140 I.C. 678 =1932 C. 829. An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. When therefore a rice mill is notified under S. 193 (1), Local Boards Act, it must be taken that the President of the Panchayat Board issued the notification in conformity with the law and cannot be said to be invalid. 138 I.C. 583 (1) =1932 M. 508 (1924 M. 375, Rel. on). When a document is accepted by the Sub-Registrar as duly presented there is an initial presumption that the document was duly presented and that the person presenting it was duly authorised to do so. 15 L. 694=1934 L. 452. Under S. 114 there is a presumption not only that official acts are regularly performed but also that ordinary business acts are normally carried out. Therefore, in the absence of any evidence to the contrary the Court can presume that a power-of-attorney which was stamped was in fact stamped by the proper officer in the Financial Commissioner's office. 196 I.C. 619=43 P.L.R. 499= 1941 L. 345. As to presumption of regularity of official acts in settlement proceedings, *see* 1939 P. 364. *See also* 1941 R.D. 198. Police officer asked to remember certain date refusing to refresh memory—Adverse inference may be drawn. 164 I.C. 373=1936 L. 707. So also in the case of a party ordered to appear for further cross-examination not so appearing. *See* I.L.R. (1937) C. 203=64 C.L.J. 80=1937 C. 129.

VALUE OF PRESUMPTION.—Conflicting presumptions neutralise each other and leave the case at large to be determined solely on the evidence given. 38 C.W.N. 861. When an accused was convicted under S. 412 of the Penal Code, and the Judge holding that under S. 114, he must be presumed to have known the nature of the dacoity, awarded him the maximum penalty, *held*, that as the presumption alone would not justify fixing the accused with knowledge, that the goods recovered from him had been obtained by dacoity, the sentence was excessive. 59 I.C. 204=32 C.L.J. 89. Presumptions of fact are assumptions resulting from one's experience of the course of natural events of human conduct and human character, assumptions which one is entitled to make use of and has to make use of in the ordinary business of life as well as the business of Courts. A Judge of fact may raise such presumptions to assist him, if he thinks them likely in relation to the facts of the case with which he is dealing. It is always a question for the judge of fact in any particular case whether he will make use of such an assumption whether he will raise such a presumption of fact. His discretion in the matter is subject to reconsideration by an appellate Court, if there is an appeal on facts. If the burden of proof lies upon one party, it is not reasonable to raise a presumption of fact which begs the question in favour of that party. 14 Mys.L.J. 491=42 Mys.H.C.R. 163.

COURSE OF NATURAL EVENTS.—An inference of approbation of a book of an objectionable character by persons having access to the library of an individual or association possessing it is not necessarily justifiable. 16 I.C. 257=16 C.W.N. 1105. Human conduct—Discovery on information—When a man points out unknown matters to others, one may presume under S. 114 that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge. 47 B. 74=24 Bom.L.R. 803=1923 B. 183. Where a lessee of a wakf property *prima facie* proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made. The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evi-

NOTES.

dence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor is it one which a certain class of possessors is entitled to *de jure*. 34 C.W.N. 462=1930 P.C. 103=58 M.L.J. 641 (P.C.). Presumption of fact—Mortgage deed endorsed by mortgagee as fully satisfied—Presumption of satisfaction. 30 N.L.R. 196=1934 N. 29. A document on plain paper unstamped and unregistered and never seen the light of the day till it was filed is presumed to be not genuine. 1930 P. 78. Of two conflicting statements of witness, the statement against interest should ordinarily be preferred. 1930 P. 293. The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. 38 C.W.N. 763=1934 C. 707. No presumption can be made that a state of things that once existed continued to exist when that would militate against the fundamental presumption of law in favour of innocence. So merely because a person is shown to have been a member of an assembly before it was declared unlawful, he cannot be presumed to have continued as a member thereof after it was declared unlawful, because the initial presumption of law is in favour of innocence and unlawful conduct. 33 Bom.L.R. 90. Common course of conduct can only be that which is most common in the experience of the Judge who has to decide the point. 1928 N. 52. In the case of a young woman giving birth to her first child and entirely unattended during the process no presumption can reasonably be made under S. 114 that the child was born alive. 1941 Pesh. 22.

ABSCONDING ACCUSED—PRESUMPTION.—No presumption as to guilt can be raised from the fact that the accused has absconded. 21 I.C. 473=24 Cr.L.J. 601. *See also* 49 A. 57. No adverse inference can be drawn against accused for not disclosing his defence in the preliminary enquiry stage. 8 P.L.T. 656=1927 P. 292. It is to be presumed under S. 114 that every official act is properly performed, but this presumption is hardly sufficient to satisfy a Court that such precautions have been taken as to render an identification truly valuable, *e.g.*, mixing the accused in a large number of men dressed all alike. 67 I.C. 721=1922 L. 31.

OTHER MISCELLANEOUS PRESUMPTIONS.—Things prescribed by statute may be presumed to have been properly done. 48 A. 766. Presumption that a Court is satisfied about service of notice. *See* 102 I.C. 12=1927 L. 506. The possession of full bottles of wine in a person's house when the number of bottles is less than that allowed by law does not raise the presumption that the bottles were for sale. 14 I.C. 968=13 Cr.L.J. 424. The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge participated in the act of concealment, if the place is not his own. 43 P.L.R. 600=1941 L. 471. It is more than doubtful if any presumption under S. 114 can arise against any person merely because his finger-prints were found upon a piece of stolen property. 196 I.C. 679=1941 C. 479. Legitimacy—Connection between man and woman permanent—Presumption. 62 I.C. 769=13 L. W. 511 (M.). A presumption of marriage may be drawn from long co-habitation, but if it is known that the connection started in mere concubinage, this presumption cannot arise. 98 I.C. 887=1927 L. 48; 1929 R. 64. Also the relationship of concubinage once found to exist is presumed under the law to continue until the contrary is proved. 98 I.C. 887. When signature on a document has been proved it is for the person signing to prove that it was affixed by him otherwise than voluntarily. 25 A.L.J. 833. The ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary. 49 C.L.J. 502=1929 C. 283. It might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity was, in fact, done first. 1929 N. 257. The law presumes in favour of marriage and against concubinage when a man and a woman have cohabitated continuously for a number of years. 56 I.A. 201=10 L. 725 (P.C.). But in case of persons who cannot *prima facie* contract valid marriage living together as man and woman there is no presumption of valid marriage. 1929 N. 343. The illustrations to S. 114 show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house, must have slept on the other cot on a particular night. I.L.R. (1939) Kar. 509=1939 S. 234. Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given. (14 M.I.A. 67; 1924 P.C. 137, Foll.) 118 I.C. 154=1929 A. 561. Failure of party coming forward with a case to give evidence on matters within his knowledge, ought to be a weighty factor when the value of the case put forward on his behalf is appraised. 36 P.L.R. 280=1934 L. 398; 148 I.C. 45=1934 L. 63 (2). Suit for breach of contract—Defendant denying any knowledge of contract—Defendants not going into witness-box—Inference need not be adverse to defendant. 149 I.C. 1119=1934 L. 59. Best evidence not produced though available raises adverse presumption. Inconsistent pleas and not proving pleas raised indicate falsity of defence. 33 C.W.N. 430=1929 P.C. 99=57 M.L.J. 565 (P.C.). Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that the Criminal Court acted according to law, and the presumpas to *illustration* (*a*)—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

NOTES.

tion is that the criminal case was withdrawn and not compounded. 116 I.C. 749=1929 A. 456. Where a wife, alleging that her husband is dead, fails to produce such evidence as she ought to know, a presumption arises against her. 117 I.C. 209=1929 N. 127. Where a mother and daughter met their death in the Quetta earthquake and there is no reliable evidence to show which of the two died first, there can be no presumption in law that the elder died before the younger. I.L.R. (1939) Kar. 509=183 I.C. 717=1939 S. 234. If an accused is to be convicted on his confession it must be taken as a whole and it would be unsafe to use the part against him and discredit the part in his favour. 1928 M. 493 (1)=54 M.L.J. 607. The mere signing of an entry does not raise an irrebuttable presumption of law against which no evidence can be let in. 1928 L. 820. Admission of execution of deed before Registrar—Presumption that the deed is valid. 1930 A. 605. S. 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. 35 C.W.N. 133 =1930 C. 815.

ILLUSTRATIONS—SCOPE OF.—The illustrations appended to S. 114 are not statements of the law qualified only by particular exceptions. They are merely what they call themselves, illustrations or instances of the application of certain maxims out of many possible instances. 69 I.C. 257=17 N.L.R. 113. The illustrations to S. 114 show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house, must have slept on the other cot on a particular night. 1939 S. 130. The question as to what amounts to recent possession sufficient to justify the presumption of guilt in any particular case, varies, according as the stolen article is, or is not, calculated to readily pass from hand to hand. But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved. 109 I.C. 801=1928 N. 213. *See* 111 I.C. 832 for nature of possession necessary. The mere fact that the accused person points out the place in which the stolen property is concealed does not give rise to any presumption under S. 114 or justify his conviction of the offence of receiving stolen property. But that presumption would arise when the accused is not able to account for his possession of such stolen articles. 32 Bom.L.R. 574=1930 B. 244. Accused proved to have disposed of property stolen —No evidence as to theft—Conviction not sustainable. 54 B. 171=1930 B. 155. The presumption that a person in possession of goods obtained by theft is aware of that circumstance is not confined to charges of theft but extends to all charges, however penal, not excluding even murder. 9 P. 606. The fact that cloths with blood stains are discovered in the house of the accused in a murder trial does not entitle the Court to make any presumption against the accused as to his guilt or as to the stains being of human blood, though the cloths admittedly belonged to the deceased. If the prosecution proves that any stain of human blood is found on the cloths, the accused might be called on to explain the fact, but when the prosecution failed and there was no evidence to prove that the stains were of human blood, the Court is wrong in making a presumption. 11 O.W.N. 969=1934 O. 373. *See also* 11 O.W.N. 950=1934 O. 388.

ILLUSTRATION (*a*).—This illustration does not mean that the burden of proof is shifted on the accused. If the accused gives any explanation which in the opinion of the jury may possibly be true, although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case. 1933 Cr.C. 1523=1933 A. 893. The onus in a criminal case always rests on the prosecution and never shifts on to the accused. Before raising a presumption of guilt under S. 114 (*a*) the jury or the Court will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not and to find out for itself whether the explanation given by the accused even though not believed in its entirety is such as to raise a reasonable doubt in the mind of the jury or the Court as to the guilt of the accused. 1941 O.A. 773= =1941 O.W.N. 1061 (2)=1941 O. 618. Where a person is found in possession of stolen property shortly after it was stolen, presumption under S. 114 (*a*) arises, and hence Sessions Judge cannot expunge the charge under S. 379, I. P. Code, without going into the evidence. 150 I.C. 558=1934 A. 495. *See also* 40 C.W.N. 1090 ; 1937 A. 47 ; 17 Mys.L.J. 158 ; 41 Cr.L.J. 44 ; 1936 N. 200 ; 17 P.L.T. 754 (Possession of stolen articles after lapse of a long time). *See also* 166 I.C. 582=1937 N. 17 (F.B.) ; 10 O.W. N. 47=1933 O. 117 ; 17 P.L.T. 754=173 I.C. 450 ; 1938 M. 477 ; 40 P.L.R. 58=1938 L. 252. The question as to what period is covered by the expression "soon after" in Ill. (*a*) to S. 114 Act must vary according to the circumstances of each case. The Court is not bound to draw this presumption and theCourt must always ask itself whether in the circumstances of a particular case the presumption is one which in fairness to the accused can be drawn. 196 I.C. 526=43 Bom.L.R. 629=1941 B. 325. The Court is entitled to presume that a person found in possession of property which had been stolen is either the receiver or the actual thief. The nature of the presumption in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered it is often unsafe to assume that the possessor is the actual thief. 184 I.C. 545= 1939 R. 361 ; 23 P.L.T. 18. Mere physical relation arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession of the stolen property should be exclusive well as recent. 149 I.C. 31=35 as to *illustration* (*b*)—*A*, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of *A* and himself:

NOTES.

Cr.L.J. 994=1934 R. 80. A presumption under Ill. (*a*) is one which can be rebutted by the accused giving a reasonable explanation of his possession of the property in question. But that cannot have the effect of throwing the onus upon the accused of proving affirmatively that he had no knowledge of the property being stolen property. By reason of the illustration (*a*), the accused must give a reasonable explanation of his possession and an explanation which may well be true. He is not bound to establish beyond all reasonable doubt that he obtained the property innocently. There is no question of the onus of proof being shifted on to the accused. If the explanation given by the accused is an eminently reasonable one and one which may well be true, the Court is bound to acquit the accused, even if it is not satisfied affirmatively that it is true. 23 P.L.T. 18. *See also* 1941 O.W.N. 1061=1941 O. 618. Case where stolen property was produced by the accused. 1933 M.W.N. 325. Where certain silver pieces of the size of a rupee were found along with counterfeit rupees all bearing the same year and it was shown that all the coins were concealed under *bhusa* in a locked room of which the accused had the key. *Held*, that S. 114 created a presumption of guilt against the accused and that he was liable to be convicted under S. 243, I. P. Code. 143 I.C. 152=9 O.W.N. 1198=1933 O. 85. *See also* 32 I.C. 160; 18 I.C. 684=11 A.L.J. 94; 46 I.C. 158=22 C.W.N. 597; 21 I.C. 156=17 C.W.N. 1077; 53 I.C. 819; 26 M.L.J. 389; 19 Cr.L.J. 189=43 I.C. 605; 13 I.C. 828=1912 M.W.N. 97; 12 I.C. 652=21 M.L.J. 1071; 53 I.C. 481=20 Cr.L.J. 753 (N.). The possession by an accused person of jewels belonging to a murdered person if unexplained, is presumptive evidence that he was the murderer as well as the thief. 12 Mys.L.J. 353. Ghee stolen from tins in a train was found in a railway wagon occupied by five porters and a policeman—No presumption can arise. 1929 S. 7=111 I.C. 732. The mere fact that a person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft. 40 Bom.L.R. 927=178 I.C. 330=1938 B. 463. Charge of murder, robbery and receiving stolen property—Murder and robbery alleged to be simultaneous and part of same transaction—Finding of articles concerned in robbery in possession of accused—Nature of presumption to be drawn. 20 P.L.T. 420=1939 P. 577.

ILLUSTRATION (*b*).—[*See also* Notes under S. 133.] As to who is an "accomplice," *see* 1934 S. 185=28 S.L.R. 336; 38 C.W.N. 777=1934 C. 678 (F.B.); 1934 L. 171. It has long been a rule of practice for a Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and it is in the discretion of the Judge to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice, which has virtually become a rule of law has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required as corroboration is some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it. It is not necessary to require confirmation of all the circumstances of the crime. It is sufficient if there is confirmation as to a material circumstance of a crime and of the identity of the accused in relation to the crime. 31 S.L.R. 82=1937 S. 162=169 I.C. 716. *See also* 42 P.L.R. 67; 1941 L. 82; 198 I.C. 78. An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the defendant (principal). The act of a detective in supplying marked money and placing bets with the accused for detection of a crime has not the element of *mens rea* and so cannot be treated as that of an accomplice and hence his evidence does not require corroboration. 1936 N. 245. But *see* 48 L.W. 322=1938 M. 893. Although S. 114, Ill. (*b*) provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, the word 'may' is not 'must' and no decision of a Court can make it 'must.' 1941 A.W.R. (C.C.) 402=1941 O.A. 1018. The mere fact that a witness did not reveal the knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or an accomplice so as to vitiate his evidence. 1939 C. 335. A wife who is cognisant of the fact that the accused intended to kill her husband but did not disclose that fact to him, must be regarded as an accomplice, and her testimony cannot carry any higher value than the testimony of an accomplice. 164 I.C. 700=1936 L. 731. A person who knowingly aids in the disposal of stolen property is an accomplice. 40 L.W. 873=1934 M. 721=67 M.L.J. 693. Even where the object of the person who instigates another to commit a crime is to catch him in the act of committing the crime, *e.g.*, police decoys, the instigation amounts to an abetment of the offence, and the abettors must be regarded as accomplices when the object of the instigation is to make the offender commit the crime and the person who is instigated actually commits the offence. Even if they are not accomplices in the strict legal sense, their evidence has to be viewed with caution, and it is not safe to act upon their evidence without material corroboration. 48 L.W. 322=1938 M. 893. But *see* 1936 N. 245. As to corroboration of accomplice evidence, *see* 5 L.L.J. 572; 1923 L. 76=68 I.C. 821; 20 Cr.L.J. 561=52 I.C. 49 (A.); 19 I.C. 321=15 Bom.L.R. 288; 15 M. 814; 14 Bom.L.R. 367; 3 L. 144; 65 I.C. 622=23 Cr.L.J. 158; 20 P.R. (Cr.) 1919=49 I.C. 607; 35 M. 397=14 I.C. 896; 17 P.R. (Cr.) 195; 16 Cr.L.J. 634; 17 Cr.L.J. 97; 17 Cr.L.J. 107; 1927 C. 63; 1927 C. 536=54 C. 721; 1 Luck. 339=1927 O. 369;

as to *illustration* (*b*)—a crime is committed by several persons. *A*, *B* and *C*, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

NOTES.

8 L.L.J. 610=1927 L. 78; 31 C.W.N. 554; 8 L.L.J. 616=1927 L. 10; 102 I.C. 500; 120 I.C. 721; 1937 C. 433 (S.B.); 170 I.C. 201; 175 I.C. 465=1938 R. 177 (F.B.). Need for corroboration specially in conspiracy cases. 1935 A. 162=155 I.C. 369. Where a charge of conspiracy depends upon the evidence of an approver, the judge should make up his mind whether he is going to believe the approver and if he thinks that the approver's evidence is unsatisfactory and suspicious, he should disbelieve it altogether. If on the contrary he comes to the conclusion that inasmuch as there is corroborative evidence, it does not matter much whether the approver is telling the truth or not, he would be approaching the case from a wrong point of view. 66 C.L.J. 575. *See also* 166 I.C. 667=1937 O. 259; 165 I.C. 138 =1936 O. 413 (accessory after crime); 1937 R. 513. Indian law does not recognise any such thing as an accessory after the fact. A man who does not abet a crime cannot be regarded as an accomplice. Although a person who assists in disposal of the dead body may become liable to punishment under S. 201, Penal Code, this is quite another offence, and helping to dispose of the body of a man who had been murdered, without having taken any part in the murder itself, does not make a man an accomplice with regard to the murder. 1937 R. 513; 1937 O. 259; 164 I.C. 677=1936 R. 373 (corroboration not necessary in every detail). *See also* 163 I.C. 681=1936 P.C. 242 (P.C.); 165 I.C. 144=1936 O.W.N. 848; 17 L. 518 =162 I.C. 511=1936 L. 400; 1936 A. 337. Without material corroboration there should ordinarily be no conviction, when accused can explain for articles found with them. 76 I.C. 716=1923 L. 385. The discovery of blood marks on the person and in the house of the accused as well as his suspicious conduct immediately after the murder were held to be sufficient corroboration of the evidence of the accomplice. 4 L.L.J. 405. An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief. 4 L.L.J. 284. To support a conviction on the statement of an approver especially of one whose initial statement was very long delayed the statement requires material corroboration connecting each individual accused with the crime committed. 63 I.C. 612=22 Cr.L.J. 676 (L.); 10 O.L.J. 280=1924 O. 65. *See also* 1929 M.W.N. 698 (mere presence of a person in the house is not such a corroboration). *See also* 1928 C. 309; 6 Mys.L.J. 419; 34 P.L.R. 666; 147 I.C. 1172=1934 C. 114; 150 I.C. 21=1934 L. 346. It is unsafe but not illegal to convict on the uncorroborated testimony of an accomplice. An accomplice evidence must be viewed with suspicion. 1928 C. 233; 142 I.C. 809=13 P.L.T. 802=1933 P. 96; 1933 P. 100; 1934 S. 185; 1934 S. 78 (2); 9 Luck. 355=11 O.W.N. 62=1934 O. 90; 1938 M.W.N. 1272; 175 I.C. 465=1938 R. 177 (F.B.); 41 P.L.R. 333 (retracted confession of co-accused is no corroboration); 1937 R. 209; 16 Mys.L.J. 147; 41 P.L.R. 333=1939 L. 429. The testimony of a professed accomplice requires to be carefully scrutinised with anxious search for possible corroboration. 112 I.C. 375 (2) =1929 P.C. 15 (P.C.). *See also* 1930 C. 430; 1930 A. 740; 145 I.C. 251=1933 R. 116. Only in exceptional cases the corroboration can be dispensed with. The evidence in corroboration of the approver's evidence need not be direct evidence. It is sufficient that it is merely circumstantial. 118 I.C. 423=1929 O. 321 (2); 152 I.C. 934; 146 I.C. 935=1933 P. 112; 35 Bom.L.R. 1040 =1933 B. 482; 15 L. 673; 159 I.C. 875= 1936 O.W.N. 64=1936 O. 156. *See also* 1929 L. 850; 1928 O. 207; 1930 O. 353. Corroboration of an approver's evidence by another co-accused amounts to one tainted piece of evidence being corroborated by another tainted piece of evidence and conviction thereon is bad. 1928 C. 745=33 C.W.N. 58; 38 C.W.N. 777=1934 C. 678; 1934 L. 171; 15 L. 491= 1934 L. 873; 16 N.L.J. 186=1923 N. 352; 1937 R. 264; 1938 M.W.N. 962; (1937) R. 218; 1937 C. 433 (S.B.); I.L.R. (1938) N. 516=176 I.C. 853=1938 N. 328; 40 P.L.R. 61=1938 L. 339; 41 P.L.R. 333; 146 I.C. 364=1933 L. 946; 146 I.C. 303=1933 R. 320; 55 A. 91=1932 A.L.J. 1125=1933 A. 31. Where the only witness who corroborated an accomplice was his son aged 7 years who parrot-like repeated what he had been tutored to say, *held*, that it was unsafe to convict the accused on such evidence. 1929 L. 587. Approver's statement as to identity of accused should be corroborated. 48 C.L.J. 481. *See also* 1930 C. 430 (most careful scrutiny is needed.) Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. 118 I.C. 512= 1929 M. 285. Extent of corroboration varies with the circumstances of each case including the character and antecedents of the approver. 1929 L. 850=107 I.C. 97. *See also* 1941 L. 82. The question as to whether corroboration is necessary, and, if so, to what extent is a question to be decided on the facts of each particular case. Much depends on the nature of the offence, the extent of the complicity of the witness in it and the circumstances under which the accomplice makes his statement. 1934 S. 185. Where an accomplice is coerced and threatened into submission to commit an offence he is not a criminal of the basest kind. Th corroboration necessary to establish his cred will be less than if his complicity in the offen had been voluntary and spontaneous. 150 I.C. 917=1934 S. 78. The force of the presumption to be drawn varies as the malice to be imputed to the deponent. 1934 S. 78. The co-accused against whom a charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in both cases. 144 I.C. 74=1933 C. 148. All persons coming technically within the category of accomplices cannot be treated as

as to *illustration* (*c*)—*A*, the drawer of a bill of exchange was a man of business. *B*, the acceptor, was a young and ignorant person, completely under *A's* influence :

as to *illustration* (*d*)—It is proved that a river ran in a certain course 5 years ago, but it is known that there have been floods since that time which might change its course :

as to *illustration* (*e*)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances :

NOTES.

precisely on the same footing. 13 P.L.T. 802 = 1933 P. 96. Where the corroborating witness is apparently interested, he being inimical to the accused, the evidence of the approver cannot form any basis for conviction. 34 P.L.R. 1. Corroborative evidence is a question of law. 32 C.W.N. 945. Although S. 114, Illus. (*b*) provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, "may" is not "must" and no decision of Court can make it "must." Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances one of which being that he is an accomplice whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. 1941 O.A. 947= 1941 O.W.N. 1255 ; 1929 C. 822. *See also* 1928 P. 630 for principles governing accomplice evidence. 11 Pat.L.T. 545. To let the evidence of approvers go to a jury without giving them proper warning is a misdirection. For a Judge to withdraw consideration of the guilt of innocence of the accused from the jury by telling them that a conviction cannot be based upon uncorroborated testimony of an approver would be no less a misdirection and directly contrary to the statute. The Judge is bound to caution the jury and to advise them that generally speaking the natural presumption for them to make is that the evidence of the approvers is unreliable though they are not compelled in law to act on the presumption. Nature of corroboration required pointed out. 1933 P. 500. The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft. 111 I.C. 447 =29 Cr.L.J. 863. It is nowhere laid down as an inflexible proposition of law that a conviction cannot be based upon the uncorroborated testimony of an accomplice but it is the usual practice of the Courts to require corroboration of the story of the approver before declaring an accused person to be guilty of crime. The amount or kind of corroboration required in a particular case must, however, depend upon the particular circumstances of that case. 107 I.C. 97 ; 1930 O. 455. *See also* 6 Mys.L.J. 419 (Courts require material corroboration as a matter of prudence and practice.) The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence for authenticity of which is not open to doubt. 120 I.C. 257 (2) =1930 A. 29. Witness to a crime who does not give information of the same, though not an accomplice in the strict sense of the term, still his evidence is not free from suspicion. 152 I.C. 473=11 O.W.N. 1383 ; 11 O.W.N. 661 =1934 O. 315. Persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and it is highly unsafe to base a conviction under S. 161 of the Penal Code on their testimony without independent corroboration. 34 P.L.R. 836. Ill. (*b*) to S. 114 is to be read along with S. 133, and neither rule is to be ignored in the exercise of judicial discretion. It is the duty of the Court which has to deal with an accomplice's testimony to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly, in exceptional cases, in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon other grounds. (21 W.R. Cr. 69, Foll.) 159 I.C. 875=1936 O. 156.

ILLUSTRATION (*c*).—In a suit on a bond the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves or it is admitted, that the signature or thumb mark (it does not matter which) is the defendant's then the presumption arises and the burden shifts to the defendant. He can then either prove that he cannot be charged because of fraud, etc., or that the presumption under S. 114 cannot on the facts fairly arise. If he succeeds in doing that, then the burden shifts back. I.L.R. (1939) N. 160=1939 N. 78. Promissory note by Hindu father—Suit after father's death against sons—Burden of proof—Presumption as the consideration—If any—Presumption under S. 114—Power of Court to raise from omission to adduce available evidence. *See* 44 L.W. 784=1937 M. 182.

ILLUSTRATION (*d*).—The presumption mentioned in S. 114 (*d*) is a permissive presumption and a Court of fact cannot be compelled to raise the presumption in favour of either party. 194 I.C. 428=1941 P. 536. *See also* 1931 M.W.N. 1312 (a case of conviction under S. 69, Provincial Insolvency Act). Common course of events—Theft of revolver in October—Revolver found with accused in following May—Presumption. 1933 A.L.J. 523=1933 A. 461. As to presumption for non-production of old account books, *see* 1936 A.W.R. 547. Presumption of continuance of relationship of landlord and tenant after decision in rent suit, *see* 71 C.L.J. 100. On this illustration *see also* 1941 P.C. 11 (P.C.).

ILLUSTRATION (*e*).—S. 114, Ill. (*e*) simply raises a presumption as to the regularity of the procedure, if the official act is as a matter of fact proved to be done and not otherwise. 45 C.W.N. 44=1941 C. 353. Presumption that oath was duly administered. *See* 11 A.L.J. 933=35 A. 575. Presumption of regularity of official acts. *See* 18 I.C. 651=17 C.W.N. 531 ; 49

as to *illustration* (*f*)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

as to *illustration* (*g*)—a man refuses to produce a document which would bear on a contract

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NOTES.

I.C. 171=3 P.L.J. 636 ; 39 P.L.R. 187 ; 1937 P. 14. (Presumption of publication of official notification). *See also* 37 B. 19 ; 19 A. 493 ; 9 A. 920 ; 18 C. 129 ; 1937 P. 14 ; 8 Mys.L.J. 257. But such presumption cannot supply deficiency in the proof. 143 I.C. 285=1933 C. 1937. Presumption of correctness of entries in settlement papers. 28 I.C. 239. Official acts—Entries in record of rights—Presumption of due enquiry before making of entries. *See* I.L.R. (1937) N. 395. One cannot presume against the interest of an accused person that the ordinary official procedure was not carried out. 39 P.L.R. 629. The report of a Revenue Officer conducting a sale is admissible in evidence, and there is a presumption attaching to such report, it being for the objector to show that anything was done irregularly. 39 P.L.R. 187. If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was posted on a conspicuous part of the Court-house, the initial presumption is what is not mentioned therein was not done. 41 P.L.R. 149. Presumption that things remain in their original state. *See* 11 M.I.A. at 209 ; 11 I.C. 472 ; 9 I.C. 322. Presumption as to the identification parade, *see* 67 I.C. 271=1922 L. 31. There must be proof that the act was done—No presumption without such proof. 1928 P. 600 ; 151 I.C. 337=1934 R. 207 (a case of attachment) ; under S. 114 (*e*) if an official act is proved to have been done, it will be presumed to have been regularly done. (*Ibid*). *See also* 7 P. 833 =1928 P. 459 ; 58 C. 598=1931 C. 763. Presumption of correctness of a certified copy of a deposition in a suit of Cutch Court. 30 Bom.L.R. 1519=1929 B. 24. Presumption as to delivery of possession in execution is according to law —Onus is on the defendant to disprove it. 1928 L. 910 ; 31 P.L.R. 1001. Circular by a public servant stating that it was made on the authority of the superior officer—Presumption. 146 I.C. 572. Registration under S. 23-A of Registration Act—Presumption that it was in time. 1933 M.W.N. 1148. Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly. 1928 L. 94. Where a notice sent by post in a registered cover is returned by the postman with a notice that the addressee refused to receive it and the posting of the notice has been proved, there is a presumption under S. 114 that the addressee did refuse to receive it. 121 I.C. 382=1930 L. 439. Where a committing Magistrate writes at foot of the deposition that the cross-examination is being reserved he does not mean that it is being reserved by him and that the accused has not been given an opportunity for cross-examination. 120 I.C. 524=1930 S. 54. Though ordinarily it may be presumed that a Government notification purporting to have been published in a Gazette of a certain date, was in fact so published, yet where the interval between the issue of a notification and action taken on it is so short, as *e.g.*, a night, a Court might require stricter proof that all the formalities requisite to the act of notifying, or, in other words, publishing the notification, had actually been carried out. 33 Bom.L.R. 82. The presumption that official acts were rightly carried out applies to the return of a process under O. 21, r. 22, C. P. Code, as duly served so that the burden of proving that the record is wrong lies heavily on the judgment-debtor. 36 C.W.N. 242=1932 C. 627 ; *see also* 40 P.L.R. 142 ; 1938 R.D. 883 ; 1938 M.W.N. 421. It must be assumed that a Court, which passed a decree on a compromise assented to by a pleader of one of the parties, satisfied itself that the pleader was authorised to effect a compromise on behalf of his client, unless the contrary is established. 38 P.L.R. 467. The presumption in favour of official acts being properly done is destroyed when it is established that the investigating officers have not acted in a straightforward manner and have clearly made false statements in Court. 162 I.C. 969=1936 L. 409. *See also* 39 P.L.R. 187 (Report of Revenue Officer conducting sale). As to presumption regarding entries in jamabandi, *see* 13 L. 432=1932 L. 586 ; 29 N.L.R. 273=1937 N. 130. The presumption of correctness cannot apply to papers of a survey until final publication, but the presumption arising from the circumstances that official duties are taken to have been regularly performed applies. 1933 P. 468.

ILLUSTRATION (*f*).—The mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. 21 A.L.J. 865=1924 A. 205. The question whether, where a registered letter is returned by Post Office as refused, a presumption can be drawn as to due delivery or service of the letter by post must depend on particular circumstances of each case. Though it is open to the court under S. 114 (6) to presume that the common course of business has been followed, it cannot hold that the posting of the letter proves delivery as it is a matter of common knowledge, that postal servants are not always diligent. 1933 R. 76=146 I.C. 422 ; 1937 P. 14 (Presumption as to publication of official notification). Where a certificate of posting is put in evidence, the presumption is that the letter was posted and that it reached its destination unless something is shown to the contrary. It is entirely wrong for the Court to work on the presumption that the certificate of posting is a forgery. 190 I.C. 533=1940 C. 227. When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption until the contrary is proved, that the letter is written under instructions. 144 I.C. 996=1933 R. 147.

ILLUSTRATION (*g*).—As to scope of illustration *see* 61 C. 711. Where the prosecution does not of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

as to *illustration (h)*—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

NOTES.

call all available eye-witnesses, the Court may draw an inference adverse to the prosecution. *See* 42 C. 422=27 I.C. 554 ; 51 I.C. 679=20 Cr.L.J. 519 ; but *see contrà* 74 I.C. 434=1923 O. 217. On this point, *see also* 34 I.C. 987=12 P.R. 1916 (Cr.) ; 37 C.W.N. 1098=1933 C. 600. (As to presumption from " refusal " of a registered letter, *see* 3 Bom.L.R. 420). The non-production of material witnesses like the investigation officers is a serious omission which cannot but throw suspicion on the whole prosecution case. 1 P. 630=71 I.C. 219. *See also* 2 P. 309=74 I.C. 705 ; 1928 L. 125 ; 1929 P. 651 ; 168 I.C. 1= 1937 P. C. 152 (P.C.). (Theft of goods from running train, which was covered by Risk-note B—Company withholding evidence of Guard—Adverse inference against railway may be drawn). Criminal trial—Some eye-witnesses not called —No reference favourable to accused can be drawn. 1 O.L.J. 68 ; 74 I.C. 434=1923 O. 217. Where there is a dispute as to the area actually settled with the defendants and the receipts given by the plaintiff for the *nazarana* paid which would enable the ascertainment of the actual area settled, are not produced by the defendants, it goes to show that the defendants are deliberately keeping them back as they went against them. 1940 R.D. 608=1941 A.W.R. (Rev.) 95=1941 O.A. Supp. 83. Where in a suit for damages for infringement of copyright, even after a notice the defendant fails to produce his account book there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits raised by the sale of the books, and the Court is entitled to assume that the entire stock of copies of books published had been sold by the defendants and the sale proceeds appropriated by them. 55 A. 564=1933 A.L.J. 791=1933 A. 474. Where a person fails to produce the accounts in his possession showing the amount of expenses he has incurred which fact is proved by other evidence, one would be justified in presuming from the non-production of such amount that he was exaggerating the expenses incurred by him ; but simply because of this non-production, one could not be justified in coming to the conclusion that no expenses had been proved. 1934 A. 71. *See also* 1936 A.W.R. 547 ; 1942 R. 52 ; 1942 N. 39. Where the non-production of accounts on either side is plausibly explained, no inference can be drawn against either one side or the other from that circumstance 146 I.C. 31=10 O.W.N. 827=1933 O. 412. *See also* I.L.R. (1936) N. 142=164 I.C. 740= 1936 N. 130 (non-production of evidence which is not relevant and necessary—Prosecution under S. 408, I. P. Code). Several items of breaches of trust charged—Defence contention that interval between first and last charge was more than a year—Non-production of accounts by complainant. *Held*, that it was a legitimate inference that if they had been produced, they would not have supported the allegation made by complainant that the defalcation covered a period of only one year. 15 Pat.L.T. 647=1934 P. 132. As to presumption from non-production of account books by a company when no explanation for such non-production given, *see* 31 Bom. L.R. 1310 ; 1937 M. 816=(1937) 2 M.L.J. 559. If a defendant either suppresses his accounts or has falsified them, the Court will presume everything most unfavourable to him consistent with the established facts. 41 L.W. 104=1935 M. 152. *See also* 11 O.W.N. 880 ; 1928 L. 397. (Adverse inference should be drawn from non-production of account books by party). *See also* 46 L.W. 275=1937 M. 816 =(1937) 2 M.L.J. 559. Where a defendant fails to produce his account books before the Court in time, and they are rejected by the Court when produced as having been produced too late, the penalty for this conduct of the defendant is only to deprive the defendant of the benefit of the evidence afforded thereby. But it is not open to the plaintiff who has opposed their production to contend that an adverse inference ought to be drawn against the defendant from their non-production. 1939 M.W.N. 841. The defendant's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a *pardanashin* lady is not a sufficient excuse for her not getting herself examined even on commission. 1937 O.W.N. 1022. The failure to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution. 1928 L. 125. *See also* 1929 P. 561 ; 15 L. 407 ; 159 I.C. 898=1934 R. 130. The non-production of witnesses cited but unnecessarily cannot justify adverse inference. 120 I.C. 606=1930 L. 163. The failure of plaintiffs to go into witness-box goes strongly against them. 11 L. 142=1930 L. 1. Generally speaking there is a good deal to be said for the contention that a suit should succeed on the ground that the defendant had not cared to enter the witness-box and testify as to the truth of his case. But if a defendant is of opinion after the plaintiff's case had been completed that the evidence was so discrepant and doubtful as to make it impossible for any Court to believe it, then if he is so liked to take the risk he is justified in not giving evidence. 1940 A.M.L.J. 93. In order to entitle the Court under S. 114, ill. (*g*), to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced. 37 C.W.N. 657 =35 Bom.L.R. 500=1933 P.C. 87=64 M.L.J. 413 (P.C.) ; 61 I.A. 177=57 M. 443=38 C.W.N. 669=67 M.L.J. 1 (P.C.)

Illustration (*h*).—Where the Crown withholds relevant documents in its possession, the Court will draw an inference adverse to it. 50 C. 276=1923 C. 233. Presumption from refusal to take oath. *See* 2 C.L.R. 476 ; 22 B. 680. But *see* 1929 M. 399 (where the Government failed to produce original settlement record but no adverse inference was drawn). Persons accused as to *illustration* (*i*)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

CHAPTER VIII.

ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person, or his representative, to deny the truth of that thing.

NOTES.

of an offence may not have a very satisfactory explanation to offer for the circumstance in which they were found and they may prefer to say nothing. One cannot in all cases draw an adverse inference from the fact that the persons accused refuse to give their account of what happened. 1937 R. 516.

ILLUSTRATION (*i*).—Where the mortgagor has produced the mortgage-deed with the stamps punched in the ordinary way, such production would raise a presumption that it had been paid up, but it would not help to prove that it had been paid before a particular date. 144 I.C. 175=1933 R. 61 (2). [29 C. 334 (P.C.), Rel. on]. Presumption of discharge of mortgage arising from the mortgagor's possession of the mortgage bond, when rebutted. 105 I.C. 263=53 M.L.J. 205 (P.C.); 103 I.C. 481; 121 I.C. 730. Strength of presumption. 29 N.L.R. 298=1933 N. 379.

Sec. 115.—Section is not exhaustive, and estoppels are not confined to this section. 15 P. 721=17 P.L.T. 697=165 I.C. 98. The ordinary laws of estoppel that arise out of the conduct of the principals apply equally well to contracts entered into by a District Board through its executive officers, with different bus owners in respect of their licenses. 1937 M.W.N. 1223 (2). Estoppel is nothing more than a rule of evidence. The Law of India and England is the same as regards estoppel. 1933 P. 708; 1939 P. 296=182 I.C. 618. The law of estoppel which S. 115 enacts is the same as the English law. 65 I.A. 75=I.L.R. (1938) M. 360=(1938) 1 M.L.J. 268 (P.C.). A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts in unmistakable terms admitted the waqf nature of a house he cannot subsequently be allowed to resile from the position. (1938 L. 686, Foll.) 183 I.C. 645 =41 P.L.R. 342=1939 L. 63. *Abdur Rahman, J.* —There can be no estoppel by judgment or decree apart from the doctrine of *res judicata* unless the same matter is found to be in issue in the former trial as that now in question and unless the judgment was rendered on the merits. 1938 M.W.N. 224 (2)=47 L.W. 374. *See also* 1940 N.L.J. 1=1940 N. 163. A judgment not only creates a right, it works an estoppel. A judgment creating a charge on immovable property binds not only the parties to the suit but also their privies. The term "privy" is a term of the law meaning a partaker who is not a party, that is, in this connection, it includes all who derive title to the land, the subject of the charge from one who was a party to the suit by the decree in which the land was charged. It follows, therefore, that the charge is effective against a *bona fide* purchaser of the land for value without notice by reason of the law of estoppel by record, I.L.R. (1938) N. 431=172 I.C. 949=1938 N 129. A person claiming the benefit of a general estoppel under S. 115 cannot be placed on exactly the same footing as a person who obtains a transfer from an ostensible owner and claims protection under S. 41, T. P. Act. S. 41, T. P. Act, no doubt deals with a branch of estoppel; but S. 115 does not impose on the person acting on the faith of a representation made to him the same duty of making inquiries into the truth of the representation as is imposed on a transferee from an ostensible owner by S. 41, T. P. Act. 11 O.W.N. 1097=1934 O. 460. *See* 20 C. 296 (P.C.); 46 A. 728 (P.C.). As to conditions of applicability, *see* 138 I..C. 552. *See also* 1932 A. 643. A mere representation of intention cannot be the basis of estoppel. 1938 C. 172. The term "representative" in S. 115 is not limited to a gratuitous transferee or to a subsequent transferee for value with notice. It includes a *bona fide* assignee for value without notice of the circumstances creating an estoppel. 1934 M. 302=66 M.L.J. 563. Estoppel is a rule of civil action. There is no estoppel in Criminal Law. 40 A. 393=45 I.C. 519. Plea open to plaintiffs as well as defendants. 1927 O. 97. Plea open only to person for whom representation was meant, and hence in *re* declarations in sale proclamation only auction-purchaser can plead estoppel and not private purchaser from judgment-debtor. 1927 C. 34. Where plea of estoppel is not set up in the pleadings or issues, it cannot be availed of later, because estoppel is eminently a matter of pleadings. 119 I.C. 152=1929 M. 467; 22 C.W.N. 179; 43 I.C. 556=46 P.R. 1918; 44 I.C. 254; 52 I.C. 739; 23 C.L.J. 122; 16 N.L.J. 248; 14 L. 218= 34 P.L.R. 149=1933 L. 179. It is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. 40 P.L.R. 848=178 I.C. 436=1938 L. 558. *See also* 41 P.L.R. 414=1939 L. 538. Where the case is one of two competing estoppels, one arising out of the execution of a mortgage and the other arising out of a judgment in the previous suit, the latter estoppel should prevail. In the words of Lord Coke 'estoppel against estoppel setteth the matter at large." 8 O.W.N. 809=1931 O. 263. Under S. 115, a person is estopped only when he has by his declaration or act intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. If a person in suit claims a certain status on the strength of the interpretation put by him on a certain document, he cannot be said to have led the other party to believe a thing or act on its belief, for it was open to the latter to examine the document and to decide

NOTES.

for himself whether the interpretation put by the opposite party was correct or not. 1940 O.W.N. 1233=1940 R.D. 582=1941 A.W.R. (Rev.) 80. Judgment-debtor not objecting to low price advertised in proclamation cannot complain of it after sale. 1929 M. 275. Small cause suit transferred to original side—Question of title being raised—Issue of title deleted but suit tried on original side without objection by plaintiff—Plaintiff not raising that objection in grounds of his appeal to High Court—He will not be allowed to do so at later stage. 1929 M. 525. *See* 1929 P. 717=10 P.L.T. 669. Suit for declaration, accounts and injunction in Court of second class Sub-Judge—Objection to valuation—Finding that valuation beyond Court's jurisdiction—Suit sent to first class Subordinate Judge and tried there—Appeal to High Court by defendant—Objection to forum not competent —Such an objection taken to the forum of appeal is rather like approbating and reprobating. 189 I.C. 836=42 Bom.L.R. 443 =1940 B. 242 (As to whether S. 92, proviso 4, of the Indian Evidence Act can override this section). Judgment-debtor's right to dispute executability of decree—Adjournment of sale at his instance on waiver of fresh proclamation—Estoppel. 28 L.W. 20. Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement. 8 O.W.N. 940=1930 P.C. 249 (1). The representation made by the appellant is a 'thing' within the meaning of the section, not being a question of law, but a mixed question of law and fact. 1929 C. 819=33 C.W.N. 873. *See also* 173 I.C. 991=1938 O.W.N. 355=1938 O. 110. Rent suit—Appeal—Death of one of the plaintiffs-respondents—Representatives not impleaded—Representation by other plaintiffs that they were the representatives—Plaintiffs are estopped from saying that the lower appellate decree was a nullity because of the failure to add legal representatives of the deceased. 1929 C. 819=33 C.W.N. 873. Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party. 1930 A. 434 (2). A party having by his conduct induced the other party to make an immediate payment of the decretal amount, and having entered into an engagement with him which makes it impossible for him to question the decree, is estopped from acting contrary to his undertaking. 1934 P. 644. *A* held two mortgages against the same property. He obtained a decree for the sale of mortgaged property in a suit brought on the second mortgage. Therein he clearly disclosed the existence of a prior mortgage. In the meantime the mortgagor sold the property to *B* privately and free from incumbrances and the decretal amount was deposited in Court. *Held*, that as *A* had disclosed the existence of prior mortgage and as he did not know that the property was sold privately to *B* free from incumbrances, he was not estopped from suing on the prior mortgage. 1936 L. 1020. *See also* 45 C.W.N. 470. (Estoppel between mortgagor and mortgagee). *Mortgagee parting with title deeds* knowing that they are required for effecting a sale—Estoppel against mortgagee in favour of purchaser, if arises. 1937 M. 195. *See also* 20 C. 286 (P.C.); 1928 A. 459; 1938 L. 558. If the owner of the railway allows the railway represented by its manager to deal with third persons as a legal entity and to enter into a contract on that footing, he cannot, when a suit is brought on such contract, assert his position as the proper party nor can the railway administration repudiate its liability to be sued. 1934 A.L.J. 1093 =1934 A. 740. Where during the course of a winding up of a company a certain person gave an undertaking to the Court that he would pay a certain sum of money to the official liquidator if the assets of the company, namely, a mill, be handed over to him and he obtained possession he is estopped from resiling from it. 1930 A. 330. The admission of liability under a decree obtained against the ward does not create an estoppel and debar the Court of Wards from challenging the validity of the decree on the ground that certain formalities under the Court of Wards Act not having been complied with the decree was not validly obtained. 31 Punj. L.R. 749=1930 L. 798. In order to sustain the plea of estoppel it must be proved that the defendants relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. 14 L. 218=1933 L. 179. *See also* 38 L.W. 896=1933 M. 471. Legitimacy—Treatment of defendants as members of family —No representation acted upon by defendants —Plaintiff not estopped from questioning legitimacy. 142 I.C. 606=1933 L. 412. unless the act which the plaintiff did to his own prejudice is referable to the defendant's representation, no estoppel arises. 61 C. 64=151 I.C. 334=1934 C. 441. S. 115 is not exhaustive of the doctrine of estoppel by representation. 33 C. 915. *See also* 20 C.W.N. 1335; 23 M.L.J. 335; 1930 A. 330. But *see* 35 C. 904=12 C.W.N. 721 (P.C.). There are three kinds of estoppel: (1) by record, *see* Evidence Act, Ss. 40 and 44. 39 C.L.J. 40; 48 I.A. 49. (2) Estoppel by deed. *See* 12 L. 546. (3) Estoppel *in pais* or by conduct which is dealt with in Ss. 115-117. To bring a case within the section there must be (1) a representation which amounts to an intentional causing or permitting belief in another, (2) a belief on the part of the other in its truth, (3) the declaration must have caused the other to act on the faith of it and alter his position. *See* 22 C.W.N. 891 (P.C.); 57 I.C. 263; 39 Bom.L.R. 130. *See also* 1937 L. 272. In the case of an outlay of money by a person on another's land the following essentials must co-exist in order to constitute acquiescence which would estop the true owner. In the first place the person incurring expenditure must have made a mistake as to his legal rights. *Secondly* he must have spent some money or must have done some act on the faith of his mistaken belief. *Thirdly* the true owner must know the existence of his legal right which is inconsistent with the right claimed by person incurring expenditure. *Fourthly*, the true owner must know of the mistaken belief of the person incurring expenditure. *Lastly*, the true owner must have encouraged the person incurring expenditure in his expenditure, or ni other acts which he has done, either directly

NOTES.

or by abstaining from asserting his legal right. I.L.R. (1938) L. 296=177 I.C. 198=1938 L. 88. *See also* 21 Pat.L.T. 277=1940 P. 438. Where the act of building upon the land of another is not *bona fide*, a plea of estoppel by acquiescence cannot avail. 15 Luck. 689=1940 O.A. 408=1940 O.W.N. 462=1940 A.W.R. (C.C.) 207=1940 O. 164. *See also* 189 I.C. 735=1940 R. 172; 15 Luck. 619. Where a person knowing that another person had encroached upon his land by erecting a costly building keeps silent and raises no objection to the encroachment he is estopped from bringing a suit for possession of land encroached upon by that person. 184 I.C. 826=1939 L. 502. The law of estoppel draws a distinction between representations and omissions, and omission to speak will furnish a basis for estoppel, only when the circumstances are such as to throw upon the party sought to be bound by estoppel the duty to speak out the truth. 44 L.W. 859=1937 M. 158. Before an estoppel can take place, it would be necessary for the party relying on the same to establish that he had been led to do something detrimental to his own interests owing to the action of the other person. 119 I.C. 337=1929 O. 494. *See also* 1937 O.W.N. 423. No case of estoppel can be established by a party if it is not shown that any action of his was induced by any representation or conduct of the other party. 32 S.L.R. 340=172 I.C. 981=1938 P.C. 87 (P.C.). In order that a representation may operate as an estoppel it must be a representation of an existing fact and not of mere intention or future promises. Also, estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment, 56 C. 989. The existence of estoppel does not depend on the motive or knowledge of the person making the representation and it is not essential that the intention of the person representing should be fraudulent. A rule of estoppel is purely personal against the person estopped and does not create any substantive right *in rem* except against the person estopped or against his representative. No estoppel can ensue on a representation of a mere opinion or of a point of law. 110 I.C. 665=1928 A. 459. *See also* 101 I.C. 803. Rule of estoppel between mortgagor and mortgagee does not apply to a case where the suit is not based on the mortgage but is one in repudiation of the mortgage. 1937 O.W.N. 237. *See also* 1937 L. 272; 1937 M. 195. Doctrine of estoppel cannot be invoked by the defendant claiming from her husband, through whose concealed fraud the plaintiff was kept in ignorance of his real rights and was in consequences induced to execute a release of all his claims. 36 C.W.N. 758=55 C.L.J. 420. *See also* 4 O.W.N. 1019; 1937 P. 280. A statement to found an estoppel should be clear and unambiguous. Certainty is essential. 13 Beng.L.R. 12 (P.C.); 26 B. 75; 25 B. 499; 1926 M. 1052; 11 O.W.N. 1571=1935 O. 121. *See also* 161 I.C. 514=1936 P. 133. It must be of an existing fact and not of a future act. 39 Bom.L.R. 1257=1938 B. 148. There can be no estoppel when both parties are equally conversant with true facts. 23 B. 182; 35 B. 182 (188); 48 B. 38; 2 P. 585; 27 C. 107 (P.C.); 46 P.R. 1912; 13 M.I.A. 585; 47 M.L.J. 622; 2 L. 88; 122 I.C. 871; 143 I.C. 542=14 Pat.L.T. 189=1933 P. 210 (2); 15 Pat.L.T. 596; 191 I.C. 830; 151 I.C. 576=11 O.W.N. 1097=1934 O. 460; 1940 L. 254; or presumed in law to be conversant with true facts. 1926 O. 330; 146 I.C. 873=1933 A. 641. Where both parties are perfectly aware of the circumstances and merely make a temporary arrangement for their mutual convenience, no estoppel arises. 147 I.C. 715=1934 A. 75. Representation must be of an existing fact, not of promises or intention. 42 C. 254; 39 I.C. 385; 28 B. 399; 7 Bom.L.R. 184; 41 M. 315; 34 M.L.J. 463. *See also* 1937 N. 402. Where a person who has bot been appointed executor of a will either expressly or by implication, describes himself as an executor under a mistake about his legal position, this would not make him an executor or raise an estoppel against him. 183 I.C. 885=12 R.P.C. 78=1939 O.L.R. 586=1939 P.C. 238 (P.C.). Recital of receipt of consideration in deed does not operate as estoppel. 49 A. 707. *See also* 1926 L. 471. When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true it is an estoppel upon all. But, when it is intended to be the statement of one party only the estoppel is confined to that party and the intention is to be gathered from construing the instrument. The recital however cannot operate as against a third party. 1933 P. 708. *See also* 19 P.L.T. 421=1938 P. 431. The onus of establishing facts giving rise to estoppel rests on the party pleading it. 1924 P.C. 212. There can be no estoppel on a point of law. 21 A. 285; 20 N.L.R. 162; 30 C. 883; 35 M. 75; 44 M. 421 (P.C.); 1929 P.C. 32; 140 I.C. 687=1932 P. 267. *See also* 178 I.C. 288=1938 L. 868. Dispute between co-operative society and its member referred to arbitration under Society's bye-law—Bye-law making award final and not open to appeal—Society cannot challenge validity of bye-law and claim right of appeal. 168 I.C. 483=39 P.L.R. 460=1937 L. 673. Where a municipality owing to some mistake failed to recover a particular tax, it cannot be pleaded that they are estopped from recovering it, when they later on make attempts to collect it. The plea cannot enable a defendant to escape from a statutory obligation. 1939 N.L.J. 265=1939 N. 195. Counsel waiving objection as to limitation does not estop his client from raising the same. 178 I.C. 288=1938 L. 368. *See also* 1938 R. 376. The question as to what is the proper basis for the valuation of a suit under O. 21, r. 63 of the C. P. Code by an unsuccessful claimant whether it is the amount of the decree sought to be executed or the value of the property sought to be proceeded against, is one of law and a party who has acted in the lower Court on one basis is not precluded from maintaining the contrary in the appellate Court. 55 A. 315=1933 A. 249 (F.B.). If in a proceeding under O. 21, r. 58, C. P. Code, the decree-holder omits to raise the plea that the proceeding ought to be under S. 47, C. P. Code, and not under O. 21, r. 58, he is not thereby estopped

Illustration.

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

NOTES.

from pleading that in defence in a regular suit filed under O. 21, r. 63. 1934 A. 699. Acquiescence in an invalid and illegal objection does not bind the plaintiff or prevent him from exercising his right. 1933 S. 258. Nor does estoppel arise where statement is due to a mistake, *e.g.*, a policy began by stating that *A* had paid the company a certain sum by way of premium. *Held,* that the existence of these words in the policy does not prevent the company from asserting that the premium was not in fact paid. 1934 R. 343. *See also* 1938 A.W.R. 16=1938 R.D. 4. Where in enhancement proceedings relating to a holding, the landlord, misled by the patwari's entry, described the tenant as also the tenant of an adjacent piece of fallow land, he is not, on that account precluded, from contesting the status of the occupier and from bringing a suit that the defendant was not a tenant of the fallow land. 14 L.R. 68 (Rev.)=17 R.D. 62. Where certain payments by way of bazaar dues are made by the defendants in ignorance of their legal position, that cannot estop the defendants from questioning the right of the plaintiffs to recover such dues. Further, there can be no estoppel against a statutory provision. 190 I.C. 143=1940 A.W.R. (C.C.) 357=1940 O.A. 746=1940 O.W.N. 782=1940 O. 409. There can be no estoppel where a man misconceived the legal effect of an order which was of no legal force. 27 M.L.J. 465. Where two persons not eligible for marriage live as husband and wife, the marriage not being valid cannot be supported by an estoppel. Opinions on the legal effect of an adoption is not a "thing" within S. 115. 46 P.R. 1912 =13 I.C. 482. No estoppel against a statute. 1937 P.C. 114; 40 C.W.N. 341; 146 I.C. 482 =1933 O. 542 (F.B.); 15 P.L.T. 661=1934 P. 666 (F.B.); 52 I.A. 126=52 C. 408=49 M.L.J. 136 (P.C.); 49 C. 507; 2 R. 459; 19 M. 200; 44 M. 187; 38 M. 519; 38 B. 709; 22 C.W.N. 894; 36 C. 920; 1930 N. 191; 1929 M. 622; 56 C. 252; 53 B. 676; 58 I.A. 58=10 P. 481 =60 M.L.J. 441 (P.C.); 58 C. 1453; 12 L. 367; 27 A.L.J. 889=115 I.C. 642; 21 B. 399; 7 S.L.R. 58. But *see* 15 P. 589=1936 P. 417 (S.B.); 1937 P.C. 114; 1938 O. 110. A promise not to eject against the express provisions of law cannot operate as an estoppel. 1940 R.D. 239=1940 A.W.R. (B.R.) 144. When, therefore, a mortgage is void under the law, there is no rule of estoppel which prevents the mortgagor from pleading and proving the fact of the mortgage being void. 11 O.W.N. 1571= 1935 O. 121; 167 I.C. 79=1937 O. 431; I.L.R. (1938) A. 714=1938 A. 418 (F.B.). (Different allegations as to nature of same mortgage—Simple or usufructuary). *See also* 38 C.W.N. 459=1934 C. 537. (Co-operative Societies Act); 1929 M. 622 (the mandatory provisions of S. 36, Stamp Act); 1930 L. 1034 (Punjab Land Alienation Act.)

CONSENT DECREE—ESTOPPEL—TEST.—The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend upon the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree"? (35 M. 75, Rel on). 1941 L. 116.

A compromise in contravention of provisions of law cannot operate as estoppel. 1936 R.D. 565. But where in a deed, the term which is in contravention of the statute is separable, the deed is void in respect of that party only, and the rest being severable, estoppels may arise in respect of the parts which are good. 63 C.L.J. 52=1936 C. 774. A party is not bound by his lawyer's admission on a point of law. 11 C.W.N. 341; 24 B. 363; 1938 R. 376; 1938 L. 868; 1939 L. 364; 1939 L. 303. It is well established that a representation on a question of law does not amount to an estoppel. 195 I.C. 428=1941 P. 276. Estoppel by conduct, *see* 80 I.C. 994; 15 A. 119; 22 A. 83; 18 C.W.N. 420; 46 A. 214; 15 C.W.N. 741 (P.C.); 1927 M. 1066= 29 L.W. 220; 55 M. 40=139 I.C. 684=62. M.L.J. 116. *See also* 140 I.C. 610=34 Bom. L.R. 1252; 42 P.L.R. 249; 1939 M.L.R. 229 (Civ.); 10 O.W.N. 58; 10 O.W.N. 201; 111 R. 79=1933 R. 52; 131 I.C. 669=1931 M. 334 (principle of the doctrine stated). Estoppel by acquiescence, *see* 23 C.L.J. 82; 29 B. 580; 41 C. 771; 2 L. 258; 2 P.L.J. 600; 1927 O. 89; *Ibid.* 66; 61 I.A. 18=12 R. 13=38 C.W.N. 337=66 M.L.J. 239 (P.C.); 11 O.W.N. 379=1934 O. 178. There is a distinction between acquiescence and mere quiescence. 1936 A.M.L.J. 81.

ESTOPPEL BY SILENCE.—*See* 6 C.L.J. 601; 7 C.L.J. 604; 9 A. 413; 32 C. 359. *See also* 31 B. 566 (P.C.). A person is not justified in keeping silent when he is aware that another person has encroached upon his land and is erecting a costly building. He will be estopped by his conduct from claiming possession of the area encroached upon by demolition of the construction erected thereon. 41 P.L.R. 573. *See also* 1940 O. 164. Silence may amount to acquiescence if it is an omission to act according to the circumstances of a particular case. Where a site is sold with a condition attached that it should not be used as a shop, but it is allowed to be used as a shop by the first vendee and his successors and the shop is even re-built without any objection being raised by the vendor, the latter is estopped from raising the objection subsequently. 42 P.L.R. 133. An admission inferred from conduct does neither amount to an estoppel nor is a conclusive proof of the matter admitted, but it is certainly a strong *prima facie* evidence and may be conclusive when not rebutted by any evidence. 1939 M.L.R. 229 (Civ.). Where after an order for ejectment under S. 61 of the Oudh Rent Act for arrears of rent, the landlord files a fresh suit for arrears of rent, it operates as an admission on the part of the Zamindar that the

NOTES.

defendant is his tenant in spite of the previous decree for his ejectment and operates also as an estoppel under S. 115 against the landlord seeking execution of his ejectment decree. 1941 R.D. 415. Estoppel by omission. 1 P.L.J. 16; 24 C.W.N. 269; 15 M. 303. No estoppel by representation of an act to be performed in the future. 39 Bom.L.R. 1257=174 I.C. 67=1938 B. 148. Estoppel against a party cannot confer jurisdiction on a Court when it had none. 1931 A.L.J. 715=134 I.C. 236. As between parties in *pari delicto* there can be no estoppel. 23 C. 962; 33 C. 967; 35 C. 551 (P.C.); 31 M. 27. But *see* 8 C.W.N. 623; 32 M.L.J. 488; 36 C.L.J. 391. No estoppel against infants. 25 C. 616; 26 C. 381; 1929 B. 201=55 B. 741. Attestation when amounts to estoppel. 49 C. 334=42 M.L.J. 434 (P.C.). *See also* 42 C. 876; 36 C. 780 (P.C.); 37 A. 350; 15 P. 721=17 P.L.T. 697. Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. 1937 P.W.N. 144=170 I.C. 1005=1937 P. 353. Attestation by minor—Effect. 1927 R. 108. Attestation by legatee.—Effect. 8 L. 181. A party cannot take up inconsistent positions, approbate or reprobate, to the detriment of his opponent. 15 C.W.N. 724; 16 C.W.N. 736; 1929 N. 79; 1930 A. 15. Suit filed in Small Cause Court —Defendant's contention as to jurisdiction—Suits represented on original side—Defendant estopped from pleading that suit is Small Cause. 1926 A. 664; 1930 A. 15 (case of appeal). Major allowing decree to be passed as minor —Estoppel to question decree in subsequent suit. 48 A. 661. Even if, in S. 115, the word 'person' includes minors, the general intention of adjective law of the legislature as to the rule of evidence in this section must give way to the particular intention of substantive law in S. 11 of the Contract Act. A deed executed by minors is a nullity according to Indian Law and that it cannot be the subject of plea of estoppel as against the executant. 31 Bom.L.R. 340=1929 B. 201. *See also* 45 C.W.N. 906. Minor executing sale deed representing himself as major —No estoppel to plead invalidity of sale. 23 L.W. 521; 1934 M. 560=67 M.L.J. 257 (case of pronote executed by minor); 20 P. 130=1941 P. 433; 139 I.C. 718=1932 A. 710; *See also* 1926 N. 491; 9 L. 701=1928 L. 609 (F.B.); 1928 A 626; 31 Bom.L.R. 340=1929 B. 201; 1936 C. 567 But the minor is liable to refund benefit derived or make good loss sustained by other party. But not so, where by using due diligence, the vendor could have found out the age of the vendor and where, as a matter of fact, the vendee knew that a guardian had been appointed for the vendor and no fraud was committed on he vendee. 150 I.C. 968=1934 L. 304 (1). Estoppel is purely personal. 14 C. 406; 1928 A. 459. *See also* 1937 A. 710 (Agreement to abide by statement of third party—Binding nature of such statement—Right to challenge—Estoppel); 20 N.L.J. 209 (non-enhancement of assessment of Government land, if operates as estoppel against Government.) Equitable estoppel. *See* 37 M. 270; 25 C.W.N. 29 (F.B.) 48 A. 363; 58 C. 368; 58 I.A. 91=58 C. 1235 =60 M.L.J. 538 (P.C.); 1931 A.L.J. 653.

NO ESTOPPEL AGAINST STATUTE.—Will in contravention of statute—Devisee acting upon it—Dispute between co-devisees—Invalidity of will —Bar in pleading. *See* 1938 N.L.J. 181. *See also* 41 Bom.L.R. 170. There is no estoppel on a *statement of law.* 43 C.W.N. 1037=1939 P.C. 201 (P.C.). *See also* 1940 O. 409; 1941 Rang. L.R. 309=1941 R. 234; 1940 A.W.R. (B.R.) 144. There can be no estoppel against an *act of the legislature.* When therefore the legislature has declared that no adoption would be valid without a registered adoption deed the plaintiff is not estopped by her conduct from disputing the validity of defendant's adoption for want of a registered deed. 1939 A.M.L.J. 60 (C.) *See also* 1941 R. 234. The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise, must depend upon the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of what was embodied in the decree?" 42 P.L.R. 749; I.L.R. (1940) L. 352=1940 L. 100; 1941 L. 116 (*See also* 35 M. 75, Rel. on.) A *compromise* entered into in contravention of the provisions of law cannot operate by way of estoppel as there can be no estoppel as against a state. *See also* 18 P.L.T. 430; 1936 R.D. 565. In case of a statute enacted for the benefit of a section of the public, that is, on grounds of public policy, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the party suing seeks to do, it is not open to the opposite party to set up an estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence by a party to an action; it cannot therefore avail in such a case to release the party suing from an obligation to obey such a statute nor can it enable the opposite party to escape from a statutory obligation of such kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey law. 1937 M.W.N. 663 =1937 P.C. 114 (P.C.). An *ultra vires* statute cannot be validated by acquiescence, but an acquiescing party may be estopped from questioning it. 1939 N. 44=1939 N.L.J. 439. Every body is supposed to know the law or at least to have as much opportunity of knowing the law as another so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another. 173 I.C. 991=1938 O.W.N. 355=1938 O. 110.

DOCTRINE OF ESTOPPEL AND ACQUIESCENCE, DISTINGUISHED.—The doctrine of acquiescence

NOTES.

is only another phase of estoppel. The foundation of the doctrine of estoppel and acquiescence is that one party has made to the other representations which were intended to be and were in fact acted upon by that other spending money or doing an act which he would not have otherwise done, which involved expenditure or a change of position. In the case of estoppel the material representations are active, while in the case of acquiescence the representations are to be inferred from silence. The doctrine of acquiescence also goes by the name of the doctrine of standing by. If an owner of land finds another person trespassing upon his land and building on it: mere silence or inaction on his part at the time will not be sufficient to support a case of acquiescence. Mere silence or mere inaction cannot be construed to be a representation. To support a case of acquiescence there must be something more than mere silence or inaction. Inaction or silence in circumstances which acquire a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only can the doctrine of standing by or acquiescence be applied. The party seeking the aid of the doctrine has to prove (1) that he made a mistake of his legal rights; (2) that he expended money or did some act on the faith of the mistaken belief; (3) that the legal owner or possessor of the legal right knew of his own right which is inconsistent with the right claimed by the party relying on the doctrine; (4) that the possessor of the legal right knew of the mistaken belief of the other; and (5) that the legal owner encouraged the other party in his expenditure of money or in the other acts, either directly or by abstaining from asserting his legal rights. 40 C.W.N. 1370 =1936 C. 711. *See also* 1937 M. 158; 48 L.W. 908 (Representation as to authority of widow to adopt); 1937 O.W.N. 330=167 I.C. 870= 1937 O. 226; 1937 O.W.N. 252=167 I.C. 414 =1937 O. 263; 38 P.L.R. 931=1936 L. 700; 15 P. 721 =17 P.L.T. 697=165 I.C. 98. Acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. 1941 O.W.N. 1021 =1941 O. 611. A person though not a party to the litigation that effected a division of holding, has nevertheless profited from it and has all along abided by it, cannot later on seek to question the division of holding on the ground that he was not a party to that litigation. 1941 A.W.R. (Rev.) 924=1941 O.A. (Supp.) 798=1941 R.D. 813.

EQUITABLE ESTOPPEL.—Void lease—Tenant putting up structures *bona fide*—Right to value thereof. 37 C.W.N. 473=1933 C. 612. *See also* 170 I.C. 944=1937 A.L.J. 783=1937 A. 512; 1937 O.W.N. 352=1937 O. 263. No plea of equitable estoppel can be maintained against a statute. 152 I.C. 508=18 R.D. 590. As to part-performance, *see* 39 M. 509 (P.C.); 42 C. 801; 40 M. 1134. One's own fraud cannot be pleaded. 1929 A. 237. Fraud committed upon creditors. Judgment-debtor is estopped. 1930 M. 298. Admissions do not operate as estoppel but they must be explained by persons making them. 1929 L. 748. The mere fact that the purchaser from the guardian of a minor of properties belonging to the minor took a letter from the minor stating that there was necessity for the alienation does not estop the minor from impeaching the sale, so long as it is not shown that the minor caused or permitted the vendee to believe that necessity existed. 115 I.C. 175 (2)=1929 N. 211. Co-sharer intending to sell share—Other co-sharer refusing to purchase—Right of pre-emption not assented—Vendee induced to purchase—Failure to give notice under S. 14, Agra Pre-emption Act—Other co-sharer is estopped. Where certain members of a Hindu joint family, who were fully aware that the suit mortgages had been attached and put to sale in execution, did not raise any objection to the attachment or sale. *Held*, that the conduct of the member constituted a clear representation to the decree-holder and auction-purchasers that they had no objection to the sale and that they could not sue to set aside the sale. 10 O.W.N. 58=1933 O. 166; 1929 A. 531=51 A. 820. *See also* 27 A.L.J. 526; 16 Mys.L.J. 32=42 Mys.H.C.R. 669. In a land acquisition proceeding, the owner of land received compensation for the use of the minerals under his land by the Government for the construction of a bridge. It is no estoppel against the owner suing for declaration of his right to the remaining minerals after the completion of the bridge. 8 P. 742. Prior transferee allowing subsequent purchaser to build on land —Negligence of prior transferee to take necessary steps to protect himself—Estoppel to assertion of title. 6 R. 643=1929 R. 17. The mere attestation of a deed by a party does not estop him from asserting that he had not the knowledge of the contents of the document or that he was not bound by the recitals in the document, But if the person attesting asserts the facts that are stated in the document he is estopped. 116 I.C. 716; 54 M.L.J. 254. *See also* 107 I.C. 20=1928 P.C. 20 (P.C.). The attestation by the reversioner of an alienation by the widow cannot be taken as presumptive proof of necessity where the document contained no recital of the purpose for which the money was required. 145 I.C. 862=1933 M. 637=65 M.L.J. 282. Attestation does not fix an attesting witness with knowledge of the contents and is no estoppel. 9 L. 224. *Also* 1933 L. 551=14 L. 369; 145 I.C. 746=1933 L. 703; 38 P.L.R. 416=165 I.C. 997=1936 L. 978; 1937 P. 353. Where an attesting witness is present at the transaction and attests the deed having heard its contents he is estopped from challenging the right of the transferee. 150 I.C. 765=1934 P. 93. *See also* 15 P. 721= 17 P.L.T. 697=165 I.C. 98. Company assessed to company's tax by Municipality—Letter by company's agent to Municipal Council assuming validity of assessment—Suit questioning the legality of the assessment—Miantainable—No estoppel. 1929 M. 146 (2)=108 I.C. 216. Party is taking advantage under partition estopped from setting up plea of impartibility. 1929 C. 577. Person not included in the cause-title but claiming to be party, taking steps for securing some relief to himself, He is estopped

NOTES.

from contending that he was not made a party. 1928 M. 690. Where consent orders in two suits were intended to stand or fall together *quaere*, whether it is possible for one of the parties to the orders to stand by the order in one suit while repudiating the order in the other. 1929 P.C. 289=57 M.L.J. 429 (P.C.). For purposes of estoppel, an order by consent, is as effective as an order of the Court made otherwise than by consent. In other words the only difference between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by an order of the Court; the second stands unless and until it is discharged on appeal. A consent order, even where it has been obtained by fraud or mistake, is not a nullity. The order stands until it has been effectively set aside. (*Ibid.*). A party to a consent decree is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. 26 S.L.R. 395. *Also see* 13 L. 70=1932 L. 281. Estoppel by conduct—Mortgage amount tendered by purchaser of equity of redemption—Refusal to accept—Interest ceasing to run—Claim to recover interest—Maintainability. 29 L.W. 220=56 M.L.J. 255. Where a lease was executed by the Nawab in contravention of the Murshidabad Act, *held*, that he was not estopped from denying the validity of the lease. 56 C. 252=1929 C. 433. Lease contrary to B. T. Act—Lessor's plea of invalidity—Maintainability. 1928 C. 156. Void alienation of khoti land to mortgagee—Mortgagor can resile land sale. 53 B. 676=31 Bom.L.R. 778. Although the transfer of property for an immoral object is void, still in a suit for the recovery of the property by the transferor, *held*, the principle of equity enunciated in *Ayerst* v. *Jenkins*, L.R. 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. 35 Bom.L.R. 345=1933 B. 209. A purchaser of mortgaged property at a sale in execution of a decree is estopped from denying the validity of the mortgage if the mortgagor himself could not be permitted to deny its validity. 139 I.C. 695 (36 A. 141, Foll.); 15 P. 721=17 P.L.T. 697=165 I.C. 98. Evidence—Inadmissibility of, by reason of prior decision—No estoppel by reason of. 1929 P. 32. Estoppel against a Mahant whether can be got rid of by a suit brought by him formally in the name of idol. 56 M.L.J. 636. Where in a usufructuary mortgage deed the recital states that the plaintiff is mutwalli of the wakf, the property of which is the subject-matter of the mortgage and the document is acted upon and possession is transferred and sums of money are received by the plaintiff, the document amounts to a representation that the plaintiff as mutwalli is competent to make that transfer and he is therefore, estopped from denying its validity. 1935 A.L.J. 217=1934 A.W.R. 275. Where the wife acquiesced in her husband's acts and allowed him to deal with the property as his own and derived benefit therefrom, *held*, that she could not be permitted to turn round and impugn the transaction. 7 Mys.L.J. 112. Father purchasing and recording property in son's name, is not estopped from pleading that it is not the son's, if the party pleading estoppel knew or would on inquiries, have known that it was acquired with the father's money. I.L.R. (1936) N. 65=165 I.C. 350=1936 N. 185. Permitting another to build on land—Suit to recover possession of land built upon is not maintainable—Plaintiff estopped only entitled to a fair rent—Rule in *Ramsden* v. *Dyson*, applied. 31 Bom. L.R. 1310. *See also* 1937 O. 226. A pre-emptor, party to suit by village landlords challenging sale—Sale conferred by compromise decree—Estoppel. 33 C.W.N. 90 (P.C.). Where there was no evidence of any detriment to the appellants as a consequence of the silence of the respondent or which had caused the appellants to alter their position in any way and there was no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants. *Held*, that there was no question of estoppel. 163 I.C. 295=44 L.W. 128=1936 P.C. 193 (P.C.). A mere silence cannot operate as an estoppel unless it is established that there was a duty to speak. 119 I.C. 882; 28 N.L.R. 227=140 I.C. 390=1932 N. 165; 148 I.C. 546=38 C.W.N. 344=1934 P.C. 83 (P.C.). *See also* 1937 M. 158=168 I.C. 842=44 L.W. 859. Case where the Collector sent a letter intimating to the mortgagee that the entire debt has been paid off, the mortgagee did not inform the Collector that a portion of the debt yet remained unpaid. Tenant making grave on abadi—Zamindar's servants standing by and not objecting—No acquiescence. 1929 A. 386=115 I.C. 628. Widow making gift of her deceased husband's property to her daughter and daughter's husband jointly—Daughter acquiescing for less than 12 years in the position that her husband was co-owner of that property does not constitute estoppel so as to deprive her reversionary right. 1929 M. 467. Where a house left by a Hindu father is mortgaged by his son and the widow of the deceased has signed the mortgage deed after hearing its contents and as token of consent, the widow has acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance, she is estopped from claiming those rights against the mortgagee. 1941 Pesh. 17. Acceptance of benefit—*Compromise decree*—Money paid under—Party repudiating other terms—Permissibility. 35 P.L.R. 315=1934 L. 423. *See also* 42 P.L.R. 61=1940 L. 100; 42 P.L.R. 749. Where an amendment of plaint is allowed by the Judge on payment of costs, the acceptance of the costs by the defendant without protest precludes him from contesting the validity or the order. Per *Lort Williams, J.* (*Ghose, J.*, *contra*). 61 C. 433=38 C.W.N. 488=1934 C. 554. A party can challenge the validity of the compromise, when he has not taken advantage of the benefit thereunder. 1928 C. 334. *See also* I.L.R. (1938) 2 C. 266=42 C.W.N. 701=1938 C. 500. Double remedies—Election of one—Estoppel as to the other remedy. 1928 S. 40. Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election if made with the knowledge of facts, is in itself binding. The

NOTES.

election must be, however, a voluntary act, not forced upon him by circumstances over which he had no control and notwithstanding his protest. 59 C. 1464=36 C.W.N. 955. In a subsequent suit for rectification of the instrument of guarantee, *held*, that, having elected to take their chance of succeeding upon the terms of the instrument as it stood, the sureties were estopped from reagitating the question on the basis of the very ground which they had waived on the former occasion. 59 C. 985=1932 C. 889. Where a party has asserted a certain position in a previous litigation, he cannot agitate the matter on the assumption of fresh fact against persons who were parties in the previous suit. 106 I.C. 484. *See also* 40 P.L.R. 243=1938 L. 525. As between the same litigants one party cannot defeat the claim of the other by a plea negativing a contention advanced by him successfully in a former suit. A party who has obtained an order of the Court and has succeeded under it cannot after he has enjoyed a benefit under that order say that it was valid for one purpose and invalid for another. 144 I.C. 50=1933 S. 119. *See also* 14 L.R. 281 (Rev.)=17 R.D. 404. Inconsistent pleas—Execution proceeding—Nature of property—Prior statement of judgment-debtor—Binding effect. 150 I.C. 141=1934 A. 430. Husband and wife—Party once affirming marriage cannot subsequently object to it. 30 Bom.L.R. 523=1928 B. 279. Where the ancestor of a reversioner had admitted the execution of a sale deed by a Hindu widow who was a pardanashin lady but her knowledge and understanding of the document was nowhere admitted, the reversioner was not estopped from pleading want of proper understanding of the transaction by the executant. 10 O.W.N. 147=1933 O. 170 (2). The facts that the reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing his reversionary right to the remainder and that his son, himself inherited those items which the father had received, could not operate as estoppel against the son from questioning the subsequent alienation by the widow in favour of others. 1933 M. 637=65 M.L.J. 282. Reversioners cultivating under the alienees from the widow and getting contribution from them for building a common well and such act, while widow is living is insufficient to establish admission of alienees' title. 1928 L. 6. The Official Receiver is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors; nor is he precluded on that account from applying under sec. 54 to have it annulled as a fraudulent preference. 34 P.L.R. 436=1933 L. 354. An executor who has entered upon his duties as such is estopped from pleading immunity from his obligation as executor, on the ground that no probate has been taken out by him. 59 M.L.J. 596. The question of the proper construction to be placed on a deed is one of law and there can be no estoppel by a pleading of law. 2 O.W.N. 1052. Where in a probate proceeding a dispute as to genuineness of the will was referred to arbitration and no objection as to the award was taken but in appeal the point as to illegality of the reference to arbitration was raised, *held*, that the point could be raised and the doctrine of estoppel was not applicable. 1930 A. 840. Son joining in sale-deed by father in ignorance of legal rights whether estopped. *See* 1927 A. 838. Sunni Mahomedan conveying more than third of the estate by will—Attestation by heir—Whether estopped. 6 R. 542. There cannot be any estoppel on a point of law going to the jurisdiction of the Court. 1928 L. 802. Person taking possession of property as mutawalli—Wakf discovered to be void—Person estopped from saying property was his. 1928 C. 130. *See also* 1939 L. 63. Though by reason of having accepted certain benefits under an ekrarnama wrongfully disposing of properties belonging to a wakf, a minor may be estopped from questioning the validity of the ekrarnama in his personal capacity, it does not preclude him in the capacity of mutawalli to sue for the recovery of the properties of the endowment wrongfully disposed of under the ekrarnama. 36 C.W.N. 972. A Burmese wife refrained from making any claim in her husband's *payin* property but referred to it as her husband's property and attested the mortgage-deed, and made payment of interest thereon. *Held*, her conduct was definitely calculated to induce the mortgagee to believe that she had no interest whatsoever in the land and that she cannot subsequently come forward and claim that she has an interest in the mortgaged property and that the decree obtained by the creditor is inoperative against that interest. 1934 R. 17. Where during the lifetime of the mother, the daughters who were in possession effected a partition of certain properties and the parties enjoyed the properties in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves. *Held*, that they were estopped from doing so. 1930 A. 687=1930 A.L.J. 688. Conduct—Adoption made under settlement deed—Validity of adoption—Party bringing about settlement and adoption, if can question. 153 I.C. 102=1935 M. 141. A mere presence at an adoption or a mere acquiescence in an adoption does not create an estoppel, so as to preclude the person present or acquiescing from challenging the adoption afterwards, when there is no representation made as to any matter of fact on the strength of which the act of adoption can be said to be made and especially when the parties are labouring under a mistake of law. 39 Bom.L.R. 599. As to estoppel by conduct, *see also* 1940 Bom. 242=42 Bom.L.R. 443; 1940 Cal. 60; 1940 Lah. 100=42 P.L.R. 61. An estoppel does not arise against the maker of a promissory note, by the mere fact that after discharge by satisfaction at or after maturity of the note, the piece of paper or "waste paper" which once had but has lost its negotiable quality is left with the payee and he passes it off on others as if it were still a negotiable instrument. 1933 M. 300=64 M.L.J. 241. Where persons to be sued are majors a suit brought without their knowledge against them on the footing that they are minors is wrong, and the guardian *ad litem* appointed to represent them has no legal standing to act for them in the suit and his admission of liability is not

NOTES.

binding on them. Such persons if they were not aware of the suit until after the decree in the suit was passed are not estopped from contesting the validity of the decree even if they became aware of the execution proceeding and did not come forward to prosecute their claims then. 1938 R. 468.

LANDLORD AND TENANT.—*See* 1939 Pat. 296. The acceptance by the landlord of rent at uniform rate does not by itself raise any estoppel against the landlord, because there is no representation thereby that it would confer permanent tenancy on the lessee. 58 B. 419=36 Bom.L.R. 359=1934 B. 194. Where in rent receipts given by the agent of the Zamindar, the tenants are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zamindar is not estopped from asserting that the tenants had no occupancy rights. L.R. 3 A. 517 (Rev.). *See also* 1939 R.D. 135; 1941 R.D. 678. In order that a tenant may raise the plea of estoppel as against his landlord, there should be a representation believed in by the tenants and in the second place it must be a case consistent with the document under which the tenancy was created. Where the alleged representation was contrary to the terms of the document between the parties, *held*, that the plea of estoppel was not available. 37 C.W.N. 643=1933 C. 682. *See also* 1937 R.D. 256; 1936 R. D. 541; 1940 R.D. 488=1940 O.A. 1017. The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenancy. L.R. 4 A. 174 (Rev.). Where a Zamindar took nazarana and admitted the tenant into land pending the execution of a lease deed, he is estopped from denying that he had admitted the tenant into the land with the intention of giving a lease. L.R. 3 A. 543 (Rev.). The fact that a registered lease was not given does not affect the question. L.R. 3 A. 543 (Rev.). *See also* 16 R.D. 518; 1940 R.D. 224=1940 A.W.R. (B.R.) 85; 1940 R.D. 197=1940 A.W.R. (B.R.) 65. Tenants recorded as occupancy tenants by order of Collector and treated as such for over 28 years—Subsequent suit for declaration that they were only statutory tenants—Non-maintainability. 14 L.R. 135 (Rev.)=17 R.D. 174. *See also* 1941 R.D. 415=1941 A.W.R. (Rev.) 475. Landlord and tenant—Estoppel—Suit for rent—Money decree—Execution proceedings taken as if the decree was a rent decree—Objection to the form of execution proceedings not taken by the tenant—Effect—Tenant not barred from contending afterwards that the decree was only a money decree—No estoppel. 119 I.C. 882. *See also* 1939 R.D. 135=1939 A.W.R. (B.R.) 149. Agreement to pay enhanced rent—Failure to register as required by Agra Tenancy Act—Tenant continuing to pay rent—No estoppel from asserting in a subsequent proceeding that rent was payable only on the old scale. 13 R.D. 859. Covenant against alienation—Transfer recognised by lessor—Effect. 1929 C. 228. Permanent lease of vatan lands—Succeeding vatandar receiving rent for ratifying lease—Suit in ejectment—Estoppel. 31 Bom.L.R. 218. *See also* 1938 P. 435. Though a tenant can never be estopped from claiming occupancy rights in respect of land in an estate by reason of the Statute he will be estopped from saying that the land is an estate. If he has previously taken it on the footing that it is not an estate it may be that the estoppel extends only up to his surrendering vacant possession; after he surrenders, he may agitate any question he likes. But he cannot keep the possession which he obtained by representing that he will not claim the land to be in an estate. 119 I.C. 577=1929 M. 529. Grant of permanent lease by holder of ganti interest—If estopped from saying that he was mere ryot—Purchaser at execution sale is not estopped. 1928 C. 87. Landlord allowing exproprietary tenant to continue in possession after ejectment is estopped from denying status of the tenant. 14 R.D. 502; 15 R.D. 39. A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status. 119 I.C. 568=1929 A. 305. Mortgagee not to question mortgagor's title—Hindu widow effecting mortgage for 99 years—Same cannot be impugned by mortgagee—Widow to be presumed to deal with property as owner. 1928 B. 380=114 I.C. 377. Where a mortgagor refused possession when according to the terms of the contract he was bound to give possession, the mortgagor is precluded from asserting that the property is not liable to sale in satisfaction of the mortgage debt. 116 I.C. 214=1929 L. 289. *See also* 41 M. 259 (F.B.). Where a person admits his character as mortgagee in civil suit, he cannot subsequently in a revenue suit plead that he was not mortgagee but a proprietor. 15 R.D. 94. *See also* 14 L.R. 281 (Rev.); 17 R.D. 404. A muafidar who has mortgaged his muafi plots cannot assert against the mortgage his own want of title. 1928 O. 336. A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property. 31 Bom.L.R. 439=119 I.C. 186=1929 B. 227. Although if a person went into possession of properties in pursuance of the directions contained in a will conferring a life-estate on him, he may be estopped from denying the title of the remainderman, a person who entered into possession after his father's death without any title at all cannot be affected by any estoppel to which his father might have been subject, because his father had nothing to pass to him and he took nothing through his father. The mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purpose of the rule of estoppel laid down in *Board* v. *Board*, (1882) 9 Q.B.D. 48; 59 I.A. 268=1932 P.C. 172=63 M.L.J. 336 (P.C.). *See* on this section also 1932 A.L.J. 971=1932 P. C. 255=63 M.L.J. 418 (P.C.). Estoppel by conduct—Adoption—Widow acting in pursuance of power contained in will and adopting boy—Representation and conduct—Change of position—Will found in-

Estoppel of tenant; and of licensee of person in possession.

116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

NOTES.

valid as such—Widow estopped from questioning validity of adoption. 1933 M.W.N. 1148. Change of position—Family arrangement—Mahomedan wife renouncing of rights of inheritance—Binding nature of arrangement. 10 O. W.N. 201=1933 O. 142. Omission to object—Arbitration—Clause for reference in voidable contract—Contract treated as valid and reference and award made—Subsequent avoidance of contract—Estoppel. 1933 Sind 207. An agreement between the Government and a grantee under a sanad was based on the assumption that the lands granted were Kadim Inam. The grantee led the Government by his conduct to believe that he accepted the assumption and obtained the benefit of a lower judi. *Held*, that the grantee was estopped from contending that the lands were not Kadim Inam. 36 Bom.L.R. 1055. Cases relating to waiver. 11 R. 79= 143 I.C. 299=1933 R. 52; 1933 L. 546. *See also* 171 I.C. 461=1937 P. 399; 20 N.L.J. 209. Mutation proceeding—Offer to be bound by oath—Decree passed on basis of oath—Re-opening of matter in Civil Court. 151 I.C. 973= 1934 A.L.J. 92=1934 A. 300. Conduct—Plaintiff permitting a wooden platform to be placed before his shop—If estopped from objecting to erection of building. 1934 L. 900. *See also* 17 P. 358. The law of estoppel will not be invoked in favour of a party who comes to Court with dirty hands; where a suit between two co-tenants one of whom claims to be sole tenant is compromised, and one of them subsequently goes behind it and revives the matter the other will not be estopped from pleading the true facts. 18 R.D. 507. Where a defendant in his written statement in a former suit makes admission regarding the title of a co-defendant in that suit, those admissions do not operate as estoppel in the absence of proof that the co-defendant owing to the written statement acted in any way in which he would not have acted if the written statement had not been filed. 190 I.C. 609= 1940 Rang. 136. The rule in this section is not modified by sec. 43 of the Presidency Small Cause Courts Act. 1940 M. 700=(1940) 1 M. L.J. 605. Carriage of goods by Railway—Declaration of value by consignor—Fixing of rate of carriage on basis of declaration—Loss of goods—Plea that value declared not true value, if available—Estoppel. 17 P.L.T. 268.

Sec. 116.—*See* notes under sec. 115. Scope and principle of. *See* 19 M. 200; 37 A. 557 (P.C.); 44 C. 771; 35 C.L.J. 146; 10 O.W.N. 48=1933 O. 129. "At the beginning of the tenancy"—Meaning of. 15 Pat.L.T. 519=1934 P. 555. *See also* 186 I.C. 274. Section is applicable to the case of immovable property only. 4 R. 503=1927 R. 94. It is only so long as the tenancy is subsisting and the tenant is in possession, that a tenant cannot set up the title of a third person. Where, before the lease is to take effect, the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title. (1937) 1 M.L.J. 697 (F.B.). *See also* 17 Mys.L. J. 310. Once a complete relationship of landlord and tenant is established, the rule of estoppel comes into operation and prevents the tenant from denying the authority and title which he admitted to rest in the landlord who inducted him into possession of the land. 73 C.L.J. 281=1941 Cal. 408. A tenant cannot be permitted to show that in granting him the lease, the landlord acted as agent of another person who was the real owner, and that the liability to pay rent to the lessor cannot be discharged by payment to that alleged owner. To so permit the tenant would be contrary to the rule of estoppel laid down in S. 116. 53 L.W. 492=1941 Mad. 607=(1941) 1 M.L.J. 554. Sec. 116 only estops a tenant from pleading that at the time of leasing the land his lessor had no title; if the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim. 1936 R.D. 384. *See also* 186 I.C. 274; 1940 A.W.R. (B.R.) 171. Sec. 116 does not estop a tenant from denying the right, as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession. 182 I.C. 533=41 P.L.R. 346=1939 L. 49. *See also* 1940 Lah. 341. In a suit by a landlord for rent, it is open to the tenant to plead in defence that the title of the plaintiff has, subsequent to the commencement of the tenancy passed to somebody else, and that as such he was not entitled to the rent. Sec. 116 does not prevent a tenant from pleading that the title of the original lessor has since come to an end. 1939 A. L.J. 913=1939 All. 670. Party acquiring by adverse possession—Permissive possession after no estoppel. 1929 R. 170. Section not exhaustive, 32 C. W. N. 867. Sec. 116 does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be

NOTES.

heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise, the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the *derivative* title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, *e.g.*, by attornment, acceptance of rent, etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. There is in English case-law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in sec. 116 the Indian Legislature has formulated no such condition. 41 C.W.N. 1253=1937 P.C. 251=(1937) 2 M.L.J. 286 (P.C.). The mere fact that the lease in favour of a lessee of land has expired does not disentitle him to *sue his sub-lessee and to claim rent or damages for use and occupation from him*, when neither the lessee nor the sub-lessee have surrendered possession after such expiry. A lessee of land is under an obligation to surrender possession of the premises demised to his lessor from whom he derived possession; and until he fulfils that obligation, he is bound to pay his lessor either rent or damages for use and occupation. It is no doubt open to the sub-lessee to show that his title having expired he has surrendered possession to the original landlord from whom his lessor derived possession or to a person claiming by title paramount. In such cases no question of estoppel would arise; but when he is unable to plead a valid defence his obligation to surrender possession, it would not be open to him to resist his lessor's demand for damages for the use and occupation during the period he has been in possession until he surrenders possession to the lessor. Even though, therefore, the original lessee's title may have expired, by the expiration of the term of his lease, until the sub-lessee shows that he has renounced the obligation of surrendering possession to him by commencing to hold under some other person either the landlord of the original lessee (*i.e.*, his lessor) or a person claiming by title paramount or by delivering possession to him, the mere fact that the original lessee's title has expired is no defence to a suit by him against the sub-lessee for arrears of rent or damages for use and occupation. 1937 M. 478=(1937) 1 M.L.J. 566. Ejectment suit by landlord—Adverse rights claimed by tenant—Independent suit as the remedy. 1928 C. 546; 35 C.W.N. 652. Sec. 116 presupposes a provable contract of tenancy. When there is no denial of the landlord's title but only a denial of a contract of tenancy, the section is not a bar. There can be no estoppel on a matter of law. 164 I.C. 557=19 N.L.J. 179=1936 N. 174. If once the relation of landlord and tenant is established between the parties, the tenant would be estopped from disputing the landlord's title. There are no words in sec. 116 to show that the tenant must be put into possession by the landlord in order to estop the tenant from disputing the landlord's. 30 Bom.L.R. 741=1928 B. 265; 139 I.C. 46=33 P.L.R. 799 (2); 36 Bom.L.R. 1074. Sec. 116 does not estop a tenant from denying the right as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession. 1939 L. 49. Where the rent suit is brought by the daughters claiming to be heirs to the leasehold rights alleged to be the stridhan of their mother, though the tenants cannot dispute the title of their mother at the commencement of the lease they can dispute the derivative title of the plaintiffs. It is in such a case incumbent upon the plaintiffs to prove that the leasehold rights in question were the stridhan of their mother and they are entitled to inherit the said rights according to Hindu Law. 1940 Lah. 341. Sec. 116 of the Evidence Act only estops a tenant from disputing his landlord's title during the continuance of the tenancy. Where the tenancy originated in a lease, the estoppel continues even after the expiration of the period of the lease, unless the tenant has openly surrendered possession or has at least given notice to his landlord that he claims under his own title. But in the absence of evidence to prove that the tenant paid rent to the landlord after the expiry of the lease, or that the landlord assented to the possession of the tenant after the determination of the lease or that the tenant accepted the title of the landlord after that, it cannot be inferred that the relationship of landlord and tenant continued after such determination, and Art. 139 of the Limitation Act bars any suit to recover possession from the tenant after the expiry of twelve years from the date when the tenancy was determined. When the tenant has proved that the tenancy has been determined by efflux of time it is for the landlord to prove that any tenancy was created or arose after such date. 176 I.C. 84=46 L.W. 848=1938 M. 73. A tenant is not estopped merely because by the tenancy he acknowledges the title of his landlord, and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance. 177 I.C. 599=1938 R. 227. Tenant can set up his own title against third person though not against landlord. 1930 A. 299. If a tenant desires to challenge the title of the landlord, he must quit the land. 1928 R. 162. The tenant is concluded for ever from filing a suit on his title if a suit is filed against him in ejectment during the continuance of the tenancy and is decreed against him. 1928 R. 162. If a tenant has been let into possession by a landlord he cannot deny and set up adverse title. 20 C.W.N. 1335; 34 B. 329; 28 M. 526; 51 B. 43=1927 B. 129; 103 I.C. 421=1927 L. 626. Tenant cannot deny landlord's title until and only until he surrenders possession. 101 I.

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawyer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

NOTES.

C. 771; 97 I.C. 992. *See also* 1938 N.L.J. 317=1938 N. 506; 104 I.C. 892; 55 M. 601=1932 M. 298=62 M.L.J. 313; 1934 L. 445. Where the defendant's father who held a shop as a tenant under the predecessor in title of the plaintiff fell in arrears of rent, and the defendant undertook to pay the arrears and to execute a *sarkhat* it must be deemed that there was surrender by the father of the defendant followed by the defendant being let in to possession under the lease executed by him in favour of the plaintiff. The defendant, in such circumstances is estopped from denying the title of the lessor. 1937 O.W.N. 49=1937 O. 113. *See also* 42 C. W. N. 1032. However defective it may be, tenant holding over is in no better position. 6 R. 657. *See also* 32 C.W.N. 867=1934 C. 499. The tenant's estoppel operates even after the termination of the tenancy and even though the defendant is sued as a trespasser. (*Ibid.*) Where a person in possession of land executes a kabuliyat, he is bound by the kabuliyat and estopped from challenging the title of his landlord unless he can prove fraud, misrepresentation, coercion or mistake. (1935 O.W.N. 449, Foll.) 171 I.C. 84=1937 O.W.N. 1030=1937 O. 505. Where lease was executed through ignorance or fraud, no estoppel. 1926 C. 720. If the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim. 1936 R.D. 384. No estoppel in case of tenant evicted actually or constructively by true owner. 23 L.W. 296. A tenant may dispute his landlord's title if he has been evicted by title paramount or if under threat of eviction by a party having a title paramount he has attorned as tenant. But if the tenant has attorned voluntarily, he is estopped from denying the landlord's title. 1934 M. 197=66 M.L.J. 355. Where, however, if before the lease is to take effect, the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title. (1937) 1 M.L.J. 679 (F.B.). Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance, mistake or the like. 112 I.C. 382; 150 I.C. 898=1934 R. 139; 1937 P. 27=167 I.C. 141; 1937 O. 505=1937 O.W.N. 1030 or that the contract of tenancy is void. 1928 B. 265. Such a tenant may set up adverse possession against new landlord without surrendering possession to him. 167 I.C. 141=1937 P. 27. Mere attornment after previous possession as proprietor would not raise estoppel. 1928 P. 284=113 I.C. 703. Persons attorning to lessors as tenant cannot question title of lessors. 1927 C. 941. *See also* 1937 O. 505; (1941) 1 M.L.J. 554; 26 A.L.J. 1255=110 I.C. 376=1928 A. 650. Lessors also are estopped from denying validity of lease. 1926 C. 882. Verbal lease for more than one year—Tenants in possession—Liability for rent—Invalidity of lease—Effect of. 148 I.C. 684=1934 P. 369. If a tenant is inducted on a land by a person, the tenant cannot question the title of that person who has so inducted him on the land. The tenant is thus estopped forom raising the question that the person letting him into possession is merely a benamidar. 63 C. 763=161 I.C. 468=40 C.W.N. 460=1936 C. 93. *See also* 41 M. 461; 24 C. 411; 26 M.L.J. 597; 58 C. 1371=1931 C. 167; 36 Bom.L.R. 1074. As to licensee's estoppel, *see* 39 C. 439; 42 C. 262. *See also* 60 I.A. 297=60 C. 980=64 M.L.J. 103 (P.C.). The representatives in interest of the lessee are estopped from questioning the title of the lessor, even if the lessee had not been inducted on the land by the lessor. 42 C.W.N. 1032. Adverse possession cannot be set up by the tenant against the landlord. 45 I.C. 656; 30 I.C. 218. Plea of title in third person, *see* 7 C.W.N. 596; 15 M.L.J. 368. In a suit in ejectment where the defendant relies on the title of a third party having no other title to rely on, it is always open to the plaintiff to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*. 1937 M.W.N. 299=1937 M. 544. A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is, however, open to him to assert that on the death of the mortgagor, persons who are his heirs under the Hindu law did not succeed to his occupancy rights in accordance with the special rules laid down in Act XII of 1881. 122 I.C. 414=1930 A. 108. *See also* 38 L.W. 266=1933 M. 635; 53 L.W. 492=(1941) 1 M.L.J. 554. Sec. 116 merely states that the licensee ought not to deny the title of the licensor. It does not state that every license is revocable at the instance of the lessor. Consequently the licensee is not prevented from asserting that he must not be turned out. 7 R. 617.

Sec. 117.—*See* 36 B. 455=12 I.C. 257 (estoppel between banker and customer). It is not

CHAPTER IX.

OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligble, as by writing or by signs ; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

NOTES.

open to the defendant to show that the signatory was in reality acting for an undisclosed principal, whether the defendant is a drawer or an acceptor. 117 I.C. 160=1929 Sind 172 (1).

Sec. 118 : SCOPE OF SECTION.—Sec. 118 suggests that in India the rule generally is in favour of the admission of all the evidence of doubtful character though the weight to be attached will be a matter for the Court's discretion. 34 I.C. 976=18 Bom.L.R. 266. Where a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself by questioning the child that it is a competent witness within the meaning of sec. 118. 1939 Rang. 402. Sec. 118 vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding ; but this discretion must be exercised in a judicial manner. No doubt, the proposition that the competency of the witness to understand and give rational answers should be tested by Court by interrogating him before his examination is commenced, is not quite justified by the provisions of the section. But such a course should be pursued where the circumstances of the case make it plainly desirable. 43 C. W.N. 1117. Witness may be competent without being compellable. *See* Field, p. 402 (6th Ed.). Test of competency is that witness should be able to understand questions put to him. 102 I.C. 349=8 P.L.T. 594 ; 1928 L. 903 ; 1930 Sind 120 (understanding is the sole test of competency). Evidence of child or minor of tender years though taken without solemn affirmation is admissible in evidence, though such evidence must be received with the due care and caution. But the Court must be satisfied before receiving the testimony, if the witness is capable of understanding the nature and obligation of an oath. 45 I.C. 497=20 Bom.L.R. 365. *See also* 15 Mys.L.J. 217=42 Mys.H.C.R. 295. The absence of such examination does not invalidate the trial. 41 C. 406=14 Cr.L.J. 485. As to competency to testify, *see also* 23 A. 90 ; 11 A. 180. As to child witness, *see also* 15 Cr.L.J. 161 ; I.L.R. (1941) 2 Cal. 180 ; 20 Bom.L.R. 365 ; 16 B. 359 ; 16 M. 105 ; 10 A 207 ; 3 P.L.T. 649=66 I.C. 73 ; 41 M. 365=34 M.L.J. 460 ; 1928 L. 903 ; 1930 L. 337. Should not be examined if unable to give relevant information. Notwithstanding sec. 5 of the Oaths Act, a child's evidence is not inadmissible merely on the ground that no oath was administered to it. Sec. 13 of the Oaths Act governs such cases. 22 I.C. 737=38 M. 550. When two persons though accused of complicity in the same offence are tried separately, each is a competent witness at the trial of the other, though the case could be different if they are tried together. 45 C. 720=22 C.W.N. 405. Evidence of husband to disprove access on the question of legitimacy of child born during wedlock. *See* 38 M. 466=25 M.L.J. 594. As to competency to testify of a person who is unable to understand oath and its significance, *see* 10 O.C. 337=7 Cr.L.J. 89 ; 20 Bom.L.R. 305. Police officers as witnesses. 6 C.P.L.R. (Cr.) 1. Accomplice evidence. 8 P.R. 1904 (Cr.). Evidence of witness illegally pardoned by police. 16 B. 661=Rat. 776. *See also* 19 B. 363. Unless there is something shown against the witness, his evidence should not be discarded merely because he is related to the party when he is a man who *prima facie* must be regarded as respectable and reliable. 145 I.C. 330=1933 R. 162.

Sec. 119.—*See* 5 O.C. 246. S. 119 applies to the case of a witness who has taken a religious vow of silence and gives his evidence in writing to questions put to him. It is not the practice of the Courts to force any man to act contrary to his religious convictions so long as his acts are legal, and if a witness's religion forbids him to speak the Court will not compel him to speak and he must be deemed "unable to speak" within the meaning of S. 119. The evidence of such a witness given and taken in writing in open Court is properly taken and is not inadmissible. 20 Pat. 898. When a witness is so deaf and dumb, that it is impossible to make him understand the question put to him, in cross-examination, he cannot be a competent witness and his evidence if taken ought to be struck out and a conviction based solely on his evidence ought to be quashed. 14 I.C. 655=1912 M.W.N. 100.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In Criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Judges and Magistrates.

121. No judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(*c*) *A* is accused before the Court of Session of attempting to murder a police officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

Communications during marriage.

122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married: nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

NOTES.

Sec. 120: ILLUSTRATIVE CASES.—Where the husband in divorce proceedings relied on the birth of a child as evidence of adultery, under secs. 118 and 120, Evidence Act, his evidence as to non-access was admissible. 38 M. 466=25 M.L.J. 594. A child born 11 months after the marital intercourse between its parents had ceased, is illegitimate. (*Ibid.*) A person against whom are launched proceedings for order for maintenance under sec. 488, Cr. P. Code, is competent witness on his own behalf in such proceedings. 18 A. 107. *See also* 16 C. 781; 5 P.R. 1914 (Cr.); 7 C.P.L.R. 127; 19 P.R. (Cr.) 1903.

Secs. 121-125.—As to the principle of the sec. 121, *see* 3 A. 573. On this sec. 121, *see also* 3 M. at 177; 2 Weir 777=6 M.H.C.R. App. 42; 12 Cr.L.J. 277=10 I.C. 917; 20 C. 857.

SCOPE OF SECTIONS.—Questions mentioned in secs. 121, 124 and 125 are not barred. The witness has simply a privilege of refusing to answer them and a Magistrate may warn the witness of his privilege. But he cannot disallow such questions. 10 I.C. 917=12 Cr. L.J. 277. As to whether a Judge can be witness in a case tried by himself, *see* 4 B. L.R. (Cr.) 15; 20 W.R. (Cr.) 76; 2 C. 405; *Ibid.* 23 W.R. (Cr.) 60; 23 C. 328; 24 C. 167; 19 M. 263; 10 B.H.C.R. 81; 28 C. 709; 5 C.W.N. 846; 4 C.W.N. 604; 7 W.R. 190.

Sec. 122: SCOPE OF SECTION.—*See* 22 M. 1 at 3; 35 Bom.L.R. 174=1933 B. 153.

APPLICATION OF SECTION.—Before admitting evidence under sec. 122, the Court should ask the party against whom the evidence is to be given whether he or she would consent to the evidence being given. The consent must be express. 27 P.R. (Cr.) 1913=19 I.C. 1004. The restriction in sec. 122 is not one that can be waived or that a Court can relax, so that disclosure by a widow of certain communications made to her by her husband immediately before his death cannot only be not compelled but should not be permitted at all. 23 I.C. 511=40 C. 891. Under sec. 122, the consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask a party against whom the evidence is to be given whether he or she should consent to the evidence being given and not to admit it unless such consent is given. 171 I.C. 529=38 Cr.L.J. 1089=1937 R. 347. No statement of an incriminating nature made by the appellant as to her guilt under sec. 302 to her husband could be received in evidence. 1923 L. 40 (10 P.R. 1914, Foll.). *See also* 27 I.C. 664=34 P.R. 1914 (Cr.); 14 Cr.L.J. 273=19 I.C. 705. A woman's confession to her husband is inadmissible in view of sec. 122. An offence against a person in the section does not include an offence against a son though it may cause grief to the father. 10 P. R. (Cr.) 1914; 25 I.C. 525. Communication by an arbitrator to his wife shortly before his death that he accepted bribe from a party can be permitted to be disclosed only if sec. 122 is fulfilled. 1930 L. 280 (2). On a trial for breach of trust by a public servant, a letter of the accused to his wife found by the police was held admissible against him in evidence. 22 M. 1.

Secs. 122 and 123.—*See* 45 L.W. 470=(1937) 1 M.L.J. 613.

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

NOTES.

Sec. 123.—The privilege in respect of official and State documents from production in Court is a narrow one, most sparingly to be exercised. Scope of privilege pointed out. 35 C.W.N. 1121=61 M.L.J. 943 (P.C.). For the purpose of sec. 123 the Court cannot be invited to discuss the question if a particular document falls within the description of "an unpublished official record." The decision of the public officer concerned is final on that question. (8 Q.B. 255; 48 C. 304; 1930 M. 342, Foll.) 8 Mys.L.J. 474. Departmental enquiry papers are not unpublished document relating to affairs of State. *See* 161 I.C. 668=1936 N. 25.

Secs. 123 and 124: PUBLIC OFFICER CLAIMING PRIVILEGE—DUTY OF COURT.—Where a public officer declines to produce certain document, claiming privilege under secs. 123 and 124, it is for the Court trying the suit in which the documents are required, in the first instance to satisfy itself that the documents relate to any State affair or that their production will be detrimental to public interests and it is not for the public officer to decide whether the documents are privileged. The privilege regarding production of documents is a narrow one and the mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production. 161 I.C. 668=1936 N. 25. Statements made to and recorded by a Forest Range Officer in the course of an investigation into an offence under the Madras Forest Act do not relate to any affairs of State nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. No privilege can be claimed in respect of such statements under secs. 123 and 124 and there is no reason why the record of such investigation should not be made available to the Court which tries the offence under the Act. It will be for the Court after perusing the statements and considering the objections as to their admissibility whether they are admissible or not. 1937 M.W.N. 322=45 L.W. 470=(1937) 1 M.L.J. 613. Where the State is not a party, the following rules govern the question of production of records, claim of privilege, etc.—(1) All documents called for must be produced. (2) In case of State documents the privilege should be claimed by the witness who is summoned to produce them. (3) When objection is taken the Court cannot inspect the document but can take other evidence to determine its nature. (4) Ordinarily it is enough if the head of the department certifies that it refers to an affair of state. (5) The Court need not accept it as final but may require further evidence. (6) If the Court decides that it is not privileged, the document should be tendered in evidence. (7) If the Court considers it a State document, it cannot be admitted in evidence unless with the permission of the head of the department, 1938 N. 358. The accidents' register kept by a medical practitioner is not a privileged document, and a Magistrate cannot therefore refuse to cause production of the same. 1939 M.W.N. 1128 (2)=50 L.W. 796=1940 Mad. 240. Under sec. 123 it is only when the document deals with affairs of State that privilege can be rightfully claimed under the section. The diary of a foot constable who was shadowing the movements of a suspect could not possibly become an affair of the State within the accepted meaning of the words. 188 I.C. 717=42 P.L.R. 484=1940 Lah. 217.

Secs. 123, 124 and 162.—Sec. 162 deals with the production of documents in answer to summons and it is obligatory on a witness so summoned, to produce the documents called for by the Court; he has no right to determine whether the documents shall be produced. When producing them, it is for him to claim privilege, if the documents are privileged, and it is the duty of the Court to determine whether the documents shall be admitted and exhibited. Secs. 162 and 123 protect the discovery of documents relating to matters of State. There is difference between a private witness called upon to produce documents and a public officer summoned to produce public record. Sec. 124 is more particular and lays down the rule of public policy and the limits within which the production can be withheld, in other words, the character and quality of the privilege. The condition precedent to or the test of privilege under sec. 124 is that the communication was made to the public officer in official confidence. The question is primarily to be decided by the Court before whom the privilege is claimed. It should be claimed at the earliest opportunity, and it is futile to claim the privileges at a late stage when there has already been a disclosure of the document given in charge of the Court. 41 Bom.L.R. 391=1939 Bom. 237. *See also* I.L.R. (1940) Nag. 280.

Secs. 123-126: SCOPE OF SECTIONS.—Questions referred to in secs. 123 and 126 should be disallowed by the Magistrate. 10 I.C. 917=12 Cr.L.J. 277. Where the accused's demand for permission to peruse the complaint merely to ascertain the name of the informer is denied, the non-production of the complaint is not improper but privileged under sec. 125. The disclosure of the name of the informer will be contrary to sec. 123. 37 I.C. 54=18 Cr.L.J. 70. Statements in departmental enquiry into bribery case. 16 C.W.N. 431=13 Cr.L.J. 445. Where letters addressed by the head of a department reach the addressee those letters would not be unpublished documents within the meaning of sec. 123, and the Court would be entitled to see the documents and decide under sec. 162 as to their admissibility. 1933 L. 157=143 I.C. 683. Communications between

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communications.

NOTES.

ministers of State. 27 B. 189; 32 M. 62. As to production of State records to which protection of this section does not extend, *see* 2 Weir 781. An entry in a posting register kept by the Customs department showing the sections to which officers are posted, is not a State document for which privilege can be claimed under sec. 123 or 162. 45 I.C. 284. A statement made by a subordinate officer to his superior regarding the apprehension of an accused person within the hearing of various other people is a relevant fact and is admissible under sec. 124. 45 I.C. 284=22 C.W.N. 451. Statements made by witnesses in the course of a departmental inquiry into the conduct of police officers are not privileged under secs. 123, 124 or 125. 15 I.C. 77=16 C.W.N. 431. The Magistrate is bound to call for them under sec. 162 and to allow the accused to cross-examine the witnesses under sec. 155 on the statements made whether they are in favour of the accused or against them. (*Ibid.*) Sec. 163 entitles the prosecution to make use of them if they turn out to be not in favour of the defence. 15 I.C. 77=16 C.W.N. 431. The question whether a certain document shall be given in evidence or withheld, in a case where objection is taken to its production, must be decided by the public officer concerned and not by the Judge. If the objection is taken by the proper person, the Court will not go behind it. 119 I.C. 718. *See also* 178 I.C. 982=1938 A.W.R. (C.C.) 140.

Sec. 124.—*See* notes under sec. 123. *See also* 6 Bom.L.R. 131; (1911) 2 M.W.N. 369; 2 Bom.L.R. 329; 7 C.W.N. 246. For the purposes of sec. 124, communication has to be made to the public officer who considers that the public interest suffers by its disclosure. It is for the Court to decide whether or not a particular document for which privilege is claimed was a communication made to a public officer in official confidence and if the Court decides that it was so made, then it has no authority to compel the public officer to produce it; for the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests. Where the statement contained in a document was not intended to be made public, it must be said that it was made in official confidence. It is not, however, enough for the public officer to merely claim privilege. He must apply his mind to the question whether public interests are likely to suffer by the disclosure of the contents of the document called for; and only if he considers that public interests would suffer by such disclosure, would the Court grant privilege. 41 Bom.L.R. 391=1939 Bom. 237. It is not proper for an authority claiming privilege to claim privilege without considering particular papers and then coming to a decision whether privilege should or should not be claimed. 178 I.C. 982=1938 O.W.N. 1354=1939 O. 65. The most reasonable construction of the term 'public officer' in sec. 124 is to be partly derived from the section itself. He is an officer with public as opposed to private duties who received communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The Court of Wards, for the purposes of sec. 124 is to be considered as a Government office and its officers public officers. 178 I.C. 982=1938 O.W.N. 1354=1939 O. 65. Sec. 124 is designed to prevent the knowledge of official papers beyond that circle that which would obtain knowledge of them in confidence whether the confidence was express or implied. As the object is to prevent the disclosure of things not known outside that circle which is in confidence, the section has no application when once there has been a disclosure to what may be called a member of the public to whom the contents of such papers has not been made known in confidence. 178 I.C. 982=1938 O.W.N. 1354. Resolution of Government containing opinions of Government officers whether privileged. 99 I.C. 293=21 Bom.L.R. 1213=1926 B. 590. A Magistrate who came across a document during trial of a criminal case consulted the first Magistrate and declined to allow the document to be produced on ground that it was a document of State. *Held*, his action was correct. 22 N.L.R. 34. The law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed, and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that the head of a department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but it would be good to follow the practice of the English law, namely that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document. The Court is entitled, according to the circumstances of each particular case, to draw an inference adverse to the party claiming the privilege. 188 I.C. 717=42 P.L.R. 484=1910 Lah. 217. Correspondence between President of Municipal Council and Secretary to Government is privileged. Nor could secondary evidence from the President be got. 6 Mys.L.J. 453. Whether President of the Municipal Council is a "public officer." (*Ibid.*) A confidential report submitted as the result of a confidential inquiry held under the orders of a railway officer to enable him to take departmental action, is a privileged document falling within the purview of sec. 124 of the Evidence Act. Nor is such a document admissible under any section of the Evidence Act. 28 S.L.R. 274. Whether station

Information as to commission of offences.

[1][125. No Magistrate or police officer[2] shall be compelled to say whence he got any information as to the commission of any offence, and no revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation.—" Revenue-officer " in this section means any officer employed in or about the business of any branch of the public revenue.]

Professional communications.

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [illegal][3] purpose ;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader][4], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

LEG, REF.

[1] This section was substituted by Act III of 1887, sec. 1.

[2] All the privileges which a Police-officer has under sec. 125 of this Act have been conferred on a Commandant or Second-in Command of military police in Burma; *see* the Burma Military Police Act (XV of 1887), sec. 13, Burma Code. *See also* the revised edition of the Act as modified up to 1st May 1899, printed by the Government of Burma.

[3] Substituted for the word "criminal" by Act XVIII of 1872, sec. 10.

[4] Inserted by *ibid.*

NOTES.

master of State Railway is a public officer. 6 O.W.N. 937=1929 O. 543. Statements made to a station master of State Railway not made in official confidence is not privileged. 1929 O. 543. The Agent of a Railway Company is not a public officer as defined in sec. 2 (*e*), C. P. Code, although he has power under sec. 131 of the Railways Act to arrest certain persons for offences committed on the Railway. He cannot, therefore, object to produce documents in his possession under sec. 124. 43 C.W.N. 664.

Sec. 125: SCOPE AND OBJECT OF THE SECTION.—Sec. 125 rests upon policy and it protects the name of a spy or informant not the nature of the information and it has no application to an informant who lays a sworn information and thereby initiates criminal proceedings. This rule is clearly applicable to gambling cases. 29 I.C. 79=16 Cr.L.J. 447. In criminal prosecutions the witnesses for the Crown are privileged from disclosing the channel through which they received or communicated information. But this privilege cannot be claimed by a detective. 42 C. 957=19 C.W.N. 676.

Sec. 126.—Sec. 126 is not restricted only to oral communications made to the pleader by the client, but extends also to facts observed by the pleader in the course of and for the purpose of his employment and he is not bound to disclose them without the consent of the client. 152 I.C. 164=1934 L. 269. The privilege afforded to a legal adviser under sec. 126 is of a very limited character. It protects only such communications as are made to the legal adviser in confidence, in the course and for the purpose of his employment. And if the communication is not made in confidence then, communication is in no sense privileged. 1933 Sind 47. A failure on the part of a client to claim privilege when he is under cross-examination does not amount to "express consent" given by him to his legal adviser to disclose a communication which is otherwise privileged under the section. (*Ibid.*) There is no privilege to communications made before the creation of the relationship of pleader and a client. Where two persons have a dispute about a claim made by one of them upon the other and both seek the help of a pleader, and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible. The test is whether the communication is made to the witness in his character of legal adviser. Further, in order to attract sec. 126 the communications by the party to his pleader must be confidential. 58 C. 1379=1932 C. 148. But the mere presence of friends of clients specially when such friends occupy more or less the same position as the himself, does not destroy the privilege. 1933

Illustrations.

(*a*) *A*, a client, says to *B*, an attorney—" I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) *A*, a client, says to *B*, an attorney—" I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c*) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A's* account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Section 126 to apply to interpreters, etc.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or, otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader][1], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Confidential communications with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case, he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Production of title deed of witness, not a party.

130. No witness who is not a party to a suit shall be compelled to produce his title deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them

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LEG. REF.

[1] Inserted by Act XVIII of 1872, sec. 10.

NOTES.

Sind 47. There must be a definite charge of fraud and something to support the charge before the claim of privilege can be overruled; and the legal practitioner can then be rightly compelled to answer the question with regard to the condition of the document at the time that it was in his possession. 144 I.C. 175=1933 R. 61 (2). The Court cannot rule out the evidence of a counsel as inadmissible on the ground of the incompetency of the counsel to be a witness. 24 I.C. 165=12 Cr.L.J. 429. On this section, *see also* 3 A. 91; 28 B. 263; 4 Bom. 376; 4 Bom.L.R. 460; 12 A.L.J. 285. Where a Hindu widow applied through her pleader for a succession certificate to the estate of her husband and the same was granted without the production of the will, the contents of which had been disclosed to the applicants' pleader, and in a later proceeding the pleader was sought to be examined with reference to the will, *held*, that as the pleader, became acquainted with the will in the course of and for the purpose of his professional employment he was privileged under sec. 126. The circumstance that the widow was willing to tender the will in Court or that its contents had otherwise been made known was entirely immaterial. 31 Bom.L.R. 1046=1929 B. 414. Communications between a prosecutor in a Crown case and his attorney are not privileged. 27 S.L.R. 72=1933 Sind 47. There is no protection afforded by the Evidence Act to a doctor as such. It is his duty to, assist the Court in every way possible and to disclose to the Court all the information in his possession relevant to the matter in issue. 55 A. 134=1933 A.L.J. 14=1933 A. 56.

Sec. 127.—Protection to interpreters is of peculiar importance in India as there are so many races speaking different languages. 26 C. 53=2 C.W.N. 649.

Sec. 129.—*See* 4 B. 576; 2 B. 453; 11 C. 655; 21 C. 392; 29 Bom.L.R 414.

Sec. 130.—Witness present in Court, if can be compelled to produce document. *See* 12 Cr. L.J. 250; 14 C.L.J. 120. Effect of non-production. 15 C.L.J. 7=17 C.W.N. 108=13 I.C. 120.

with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person, having possession, could refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend to directly or indirectly to criminate, such witness, or that it will expose, or tend, directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

133. An accomplice shall be a competent witness against an accused person ;

NOTES.

Sec. 132.—"Compelled to answer question," meaning of. 28 S.L.R. 251=152 I.C. 346=1934 Sind 114 ; 41 Cr.L.J. 48. The compulsion contemplated in the proviso to sec. 132 is something more than being put into the box and being sworn to give evidence ; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to undertand that he must answer all questions without exception, it would amount to compulsion. If he hesitates to answer and the Court tells him he must answer the question, the hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso. [52 M. 432 (437), Foll.] 1939 Rang.L.R. 479=184 I.C. 566=12 R.R. 159=1939 Rang. 371. A witness must claim the benefit of the protection afforded by sec. 132 before he makes the statement in respect of which a question is subsequently raised. 40 A. 271=43 I.C. 823 ; 1928 N. 58. His status, motive, etc., go a great way to determine his criminal responsibility. (*Ibid.*) Unless a person objects to any question the answer to which is likely to criminate him, he cannot be said to have been compelled to give such answer within sec. 132 proviso of the Act. 59 I.C. 324=22 Bom.L.R. 1247; 50 B. 162 ; 10 O. W.N. 735=1933 O. 370. *See also* 43 Mys.H.C. R. 675. A person who answers questions put to him by counsel without seeking the protection of sec. 132 of the Evidence Act is not entitled to protection in a charge of defamation and that all he is entitled to is the limited privilege under sec. 499, I. P. Code. 52 M. 432=56 M.L.J. 570. The mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness. 1928 N. 58. The protest from a witness is not necessary in respect of every question for the benefit of the privilege afforded by sec. 132. 43 A. 92=18 A.L.J. 940=58 I.C. 825. But *see* 1926 L. 385. Where the witness was compelled to answer the question put to him by the Judge under sec. 132 proceedings for defamation could not be taken against him. 11 O. W.N. 1075=1934 O. 386 ; 42 A. 257=21 Cr.L. J. 186 ; 54 I.C. 890. A person making a defamatory statement as a party or as a witness in a judicial proceeding is liable to be charged under sec. 450, I. P. Code, irrespective of the liability for perjury. Such person can be protected if he pleads and succeeds in applying any of the exceptions mentioned in sec. 499, I. P. Code. 10 I.C. 682=12 Cr.L.J. 193. The English doctrine of absolute privilege in cases of defamation does not apply in India. 13 I.C. 217=13 Cr.L.J. 25. *See* 51 M.L.J. 112 (F.B.). The taking of a thumb impression is not equivalent to asking a question and receiving an answer and may be proved against the person in any criminal proceeding and the proviso to sec. 132 does not apply where no objection is taken to the thumb impression being taken. 39 C. 348=13 I.C. 925=16 C.W.N. 503. Where a charge for perjury is based on two contradictory statements, every possible presumption in favour of their reconciliation should be made. 15 Cr.L.J. 379=23 I.C. 747. A sanction to prosecute for perjury should not be given on the basis of two contradictory statements where two statements are reconcilable and every possible presumption must be in favour of such reconciliation. 24 I.C. 576=15 Cr.L.J. 488. A person who is tried for an offence under sec. 3 of the Gambling Act has every right to cite as his witness another person who is a co-accused with him for an offence under sec. 4 in a separate trial. The co-accused's position is sufficiently protected by sec. 132. 73 I.C. 521=1924 L. 247. As to privilege of statement made before the coroner, *see* 50 B. 56.

Sec. 133.—*See also* notes under sec. 24. Accomplice is a competent witness. 45 A. 226=1923 A. 91.

"ACCOMPLICE" — MEANING OF.—The word

Accomplice.

and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

NOTES.

'accomplice' has not been defined by the Act and should therefore be presumed to have been used in its ordinary sense. An accomplice means a guilty associate or partner in crime, or who, in some way or other, is connected with the offence in question, or who makes admissions of facts showing that he had conscious hand in the offence. An accomplice confesses himself a criminal who has been concerned in the commission of a crime, *participes criminis* whether he is concerned in the strict sense legal propriety as principal in the first or second degree, or merely as accessory before or after the fact. Persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged. 1941 A.W.R. (C.C.) 402 =1941 O.A. 1018. One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice. 73 I.C. 506=1923 L. 345. *See also* 161 I.C. 289=63 Cr.L.J. 289=1936 C. 101; 45 C.L.J. 581; 99 I.C. 929; 146 I.C. 240= 1933 R. 190; 1937 R. 513 (accessory after the fact). An accomplice is a witness and not an accused person. 9 P.R. (Cr.) 1911=10 I.C. 340=12 Cr.L.J. 267. The rule of law says that an accomplice is competent to give evidence, and the rule of practice says that it is almost always unsafe to convict upon his testimony alone. But the rule of law to this extent triumphs over the rule of practice that if special circumstances exist which render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of sec. 133. There is no difference between the law in India and the law in England in this respect. 1937 Rang.L.R. 110= 169 I.C. 705=38 Cr.L.J. 785=1937 R. 209. Evidence of accomplice and confession of co-accused—Distinction between. *See* 38 Bom.L.R. 1122=1937 B. 31. A suspected participator in the crime appearing as a prosecution witness is on the same basis as an accomplice and a conviction cannot be based upon his uncorroborated testimony. 15 Cr.L.J 440=24 I.C. 146. Persons taking part in negotiations for bribe cannot be said to be independent witnesses and their evidence is not free from doubt but persons merely present are not accomplices. 20 Cr.L.J. 258=50 I.C. 18; 34 P.L.R. 836. Person having knowledge of commission of offence and keeping quiet for some days is no better than accomplice. 30 C.W.N. 816. But *see* contra 38 C.W.N. 777 =1934 C. 678.

ACCOMPLICE AND DETECTIVE—DISTINCTION.—The detectives and accomplices are distinguished clearly when a conspiracy contains persons of both the character. The former enter with a design of detecting or betraying it, while the latter do concur fully with other accomplices till they are alarmed or they turn upon their associates and expose them. In the case of those, corroboration equal to that of others is necessary. 16 I.C. 257=16 C.W.N. 1105.

WHO IS NOT AN APPROVER.—Where a person was not granted a formal pardon but was examined under sec. 10, Gambling Act, he is not an approver and therefore his evidence can be accepted without corroboration. L.R. 1 A. (Cr.) 101. One who is already convicted of a different offence could not be considered as an accomplice as he has nothing to gain or lose by the evidence he gives in Court. 14 I.C. 607 (2) =15 C.L.J. 962.

ACCOMPLICE AND INFORMER—DISTINCTION.—If at the time when a person joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice; and his position is not modified simply because later on he turns round and carries information to the police. (1928 L. 193, Rel. on.) 110 I.C. 676=1928 L. 647. *See also* 9 L. 550= 1928 L. 193.

VALUE OF ACCOMPLICE'S OR APPROVER'S EVIDENCE.—The evidence of an approver, if believed, is sufficient foundation whereon to repose a conviction, but in practice the Court *ex majori cautela* insists upon corroboration of the approver's statements in material particulars. 69 I.C. 462=1925 L. 153; 151 I.C. 473=1934 C. 719 (F.B.). *See also* 1938 Rang.L. R. 213; 1937 A.M.L.J. 123. This rule is not rendered inapplicable by the personal conduct and antecedents of the approver or by the absence of motive on his part or on the part of the investigating agency to implicate individual accused. 148 I.C. 745=1934 L. 583. The confession of an accomplice should be subjected to the most anxious scrutiny in so far as it incriminates others, and received with caution as it is not sifted by cross-examination. 14 Cr.L.J. 179=19 I.C. 179; 16 Cr.L.J. 233; 27 I.C. 905 =8 S.L.R. 203; 103 I.C. 49=1927 L. 581; 24 A.L.J. 1050; 99 I.C. 929. The evidence of an approver should not be believed without material corroboration and in order to see whether there is such corroboration, the Court should scrutinise and marshal out very carefully the facts. 9 I.C. 232=12 Cr.L.J. 35. The statement of an approver, veracious though it may appear to be, and though the truth of a large part of it be established, beyond all doubt nevertheless requires corroboration. 34 I.C. 993 =17 Cr.L.J. 273. Evidence of approver may, in exceptional cases and for reasons stated, be admitted though uncorroborated. 17 Cr.L.J. 220=34 I.C. 332. There should be direct and material corroboration of the statement of an approver who is of very bad character. 32 I. C. 843=17 Cr.L.J. 107. Where the complicity of a person is due solely to coercion and his evidence cannot be ascribed to any desire to escape legal consequences, the discredit attaching to his evidence is practically negligible. 19 I.C. 207=1912 M.W.N. 1108.

NECESSITY FOR CORROBORATION.—An ap-

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prover's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. 13 I.C. 998=13 Cr.L.J. 182. *See also* 9 L. 550=1928 L. 193; 9 Luck. 355=1934 O. 90; 73 I.C. 808=1924 L. 235; 19 A.L.J. 725=63 I.C. 455; 34 I.C. 976=18 Bom.L.R. 266. Persons who assisted in the concealment of the offence are no better than accomplices. 1929 L. 540. A conviction based on the evidence of an accomplice is not bad but in established practice it is necessary that such evidence should be corroborated by some untainted evidence in material particulars. 24 I.C. 174=18 C.W.N. 550; 73 I.C. 963=4 P.L.T. 381; 2 P.L.T. 773=60 I.C. 56=1929 L. 850. Conviction on uncorroborated evidence, when approver is a scoundrel, is not warranted. 77 I.C. 429=1924 R. 173. The probative value of the evidence of an accomplice is practically the same as the confession of a co-accused. 24 I.C. 156 (38 B. 156, Foll.). A conviction based on the evidence of an accomplice or the confession of a co-accused is not illegal, though it is not safe to act on such testimony, unless corroborated in material particulars. 24 I.C. 153=15 Cr.L.J. 417; 1929 N. 215; 7 O.W.N. 862.

WHAT IS GOOD CORROBORATION AND WHAT IS NOT.—Corroborative evidence should confirm in some material particulars not only the evidence that the crime has been committed, but also that the accused committed it. 1933 L. 295=1933 Cr.C. 394. The nature of corroboration necessarily varies according to the particular circumstances of the offence charged. The corroboration need not be such as to confirm the accomplice in every detail of the crime; nor need it be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. (*Ibid.*) In all cases depending upon informer's evidence the degree of support required for the evidence depends in each case upon the individual's credit. 15 I.C. 987=16 C.W.N. 669. All persons coming technically within the category of accomplices cannot be treated as precisely on the same footing. 13 P.L.T. 802=1933 P. 96. An approver's evidence supported by the retracted confession of a co-accused behind the back of the accused is not sufficient to convict the accused. Such a retracted confession is not a corroboration of a high value. 18 I.C. 672=11 A.L.J. 73. It is unsafe to rely upon the uncorroborated testimony of the approver; the corroboration must be of the statement connecting the accused with the offence. 12 I.C. 513=12 Cr.L.J. 537 (A.); 1929 M.W.N. 794. There is nothing in sec. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation, this corroborative value would be greatly diminished. 1923 L. 666. *See also* 76 I.C. 698=1923 L. 335; 1923 L. 152; 96 I.C. 127=1926 A. 705; 146 I.C. 364=1933 L. 946. Courts must exercise great caution if there are circumstances which indicate inducement or pressure which is not recognised by law. 148 I. C. 745=1934 L. 583. *See also* 34 P. L. R. 2. Confession of one accused cannot be said to be corroborated by the confession of another as against a third accused who has not confessed at all. But between the first two, the confession of one may be said to be corroborated by the confession of the second and *vice versa*. 60 I. C. 786=22 Cr.L.J. 290 (L.). (38 B. 156, Dist.) The rule that testimony of an approver must be corroborated not only as to the crime but also as to the identity of each accused person and that the corroboration must proceed from an untainted source is not a technical rule, but is founded on long judicial experiment. 38 C. 559=10 I.C. 582=15 C.W.N. 593; 1929 N. 222; 1929 L. 850=34 P.L.R. 866. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of consultation, deposed to the same acts as having been committed by particular accused person. 3 L. 144=68 I.C. 113=1922 L. 1. An accused should not be convicted on the statement of an approver unless such testimony is strongly corroborated and the corroboration distinctly implicates the accused with crime committed. 40 I.C. 696=9 P.W.R. (Cr.) 1917; 39 I.C. 680=9 P.R. (Cr.) 1917; 1930 P. 164=11 P.L.T. 545; 146 I.C. 701=1933 N. 352; 147 I.C. 1172=1934 C. 114. The evidence of one accomplice is not sufficient corroboration of the evidence of other accomplices, nor are previous statements, made by the same person sufficient. 21 M.L.J. 283=9 I.C. 897; 1928 N. 215; 1929 L. 850; 1933 C. 146; 146 I.C. 1064=1933 O. 355. Accomplices in different stages of crime—Their evidence is not mutually corroborative. 1933 M.W.N. 1129. *See also* 146 I.C. 701=1933 N. 352. Corroboration—Nature and extent of—Whether English and Indian Law on the point are the same. *See* 69 I.C. 257=17 N.L.R. 113; 5 P. 63=93 I.C. 884; 1929 M.W.N. 698. In cases where a judge combines the functions of a judge and jury, he is bound under law to scrutinise the accomplice's evidence with the same degree of care and caution, which is required of him in a trial by jury, and, just as he is bound to give a warning to the jury, he must warn himself that it is unsafe to convince a person on accomplice evidence in the absence of substantial corroboration by independent evidence. 114 I.C. 457=1929 N. 215; 1934 C. 114=37 C.W.N. 934. It is mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. An accused is under no legal obligation to do so. (*Ibid.*) *See also* 1941 O.A. 1018=1941 A.W.R. (C.C.) 402. An accomplice is a competent witness against an accused and a conviction will not be illegal if it proceeds upon his uncorroborated testimony; but this absolute rule of law as regards the evidence of accomplice is subject to a rule of guidance contained in Ill. (*b*) of sec. 114 of the Evidence Act that an accomplice is unworthy of credit

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

NOTES.

unless it is corroborated in material particulars. 114 I.C. 609=1929 N. 233. The fore most essential condition for accepting the approver's statement is that it must be a trustworthy statement. 114 I.C. 623=1929 N. 222. Where the accomplice's evidence is found to be truthful, there is no need for corroboration. 9 P.L.T. 672; 1930 M. W. N. 169. Credibility of approver's testimony depends upon the extent of removal of "taint" in his evidence. 1929 L. 850. Where the evidence of an accomplice is corroborated only as regards some accused, conviction of others is bad. 1929 M. 222. *See also* 146 I.C. 934=1933 P. 112. Corroboration may be circumstantial. 1930 N. 97; 1933 L. 294. If the evidence of an approver is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution. 1930 P. 164. The rule in sec. 114, illus. (*b*), that an accomplice is unworthy of credit unless, he is corroborated in material particulars. has become a rule of practice of so universal application that it has now almost acquired the force of law. 120 I.C. 721=1930 N. 97. *See also* 184 I.C. 545=1939 Rang. 361.

RETRACTED STATEMENT IS ADMISSIBLE.—A retracted statement of an approver is admissible as evidence against an accused person. 61 I.C. 528=12 L.W. 385. May be sufficient corroboration of the approver's story as against himself but not against a co-accused. 20 Cr.L.J. 188=49 I.C. 604. If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. 55 A. 91=1933 A. 31.

DELAY IN MAKING STATEMENTS.—Long delay in making their statements would make their evidence liable to grave suspicion. 67 I.C. 828 (2)=2 L.L.J. 296.

Sec. 134: SCOPE AND PRINCIPLE OF SECTION —EXPLAINED.—10 W.R. 236; 22 C.W.N. 408. Court may believe one witness in preference to a larger number on the other side. 24 W.R. 18 (Cr.). Evidence in case of perjury—Necessity for more than one witness. 5 W.R. (Cr.) 23; 23 Bom.L.R. (Sup. Vol.) F.B. 457. Case of two contradictory statements—Conviction on alternative charges. *See* 4 B.L.R. (Ap. Cr.) 9; 13 C. 435; 8 W.R. (Cr.) 79; 9 W.R. (Cr.) 52; 9 W.R. (Cr.) 25; 12 W.R. (Cr.) 11; 12 W.R. (Cr.) 66; 4 B.L.R. (A.C.) 4; 3 B.L.R. (Ap. Cr.) 36; 12 W.R. (Cr.) 31; 22 W.R. (Cr.) 2; 4 B.L.R. (Ap. Cr.) 9; 10 B. 124; 11 B. 702. *See* Field, 6th Ed., p. 433.

Sec. 135.—Order of examination of witnesses generally left to discretion of counsel. 5 C.W.N. 15. Where at the trial the prosecution witnesses who had been summoned were present in the Court as also the complainant and though the accused for certain reasons of his own wanted to cross-examine the witnesses before the complainant the Court insisted on the complainant being examined first on the ground that his state of health necessitated that course. *Held*, that the Magistrate should have acceded to the request of the pleader of the accused and directed the cross-examination of the witnesses before the complainant. 37 C.W.N. 288=1933 C. 189. Where the witnesses are not summoned at the instance of the accused for cross-examination, but are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined in chief rests at the discretion of the prosecution. (1933 C. 189, Dist.) 151 I.C. 236=1934 N. 209. Power of Court to regulate order of examining witnesses. 39 C. 245=16 C.W.N. 265. *See also* 8 B. 200; 12 B. 459; 7 C.L.R. 274. Witness present during examination of previous witness—Power of Court to exclude the witness—C. P. Code, sec. 151. 1934 A.L.J. 750=1934 A. 840. Effect of Judge's suggestion that further evidence need not be given. 6 Bom.L.R. 636. "No matter how often the same case comes before Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo*." *See* W.R. 1864 (Cr.) 38; *ibid*. 1; 13; 18; 22 W.R. (Cr.) 38; 1 B.L.R. (O.Cr.) 37; 9 M. 83. Omission to do this, though illegal, yet if it has not occasioned a failure of justice, a new trial need not be ordered. 9 M. 83. Where a party to a suit was present in Court when his witnesses were examined and later on claimed to be examined as a witness in support of a contention put forward by him and it was disallowed, it was *held* that there was no doubt a practice to refuse to allow such a person to give evidence, but that there was no rule of the Court to that effect, nor was there any provision of law in the C. P. Code or in any other statute. S. 135 did not authorise a Court of law to refuse the examination of a witness who might have done something which was not very desirable. It was also held that the inherent powers of the Court were very wide and undefinable, but at the same time the exercise of such powers should not be made in an arbitrary and capricious manner. 1941 O. A. (Supp.) 586=1941 A.L.J. 345=1941 All. 314.

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c*) *A* is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (*B*, *C* and *D*) which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue. The Court may either permit *A* to be proved before *B*, *C* and *D* is proved, or may require proof of *B*, *C* and *D* before permitting proof of *A*.

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

NOTES.

Sec. 136.—*See* notes under sec. 135. Where in cross-examining a witness for the prosecution, questions are disallowed by the Court on the ground of irrelevancy or other grounds, the evidence should show what the questions are and the reason for disallowing them. 55 I.C. 593=1 P.L.T. 632.

Secs. 137-138: APPLICATION OF SEC. 138.—It is certainly implied by sec. 138 that the party should have an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of the law. 73 I.C. 339=24 Cr.L.J. 595. Sec. 138 deals with order of proceedings and not with rights of parties. 1929 C. 822. Unfinished testimony, when admissible. 144 I.C. 331=1933 L. 561.

SCOPE OF CROSS-EXAMINATION.—The right of cross-examination given by sec. 138 is not fettered by the fact that there are police papers which are not referred to by the prosecution; and the cross-examination can be made on all matters allowed by the Evidence Act. The cross-examination is not limited to matters raised in evidence elsewhere. 10 I.C. 917=4 Bur.L.T. 113. Court should generally leave cross-examination to the parties. *See* 82 I.C. 154=1924 O. 361. The questions put in cross examination must be either relevant and pertinent to the matter in issue or calculated to elicit answers affecting the witness's title to credit. 6 Mys.L.J. 551 (F.B.). Read in this connection the observations of Sir John Wallis in 1932 P.C. 69 =62 M.L.J. 457 (P.C.).

LIMITS OF CROSS-EXAMINATION.—2 Jur. N. S. 161; 7 B.L.R. (App.) 88; 9 W.R. 586; 12 M.I.A. 381; 3 B.L.R. (A.C.) 273. Where the same witness is cross-examined on behalf of different parties and during the course of it he makes a statement damaging to the case of one of the parties who had already cross-examined him, then, the latter party is entitled to cross-examine the witness with reference to the statement so made. 189 I.C. 757=1940 All. 353.

USE OF CROSS-EXAMINATION.—*See* 6 W.R. 181; 21 C. 401; 6 C. 279. Object of cross-examination. 30 C. 625. There is no hard and fast rule as to the right of a counsel to demand in cross-examination the repetition of the whole story told in the examination-in-chief. 15 Cr. L.J. 148=22 I.C. 724. Right of party to cross-examine hostile witnesses. *See* 1937 A.L.J. 1214=1937 A. 754. A witness was cross-examined and re-examined. In re-examination fresh matter was introduced. The Counsel asked for cross-examination of the witness again. The Court granted only three minutes. *Held*, the object of re-examination was to clear ambiguities in cross-examination and that if new and important matter was allowed to be introduced in

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading questions.

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

NOTES.

re-examination, the other party has a right to cross-examine the witness as regards the matter introduced. Therefore the time of three minutes given for cross-examination was insufficient. 176 I.C. 515=38 Cr.L.J. 416 (2)=1937 A. 171.

SCOPE OF RE-EXAMINATION.—After the cross-examination of the witness on behalf of the accused, the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. 3 P.L.T. 32. *See also* 44 I.C. 343.

Sec. 138.—The object of re-examination is to clear the ambiguities in cross-examination and if new and important matter is allowed to be introduced in re-examination by the prosecution, the accused has a right to cross-examine the witness as regards the matters so introduced. 1936 A.W.R. 967=1937 A. 171. Where the cross-examination of a witness begins on one day and is completed only the next day, the party calling the witness is entitled to re-examine the witness on the whole field covered by the witness and not merely on the matters arising in the cross-examination on the second day. The law does not contemplate the placing of any such restriction on the right of re-examination conferred by S. 138 and it is not open to the Court to take it away. If the matter elicited in re-examination gives rise to any suspicion that it has been the result of tutoring with regard to any matter covered on the first day of the cross-examination, it would be open to the Judge to draw the attention of the jury to the fact that the lapse of time may have given an opportunity for preparation; but this would not be a ground for refusing to let questions in re-examination being put. 195 I.C. 107=1941 P.W.N. 255=22 P.L.T. 327=1941 P. 362. To tender a witness for cross-examination in a Sessions trial is a very irregular course. The practice of tendering a witness for cross-examination is inconsistent with S. 138. Such a course should, if at all, be adopted only in the cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court but at the same time do not want to deprive the accused of his right of cross-examining such witness, they tender him for cross-examination. But the witness should, strictly speaking, be asked by the prosecution, with the consent of the accused's pleader and the leave of the Court, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. In any case the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important witness. 43 Bom.L.R. 946. *See also* 44 Bom.L.R. 27 (F.B.).

Sec. 139.—*See* 12 B. 63.

Sec. 142—A leading question to the prose-

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked.

143. Leading questions may be asked in cross-examination.

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—"*B* wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing *A's* motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Cross-examination as to previous statements in writing.

145. [1]A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

LEG. REF.

[1] As to the application of S. 145 to police diaries, *see* the Code of Criminal Procedure, 1898 (Act V of 1898), S. 172.

NOTES.

cution witness by the prosecution cannot be allowed nor can the reply be used. 1 P. 630=4 P.L.T. 76. On this section, *see also* 12 M.I.A. 380.

Sec. 143.—In the course of cross-examination by the defence for eliciting facts in their favour from the prosecution witnesses the defence are entitled under S. 143 to ask leading questions. 19 C.W.N. 676=42 C. 957. The Court may, in its discretion under S. 143, permit the prosecution to cross-examine a witness even though he had been originally called by them with regard to the matters elicited by the defence. (*Ibid.*). Leading questions such as can properly be put in cross-examination of a hostile witness cannot be put by the Public Prosecutor in examination-in-chief. 2 P.L.T. 757. If a Judge disallows a question, the pleader should have the question, and order disallowing it recorded, if such a refusal is illegal. 36 I.C. 468=9 Bur.L.T. 133. On this section, *see* 37 C. 467.

Sec. 144.—*See* 35 C. 141; 19 A. 390 at 421; 12 Cr.L.J. 214.

Sec. 145.—Scope and application of the section. *See* 19 A. 390; Rat 610 and 924; 11 B.H.C.R. 120; 20 C. 642; 31 C. 142; 33 C. 1023; 28 C.W.N. 587; 74 C.L.J. 547. An illiterate person is not immune from the processes of law with regard to contradiction by a previous statement, because S. 145 makes not the slightest difference whether the witness is literate or illiterate. 182 I.C. 935=41 P.L.R. 775=1939 L. 268. Where an approver goes back upon his confession, it can be used to contradict him when he is treated as a hostile witness, but it is not substantive evidence and cannot be used to contradict a co-accused's confession. 184 I.C. 274=1939 N.L.J. 442=1939 N. 295; I.L.R. (1941) N. 506. Before a previous statement of a witness in writing can be used to contradict his evidence, his attention must be specifically drawn to the statement sought to be used under S. 145. That is, however necessary only if the document containing the statement becomes relevant solely under the section and is otherwise irrelevant and inadmissible. If the document is otherwise relevant and admissible as an admission under S. 21 of the Act, it is not necessary to observe the provisions of S. 145 before using it. 17 P.L.T. 621=1936 P. 588. *See also* 1939 M.L.R. 76 (Cr.). Where the whole of the previous statement made by the witness is read out to him and he is cross-examined in respect of it but he gives evasive replies, S. 145 is fully complied with; although the witness is not specifically asked about particular portions of that statement 40 P.L.R. 471. There is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement, first to prove that statement. S. 145 has to be read with S. 162, Cr. P. Code, and quite clearly indicates that the attention to a witness is to be called to the previous statement before the

NOTES.

writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statements thereafter to be proved. On the other hand if the statement still requires to be proved that can be done by calling the person before whom it was made. I.L.R. (1939) L. 509=41 P.L.R. 775=1939 L. 268. A document which is used to contradict a witness must be put to the witnesses. Simply because the witness does not go into the witness-box, the Court is not entitled to break the law and admit such document. 150 I.C. 841=1934 P. 55 (2). Section can be used only to show that the witness is *contradicting* something he has said before ; but not to show that he had omitted to state in former inquiry to the Police what he was stating at the trial. 56 M. 475=1933 M. 372 (2)=64 M.L.J. 519. S. 145 does not militate in any way against previous statements being used by way of corroboration of statements put in under S. 288, Cr. P. Code, which are substantive evidence in the case before the Court of Session. 37 C. W.N. 1066=58 C.L.J. 66. There is nothing in the Evidence Act to show that a document, which is meant to contradict a witness or impeach his credit, must come from proper or legitimate custody. So a question to the prosecution witness in cross-examination with reference to the contents of a letter alleged to have been written by him to another asking the latter to depose to a certain effect cannot be disallowed on the ground that it had not been proved to have come from proper custody. 146 I.C. 83=36 Cr.L.J. 1162. *See also* 174 I.C. 678 =1938 Pesh. 18. First information report. *See* 8 L. 605. *See also* 54 C. 237 ; 39 P.L.R. 200. Deposition not read over to witness as required by S. 360, Cr. P. Code. 6 P. 478=1927 P. 315. Replication filed by a party under O. 6, r. 5, C. P. C. 41 P.L.R. 652=1939 L. 529. Attention of complainant to be drawn to statements used in cross-examination to contradict. 31 I.C. 354=17 Bom.L.R. 59. Previous statements can be used only for the purpose of cross-examining a witness. They cannot be admitted as evidence against an accused. 12 Cr.L.J. 214 =10 I.C. 119. Statements taken under S. 164, Cr. P. Code, and not covered by S. 238 are inadmissible against the accused. But they can be used for the purpose of contradicting the statements subsequently made in Court by the persons making the former statements. 27 I.C. 197=17 O.C. 363. Advocates and pleaders may examine witnesses in their chambers or elsewhere before such witnesses appear in Court if they think fit. 14 I.C. 763=5 Bur.L.T. 38. Such examination is not made with intent to fix witnesses down to certain evidence, but is made to ascertain what they know and to enable the case to be conducted properly. (*Ibid.*) Writing need not be produced in absence of intention to contradict. 1925 M. 145. To cross-examine a witness on a previous deposition with a view to discrediting him, the attention of the witness must be drawn to those discrepancies so that he may have the chance of explaining them. In such a case it is not proper for the Judge to stop the examination and have the whole deposition filed with a view to discrepancies being pointed out at the time of argument. 1931 L. 38 ; 1929 M.W.N. 789. The passages are to be specifically referred to. 12 R.D. 312=1928 A. 511. The first information report can be proved to impeach the credit of the witness by cross-examination under this section. 107 I.C. 761. It is only what is written in the police diaries that can be used under this section but not what the Sub-Inspector of Police stated that a witness did or did not say. 108 I.C. 162=1928 L. 507. Procedure to be adopted where statements in police diaries which are sought to be used under this section. 1933 M.W.N. 919 ; 14 P.L.T. 543=1933 P. 589. In the case of statements before Inspector of Excise. 1933 M.W.N. 1270. In the case of statements made to a Headman in the course of an enquiry in a criminal case. 144 I.C. 369= 1933 R. 119. Statements contained in the inquest reports cannot be used to discredit the evidence of the inquest officer unless they are put to him under S. 145. 48 L.W. 615=177 I.C. 808= (1938) 2 M.L.J. 618. Where an admission is not put to the party making it and the party making it is not examined on it under S. 145, the admission is not legal evidence and cannot be used against the party making it. 1930 L. 695 ; 1934 L. 750 ; 1934 L. 753. The statement of a witness abstracted in a judgment can be used only in one of two ways either under S. 145 of the Evidence Act to contradict the witness or as an admission under S. 21. For the former purpose, it is incumbent upon the party examining the witness, before proving the writing, to call his attention to those parts of it which are to be used for the purpose of contradicting him. This is an essential step in the procedure, the omission of which is likely to cause grave injustice. 53 M. 952=60 M.L.J. 14. *See also* 170 I.C. 315=39 P.L.R. 200 ; 1937 L. 480. Suit on handnote—Denial of debt but admission of signature on blank paper—Admission of debt contained in affidavit of defendant filed in prior case—Use of—Conditions. *See* 17 P.L.T. 621=165 I.C. 805=1936 P. 588. Non-compliance with provisions of the section, effect of. 152 I.C. 325=1934 R. 273. *See also* 11 O.W.N. 568=1934 O. 229 ; 152 I.C. 873=1934 A. 956.

Secs. 145 and 67.—Where the object of trying to prove certain documentary admissions is to utilise those admissions to prove a party's case and not to contradict the persons making the admissions. S. 145, Evidence Act, could have no application. The admissions in question could be proved according to the provisions of S. 67 of the Act by the production of other witnesses. 1941 O.A. (Supp.) 420=1941 A.W.R. (Rev.) 461=1941 A.L.J. (Supp.) 89.

Secs. 145 and 155.—S. 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ; but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is provided in S. 145. In other words, S. 155 is controlled by S. 145 and is not independent of it. 1930 L. 491. *See also* 1938 N.L.J. 434. S. 145 must be taken as it is uninfluenced by any consideration derived from the previous state of the law

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

Court to decide when question shall be asked and when witness eompelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence ;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

NOTES.

or the English law upon which it may be founded. It makes no mention of oral statements. It therefore cannot control S. 155. Hence questions with reference to statements made by one witness to another are legally admissible, though the Court could refuse to rely on them on the ground that they had not put to the witnesses concerned for explanation. 1939 N. 13=I.L.R. (1939) N. 109.

Secs. 145, 155 and 157 A petition of complaint filed before a Magistrate by a witness some days after the occurrence, can be used not only to corroborate him under S. 157 but also to contradict him under S. 145 or to impeach his credit under S. 155 of that Act. 196 I.C. 439=45 C.W.N. 763=1941 C. 533.

Secs. 146-152: RELEVANCY OF QUESTIONS.—A question put to a female witness whether she was made pregnant by one *X*, in a case relating to title to property would be relevant if the point was whether by reason of unchastity she could not inherit her husband's property. But if the object was to impeach her credit, Ss. 146 and 148 to 162 must be considered 65 I.C. 692. On S. 146, *see* 3 M. 271 ; 9 Cr.L.J. 370 ; 18 C.W.N. 185. Putting scandalous questions in cross-examination. 2 Weir 819.

Secs. 146 and 148.—Magistrate should confine questions as to character asked in cross-examination to questions which are relevant to the case, and disallow questions which are unnecessary, provocative or merely harassing. 189 I.C. 705=41 Cr.L.J. 790=1940 R. 113.

Sec. 147.—17 C. 344 ; 39 B. 386.

Sec. 148.—*See* 26 A. 371 ; 37 C. 878 ; 11 Cr.L.J. 403=6 I.C. 782 ; 21 C. 392 ; 4 C.W. N. 684 ; 1940 R. 113 (Magistrate's power to disallow scandalous questions in cross-examination).

Sec. 149.—Counsel for prisoner should not state as existing facts matters which he had been told in his instructions on the authority of the prisoner but which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses. 30 I.C. 128 =19 C.W.N. 923=21 C.L.J. 396. *See* 18 C.W. N. 185.

(*b*) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty.

He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) *A* affirms that on a certain day he saw *B* at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) *A* is asked whether his family has not had a blood-feud with the family of *B* against whom he gives evidence.

NOTES.

Sec. 150.—*See* 19 B. 340.

Sec. 151.—Indecent or scandalous question—Latitude to Counsel. 52 I.C. 54=20 Cr.L.J. 566.

Sec. 152.—*See* 18 B. 468 (470); 3 M.H.C.R. 372; 2 Weir 819.

Sec. 153.—*See* 11 B.H.C. 169; 9 Cr.L.J. 226. The principle of this section should be observed in examination on commission also. 47 C. 1040. Ss. 153 and 155 must be strictly construed and narrowly interpreted. 6 R. 148 =1928 P.C. 54=54 M.L.J. 545 (P.C.).

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Questions by party to his own witness.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

NOTES.

Sec. 154—*See* 28 C. 594; 13 C. 53; 12 M.I.A. 380. The circumstances in which a witness may be cross-examined by the party calling him are not laid down in S. 154, which leaves the matter entirely to the discretion of the Court. The mischief begins when the grant of permission itself is considered to be equivalent to an adjudication or to an expression of opinion by the Court adverse to the veracity of the witness instead of being treated merely as a permission to test veracity of a witness, a permission which can hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. 144 I.C. 936=1933 P. 488; 166 I.C. 726=38 Cr.L.J. 271=1937 P. 34. *See also* 14 Pat.L.T. 494=1933 P. 517. As to the evidence of hostility and principles governing discretion of Court, *see* 1933 N. 384; 152 I.C. 1021=1935 P. 1033. When a witness becomes hostile it would in certain cases be unsafe to accept any portion of the testimony which he has rendered in examination-in-chief. To pick and choose between the statements which such a witness makes in examination-in-chief would sometimes be an unsound proceeding. But it would be quite wrong to hold that a Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there. 44 C.W.N. 999=1940 C. 536. It is not settled that the evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party, the credibility of the facts deposed being a matter for the jury. There is no legal objection to permission to treat a witness as hostile being granted freely, although it is preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance. 19 P. 369=1940 P. 289=22 P.L.T. 98. The power given by S. 154 is a discretionary one and will not be reviewed by the appellate Court provided there was some material on which such discretion can be exercised. The mere fact however that a witness does not adhere to or subsequently makes a statement different from his previous statement does not of itself justify the employment of the power given by S. 154. 11 R. 4=1933 R. 57. *See also* 166 I.C. 726=1937 P. 34. That the answer of the witness is in direct conflict with other evidence is no ground to treat him as hostile and allow cross-examination. 55 M. 904=1936 M. 516=71 M.L.J. 231. Hostile witness, who is a witness is not necessarily hostile because in an absent-minded moment he admits the truth. Before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due to enmity to the prosecution. 44 I.C. 33=3 P.L.J. 419. *See also* 61 C. 399=38 C.W.N. 659=1934 C. 636. A witness who is unfavourable is not necessarily hostile; a hostile witness is one who from the manner in which he gives his evidence show that he is not desirous of telling the truth. 49 C. 93=1922 C. 267. (47 C. 1043, Ref.) 34 C.W.N. 526=1930 C. 276. Where a witness has been tendered but not examined by the prosecution, the prosecution cannot cross-examine that witness. S. 154 does not authorise such cross-examination. 7 P. 55=1938 P. 203. A prosecution witness who was declared hostile and permitted to be cross-examined by the prosecution in the committing Court, cannot be treated at once as a hostile witness and cross-examined by the prosecution in the Sessions Court without being examined-in-chief. 196 I.C. 439=45 C.W.N. 763=1941 C. 533. Where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness need not be rejected *in toto.* It is a question for the Judge to decide whether in spite of the witness having been discredited on one point his testimony may be considered on another. 1933 M. 137=56 M. 7=64 M.L.J. 208. Before a party calling a witness can cross-examine him it is not necessary that the witness should first of all be declared hostile. In this respect S. 154 of the Indian Evidence Act gives an unqualified discretion to the Judge quite apart from any question of the hostility or otherwise of the witness. It is, however, necessary before the procedure of S. 154 can be adopted, either for permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should be signified if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. 56 M. 7; 1933 N. 389. *See also* 58 C. 1404. A party is allowed to cross-examine his own witness because the witness displays hostility and not necessarily because he displays untruthfulness. The fact that the witness is being cross-examined does not imply an admission that all the witness's statements are falsehoods. On the other hand, the main purpose of cross-examination is to obtain admission. Consequently the prosecution is entitled to rely on a part of the witness's evidence even though he has turned hostile. 9 P. 474=1930 P. 247. Per *Lort Williams, J.*—Ss. 143 and 154 do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of S. 154 is that they may with the permission of the Court, treat a witness as hostile and cross-examine him. The wording of S. 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England. 50 C.L.J. 467=1930 C. 139. It must be understood that a witness should be cross-examined to be discredited altogether and not merely to get rid of part of his testimony. 71 I.C. 657=37 C.L.J. 173=1923 C. 463. Result of cross-examining one's own witness. 53 C. 372; 33 C.W.N. 872.

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has [1][accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

LEG. REF.

[1] Substituted by Act XVIII of 1872, S. 11.

NOTES.

Secs. 155-157—*See also* Notes under S. 145. *See* 45 C.W.N. 763.

IDENTIFICATION IN JAIL—VALUE OF, AS EVIDENCE.—Evidence of identification in the jail cannot be treated as substantive evidence in the trial as it is not on oath, and is made in extra-judicial proceedings. 19 A.L.J. 947. When a person, who makes such an identification, states in Court that he can identify no one, the evidence of identification is not admissible. (*Ibid.*). Where, in the Sessions Court, witnesses retracted the statements made before the committing Magistrate, *held*, under S. 155, the statements made to the police and to the committing Magistrate were relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. 46 B. 97=23 Bom. L.R. 820=1922 B. 108. Statements of witnesses made to the police should be used to corroborate them except in very special circumstances. The evidence of a witness hostile to the Crown may be impeached by reference to the police diary. 45 I.C. 272=3 P.L.J. 568. S. 162, Cr. P. Code, allows the credit of a witness to be impeached, by a statement which he is alleged to have made to the police in the course of an investigation under Chapter XIV of the Code though no person is bound to state the truth to the police in the course of the above investigation. 41 I.C. 668=18 Cr.L.J. 844. *See also* 14 P.L.T. 543=1933 P. 589. The statement to the police is not evidence like a statement made on oath before a competent authority. (*Ibid.*) Receiver's report to the District Judge that he was wrongfully confined and obstructed in the discharge of his duties about 24 hours after the occurrence, did not come under the provisions of S. 157, as it was not made at or about the time of, occurrence but 24 hours after, and as it was not made to a person who had power to investigate the fact, and that therefore the prosecution could not have used it to corroborate the witnesses, but that it was open to the defence to have used S. 155 to impeach the credit of the Receiver. 55 C. 879=111 I.C. 327=1928 C. 732.

Sec. 155.—On this section, *see* 104 I.C. 377=1927 R. 247; 25 A.L.J. 994; 1939 N. 13; 54 M.L.J. 545 (P.C.). Section if affected by S. 162, Cr. P. Code. 4 R. 72. *See also* 14 Pat.L.T. 543=1933 P. 589. Witness not believed in judgment in previous case does not necessarily impeach his credit. *See* 162 I.C. 300=1936 Pesh. 106. Statement made before Coroner is admissible at trial. 28 Bom.L.R. 775=1926 B. 404. First Information Report admissible in defence to impeach informant's veracity. 1927 C. 17=44 C.L.J. 253; 1936 L. 833=165 I.C. 146. A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and *a fortiori* that it is inadmissible as a piece of substantive evidence in a separate proceedin, against the other accused. But where the make is examined as a witness on behalf of the othe accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court under the provisions of S. 155. 61 C. 967=38 C.W.N. 1005=1934 C. 616. The language of S. 155 (3) is *prima facie* wide enough to permit such questions as asking the investigating officers if certain witnesses made certain statements. But where the evidence has been reduced into writing it is undesirable permit the putting of such questions. In such a case the written record made by the police officer is the only proper and right thing to prove to discredit the witnesses. If the police diary is used the provisions of S. 145, Evidence Act, and S. 162, Cr. P. Code, will have to be borne in mind. A copy of the statement made before the police cannot be used as against the witness till he has been confronted with it. The right procedure then when a prosecution witness is contradicting himself is to ask the Judge to look into the diary and decide whether the accused person should not have a copy of the statement. 26 A.L.J. 139. S. 162 (1), Cr. P. Code, by enacting that no statement made to the police officer nor any record thereof shall be used " for any purpose at any enquiry or trial " repeals by implication S. 157 of the Evidence Act so far as concerns statements made by a police officer in the course of an investigation. 14 P.L.T. 543=1933 P. 589. S. 155 (3) does not render nugatory the clear and explicit provisions of S. 145 and in fact takes for granted the existence and binding

Illustrations.

(*a*) *A* sues *B* for the price of goods sold and delivered to *B*.

C says that *A* delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(*b*) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

Questions tending to corroborate evidence of relevant fact admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

NOTES.

effect of those provisions. 32 P.L.R. 259=1931 L. 38. *See also* 147 I.C. 591=1934 A. 226. Where in a dispute about the ownership of a piece of land, the lower Court granted the plaintiff a decree on the strength of the statement made by a witness on the box which was corroborated by a recital in the mortgage bond between two strangers to the suit about the boundaries of the suit property. *Held*, that such recital was not evidence and as the document was not produced by that witness his testimony could not be relied on. 146 I.C. 192=34 P.L.R. 917.

Sec. 157 : MEANING OF WORDS.—The words "legally competent" mean having power under some law, statutory or otherwise. The section is controlled by S. 162, Cr. P. Code. 50 I.C. 834=10 L.W. 239. *See also* 35 M. 397=14 I.C. 896 (F.B.); 4 R. 72=27 Cr.L.J. 881=1926 R. 116. A statement of raped girl in answer to a person who saw her weeping is admissible. 5 L. 324=82 I.C. 129=25 Cr.L.J. 1201=1924 L. 609. *Kanungo* is a person in authority. 12 Cr. L.J. 480. Document showing ownership of land adjacent to disputed land is admissible to corroborate the testimony of ownership. 44 C.L.J. 582=99 I.C. 907=1927 C. 230. *See also* 1940 M.W.N. 80. The words 'former statement' in S. 157 mean a previous statement of the witness who is to be corroborated made on another occasion, (*i.e.*) an occasion other than that at which the subsequent statement requiring corroboration is made. 174 I.C. 36=39 Cr.L.J. 395=1928 C. 125.

SCOPE AND APPLICATION OF SECTION.—12 Bom.L.R. 663; 25 M. 183 (210); 7 A.L.J. 468; 53 B. 699 (P.C.); 34 C. 129; 2 C.W.N. 704; 4 Bom.L.R. 434. S. 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception, the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. 110 I.C. 676=1928 L. 647. Ordinarily before the corroborative evidence is admissible, the evidence sought to be corroborated must be given. Where in support of the plaintiff's case a witness for the plaintiff produces a letter written to him by another witness but before the production of such letter the witness does not make any statement whatsoever, which is sought to be corroborated by the letter, the letter cannot be admissible in evidence under S. 157. 1937 M. 861. Reference by witness to deed to which he was not party not permissible. 40 P.L.R. 968=1938 L. 635.

ILLUSTRATIVE CASES.—*Sanderson, C.J.*—Where a party files a petition on the date of hearing asking for adjournment on the ground that his pleader cannot attend Court that day on account of hartal, the fact of filing the petition as well as its contents can be proved and are admissible, though not perhaps sufficient to charge the pleader with professional misconduct. *Woodroffe, J.*—The petition is admissible. 49 C. 732=26 C.W.N. 589 (F.B.). First information report is admissible. 54 C. 237=99 I.C. 227=1927 C. 17. *See also* 165 I.C. 146=38 P.L.R. 203=1936 L. 833. Statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose. 31 L.W. 51=1930 M. 632 (2). Where a statement made to a police officer is not the first information under S. 154 of Cr. P. Code, the Magistrate must take from the police officer a statement that the particular statement was made to him. 61 I.C.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved, if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

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650=22 Cr.L.J. 410 (C.). *See also* 5 L. 324=82 I.C. 129=1924 L. 609. A *kanungo* deputed to make inquiry under S. 148 of the Cr. P. Code may give his deposition and his report is admissible to corroborate his sworn testimony. 12 I.C. 88=12 Cr.L.J. 480 (C.). A statement made to the Deputy Superintendent of Police in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity, within the meaning of S. 157. 45 M.L.J. 279=75 I.C. 695=1923 M. 694. Statements by witnesses recorded by a Police Superintendent during investigation are not admissible in evidence nor oral evidence based on such statements. 45 M. 766 (35 M. 397, Ref. to). Per *White, C.J. and Ayling J.*,—The 'local area' of an officer of C.I.D. is the Presidency of Madras and he is therefore competent to investigate an offence under the Cr. P. Code (*Sankaran Nair, J., Contra*). An Inspector of the C.I.D. is not one of the officers legally entitled to investigate an offence under Ss. 157 to 167 of the Cr. P. Code, and so his evidence is not admissible under S. 157 (*White, C.J. Sankaran Nair and Ayling, JJ.*) 35 M. 247=22 M.L.J. 490=14 I.C. 859. But *see* 1927 C. 17=44 C.L.J. 253. An officer of the C.I.D. who investigates a matter under the order of his superior is not an officer "legally competent" within the meaning of S. 157 as he does not derive his power from the Police Act or the Cr. P. Code. 35 M. 397=13 Cr.L.J. 352=14 I.C. 896 (F.B.). A headman cannot examine witnesses on oath in the course of an inquiry in a criminal case. The statement made to headman can only be used in the manner provided for in Ss. 145 and 157, Evidence Act. 144 I.C. 369=34 Cr. L.J. 781=1933 R. 119. A *panchanama* is not evidence of the statements contained therein and it should be proved and exhibited as relevant evidence of those statements. 12 I.C. 209=12 Cr.L.J. 489. *See also* 1939 M.W.N. 465=1939 M. 766. Anybody who has seen a place may be examined as to what he saw under the general provisions of law. 12 I.C. 88=12 Cr. L.J. 480 (C.). A statement admissible under S. 157 can be proved by a person to whom it was made. Evidence of a person who hears a statement being made is as direct proof of the same as the evidence of a person who sees a deed is proof of the deed being done. 58 I.C. 344=21 Cr.L.J. 760. In the absence of substantive evidence, first information report cannot be used as corroborative evidence. 6 R. 481=1928 R. 295. A letter written by a police officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under S. 157 properly receivable in evidence for any purpose. 6 R. 142=1928 P.C. 54=54 M.L.J. 545 (P.C.). Prior whole statement of a witness cannot be admitted—Even admissible parts cannot be admitted before witness is examined. 22 S.L.R. 309. *See also* 1933 M.W.N. 1148. Where a person has been examined as a witness, a statement said to have been made by him to another is not admissible when no question is put to the witness as to whether the particular statement had been made to such other person. 151 I.C. 437=35 C.L.J. 1332=1934 S. 100. S.157 cannot be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case. 110 I.C. 521=1928 C. 893. Any Magistrate is competent to hold a test identification and can prove the statements made before him under S. 157 even though he is not empowered to deal with the matter under enquiry. 33 C.W.N. 616=1928 C. 50. Recital as to date of birth of the mortgagor contained in an application by his brother is admissible. 1929 A. 550. But a statement by father in vaccination register made 3 years after birth of child cannot be relied upon to prove paternity of the child. 1929 M.W.N. 696. Oral evidence of what the witness had said on the occasion of an identification parade held by the Bombay Police in the course of investigation and recorded in a *panchanama* written on that occasion in the presence of a competent police officer is admissible for purposes of corroboration under S. 157. 32 Bom.L.R. 327=1930 B. 158. On this *see also* 180 I.C. 239=1939 Pesh. 4. In proceedings under S. 107, Cr. P. Code, *sanchas or reports made by the prosecution witnesses on various dates against the accused* in the absence of the latter, are not substantive evidence in the matters mentioned in them; but under S. 157, such reports can be used in order to corroborate what the witnesses testify to in Court when they are examined in Court. 21 P.L.T. 652=1940 P. 252.

RECITAL AS TO BOUNDARIES.—A recital regarding boundaries in a document executed between strangers to the suit relating to lands, adjoining the suit lands and in which the suit land is referred as a boundary is not admissible under S. 13 but may be admissible if the executant is called and depose to the boundary to corroborate him under S. 157, or if he is dead under S. 32. 145 I.C. 944 (2)=1933 P. 636. *See also* 1940 M.W.N. 80.

Sec. 158.—Statements made before the Sub-Registrar by the deceased attestors to a will are admissible under S. 32 (7) taken with S. 158 but not under S. 33 of the Evidence Act. Under S. 158, even prior statements of deceased persons can be admitted both for contradiction and corroboration. 1933 M.W.N. 1148. *See* 8 P. L.T. 510=5 P. 777=1927 P. 91. As to scope of section *See* 1926 L. 122.

Secs. 158 and 159: LIST OF STOLEN THINGS GIVEN BY INFORMANT—ADMISSIBILITY OF.—Per

Refreshing memory.

159. A witness, may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

NOTES.

Coldstream, J.—A list of the stolen things given to supplement the first information report is admissible and can be referred to under S. 159 and proved under S. 159. The fact that a copy of such a list had been given to the police would not affect the admissibility of the informant's list. 1933 Cr.C. 1503=1933 L. 987.

Sec. 159 : REFRESHING MEMORY.—A witness can be allowed to refresh his memory by reference to any memorandum or other writing prepared by the witness, if there is a lapse of memory on a point asked of the witness. On this section, *see also* 8 C. 732 ; 19 C.W.N. 890 ; 11 B.H.C. 123 ; 11 B. 657 ; 32 M. 384 ; 1926 L. 51 ; 1930 N. 24 (1). Where the writing brings to the mind of the witness neither any recollection of the facts mentioned in it or any recollection of the writing itself but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing, which he knows to be genuine ; the witness may refresh his memory by referring to the writing. 49 C. 573=26 C.W.N. 680=35 C.L.J. 279. S. 159 does not render the notes of a speech inadmissible in evidence. 1930 L. 867. For purposes of S. 159, it is not requisite that the writing used to refresh memory of a witness should have been *admitted* in evidence. Accordingly, a document not produced in Court within the proper time and in consequence *rejected* as evidence under the provisions of O. 13, r. 2, C. P. Code, may nevertheless be referred to by the party producing it or his witness to refresh his memory of the document if otherwise within the purview of S.159, Evidence Act. "The weight of the evidence, the objection to the document upon the ground that it not having been produced at the proper time, renders its authenticity, the subject of suspicion and all other grounds upon which a document can be successfully impeached still remain open but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice." 55 I.A. 107 =7 P. 305=32 C.W.N. 565 (P.C.). Memoranda kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory. (10 N.L.R. 44, at p. 47, Rel. on.) 120 I.C. 224=1930 N. 24 (1). When a witness wants to refresh his memory under S. 159, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification of his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction, to which it relates. 120 I.C. 798=1930 L. 371. The word "writing" used in S. 159 includes also printed matter. (*Ibid.*). There is a common practice in the Punjab of referring to statements in the first information reports, medico-legal reports and so forth as if they were evidence. This is not justified by law. The proper course is for the witness to refer to the document which he has prepared at the time under S. 159 and state in Court everything which the prosecution or counsel for defence or the trying Magistrate, or Judge considers material. 39 P.L.R. 290=1937 L. 475.

HOROSCOPE—ADMISSIBILITY.—A horoscope is admissible in evidence in proof of age, and though it may not be relied on as a probative document in itself, it can be used for the purpose of refreshing the memory of the witness under S. 159, Evidence Act. 12 Mys.L.J. 133=39 Mys.H.C.R. 406. There is no provision in the Evidence Act by which *panchayatnamahs* prepared by the police for the recovery of articles on information given by the accused can be used as substantive evidence. If they are prepared at the time, they can be used by the witnesses for the purpose of refreshing their memories in the witness-box under S. 159 but in themselves they are not evidence. 1939 M.W.N. 465.

POST MORTEM REPORT.—Ss. 159 to 161 permit a limited use being made of *post mortem* notes of Medical Officer, namely, that they may be used by the witness who made them for refreshing his memory or by a party for the purpose of contradicting the witness. It is extremely undesirable that such notes of *post mortem* examination be put in evidence through the Medical Officer *en bloc* as it is prejudicial to both parties. Per *Rupchand, A.J.C.*, 1930 S. 225.

Secs. 159 and 160 : POLICE INVESTIGATION—ADMISSIONS MADE BY ACCUSED IN PRESENCE OF MAGISTRATE—ORAL EVIDENCE OF MAGISTRATE—USE OF MEMORANDUM.—Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate, the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of S. 164 of the Cr. P. Code but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible to prove the admissions of the accused. Ordinarily the written memorandum of the Magistrate is not admissible though the Magistrate under the provisions of S. 159 of the Evidence Act can refresh his memory when under examination by referring to the memorandum. In such a case the memorandum must be shown to the adverse party and the witness may be cross-examined on it. Where the Magistrate has, however, no specific recollection of the facts themselves but he is sure that the facts were correctly recorded in the document, both the testimony of the witness and the contents of the memorandum are admissible under S. 160 of the Evidence Act, the two being the equivalent of a present positive statement of the witness affirming the truth of

The witness may also refer to any such writing made by any another person, and read by the witness within the time aforesaid, if when he read it, he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. [1]Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it : such party may, if he pleases, cross-examine the witness thereupon.

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of state, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence ; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

LEG. REF.

[1] As to the application of S. 161 to Police diaries, *see* the Code of Criminal Procedure, 1898 (Act V of 1898), S. 172.

NOTES.

the memorandum. The fact that the Magistrate is empowered to record the confession of an accused person under S. 164 would not affect the question of the admissibility of such evidence. 14 L. 290=1933 L. 716 (F.B.). *See also* 1936 R. 42. (Statement of deceased person).

Secs. 159 and 161 : PANCHNAMAS CONTAINING CONFESSION, HOW TO BE USED.—No doubt an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by the law is itself a relevant fact. But where panchnamas contain confession which cannot be given in evidence because of S. 26, the proper way of dealing with a panchnama containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his memory. If he finds in it anything of which evidence can lawfully be given, he may give such evidence in the ordinary way ; but the document itself should be excluded. 144 I.C. 772=1933 S. 220. *See also* 1939 M.W.N. 465.

Sec. 160.—*See also* notes under S. 159. *See* 19 A. 390 (Special Diary) ; 11 B. 657 ; 31 C. 1050 ; 32 M. 384 ; 11 B.H.C. 120 (Statement to police officers) ; 97 I.C. 200=1926 C. 988 =43 C.L.J. 479 (Engineer's report). 1936 R. 42. (Statement by deceased person). Where no attempt is made by a witness to state orally before the Court, what the accused in the case was alleged to have said, nor does he state before the Court, that although he has no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible in evidence. 40 P.L.R. 872= 177 I.C. 707=1938 L. 629.

Sec. 161.—*See* 8 C. 745 ; 5 L.B.R. 40=2 I.C. 535.

Sec. 162.—*See* 41 Bom.L.R. 391, cited under Ss. 123 and 124. The *privilege claimable in respect of official and confidential documents* is a narrow one and is based on the principle that the infor-

Giving, as evidence, of document called for and produced on notice.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Using, as evidence, of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues *B* on an agreement and gives *B* notice to produce it. At the trial *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.

Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order,

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NOTES.

mation contained in official documents cannot be disclosed where the disclosure would not be in public interest. The circumstance that the documents are confidential or official is by itself no reason for their non-production and the Court is always entitled to summon them and to examine how far the privilege claimed is reasonable and is justified. 11 Mys.L.J. 171. *See* 3 C. 742; 16 C.W.N. 431=15 I.C. 77; 45 I.C. 898. *See also* I.L.R. (1940) N. 280. Police during an investigation seized account books of a certain person and made copies of it in their diary. In a later civil suit that person denied that he kept accounts and hence the other party called for the copies of the account books made by the police to be produced in evidence. Police refused to produce the copies claiming the privilege of "State document." *Held*, where account books were not State documents, copies of them could not assume this important shape simply because they were written in the course of a police investigation. Neither the police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document. 1938 N. 358.

Sec. 163.—Production of documents by defendant—Inspection by plaintiff—Court cannot admit without proof. 72 I.C. 459=18 L.W. 165=1923 M. 607. S. 163 does not render proof of the document unnecessary nor alter the normal incidence of burden of proof. *Quaere*, whether S. 163 is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun. 1923 M. 607. Under S. 163 it is the duty of the plaintiff to require the defendant who has taken inspection to tender the account books as evidence of both parties. Such account books need no further proof and are admissible *in toto*. 106 I.C. 305 (2)=1928 N. 119. Under S. 163, an inspection of documents by the adversary entitles the party producing them to tender them as evidence of both parties. Such documents must be admitted *in toto*. 43 P.L.R. 128. 195 I.C. 275=1941 L. 228. S. 163 is applicable to criminal trials as well as to civil actions. If during cross-examination of a witness the counsel for the accused calls for the statement of that witness recorded by the police in Calcutta during investigation and inspects it for the purpose of contradicting the witness, the Government Counsel is entitled to require the counsel for the accused to give the whole of the statement as evidence excluding only such portions as are not relevant to the case, although that would bring on the record those parts of the statement which are corroborative of the witness's evidence at the trial in addition to those brought on the record by counsel for the accused as being contradictory of that evidence. But where there is no formal notice or requisition from the accused calling for the police diary and the Government counsel produces it stating that he will not "rely on the strict technicality" thereby giving the impression, although the impression is unintended, that he will not require counsel for the accused to put in the document as a whole, the accused cannot be compelled to give as evidence the entire statement in question. I.L.R. (1939) 2 C. 429=187 I.C. 138=41 Cr.L.J. 408 =1940 C. 167. *See also* 1930 C. 370.

Sec. 165: OBJECT OF SECTION.—Under S. 165 the Court cannot order the production by a party of any document or thing, no matter how irrelevant, into Court, unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before the Court. 57 M. 635 =1934 M. 199 (2)=66 M.L.J. 498. The provisions of the section cannot be used in contravention of S. 162, Cr. P. Code. 4 R. 371=99 I.C. 1019=1927 R. 74; 27 Cr.L.J. 277=92 I.C. 453. Power of Judge to send for additional witness, to summon material witness, and to examine persons present. *See* 6 C. 279. Judge not to cross-examine on points which pleaders will examine upon. (*Ibid.*). Whether Judge can put irrelevant questions, *see* 10 B. 185. Right to cross-examine witnesses summoned by nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved :

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party ; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for improper admission or rejection of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

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Court. 3 B.L.R. (A.C.) 158 ; 5 C. 164 ; 24 C. 288 ; 29 C. 287 ; 10 B. 185 ; 11 B.H.C.R. 166. Mere sending for document does not make evidence in the case. 11 B.H.C.R. 166. In criminal cases, the moment witness commences giving evidence which is inadmissible, he should be stopped by the Court. Per *Markby, J.*, in 7 W.R. (Cr.) 25. *See also* Field 5th Ed., p. 482. Even though a document is not produced at the first hearing of a case the Court can call for the document under S. 165. 25 O.C. 286=70 I.C. 278=1923 O. 59.

Sec. 167 : SCOPE OF SECTION.—S. 167 applies to second appeals on the civil side or cases tried by a jury on the criminal side ; and not to first appeals where the facts are a matter for decision of the Appellate Court. 1934 P. 605. Under S. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction. 59 I.C. 560=22 Cr.L.J. 128. *See also* 1940 N. 118 ; 82 I.C. 283=25 Cr.L.J. 1275 ; 89 I.C. 189=1927 C. 1=31 C. W.N. 32 ; 95 I.C.,273=1926 P. 211=7 P.L.T. 673. *See also* 35 Bom.L.R. 174=1933 B. 153 ; 152 I.C. 829=1934 P. 617 (2). Where there has been an improper admission of evidence, a Judge would be acting correctly under S. 167 if he comes to the conclusion that the rest of the evidence is sufficient to justify the conviction. 39 Cr.L.J. 427=174 I.C. 523=1938 N. 325. The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial, if there is other evidence upon which the finding could be arrived at. And the High Court can in second appeal see whether there is such other evidence justifying the decision, and if there is such evidence, it cannot order a new trial. 150 I.C. 841=1934 P. 55 (2). A document was proved in the trial Court by a person who had obtained it from the writer and admitted in evidence, without the writer being examined and no objection was raised to such admission. *Held*, the non-examination of the writer would not make it inadmissible and the objection in revision had no weight. 59 C.L.J. 467=1934 C. 834. Where the High Court after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it, the conviction and sentence were set aside. 1 C. 207 ; 2 B. 61 ; 9 B.H.C.R. 358. Duty of appellate Court where evidence has been improperly admitted in the lower Court. *See* 15 W.R. (P.C.) 8 ; 6 B.L.R. 495 ; 14 M.I.A. 86 ; 6 M.I.A. 232 ; 8 M.I.A. 199 ; 7 C. 293 ; 8 C. 739. Effect of relevant evidence improperly proved. *See* 11 B. 320 ; 6 C.L.R. 497. Effect of evidence admitted at improper stage of the case. *See* 13 M.I.A. 83. Additional evidence in appellate Court, where relevant evidence was improperly shut out in lower Court. 4 A. 306. A Magistrate cannot import his personal opinion about the personal character, in the decision of the case before him nor can he refuse to believe evidence in the accused's favour on that account. 20 Cr.L.J. 283 ; 50 I.C. 171. A misdirection to the jury is strictly not a case of improper admission or a rejection of evidence within the meaning of S. 167. 42 I.C. 161=18 Cr.L.J. 929 (F.B.).

GROUNDS ON WHICH REVIEW RE-HEARINGS ARE ALLOWED.—[*See* Ss. 114 and 115 and O. 48, C. P. Code, *supra*.]. The High Court upon the hearing of second or special appeal have remanded cases for reconsideration and fresh decision by

THE SCHEDULE.

ENACTMENTS REPEALED.

[*Repealed by Act I of* 1938.]

THE EXCESS PROFITS TAX ACT (XV OF 1940).

[*Amended by Acts XLII of* 1940, *VII of* 1941, *XI of* 1941 *and XXIV of* 1941.]

PREFATORY NOTE: STATEMENT OF OBJECTS AND REASONS.—"The outbreak of war, while it has necessitated greatly increased expenditure by the Government on defence and other services, has simultaneously created opportunities for the earning by companies and persons engaged in business of abnormally large profits. The object of this Bill is to secure for the Government a considerable portion of the additional business profits which accrue as a result of the conditions prevailing during the war.

The Bill seeks to impose a tax of 50 per cent. of the excess of the profits made in any accounting period after the 1st day of April, 1939, over what in the Bill is called "standard profits." The standard profits are, in respect of businesses in existence prior to the 1st day of April, 1936, the average of various accounting periods from 1935 to 1938, subject to certain adjustments. The tax-payer is given the option of choosing between several periods or averages, and provision is made for a reference to a Board of Referees for special relief, if the profits during each of the periods which could otherwise have been chosen are abnormally low. The standard profits for businesses started after the 1st day of April 1936, are computed by reference to a percentage of the capital employed in the business.

The Bill contains necessary provisions for computing profits and capital, and these provisions follow closely those of the excess profits tax imposed in the United Kingdom by the Finance (No. 2) Act of 1939.

It is intended that the Bill should come into force on a date to be determined by the Central Government, and should remain in force until repealed. In this respect the imposition of this tax differs from that of income-tax which is imposed afresh each year by the annual Finance Act.

The Bill provides for the Act to be administered by officers of the Income-tax Departments under the Central Board of Revenue, and contains provisions for assessment, collection, appeal, reference to the High Court on a point of law, penalties for false statements, etc., which closely correspond to those in the Indian Income-tax Act, 1922." (*Fort St. George Gazette,* Part III-A, dated 6th Feb., 1940.)

REPORT OF SELECT COMMITTEE.—"We hold the view that it is desirable that legislation of this kind should be subjected to periodical review by the Legislature. We considered various expedients which might secure this end without involving the re-enactment annually of the elaborate provisions relating to machinery. We have adopted the expedient of altering the definition of 'chargeable accounting period', so that at the end of March, 1941, unless by an amending Act that date is extended, the taxing provisions cease to have effect, and of making a change in clause 4 to secure that before that date and thereafter annually at the time the Finance Bill is before the Legislature the Legislature shall have an opportunity of reconsidering the rate at which the tax is charged. We have also received an assurance, which we desire to record in this Report, that Government will promote any further legislation which is in its opinion necessary or desirable to remedy short-comings which may reveal themselves in the working of the Bill when passed. We have further received an assurance that when the Act is repealed any right, privilege, obligation or liability acquired, accrued or incurred under the Act will not be affected, and that, therefore, assessees will have secured to them the payment of any refunds to which they are entitled.

NOTES.

the lower appellate Court where important evidence had not been carefully considered by such Court (1 Jur.N.S. 35); where the judgment of the lower appellate Court was based on part of the evidence only (24 W.R. 160; 24 W.R. 293); where the importance of a particular piece of evidence has been much under-rated (24 W.R. 192); where witnesses were discredited for general reasons not affecting the credit of any individual deponent (24 W.R. 251).

GROUNDS ON WHICH REVIEWS AND RE-HEARINGS HAVE BEEN ALLOWED OR NOT.—[*See* C. P. Code, Ss. 114, 115 and O. 48, *supra*.] In second appeal the finding of the lower Courts cannot be interfered with, however erroneous they may appear to be unless there be an error or defect in procedure, provided they had before them evidence proper for their consideration in support of their findings. But a finding without evidence to support it is a substantial error in the proceedings and a good ground for second appeal. 14 C. 740=14 I.A. 101 (P.C.); 17 C. 297=16 I.A. 233 (P. C.); 18 C. 23; 19 C. 249=19 I. A. 1 (P. C.); 20 C. 93; 9 C. 309; 17 C. 875=17 I. A. 65 (P.C.).

The Committee was assured that steps will be taken to ensure that such refunds will be duly made.

Having regard to the professed objects of the Bill, to tax additional business profits which accrue as a result of the conditions prevailing during the war, we consider that the *preamble* should contain a definite reference to this aspect of the proposed legislation. We have, therefore, amended the preamble to indicate clearly that this new taxation is related to war conditions and we have altered the date on which excess profits become liable to taxation from the 1st day of April to the 1st day of September, 1939.

Clause 2.—The change made in *sub-clause* (2) corrects a printing error. In *sub-clause* (5), as drafted, it is not clear that the first proviso relates to the word 'profession' where used for the second time in the definition of 'business'. We have accordingly re-drafted the sub-clause to clarify this point. The change made in *sub-clause* (6) has been explained in the general remarks made at the opening of this report. The effect of the change is that there can be no accounting period after the 31st day of March, 1941, and, if the Act is to continue to have effect after that date, steps must be taken to alter the wording of this sub-clause by an amending Act. In the definition of 'company' in *sub-clause* (8) we have inserted a reference to companies formed in pursuance of legislation in Indian States. The change made in *sub-clause* (22) is for the purpose of mitigating the hardship that might be suffered by new businesses which had no standard period owing to their recent origin. In *sub-clause* (23) we have rejected the definition of 'written down value' and have substituted for it the definition contained in the Indian Income-tax Act, 1922. The definition in the Bill had the effect of excluding the concession given by the second proviso of section 10 (5) of the Income-tax Act. The definition we now adopt is more favourable for those concerns which had any considerable amount of unabsorbed depreciation owing to an insufficiency of profits in past years.

Clause 3.—The changes made in *sub-clause* (4) are intended to secure that the Boards of Referees, and Appellate Assistant Commissioners in the exercise of their appellate functions, shall not be subject to any control by the Central Board of Revenue. In *sub-clause* (5) we have altered the wording to correspond with that used in the provisions relating to tribunals in the Indian Income-tax Act, 1922. In *sub-clause* (6) we have transferred the power to make rules regulating the formation, composition and procedure of Boards of Referees from the Central Board of Revenue to the Central Government.

Clause 4.—The first two changes made in this clause are intended to bring the rate of tax imposed by the Bill under annual review. The alteration made in the proviso excludes the profits of life insurance business from the purview of the Bill. These are usually the subject of triennial or quinquennial valuation and cannot be determined annually, and there is a reasonable presumption that life insurance will not make additional profits in conditions arising out of the war. The profits of other forms of insurance are not affected by these considerations and are ascertainable from year to year.

Clause 5.—Where a person carried on two businesses during the standard period and discontinued one of them before the chargeable accounting period, it is necessary to secure that the profits, loss and capital of the discontinued business should be left out of account in determining the standard profits. While it is arguable that a business which has been discontinued before the chargeable accounting period is not a business to which the Act applies, we have considered it desirable to clarify this point by the insertion of the words 'during the chargeable accounting period'.

Clause 6.—We have by our amendment of sub-clause (2) provided as an additional option that the previous year as determined for the year ending on the 31st day of March, 1940, combined with that for the year ending on the 31st day of March, 1939, may be taken as a standard period, thus affording a considerable advantage to those businesses which made good profits during that period. Our amendment of sub-clause (1) is intended to provide that a business started after the 31st day of March, 1936, may at its option take as the standard profits either the profits of a standard period, where it has been in existence long enough to have a standard period, or the statutory percentage of the capital employed in the business. The first change made in sub-clause (3) has the effect of extending the right of applying to the Board of Referees to any business which has been in existence long enough to have a standard period. We have also substituted the words 'at the beginning of that period' for the word 'then' which did not indicate with sufficient definiteness the point of time referred to. The proviso has been amended so as to substitute the statutory percentage for a fixed percentage on share capital as the measure of the relief which may be granted. In sub-clause (4) we have raised the exemption limit from twenty thousand to thirty thousand rupees.

We have inserted a new sub-clause (5) to provide that profits made in Burma during the period when Burma was included in British India should not be included in the standard profits, unless they are also included subsequently in the profits of the chargeable accounting period, which of necessity falls within a time when Burma is no longer a part of British India.

Clause 7.—Sub-clause (*b*) as drafted did not clearly cover the case where a deficiency of profits occurs in the first chargeable accounting period, and we have redrafted the sub-clause to secure this end.

Clause 8.—The changes made in *sub-clauses* (2), (3), (4), (5) and (6) of the word 'April' to the word 'September' are consequential on the decision referred to in our opening remarks. We have made the provisions of sub-clause (6) mandatory. We have added a *new sub-clause* (7) to provide for the carrying over of a deficiency of profits where a change takes place in the persons carrying on a business by reason of the death of a partner after the 1st day of September, 1939, a contingency not provided for by sub-clause (1) or elsewhere in the clause.

In connection with sub-clause (1) we are assured that on the discontinuance of a business and the commencement of a new business under the provisions of the sub-clause a new chargeable accounting period will be deemed to have commenced.

We considered the desirability of adding an explanation to sub-clause (6) of clause 8 to emphasise that the sub-clause applies where two or more businesses were amalgamated after the 1st day of April, 1936, and before the 1st day of September, 1939, but are satisfied that the sub-clause already clearly applies to this case.

Clause 9.—To provide for the exclusion from the profits of a principal company of profits of a subsidiary company which operates outside British India and is not liable to income-tax, we have inserted in *sub-clause* (2) the words 'subject to the provisions of section 5' in order to emphasise that this section has not the effect of enlarging in any way the liability imposed by clause 5. The omission made in *sub-clause* (5) is merely a drafting amendment.

Clause 10.—A minor drafting amendment has been made.

Clause 11.—We have inserted an additional sub-clause—*new sub-clause* (2)—on the lines of section 49-D of the Indian Income-tax Act, 1922, to provide for the giving of relief in cases where no corresponding relief exists in other countries. We desire to record our view that should an excess profits tax be imposed in any Indian State, Government should make every effort to establish reciprocity in regard to relief with that State.

Clause 12.—The amendments made are minor drafting amendments only.

Clause 13.—We have extended the time allowed by the clause and provided that the period allowed shall run from the date of the service of the notice.

Clause 14.—We have inserted in *sub-clause* (1) a provision requiring the Excess Profits Tax Officer to supply to the person assessed a copy of the assessment order containing details of the manner in which the assessment has been calculated. In *sub-clause* (4) we have substituted the more usual expression 'legal representative' for 'personal representative'.

We consider that the tax-payer should be permitted to pay his tax by instalments. We are informed that instructions to this effect will be issued, as has already been done in connection with income-tax, and that such instructions will be published by the Central Board of Revenue.

Clause 15.—The word 'hitherto' has been omitted as being superfluous.

Clause 16.—The first change made is a minor drafting correction. We have inserted a new sub-clause on the lines of section 28 (4) of the Indian Income-tax Act, 1922.

Clause 17.—We have inserted a specific provision allowing appeals against orders made under clause 8. We consider that any person whose assessment is enhanced or whose penalty is increased should be given an opportunity of being heard and have amended *sub-clause* (4) to secure this. We have extended the period allowed for the presentation of an appeal from thirty to forty-five days.

Clause 18 (*new clause*).—We have made provision on the lines of section 32 of the Indian Income-tax Act, 1922, for appeals to the Commissioner against certain orders made by an Appellate Assistant Commissioner. The provision will cease to be necessary when the Appellate Tribunal provided for by clause 18 (now 19) comes into operation.

Clause 19 (*formerly* 18).—We desire to record our view that every effort should be made to accelerate the setting up of the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that it should, if possible, be brought into existence by the 1st day of October, 1940.

Clause 20 (*formerly* 19).—We have amended the clause so as to require that the Commissioner must correct a mistake apparent from the record whether detected by himself or brought to his notice by an assessee and so as to give him power to correct a mistake subsequently discovered in evidence recorded in assessment or appellate proceedings.

Clause 26 (*formerly* 25).—The alterations made in sub-clause (1) bring the provisions of the clause as drafted into accord with clause 6 as now amended, and empower the Central

Board of Revenue to exceed the amount of relief if any granted by the Board of Referees under sub-clause (3) of clause 6, or to grant relief in cases to which *sub-clause* (3) of clause 6 does not apply. We have inserted two additional sub-clauses, the first of which specifies two sets of circumstances which the Central Board of Revenue is required to take into consideration in making a direction under sub-clause (1) with reference to the determination of standard profits, and the second of which empowers the Central Board of Revenue in certain specified circumstances to grant allowances in computing the profits of a business during a chargeable accounting period.

Clause 27 (*formerly* 26).—In connection with the amendment which we have made in clause 20, it is necessary that there should be power to provide for the procedure to be followed in making applications for rectification of mistakes. The amendment made in clause (*a*) of *sub-clause* (2) provides for this. We have inserted a new clause (*c*) to give power to provide for the grant of relief to investment companies a part of whose investments are in British India and have already been subjected to excess profits tax.

Schedule I, Rule 2 (*new rule*).—This new provision is intended to secure that the computation of profits in any standard period should be made on the same basis as the computation of profits in the chargeable accounting period, and in particular that depreciation should be calculated on the written down value basis instead of on the cost basis and that income assessable on the arising basis in the chargeable accounting period but on the remittance basis in the standard period for income-tax purposes should be computed on the arising basis for excess profits tax purposes.

Rule 3 (*formerly* 2).—The intention of the rule was to make explicit provision to prevent the carrying forward of losses under section 24 (2) of the Indian Income-tax Act, 1922, although that section is not one of the sections of the Income-tax Act which are applied by clause 20 (now 21) of the Bill. We have revised the drafting of the rule to exclude the possibility that by a wider interpretation of the rule than was intended expenses charged in the accounting period might be disallowed on the ground that the loss though appropriate to the accounting period was not actually made in that period.

Rule 4 (*formerly* 3).—A new sub-rule (3) has been inserted to secure that where, under clause 9 of the Bill, profits of a subsidiary company are included in the excess profits tax assessment of the principal company, dividends from the subsidiary company out of such profits should not also be included in such assessment.

Rule 5 (*new*).—This rule has been inserted to provide relief in cases where a business has been expanded with capital borrowed from a bank or on debentures by securing that the interest paid on the loan should be disallowed and the loan itself should not be deducted from the total capital. The effect will be to substitute as a charge in computing the profits liable to excess profits tax the statutory percentage for the interest actually paid on the loan.

Rule 7 (*formerly rule* 5).—The addition made in sub-rule (2) secures that a company shall be able to have the remuneration paid to a managing agent allowed as an expense where that remuneration is itself subject to excess profits tax in the hands of the managing agent.

Rule 8 (*new*).—In consequence of the change made in rule 6 (2) by which remuneration paid to managing agents has been excluded from director's remuneration in certain cases we have inserted this provision to disallow for the purposes of the excess profits tax computation the payment to managing agents of remuneration at a higher rate than the rate in force in the standard period.

Rule 9 (*formerly rule* 6).—We have added a proviso providing for the adjustment of the profits of a completed contract when finally ascertained.

Rule 10 (*new*).—We have provided for special treatment of buildings erected during the period of war which might on the cessation of war conditions become almost valueless. The case of new machinery and plant which may have to be scrapped at the end of the war is provided for by the obsolescence provisions of section 10 of the Indian Income-tax Act, 1922.

Schedule II, Rule 1.—The omission of the words 'as defined in section 2 of this Act' is a drafting improvement only." (*Gazette of India*, Part V, dated 9th March, 1940, pages 115-122.)

THE EXCESS PROFITS TAX ACT (XV OF 1940).

CONTENTS.

SECTIONS.

1. Short title, extent and commencement.
2. Definitions.
3. Excess profits tax authorities.
4. Charge of tax.
5. Application of Act.

SECTIONS.

6. Standard profits.
7. Relief on occurrence of deficiency of profits.
8. Successions and amalgamations.
9. Inter-connected companies.
10. Artificial transactions.
11. Relief in respect of double excess profits taxation.
12. Allowance of excess profits tax in computing income for income-tax purposes.
13. Issue of notices for assessment.
14. Assessments.
15. Profits escaping assessment.
16. Penalties.
17. Appeals.
18. Appeal to Commissioner against Appellate Assistant Commissioner's orders imposing penalties or enhancing assessments or penalties.
19. Power of revision.
20. Rectification of mistakes.

SECTIONS.

21. Application of provisions of Act XI of 1922.
22. Income-tax papers to be available for the purposes of this Act.
23. Failure to deliver returns or statements.
24. False statement and declaration.
25. Institution of proceedings and composition of offences.
26. Power of Central Board of Revenue to grant relief in special cases.
27. Power to make rules.
SCHEDULE I.—Rules for the computation of profits for purposes of Excess Profits Tax.
SCHEDULE II.—Rules for computing the average amount of capital.
SCHEDULE III.—Rules for determining the amount of capital held by a company through other companies.

THE EXCESS PROFITS TAX ACT (XV OF 1940).

[*6th April,* 1940.

An Act to impose a tax on excess profits arising out of certain businesses.

WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE EXCESS PROFITS TAX ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "accounting period" in relation to any business means—

(*a*) where the accounts of the business are made up for successive periods of twelve months, each of such periods;

(*b*) in any other case, such period as the Excess Profits Tax Officer may determine:

Provided that in determining any accounting period under sub-clause (*b*) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922;

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under section 3;

(3) "Average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule;

(4) "Board of Referees" means a Board of Referees appointed under section 3;

(5) "Business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly

in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts:

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society:

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act;

(6) "chargeable accounting period" means—

(*a*) any accounting period falling wholly within the term beginning on the 1st day of September, 1939, and ending on the [1][31st day of March, 1942]; and

(*b*) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term;

(7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under section 3;

(8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;

(9) "deficiency of profits" means—

(*i*) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits;

(*ii*) where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits;

(10) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(*i*) is a manager of the company or concerned in the management of the business; and

(*ii*) is remunerated out of the funds of the business; and

(*iii*) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company;

(11) "dividend" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under section 3;

(13) "income" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax;

(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Commissioner of Excess Profits Tax under section 3;

(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;

[2][(16-A) "ordinary share capital" has the meaning assigned to that expression in sub-section (8) of section 9;]

LEG. REF.

[1] Substituted by Act VII of 1941.

[2] S. 16-A added by Act XI of 1941.

(17) "person" includes a Hindu undivided family;

(18) "prescribed" means prescribed by rules made under this Act;

(19) "profits" means profits as determined in accordance with the First Schedule;

(20) "standard profits" means standard profits as computed in accordance with the provisions of section 6;

(21) "statutory percentage" means—

(*a*) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

[1][(*b*) in relation to a business carried on by a partnership of which one or more of the partners is a body corporate (other than a company the directors whereof have a controlling interest therein), such a rate per cent. as is equivalent to—

(i) eight per cent. per annum on so much of the average amount of the capital employed in the business during the chargeable accounting period as represents the share of any such body corporate; and

(ii) ten per cent. per annum on the remainder of that amount;

(*c*) in relation to a business to which neither sub-clause (*a*) nor sub-clause (*b*) applies, ten per cent. per annum:]

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.:

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten, twelve and eight per cent., respectively;

(22) "written down value" has the meaning assigned to that expression in sub-section (5) of section 10 of the Indian Income-tax Act, 1922.

Excess profits tax authorities.

3. (1) There shall be the following classes of excess profits tax authorities for the purposes of this Act, namely:—

(*a*) the Central Board of Revenue;

(*b*) Commissioners of Excess Profits Tax;

(*c*) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax;

(*d*) Excess Profits Tax Officers;

(*e*) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks

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LEG. REF.

[1] S. 2 (21) (*b*) substituted by Act XLII of 1940.

fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them:

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue:

Provided that nothing in this sub-section applies to a Board of Referees:

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Boards of Referees.

Charge of tax.

[1][4. (1)] Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act:

Provided that any profits which are, under the provisions of sub-section (3) of section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.[2]

[1][(2) Where a chargeable accounting period falls partly before and partly after the end of March, 1941, the foregoing provisions of this section shall apply as if so much of that chargeable accounting period as falls before, and so much of that chargeable accounting period as falls after, the said end of March were each a separate chargeable accounting period, [3][and as if the excess of profits of that

[3]["and as if the excess of profits of that separate chargeable accounting separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period determined in accordance with the provisions of section 7-A].]

LEG. REF.

[1] Section 4 has been re-numbered as sub-S. (1) and to the section as so re-numbered sub-S. (2) has been added by Act XI of 1941.

[2] *N.B.*—"The excess profits tax imposed by S. 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits." [Finance Act VII of 1941, S. 8, cl. (2).]

[3] Substituted by Act XXIV of 1941.

Application of Act.

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (*i*) or sub-clause (*ii*) of clause (*b*) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (*c*) of that sub-section:

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in India:

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

[1][Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State; and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business.]

Standard profits.

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period:

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease:

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this section the standard period shall, at the option of the person carrying on the business, be—

(*a*) the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938; or

(*b*) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939; or

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LEG. REF.

[1] Last proviso to S. 5 added by Act XXIV of 1941.

(*c*) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939; or

(*d*) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940:

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of section 13, [1][or within the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section] the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just:

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

[2][Provided further that a determination on an application under this sub-section—

(*a*) shall have effect with respect to all subsequent chargeable accounting periods;

(*b*) shall exclude any further application under this sub-section.]

(4) The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum:

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of this sub-section be increased or decreased proportionately.

(5) Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business under this section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

Relief on occurrence of deficiency of profits.

7. Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions:—

(*a*) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

LEG. REF.

[1] Inserted by Act XLII of 1940.

[2] Added by Act XLII of 1940.

(*b*) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on:

[1][Provided that a deficiency of profits occurring in a chargeable accounting period beginning on or after the 1st day of April, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period beginning on or after the said 1st day of April, and a deficiency of profits occurring in a chargeable accounting period ending on or before the 31st day of March, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period ending on or before the said 31st day of March; and where owing to an insufficiency of profits for chargeable accounting periods ending on or before the said 31st day of March, or, as the case may be, beginning on or after the said 1st day of April, the whole or any part of the deficiency is applied otherwise than as aforesaid,—

(*a*) the application shall be treated as provisional only; and

(*b*) if it thereafter appears that there is no longer such an insufficiency as aforesaid, such adjustment shall be made as the Central Board of Revenue may by written order direct:

Provided further that where a chargeable accounting period falls partly before and partly after the end of March, 1941, the provisions of the preceding proviso shall apply as if so much of the chargeable accounting period as falls before, and so much of the chargeable accounting period as falls after, the said end of March, were each a separate chargeable accounting period, and as if the deficiency of profits of that separate chargeable accounting period were an apportioned part of the deficiency of profits occurring in the whole period; and any apportionment required to be made by this proviso shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period.]

Special provision for chargeable accounting period falling partly before and partly after the end of March, 1941.

[2][7-A. (1) In the case of a chargeable accounting period such as is referred to in sub-section (2) of section 4, the excess of profits of each of the separate chargeable accounting periods into which the whole chargeable period is deemed to be divided for the purposes of that sub-section, shall be determined in accordance with the provisions of sub-sections (2), (3) and (4), and in those sub-sections—

(*a*) references to the whole period, the first part of the period, and the second part of the period shall be construed, respectively, as references to the whole of the chargeable accounting period deemed to be divided, so much thereof as falls before the end of March, 1941, and so much thereof as falls after the said end of March;

(*b*) "excess profits" means the amount by which the profits for any period exceed the standard profits for that period.

(2) The profits or loss of, and the standard profits for, the whole period shall be computed first on the basis that rule 5-A of the First Schedule and rule

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LEG. REF.

[1] Provisos to S. 7 added by Act XI of 1941.

[2] S. 7-A Inserted by Act XXIV of 1941.

2-A of the Second Schedule do not apply to the period, and secondly on the basis that the said rules do apply to the period, and it shall then be ascertained, on each basis, whether there are excess profits or a deficiency of profits for the whole period, and, if so, what is the amount thereof.

(3) There shall be deemed to be for the first part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the first basis mentioned therein, and there shall be deemed to be for the second part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the second basis mentioned therein; and, for the purpose of giving relief for deficiencies of profits under section 7, the first part of the period and the second part of the period shall each be treated as if it were a separate chargeable accounting period.

(4) Any apportionment required to be made by sub-section (3) shall be made by reference to the number of months and fractions of months in each of the parts of the whole period.]

Successions and amalgamations.

8. (1) As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, [1][and in considering, for the purposes of computing the profits of, and the capital employed during, any chargeable accounting period, whether any and, if so, what deductions are to be made in respect of depreciation of buildings, plant and machinery]; no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—

(*a*) it had been in existence throughout the period during which there were in existence any of the former businesses;

(*b*) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business; and

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LEG. REF.

[1] **Inserted by Act XLII of 1940.**

(*c*) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business;

and, in particular, in computing the capital employed in the resulting business, [and in considering, for the purposes of computing the profits of, and the capital employed during, any chargeable accounting period, whether any and, if so, what deductions are to be made in respect of depreciation of buildings, plant and machinery][1]; no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this section relating to amalgamations, shall apply accordingly, [2][* * *]:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board to be just.

(6) Notwithstanding anything in the foregoing provisions of this section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business [3][* * *].

(7) Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

[4][(8) Where—

(*a*) a business is, by virtue of sub-section (2) or sub-section (3), deemed not to have been discontinued; or

(*b*) a business is, by virtue of sub-section (4), to be treated as if it had been in existence throughout the period during which there was in existence any other business; or

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LEG. REF.

[1] Inserted by Act XLII of 1940.

[2] The words "subject to any necessary modifications" omitted by Act XLII of 1940.

[3] Omitted by Act XLII of 1940.

[4] S. 8, sub-S. (8) added by *ibid*.

(*c*) a business is, by virtue of sub-section (5), to be treated as a continuation of another business; or

(*d*) any person who is carrying on a business after a transfer is treated, by virtue of sub-section (6), as having carried on the business as from a date before the transfer,

the provisions of this Act relating to the computation of profits and capital for the purposes of excess profits tax shall, both as respects the standard period and any chargeable accounting period, have effect subject to such modifications, if any, as the Excess Profits Tax Officer may think just, and the Excess Profits Tax Officer may make such alterations in the periods which would otherwise be the chargeable accounting periods of the business as he thinks proper:

Provided that if the Excess Profits Tax Officer makes any such modifications and the person carrying on the business is dissatisfied with the modifications so made, or if the person carrying on the business is dissatisfied with the refusal of the Excess Profits Tax Officer to make any such modifications, he may, at any time before the expiry of forty-five days from the date on which the order of the Excess Profits Tax Officer is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer.]

Inter-connected companies.

9. (1) Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if—

(*a*) the interest, annuity, annual payment, royalty or rent were not payable;

(*b*) any debt in respect of which any such interest is payable did not exist; and

(*c*) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.

[1][(1-A) Where—

(*a*) any debt is owing to any company by another company; and

(*b*) one of those companies is a subsidiary of the other, or both are subsidiaries of a third company; and

(*c*) no interest is payable in respect of the debt, but the circumstances in which the debt came into existence or is allowed to continue to exist are such that the debt represents in substance capital employed in the business of the debtor company,

the capital of both companies shall be computed as if the debt did not exist.]

(2) Where—

(*a*) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and

(*b*) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company") is a subsidiary of the principal company,

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LEG. REF.

[1] S. 9, sub-S. (1-A) inserted by Act XLII of 1940.

the following provisions of this section shall, subject to the provisions of section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(*i*) the chargeable accounting period; or

(*ii*) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expressions "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any, of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Central Board of Revenue may direct.

(6) For the purposes of this section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate to its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

Artificial transactions.

[1][10. (1) In computing profits for the purposes of this Act no deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the

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LEG. REF.

[1] New S. 10 substituted for old S. 10 by Act XXIV of 1941.

transaction or operation has artificially reduced or would artificially reduce the profits.

(2) If the Excess Profits Tax Officer is satisfied that any person has entered into or carried out any transaction or operation by which the profits have been or would be artificially reduced, he may, with the previous approval of the Inspecting Assistant Commissioner, direct that such person shall pay, in addition to any excess profits tax for which he is or, but for such transaction or operation, would be liable, a penalty not exceeding the tax evaded or sought to be evaded.]

Transactions designed to avoid or reduce liability to excess profits tax.

[1][10-A. (1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected [whether before or after the passing of the Excess Profits Tax (Second Amendment) Act, 1941] was the avoidance or reduction of liability to excess profits tax, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the powers conferred thereby extend—

(*a*) to the charging with excess profits tax of persons who but for the adjustments would not be chargeable with any tax or would not be chargeable to the same extent;

(*b*) to the charging of a greater amount of tax than would be chargeable but for the adjustments.

(3) Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal.]

Relief in respect of double excess profits taxation.

11. (1) The Central Government may by notification in the official Gazette make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India:

Provided that where under section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal

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LEG. REF.

[1] S. 10-A inserted by Act XXIV of 1941.

to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.

Allowance of excess profits tax in computing income for income-tax purposes.

12. (1) The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period [1][to the extent to which such profits are liable to excess profits tax under this Act], after diminishing such amount by any amount which is allowable by way of relief by repayment, set-off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess profits tax has also been charged in British India:

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the [1][previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922)] in which the deficiency of profits occurs.

Issue of notice for assessment.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of section 6 or the amount of deficiency available for relief under section 7:

Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require:

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the "previous year" as deter-

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LEG. REF.

[1] Substituted by Act XLII of 1940.

mined under section 2 of the Indian Income-tax Act, 1922; for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937.

Assessments.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 13, assess to the best of his judgment the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

Profits escaping assessment.

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been underassessed, or have been the subject of excessive relief; he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 13, and may proceed to assess or re-assess the amount of such profis liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

Penalties.

16. If the Excess Profits Tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that section, or has concealed particulars of the profits made by or capital employed in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

(*a*) where the person has failed to furnish the return required under sub-section (1) of section 13, the amount of the excess profits tax payable; and

(*b*) in any other case, the amount of excess profits tax which would have been avoided if the return made had been accepted as correct:

Provided that the Excess Profits Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner.

Appeals.

17. (1) Any person aggrieved by a decision made in pursuance of section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the

amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner:

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the [1][second proviso] to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule:

[2][Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8, against any [3][refusal to make modifications or against any modifications] made by the Excess Profits Tax Officer under sub-section (8) of section 8, against any decision of the Excess Profits Tax Officer under rule 11 of the First Schedule, or against any decision of the Board of Referees or the Central Board of Revenue].

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.

Appeal to Commissioner against Appellate Assistant Commissioner's orders, imposing penalties or enhancing assessments or penalties.

18. (1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under section 16 or enhancing his assessment or enhancing a penalty under section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

LEG. REF.

[1] Substituted by Act XI of 1941.

[2] Substituted by Act XLII of 1940.

[3] Inserted by Act XI of 1941.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this section shall cease to have effect.

Power of revision.

19. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit:

Provided that he shall not pass any order prejudicial to a person to whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under section 16 or section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

Rectification of mistakes.

20. The Commissioner may, at any time within four years from the date of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies:

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

Application of provisions of Act XI of 1922.

21. The provisions of sections 4-A, 4-B, 10, 13, 24-B, 29, 36 to 44-C (inclusive), 45 to 48 (inclusive), 49-E, 49-F, 50, 54, 61 to 63 (inclusive), 65 to 67-A (inclusive) of the Indian Income-tax Act, 1922, shall apply with such modifications, if any, as may be prescribed as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of section 3 as he exercises in relation to income-tax under the said Act:

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this act applies.

Income-tax papers to be available for the purposes of this Act.

22. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

Failure to deliver returns or statements.

23. If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

False statement and declaration.

24. If a person makes in any return required under section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

25. (1) A person shall not be proceeded against for an offence under section 23 or section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence punishable under setion 23 or section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner may, either before or after the institution of proceedings, compound any offence punishable under section 23 or section 24.

Power of Central Board of Revenue to grant relief in special cases.

26. (1) If [1][on an application made to it through the Excess Profits Tax officer] the Central Board of Revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just:

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded by the Board of Referees under sub-section (3) of section 6 is inadequate:

[2][Provided further that a determination on an application under this sub-section—

(*a*) shall have effect with respect to all subsequent chargeable accounting periods;

(*b*) shall exclude any further application under this sub-section.].

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely:—

(*a*) that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of

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LEG. REF.

[1] Inserted by Act XLII of 1940.

[2] Added by Act XLII of 1940.

the business that to compute the standard profits in accordance with the provisions of section 6 would be inequitable, taking into account the normal profits made in similar businesses;

(*b*) that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax;

(*c*) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have paid income-tax for the previous year as determined for the purpose of the income-tax assessment for the year beginning on the 1st day of April, 1937.

(3) If [1][on an application made to it through the Excess Profits Tax Officer], the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely:—

(*a*) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or

(*b*) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or

(*c*) difficulties in bringing into British India income arising outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India, and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India; the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just:

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

[2][or

(*d*) in the case of any business which includes the winning of any mineral (including mineral oil) the winning of which is of exceptional importance for the prosecution of the present war, an increase in the output of the mineral which was essential in the national interest and which has had the effect of shortening the period during which but for such increased wartime output the source of the mineral might havt been expected to be exhausted].

[3][(4) An application to the Central Board of Revenue under this section shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section, but in the case of an application under sub-section (1) of this section, if the person carrying on the business has made or is making an application under sub-section (3) of section 6, the application shall be presented to the Excess Profits Tax Officer before the expiry of forty-five days from the

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LEG. REF.

[1] Inserted by Act XLII of 1940.

[2] Added by Act XXIV of 1941.

[3] Added by Act XLII of 1940.

date on which the order of the Board of Referees disposing of the application under sub-section (3) of section 6 is communicated to the person who has made that application].

Power to make rules.

27. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds;

(*b*) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by section 21; or of any rules made under any such provision;

(*c*) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investment for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which have been subjected to excess profits tax in British India;

(*d*) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.

SCHEDULE I.

[*See* section 2 (19).]

Rules for the computation of profits for purposes of Excess Profits Tax.

1. The profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under section 10 of the Indian Income-tax Act, 1922:

[1][Provided that any sums, [2][(other than any interest paid by a firm to a partner of the firm)], excluded under the proviso to clause (*iii*) of sub-section (2) or clause (*a*) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of the business for the purposes of excess profits tax:]

Provided [3][further] that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purpose of excess profits tax:

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the standard period or chargeable accounting period: and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

LEG. REF.

[1] **Added by Act XLII of 1940.**

[2] Inserted by Act XI of 1941.

[3] **Inserted by Act XLII of 1940.**

3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.

(3) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of sub-section (2) of section 24 of the Indian Income-tax Act, 1922.

4. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2) [1][2-A] and (4) of this rule and not otherwise.

(2) In the case of the business of a building society, or of a money-lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under section 10 of the Indian Income-tax Act, 1922, or is charged under any other section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

[1][(2-A) In the case of a business part of which consists in banking, insurance or dealing in investments, not being a business to which sub-rule (2) of this rule applies, the profits shall include all income received from investments held for the purposes of that part of the business, being income to which the persons carrying on the business are beneficially entitled.]

(3) Notwithstanding anything contained in sub-rule (2) [1][or 2-A] where the profits of a subsidiary company are under the provisions of section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under section 9 of the Indian Income-tax Act, 1922, or under any other section of that Act.

5. If at any time after the close of the standard period, any increase in the capital ments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments:

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

5. If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

[2][5-A. (1) In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the profits of a business other than a business to which sub-rule (2) of rule 4 of this Schedule applies, or the profits of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of interest on borrowed money or in respect of any other consideration given for the use of borrowed money:

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act:

Provided further that this rule shall not apply to the computation of profits of any business for any chargeable accounting period the standard profits for which are ascertained by reference to the minimum amount specified in sub-section (4) of section 6 of this Act:

Provided further that where a direction has been given by a Board of Referees under sub-section (3) of section 6, or by the Central Board of Revenue under sub-section (1) of section 26 of this Act, that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just, such amount shall

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LEG. REF.

[1] Inserted by Act XLII of 1940.

[2] Inserted by Act XXIV of 1941.

be increased by the amount of the interest on or other consideration for the borrowed money during the standard period.

(2) In this rule and in rule 2-A of the Second Schedule "borrowed money" means borrowed money which, apart from the provisions of the said rule 2-A, would have been deductible in computing capital.]

6. No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.

7. [1][(1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have throughout that accounting period a controlling interest therein—

(a) in computing the profits for that accounting period; and

(b) if the standard profits of the business are computed by reference to the profits of a standard period, also in computing, in relation to any such chargeable accounting period, the profits for the standard period,

no deduction shall be made in respect of directors' remuneration.]

(2) [1][In sub-rule (1) of this rule] the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax.

[1][(3) If, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company—

(a) have during any part of that accounting period, or

(b) had during the whole or any part of any previous accounting period which includes the whole or any part of any chargeable accounting period or the whole or any part of the standard period (if any),

a controlling interest therein, and the case is not one to which sub-rule (1) of this rule applies, then, except in so far as the Central Board of Revenue otherwise directs, no deduction shall be made in respect of directors' remuneration either in computing the profits for the first-mentioned accounting period or in computing in relation to any chargeable accounting period wholly or partly included in that accounting period, the profits of the standard period (if any).]

8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein:

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

10. In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.

[2][11. Where in respect of any accounting period a deduction would, apart from the provisions of this rule, be allowable in computing profits, and, in the opinion of the Excess Profits Tax Officer, the deduction does not represent a sum reasonably and properly attributable to that accounting period, only such part of the deduction shall be allowable as a deduction for that period as appears to the Excess Profits Tax Officer to be reasonably and properly attributable to that period, and any balance of the deduction shall be treated as attributable to such other accounting period or periods (whether or not they include,

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LEG. REF.

[1] Substituted by Act XLII of 1940.

[2] Added by Act XLII of 1940.

or fall wholly or partly within, the standard period, if any, or any chargeable accounting period) as the Excess Profits Tax Officer thinks proper.

Any person who is dissatisfied with a determination of the Excess Profits Tax Officer under this rule may, at any time before the expiry of forty-five days from the date on which such determination is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer.]

[1][12. (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned:

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal.]

SCHEDULE II.

[*See* section 2 (3).]

Rules for computing the average amount of capital.

1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(*a*) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified;

(*b*) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions;

(*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value [2][and to such other deductions in respect of reduced values of assets as are allowable in computing profits for the purposes of income-tax]; and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

2. (1) Any borrowed money and debts shall be deducted, and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted:

Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(*a*) in the case of income-tax and super-tax, on the last day of the period of time within which the tax is payable under section 45 of the Indian Income-tax Act, 1922;

(*b*) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

[2][The debts to be deducted under this sub-rule shall include any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period; and the said sums shall be deducted notwithstanding that they have not become payable.]

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

[3][2-A. In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the average capital of a business other than a business to which sub-rule (2) of rule 4 of the First Schedule applies, or the average capital of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of borrowed money:

LEG. REF.

[1] Added by Act XXIV of 1941.

[2] Inserted by Act XLII of 1940.

[3] Inserted by Act XXIV of 1941.

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act:

Provided further that the same deduction shall be made in respect of accruing liabilities for interest as would have been made if this rule had not been enacted.]

3. Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the profits of the business, and any moneys not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments:

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. Notwithstanding anything contained in rule 3, in the case of the business of shipping, to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business:

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax.

5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

(*a*) to have accrued at an even rate throughout the period; and

(*b*) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the business.

6. Where, in accordance with the [1][second or third proviso] to section 5 of this Act, this Act is applicable to part only of a business, the capital employed in that part shall be computed separately from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.

[2][7. (1) If—

(*a*) the Central Board of Revenue is satisfied, as respects any assets of any business the standard profits of which are computed by reference to the profits of a standard period, that during that period or any part thereof those assets were inherently unproductive, and

(*b*) an application that this rule shall have effect is made through the Excess Profits Tax Officer to the Central Board of Revenue by the person carrying on the business,

then, in computing the average amount of the capital employed in the business in the standard period and in all chargeable accounting periods, those assets, and any other assets of the business, shall be treated as not having been assets thereof during any part of the period during which, in the opinion of the Central Board of Revenue, they were inherently unproductive:

Provided that in the case of a business the standard profits of which depend directly or indirectly upon a direction of the Board of Referees under sub-section (3) of section 6, or of the Central Board of Revenue under sub-section (1) of section 26 of this Act the provisions of this rule shall have effect to such extent only as the Central Board of Revenue thinks proper:

Provided further that an application to the Central Board of Revenue under this rule shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 of this Act or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section.

(2) Where sub-rule (1) of this rule has effect on the application of the person carrying on any business, any computation of capital of the business made before the making of the application, and any assessment affected by that computation shall be revised accordingly.]

SCHEDULE III.

[*See* section 9 (7).]

Rules for determining the amount of capital held by a company through other companies.

1. Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second and, if the third directly owns ordinary share capital

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LEG. REF.

[1] Substituted by Act XXIV of 1941.

[2] Added by Act XLII of 1940.

of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.

2. In this Schedule—

(*a*) any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as "a series";

(*b*) in any series—

(i) that company which owns ordinary share capital of another through the remainder is referred to as "the first owner";

(ii) that other company the ordinary share capital of which is so owned is referred to as "the last owned company";

(iii) the remainder, if one only, is referred to as an "intermediary" or, if more than one, is referred to as a "chain of intermediaries";

(*c*) a company in a series which directly owns ordinary share capital of another company in the series is referred to as an "owner";

(*d*) any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the other companies in the series, are referred to as being directly related to one another.

3. Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary or chain of intermediaries the whole of the ordinary share capital of the last owned company.

4. Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of the ordinary share capital of the last owned company through the intermediary or chain of intermediaries.

5. Where—

(*a*) each of two or more of the owners in a series owns a fraction, and every other owner in the series owns the whole, of the ordinary share capital of the company to which it is directly related; or

(*b*) every owner in a series owns a fraction of the ordinary share capital of the company to which it is directly related;

the first owner shall be deemed to own through the intermediary or chain of intermediaries such fraction of the ordinary share capital of the last owned company as results from the multiplication of those fractions.

6. Where the first owner in any series owns a fraction of the ordinary share capital of the last owned company in that series through the intermediary or chain of intermediaries in that series, and also owns another fraction or other fractions of the ordinary share capital of the last owned company, either—

(*a*) directly; or

(*b*) through any intermediary or intermediaries which is not a member or are not members of that series; or

(*c*) through a chain or chains of intermediaries of which one or some or all are not members of that series; or

(*d*) in a case where the series consists of more than three companies, through an intermediary or intermediaries which is a member or are members of the series, or through a a chain or chains of intermediaries consisting of some but not all of the companies of which the chain of intermediaries in the series consists;

then, for the purpose of ascertaining the amount of the ordinary share capital of the last owned company owned by the first owner, all those fractions shall be aggregated and the first owner shall be deemed to own the sum of those fractions.

THE FACTORIES ACT (XXV OF 1934).

PREFATORY NOTE: FACTORY ACTS.—Factory Acts are laws enacted for the purpose of regulating the hours of work, and the sanitary conditions, and preserving the health and morals, of the employees, and promoting the education of young persons employed at such labour.

THE FOUNDATION OF LAW IN RELATION TO LABOUR.—The foundations of law in relation to labour may be summed up in the words *protection* and *improvement*. Three reasons may be assigned for the enactment of laws designed to protect and improve the status of wage-earners in industry—

(*i*) the prevalence of self-interest as the dominant motive of economic activity, which often results in the exploitation of defenceless workers by avaricious employers;

(*ii*) the complexity of modern industrial organization and operation, which makes it practically impossible, except under the compulsion of law, for even well-meaning and scrupulous employers to safeguard the physical, mental and economic interests of their employees; and

(*iii*) the necessary relationship that obtains between the protection and improvement of standards of employment, on the one hand, and social welfare and progress on the other.

THE DEVELOPMENT OF LABOUR LEGISLATION IN ENGLAND.—"The legal status of the labouring classes in England, as in other European countries, during the mediæval period was definitely fixed. The workers found themselves encompassed with legal regulations concerning wages, hours of work, apprenticeship, migration from one locality to another, and various other aspects of their working life. Combinations of labourers for the purpose of changing conditions of employment were prohibited. Many of these measures were ineffective because of lax enforcement. The revolutionary changes that were taking place in the eighteenth century made the prevailing system of regulation burdensome to the rising class of capitalist-employers, as it had been from time to time to the labourers. Free access to the labour market and the abolition of extended periods of apprenticeship were desired because the new machines could be operated by women and children. Inspired by the teachings and writings of Adam Smith concerning freedom of economic activity, the manufacturers made successful attacks on statutory limitations. Freedom of action became the shibboleth of the nation and the restrictive laws were repealed.

The abolition of the old restrictions on industry and trade, and the consequent free play of economic forces under the sanction of *laissez faire* philosophy brought new problems and new evils no less serious than the old. Technical improvements and increased production were secured at the expense of the physical and mental well being of the men, women and children who worked excessive hours under unfavourable conditions.[1] New regulations therefore had to be prescribed by law. Robert Owen and some other employers of labour regarded themselves as the trustees of the interests of those whom they employed in their factories, and aided greatly in the movement for reform. Social and moral motives, rather than any conception of the economic waste of child labour and other evils, led to the demand for protective laws; there was no reference to the facts concerning the relation of hours and conditions to output. The agitation of Robert Peel and Robert Owen resulted in the Health and Morals Act to regulate the labour of bound children in Cotton Factories in 1802. Children who were not pauper apprentices were protected by the second of the Factory Acts enacted in 1819. In 1833 all textile mills were brought under regulation. This measure prohibited the employment of children under 9 years of age; children between the ages of 9 and 13 might work only 8 hours a day, and young persons between 13 and 18 years of age for only 12 hours, with no employment at night. Provisions were made for holidays, and a certificate of fitness was demanded. Special factory inspectors were appointed to enforce the Act. The Children's Half-Time Act of 1844 provided for the safeguarding of machinery, accident reports, public prosecution, and actions for damages in cases of accidents, and the employment of children for half-time only, the other half to be spent in school. Under this Act all women workers were classified with young persons of 13 to 18 years of age, for the purposes of restricting their hours to 12 a day and prohibiting their employment at night. The Ten Hour Act of 1847 secured the 10-hour day for women and young persons. But all these measures failed to reach the thousands of women and children who worked in the mines. Children began their life in the coal mines at 5, 6 or 7 years of age; girls and women worked like boys and men; and the hours were 12 or 14 in every 24, often at night. The Mines and Collieries Act of 1842 was enacted to prohibit the employment of women, and children under 10 years of age, in underground mines. The law was revised to exclude from such employment all females and all boys under 13 years of age. Moreover, the Factory Acts were extended to all large industries in 1864, and to smaller workshops in 1867. In 1878 the Factory and Workshop Consolidation Act repealed all former laws and substituted a Factory Code which made regulations more stringent. Since that time protection has been extended to workers in laundries, docks, sweetshops, mercantile establishments, and other enterprises. The new Factory Code of 1902 raised the minimum age for child workers from 11 to 12 years, and in 1920 the employment of Women, Young Persons and Children Act was passed governing the employment of women and young people on the two-day shift system, excluding from industrial employment children under 14 years of age, and permitting women, and young persons of 16 years of age and over, to be employed, under certain conditions, in shifts averaging not more than 8 hours a day, at any time between 6 A.M. and 10 P.M. or 6 A.M. and 2 P.M. on Saturdays. Workmen's compensation, sickness insurance, unemployment insurance, old age pensions, and many other protective measures have been enacted in Great Britain on behalf of the workers and social welfare.

LEG. REF.

[1] "We manufacture everything except men. We blanch cotton and strengthen steel and refine sugar and shape pottery, but to brighten, to strengthen, to refine and to reform a single living spirit never enters into our estimate of advantages." (*John Ruskin quoted in de Gubben's English Social Reform,* 212).

PROTECTIVE LEGISLATION FOR WOMEN.—The movement for the legal protection of women workers developed almost contemporaneously with the movement for the protection of children, and in many instances the same legislation has been made applicable to both of these groups of workers. Laws limiting the hours of employment were most prominent among the early protective measures for women.

MINIMUM WAGE LAWS.—Among the most recent extensions of the principle of protective legislation is the legal minimum wage, which, by specifying minimum standards of pay for certain groups of workers, seeks: (1) to protect the health and welfare of those workers; (2) to equalize the bargaining power of employers and employees covered by the laws; and (3) to promote social welfare and progress. These laws are usually made applicable to women and minors and other low-skilled and unskilled workers. Among such workers labour organization and collective bargaining have made little progress, and the keenness of competition among them has resulted in the depression of wage scales to a sub-standard equivalent to the bargaining power of the weakest individual bargainer. In a very real sense, therefore, the State intervenes to secure for these workers the full competitive rate of wages; such has been the history of labour legislation in England."—(*Watkins Introduction to the study of Labour Problems.*)

FACTORY LEGISLATION IN INDIA.—Factory Legislation in India has followed on the same lines as similar English Legislation.

The first time that public attention was drawn to the subject in India was in 1873. In a report on the Administration of the Bombay Cotton Department in 1872-73, the writer Major Moore dealt with Factory conditions in Bombay and touched specially on the length of the working hours, the condition of women and children and the age at which children were employed. It appears that, at that time children began to work at six years of age and worked from sunrise to sunset, with a brief interval of half an hour for meals, and frequently were allowed only two holidays in the month.

The Secretary of State whose attention had been drawn to the condition of labour in India and who had seen Major Moore's Report, wrote on the subject to the Bombay Government; and in 1875, that Government appointed a Commission to determine whether legislation was necessary. The decision arrived at by a majority of seven against two was not in favour of legislation.

During this period the mind of Britain was greatly exercised about reforms in legislation. Those interested in British industry began to make inquiries about the condition of labour in India, and a strong desire was expressed that mills in India should not be allowed to go on unwatched and repeat the disasters that had taken place in Britain. A powerful portion of the British Mill-owning Community seized this opportunity for diverting criticism from conditions in their own country, by drawing attention to those in India and urged that no further burden should be laid upon them which would make it still more difficult to compete with cheap labour abroad. About this time Miss Carpenter of Bristol, founder of the National Indian Association, had visited India and made inquiries about the Indian factory conditions. The Secretary of State in his dispatch to the Government of India, urging legislation in respect of factory work, wrote of pressure being brought to bear on him; but had not mentioned from what quarter. There was however a general feeling in India that "the voice was the voice of Exeter Hall, but the hand was the hand of Manchester". British influence being exerted in respect of Indian Legislation, and British interference with Indian industry, was strongly resented and criticised as being wielded by ignorant English philanthropists and grasping English Manufacturers.

The result was that special irritation was roused in India, and every suggestion that was inspired from Britain which might imply interference with Indian labour conditions, was viewed with suspicion. This suspicion was, for some time, strong and real. But facts could not be ignored for long. Abuses in factories must be attended to from whatever source criticism came.

As has been said by Mr. T. M. Nair in his Minute of Dissent to the Report of the Factory Labour Commission, 1908: "The many abuses which exist in connection with factory labour in India are certainly not of Lancashire's creation. Because certain representatives of the cotton industry in Lancashire have prominently drawn the attention of the authorities to the existence of grave abuses in the working of the textile factories,—it is no ground why those grave abuses, if real, ought to be condoned. Abuses are abuses whether they are pointed out by friends or foes".

FACTORY ACT, 1881.—In 1877 there was framed the first draft of a Bill, which after much discussion and alteration was passed for all India in 1881. Owing to the strong criticism to which it had been subjected, it finally saw the light in what was, from the point of view of its supporters in a very inadequate form. By it, children were allowed to work for nine hours a day from the age of eight upwards; clauses that related to the work of women and holidays had to be dropped; and the District Officers were expected to enforce the Act and its regulations without any addition to their staff.

FACTORY ACT XII OF 1911.—Between 1881 when the first Factory Act was passed and 1911 when Act XII of 1911 took its place, there were continuous discussions roused by Government Reports and various Labour Commissions. The Act of 1911 secured one weekly holiday for all workers in factories, a maximum of eleven hours work a day for women with one and a half hours rest during that time. It also prohibited the work of women and children at night, raised the age of children permitted to work in mills from eight to nine years and allowed them to work for seven hours only.

Apart from pressure from English Manufacturing interests which were viewed with suspicion in India, other influences also were at work. There had been an international conference at Berlin in 1890 called by the Emperor of Germany through the Swiss Government. In 1900, an "Association for labour legislation" was formed and met for the first time in Paris. The members of this Association continued to agitate till at an official International Conference called by the Swiss Government in Berne in 1905, the first international Conventions were formulated. These were signed at the same place a year later. One of the subjects dealt with by this convention was the employment of women at night.

ACT XII OF 1911—STATEMENT OF OBJECTS AND REASONS.—The following extracts from the Statement of Objects and Reasons attached to the Bill would show the problems that confronted the Legislature and how it was proposed to solve them.

The object of this Bill is to consolidate and amend the law in India relating to Factories. The Indian Factories Acts, 1881 and 1891, will be repeated and the new Act will take their place. The report submitted by the Factory Labour Commission, 1908, disclosed the existence of abuses in factories, particularly in connection with the employment of children and the length of the hours for which the operatives were generally employed. The commission made proposals with the object of checking those abuses, and also submitted proposals for strengthening the law on several points, so that inspection might be more effective and the administration of the law improved. It is now proposed to undertake legislation to give effect to these recommendations in so far as they have been approved by the Government. The opportunity has been taken to remodel the framework of the existing law and to redraft several of its provisions.

The Report of the Commission showed that excessive hours were not worked except in textile factories. The restrictions which it is considered necessary to impose on the textile factories are the following:—

(1) No person shall be actually employed for more than 12 hours in any one day.

(2) No person shall be employed before 5-30 in the morning and after 7 in the evening.

(3) The period for which mechanical power is used shall not in any one day exceed 12 hours.

(4) No child shall be employed for more than 6 hours in any one day.

Of the above restrictions the second and third will not apply to any factory for ginning cotton or for pressing cotton or jute. Power is also taken to grant exemption in special cases from restrictions (1), (2) and (3).

The Government of India will be empowered to extend by notification the provisions of the law relating to textile factories to any other specified class of factories, should the necessity arise. In the case of non-textile factories, certain new restrictions have been proposed in the case of women and children (which are explained in the notes on clauses 24 and 25 attached to the Bill).

The existing Act contains no substantive provisions providing for the health and safety of the operatives, excepting one section which deals with the fencing of the machinery. In accordance with the recommendations of the Factory Labour Commission, a number of provisions for securing the health and safety of the operatives have been included in Chapter III of the Bill. These provisions are in some cases borrowed from the English Factory and Workshop Act, 1901, and in others are based on rules which are already in force in several Provinces.

Several provisions have been inserted in the Bill with object of making inspection more effective, increasing the powers of the Inspectors, and providing generally for the better operation of the Act. The existing law makes the occupier of the factory primarily liable for any breach of the provisions and of the rules and orders made thereunder. It has been found difficult to enforce this responsibility, and, in the Bill, it is now proposed, that in place of the occupier, the manager of the factory shall be held responsible when any offence is committed against the Act.—(See *Fort St. George Gazette*, Part III, August 10, 1909, pp. 180-182).

ACT XXV OF 1934.—It was not long before Act XII of 1911 was found inadequate to satisfy the growing needs of labour. With experience of its working, the development of factory employment, the changes consequent on war conditions, the conventions arrived at by the Labour Conference at Washington in 1919, united to make further legislation necessary. A Royal Commission was appointed in 1929 with Mr. John Henry Whitley as president, "to enquire into and report on the existing conditions of labour in Industrial undertakings and plantations in British India, on the health, efficiency and standard of living of the workers, and on the relations between employers and employed, and to make recommendations".

ACT XXV OF 1934—STATEMENT OF OBJECTS AND REASONS.—"The Royal Commission on Labour in India made a number of recommendations for the amendment of the Factories Act. These were published with their Report in July, 1931. After examining these in detail, the Government of India drafted a Bill to replace the Factories Act, 1911, which embodied the great majority of the proposals and included some further alterations that experience had shown to be desirable. This Bill was circulated with a covering letter and a series of explanatory notes to Local Governments in June, 1932 and the Governments were asked to forward the papers to association of employers and employed and to other organisations or individuals who might be interested. In reply, a series of opinions were received discussing the Bill and the original Act in great detail, and after considering the numerous suggestions offered, the Government of India framed the Bill which subsequently was passed as the Factories Act (XXV of 1934).

The substantial changes made in the law are discussed in the Notes on Clauses. Nearly all the more important alterations are based on the Labour Commission's recommendations. At the same time the opportunity has been taken to re-arrange the law and to revise its expression where necessary. The old Act was in force from 1911, but since that date large changes had been made by amending Acts and the consolidation of the law in a clearer and more logical form was in itself a desirable reform.

PROCEEDINGS IN COUNCIL.—In introducing the Bill which afterwards was passed as Act XXV of 1934, the member in charge of the Bill made the following observations:— "The Act which forms the framework of the Bill that we are now submitting to the House was passed as long ago as 22 years, when factory industries were far from the state of development they have recalled to-day; and when many of the problems now facing us were unexplored or even unknown. Extensive amendments were made in 1922, and there have been no less than three other amending Acts since then. As a result, few of the more important provisions of the 1911 Act survive in their original form. The present Act, it is not going too far to say, is a thing of shreds and patches, and it stands in urgent need of consolidation and also of clarification. But that is not the only need. Government have been aware of defects in the law in certain directions for a number of years past. We have realised, for instance, that the Act gives inadequate protection to workers in respect of safety, health and comfort. Experience of its working has revealed other defects and weaknesses. Further, it countenances hours of work, which, I think every one even those who are not in favour of immediate change, realises, cannot be regarded with equanimity as a permanent feature of Indian industry, but which presented the limit to which it was thought desirable to go when the provisions in question were enacted.

Finally, the work of the Whitley Commission which probed more deeply into this subject than Government have naturally ever had an opportunity of doing, not only brought to light the need for other changes, but gave valuable guidance towards the framing of a new law. As I am not asking the House to commit itself to any particular provisions of the Bill, even those which relate to hours, it is not, I think, necessary for me to discuss those provisions in detail. I hope that, in respect of, at any rate, most of the sections, the Statement of Objects and Reasons affords a sufficient explanation.

I should like to deal specifically, if very briefly, with one clause, clause 35, which relates to the weekly hours of work, for it is in regard to that clause that I think there is, to say the least, a considerable possibility of some diversity of opinion. Briefly, our proposals are that, in seasonal factories, the limit of 60 hours should remain; continuous process factories should be allowed a 56 hour week, which is the normal limit in such factories at present; in the other non-seasonal factories, the week should be ordinarily limited to 54 hours. This, it is important to remind the House, was the limit already observed by the majority of the factories to which it is proposed to apply it. But there is a large minority of factories which still work up to the 60 hours limit. The minority includes the bulk of the mills in that very important industry, the cotton textile industry. Now, I should like to state the reasons which have led me to the view that this limit, if it were enforced, would be to the advantage both of industrialists and of workers. So far as employers are concerned it seems to me that, as I have already indicated, stability in any industry must be dependent on a reasonably efficient and contended labour force. It is impossible to my mind to build a sound industrial structure in India or for that matter in any other country, on a foundation of inefficient work. It is unreasonable to expect any high degree of efficiency or any high degree of contentment from men who have to spend ten hours a day—indeed it amounts to eleven hours if the rest interval is included—within the limits of a factory. Shorter hours are, in my view, an essential condition for any substantial advance in efficiency. Further, I would remind the House that there has recently been a very radical charge in the labour position. Formerly there was a constant scarcity of labour and many employers were, therefore, naturally anxious to keep the men they had at work as long as possible. Now, we have the spectacle of men sitting idle outside the factory gates, unable to get work, whilst others inside are required to work an unduly long period.

Turning to the workers, I recognise that for many of those in employment, that is, those who are working a longer day, the reduction in hours must mean a definite sacrifice. Industry to-day in India is unfortunately not in such a position that, if production is reduced it can pay the same wages as it did before, and until workers can make good this reduction by more intense labour, they must face a reduction from the level of earnings prevalent in the last few years. On the other hand, prices have fallen greatly, and any reasonable reduction that would be required on this account, would not bring the workers' purchasing power below the level of only a few years back. There are indeed signs that, in certain industries, particularly in the cotton textile industry, the employers are endeavouring to secure a reduction in wages before any reduction of hours has been offered or enforced. I believe that even from the point of view of those in employment a reduction in earnings would be a reasonable price to pay for a reduction in toil. The man who spends eleven hours a day in a factory throughout the year cannot be said to live at all. He is a machine and he has not the efficiency of the machine nor has he the incapacity of a machine for suffering.

But these are not the only facts that deserve consideration. There is a considerable measure of unemployment. Many men are idle. Many others have their lives shadowed by the fear of idleness. To the one, reduction of hours would bring new prospects; to the other, greater security."

After much discussion, Act XXV of 1934 was passed and received the assent of the Governor-General on the 20th August, 1934.

A solution has been found for the pressing problems of the day. But the solution is only temporary. It cannot be said that the Act has finally satisfied either the claims of the employer or the needs of the employed. In some respects labour legislation in India had to contend against opposition both from the worker's as well as the employer's points of view.

The poverty of workers in India and their need to earn every pittance they could has been made a plea for non-interference. The fear of checking a new industry has also loomed large in the minds of those, who, at one time, opposed factory legislation; and though that fear still acts as a barrier against over rapid legislation, the fact that the inefficiency of much of the labour power of India is the greatest check to its industry is widely realised—(*Labour in India* by Mr. J. H. Kilman, 1923).

RESUME OF FACTORY LEGISLATION IN INDIA.—In making a general survey of Industrial Legislation in India, the members of the Whitley Commission made the following observations:

The history of factory law in India has throughout been one of steady advance, each successive Act covering a wider field than the last and bringing within its orbit classes of workers of establishments which the increasing spread of industrialism has shown to be in need of protection or regulation. As in England, it was the case of the children which first attracted attention with the result that the initial Act sought to regulate the conditions of work of children in the bulk of factories employing 100 or more workers. This 1881 Act excluded children under 7 years, while the child of from 7 to 12 years became a "half timer" who could be worked for a maximum of 9 hours. The second Act of 1891 raised the minimum working age of the half-timer from 7 to 9 years, and the age at which he became an adult from 12 to 14 years, reduced his working hours from 9 to 7 and prohibited his employment on dangerous work. The importance of this Act, however, lay not so much in the granting of increased protection to the child worker as in its extension also to women workers, who were given a maximum day of 11 hours. In addition the Act brought under control all places employing 50, instead of the previous 100, employees provided they used power machinery. Moreover for the first time Local Governments were given power to include all factories using power and employing 20 persons or more within the scope of the new Act. The Act of 1911, which repealed both the earlier Acts, took the extremely important third step of regulating the hours of men in textile factories as well as those of women and children. The hours of children employed in such factories were reduced from 7 to 6. At the same time new provisions in respect of health and safety were introduced, but on this occasion the definition of a factory remained unchanged. The year 1922 saw the passage of an amending Act fixing an 11 hour day and 60 hour week for adults. The importance of this Act in showing the gradual extension of the principle of control lay in the reduction of the number of workers necessary to constitute a factory from 50 to 20 and in extending to Local Governments power to include places employing as few as ten persons in the case of those without any installation of power machinery as well as those using such machinery. It also took another step in protecting the child worker by excluding altogether those under 12 years, raising the age at which the industrial child became an adult to 15 years and restricting the hours of the half-timer in all factories to 6 daily. The subsequent amending Acts of 1923 and 1926 did not make any change of importance in the scope of the Act either as regards establishments or classes of workers.

GRADUALNESS THE KEYNOTE IN THE PAST AND ALSO A SAFE GUIDE FOR THE FUTURE.—This brief outline of the history of certain features of factory legislation in India shows that from the beginning the principle of factory regulation, here as in other countries, has been gradually to extend the area of protection afforded to the industrially employed worker. This principle has been effected in three ways—by regulation affecting specific classes of workers, by regulation affecting specific classes of establishments and by powers given to Local Governments to include under such regulation smaller places of a similar kind (*see* S. 5). The value of a policy of gradualness has been clearly demonstrated in the history of factory Legislation in India, in the past, and the dictates of common sense and practicability confirm us in the beliefs that the same policy should continue to actuate future developments of factory Legislation.

CONTENTS.

CHAPTER I.
PRELIMINARY.

SECTIONS.
1. Short title, extent and commencement.
2. Definitions.
3. References to time of day.
4. Seasonal factories.
5. Power to declare premises to be factories.
6. Power to declare departments to be separate factories.
7. Power to exempt on a change in the factory.
8. Power to exempt during public emergency.
9. Notice to Inspector before commencement of work.

CHAPTER II.
THE INSPECTING STAFF.

10. Inspectors.
11. Powers of Inspector.
12. Certifying surgeons.

CHAPTER III.
HEALTH AND SAFETY.

13. Cleanliness.
14. Ventilation.
15. Artificial humidification.
16. Cooling.
17. Overcrowding.
18. Lighting.
19. Water.
20. Latrines and urinals.
21. Doors to open outwards.
22. Precautions against fire.
23. Means of escape.
24. Fencing.
25. Power to require specifications of defective parts or tests of stability.
26. Safety of buildings and machinery.
27. Restrictions on work near machinery in motion.
28. Power to exclude children.
29. Prohibition of employment of women and children near cotton-openers.
30. Notice of certain accidents.
31. Appeals.
32. Power of Provincial Government to make rules to supplement this Chapter.
33. Additional power to make health and safety rules relating to—
shelters during rest,—
rooms for children,—
certificates of stability,—
hazardous operations.

CHAPTER IV.
RESTRICTIONS ON WORKING HOURS OF ADULTS.

34. Weekly hours.

SECTIONS.
35. Weekly holiday.
36. Daily hours.
37. Intervals for rest.
38. Spread over.
39. Notice of periods for work for adults and preparation thereof.
40. Copy of notice of periods for work to be sent to Inspector.
41. Register of adult workers.
42. Hours of work to correspond with notice under section 39 and register under section 41.
43. Power to make rules exempting from restrictions.
44. Power to make orders exempting from restrictions.
45. Further restrictions on the employment of women.
46. Special provision for night-shifts.
47. Extra pay for overtime.
48. Restriction on double employment.
49. Control of overlapping shifts.

CHAPTER V.
SPECIAL PROVISIONS FOR ADOLESCENTS AND CHILDREN.

50. Prohibition of employment of young children.
51. Non-adult workers to carry tokens giving reference to certificates of fitness.
52. Certificates of fitness.
53. Effect of certificate granted to adolescent.
54. Restrictions on the working hours of a child.
55. Notice of periods for work for children.
56. Register of child workers.
57. Hours of work to correspond with notice and register.
58. Power to require medical examination.
59. Power to make rules.

CHAPTER V-A.
SMALL FACTORIES.

59-A. Small factories.
59-B. Certain provisions of this Act to apply to small factories wherein child labour is employed.
59-C. Certain other provisions of law not barred.

CHAPTER VI.
PENALTIES AND PROCEDURE.

60. Penalty for contraventions of Act and rules.
61. Enhanced penalty in certain cases after previous conviction.
62. Penalty for failure to give notice of

SECTIONS.
commencement of work or of change of manager.
63. Penalty for obstructing Inspector.
64. Penalty for failure to give notice of accidents.
65. Penalty for failure to make returns.
66. Penalty for smoking or using naked light in vicinity of inflammable material.
67. Penalty for using false certificate.
68. Penalty on guardian for permitting double employment of child.
69. Penalty for failure to display certain notices.
70. Determination of "occupier" for purposes of this Chapter.
71. Exemption of occupier or manager from liability in certain cases.

SECTIONS.
72. Presumption as to employment.
73. Evidence as to age.
74. Cognizance of offences.
75. Limitation of prosecutions.

CHAPTER VII.

SUPPLEMENTAL.

76. Display of factory notices.
77. Power of Provincial Government to make rules.
78. [*Omitted.*]
79. Publication of rules.
80. Application to Crown factories.
81. Protection to persons acting under this Act.
82. [*Repealed.*]

THE SCHEDULE.

THE FACTORIES ACT (XXV OF 1934).

[Am. Acts XI of 1935; VIII of 1936; XVII of 1940; XVI of 1941 and Madras Act VI of 1941 and Rep. in part by Act XX of 1937].

[20*th August*, 1934.

An Act to consolidate and amend the Law regulating labour in factories.

WHEREAS it is expedient to consolidate and amend the Law regulating labour in factories; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE FACTORIES ACT, 1934.

NOTES.

Sec. 1: OBJECT OF THE ACT.—The object of the Act is to protect human beings from being subjected to unduly long hours of bodily strain or manual labour. It also provides that employees should work in healthy and sanitary conditions so far as the manufacturing process will allow and that precautions should be taken for their safety and for the prevention of accidents. In order to obtain the informations necessary to ensure that its objects are carried out, the Local Government are empowered to appoint inspectors, to call for returns, and to see that the prescribed registers are duly kept. This is part of the machinery which enables the authorities to maintain effective supervision, and it is undoubtedly important that there should be substantial compliance with these provisions of the Act. 38 C.W.N. 1008=152 I.C. 556=1934 C. 730 (*Per* McNair, J.). At the same time, it should not be forgotten that the Act is sanctioning interference with the ordinary rights of the citizen and that the inquisitorial powers which are given should be used with tact and circumspection. 38 C.W.N. 1008=152 I.C. 556=1934 C. 730 (*Per* MacNair, J.).

CONSTRUCTION OF THE ACT.—The provisions of the Act have to be construed in favour of the employee and strictly in favour of the employer. 152 I.C. 556=38 C.W.N. 1008=1934 C. 730. "A law which is enacted for the benefit of the employee should not be used merely for the purpose of harassing the employer. The launching of a test case in respect of an infringement of provisions which are not generally available, the meaning of which is doubtful to the authorities themselves and which the factory management honestly complied with as they understood them, asking for further enlightenment from the authorities without getting any, is to be strongly deprecated." (*Ibid.*) "I am fully alive to the great importance of Factory Acts being properly enforced for the protection of workmen, and I have no doubt that in India it is particularly necessary that their beneficial provisions should be carried out. On the other hand one must also bear in mind that the employers' position has to be considered too. It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence then it would seem only fair that the matter should be clearly brought home to them. That I have no doubt is the reason why the Legislature has distinctly specified what the Inspector has to do. Whether a particular accused in any case was negligent or not does not con-

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of January, 1935.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "adolescent" means a person who has completed his fifteenth but has not completed his seventeenth year;

(*b*) "adult" means a person who has completed his seventeenth year;

(*c*) "child" means a person who has not completed his fifteenth year;

(*d*) "day" means a period of twenty-four hours beginning at midnight;

(*e*) "week" means a period of seven days beginning at midnight on Saturday night;

(*f*) "power" means electrical energy, and any other form of energy which is mechanically transmitted and is not generated by human or animal agency;

NOTES.

cern this question of general principle on the construction of the Act." 85 I.C. 226 =26 Bom.L.R. 1245=1925 B. 143=26 Cr. L.J. 492.

CRITICISM ON THE DRAFTING OF THE ACT (XII OF 1911).—"We desire to point out to the authorities concerned that it will be difficult to uphold prosecutions under many of the sections of this Act, unless they are amended, especially in cases of factories to which exemptions have been granted" (*Per* Mallick, J.). 35 C.W.N. 1108. "The Act is carelessly and loosely drawn. It seems to consist mainly of parts of the English Act taken from their context and patched together. It is a penal statute, and as such it is essential that its terms should be clear, definite and unambiguous. On the contrary, it is difficult—if not impossible for a lawyer still less a layman, to understand many of its provisions." (*Ibid.*) 35 C.W.N. 1108. "There are many provisions in the Act which are confused and ambiguous, and the rules and forms provided do not tally with the requirements of the sections. The truth seems to be that the application of the Act to special factories has never been properly thought out. Drastic redrafting and amendment of this important Act seem to be required urgently." (*Ibid.*) 35 C.W.N. 1108.

APPLICATION OF THE ACT TO CROWN FACTORIES.—Crown factories had from the beginning been brought under the operation of the Act, which followed in this respect the British law on the subject. This had been another subject of discussion when the Bill was introduced, and the conclusion to which the Committee had come on full consideration was, that Crown factories should be brought within the scope of the Act, but that the power to exempt them temporarily, in cases of emergency, should be reserved to the Government. It was quite necessary that such power should be reserved in order to avoid great inconvenience and mischief. It would be sufficient to instance the case of the Mint, and of the powder and gun manufactories in time of war, to show the necessity for such a provision. (Proceedings in Council, *Fort St. George Gazette*, 4th May, 1881).

Sec. 2: STATEMENT OF OBJECTS AND REASONS.—The amendments made in the section have been explained as follows:—"The definitions have been generally revised and supplemented and those defining the manufacturing process and determining when a person is employed have been simplified. The definition of 'factory' has been modified so as to cover those establishments which, although they employ more than 20 persons in the day, do not employ that number simultaneously." The Select Committee said:—"The changes made in the definitions are aimed generally at making these definitions more accurate and exhaustive, and meet various criticisms contained in the opinions received upon the Bill." (Report of the Sel. Com.).

Cl. (a): "ADOLESCENT".—The expression used in the English Act is "young person" which expression is defined to mean a person who has ceased to be a child and is under the age of eighteen years. (English Act, S. 156). The Indian Law fixes the age at seventeen.

Cl. (b): "ADULT".—Under the English Act, a person would be an adult only after completing his eighteenth year.

Cl. (c): "CHILD"—ENGLISH ACT.—The expression "child" has been defined by the English Act as follows:—"The expression "child" means a person who is under the age of fourteen years and who has not, being of the age of thirteen years obtained the certificate of proficiency or attendance at school mentioned in Part III of this (English Act) Act" (S. 156).

Cl. (d): "DAY"—ENGLISH LAW.—Under the English Act, the expression "night" has been defined to mean the period between nine o'clock in the evening and six o'clock in the succeeding morning (S. 156).

Cl. (f): "ANY OTHER FORM OF ENERGY WHICH IS MECHANICALLY TRANSMITTED."—These words must be construed *ejusdem generis* with electric, steam or water power and do not include hand power. [*Wilmott* v. *Patan*, (1902) 1 K.B. 237].

(*g*) "manufacturing process" means any process—

(i) for making, altering, repairing, ornamenting, finishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) for pumping oil, water or sewage, or

(iii) for generating, transforming or transmitting power;

(*h*) "worker" means a person employed, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on;

(*j*) "factory" means any premises including the precincts thereof whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on,

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NOTES.

Cl. (g): "PROCESS."—"Process" has been defined by the English Act as including the use of any locomotive (S. 156).

"MANUFACTURING PROCESS."—These words merely refer to the particular business carried on and do not necessarily refer to the production of some article. So that laundries, carpet beating or bottle washing works, etc., are factories within the Act if mechanical power is used [*Owner* v. *Cottingham Sanitary Steam Laundry Co., Ltd.*, (1910) 74 J.P. 219; *Johnstone* v. *Lalonde Bros. and Parham,* (1912) 2 K.B. 218. See also *Royal Masonic Institution for Boys* v. *Parkes,* (1912) 3 K.B. 212 and *Patterson* v. *Hunt,* (1909) 73 J.P. 496]. Putting ginned cotton into bales and having it pressed must be considered work connected with the manufacturing process and the men engaged in the work must be deemed to be employed in the factory. 143 I.C. 772=1933 N. 283.

Cl. (h): "WORKER."—*Cf.* the definition of "Workmen" in the Indian Workmen's Compensation Act, S. 2, cl. (*n*).

Cl. (j): "FACTORY."—The definition in this cl. (*j*) applies to the term 'factory' used in S. 9 (3) of Cotton Ginning and Pressing Factories Act, 1925. 1937 M.W.N. 1335. *See also* I.L.R. (1937) Nag. 88=1937 Nag. 311. By a factory is meant premises where anything is done towards the making or finishing of an article up to the stage when it is ready to be sold or is in a suitable condition to be put on the market. 109 I.C. 599=8 L. 666=29 P.L.R. 234=29 Cr.L.J. 583=1928 L. 78. *See also* 1 N.L.R. 115. A factory includes everything, machine rooms, sheds, godowns, yards. If within these premises or precincts mechanical power is used in aid of any process for altering for transport or sale of any article, then these premises or precincts are a factory. 50 M. 834=1927 M. 345=52 M.L.J. 207. The drying yard used for drying ground-nuts, where machinery for decorticating the ground-nuts was working is a part of factory, although there is no connexion with machinery or any work incidental to the manufacturing process. (*Ibid.*) *See also* 1941 N.L.J. 471=1941 Nag. 337 (Notification of C. P. Government as to what places are factories under this Act is not *ultra vires*).

RAILWAY WORKSHOPS are 'factories'. 119 I.C. 722=1929 Lah. 573. A *Gurhal Ghar* is a 'factory', even though the engine shed is a separate building and less than twenty persons are employed therein, but over twenty persons are employed in the *Gurhal Ghar* inclusive of those employed on the crushers and those employed in the boiling shed, and these latter must be said to be employed both "on the premises, and within the precincts of the *Gurhal Ghar*". 32 Bom.L.R. 329=1930 Bom. 162=31 Cr. L.J. 1094.

TWO OR MORE BUILDINGS entirely separate from each other may in certain circumstances form part of one and the same factory. See *L. C. C. and Tuffs,* In re, (1903) 86 J.P. 29; *Hoyle* v. *Gram,* (1862) 12 C.B. 124.

"USE OF POWER IN PART OF BUILDING."—Every part of the premises unless specially exempted forms part of a factory, although power may only be used in one part [*Taylor* v. *Hickes*; *Hardcastle* v. *Jones,* (1862) 3 B. and S. 153; *Palmers Shipbuilding Co.* v. *Chaytor,* (1869) 4 Q.B. 209; but see *Vines* v. *Inglis,* (1915) S.C. 18]. The definition of "factory" is intended not to cover merely individual business in any premises but is intended to denote any premises as a composite whole with a central source of power, *i.e.*, either steam, water, or other electrical or mechanical power. 57 B. 150=35 Bom.L.R. 83=1933 Bom. 109.

"WORKPLACE" is not defined either in this Act or in the English Act, but in *Bennett* v. *Hardinge,* (1900) 2 Q.B. 397, Channel, J., said:—"I think that a workplace must be a but does not include a mine subject to the operation of the Indian Mines Act, 1923;

(*k*) "machinery" includes all plant whereby power is generated, transformed, transmitted or applied;

(*l*) "occupier" of a factory means the person who has ultimate control over the affairs of the factory:

Provided that where the affairs of a factory are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

(*m*) where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a "relay," and the period or periods for which it works is called a "shift"; and

(*n*) "prescribed" means prescribed by rules made by the Provincial Government under this Act.

NOTES.

place where some work is being perpetually or permanently done, I do not say that the mere presence of workmen in repairing a private house would make it a workplace.. ...."

N.B.—"The Act mainly deals with labour employed in what may be described as perennial factories (*i.e.*) excluding those which deal mainly with agricultural products in the raw state, and work for part of the year only; and all those establishments which either use no mechanical power or, using power, employ less than 20 persons. These also are excluded from the definition of "factories". *See* Whitley Commission Rep., p. 6.

PERSONS EMPLOYED IN THE FACTORY.—A person who works in a factory, whether for wages or not, may be deemed to be employed in that factory. Where it is shown that certain persons were engaged in the factory in one of the ways specified in S. 2 (2) [of the old Act of 1911] it must be presumed they were 'employed' in the factory. 61 Cal. 332=35 Cr. L. J. 1401=38 C.W.N. 801 =1934 Cal. 546. *See* S. 2, cl. (2) of the old Act, XII of 1911. Persons employed merely for selling the manufactured articles do not come within the definition of "employed", in that factory even though they happen to occupy a room at the factory for the sake of convenience. 109 I.C. 599=8 L. 666=29 P.L.R. 234=29 Cr.L.J. 583=1928 Lah. 78. It is not correct to say that the Factories Act affects only manual labourers. 152 I.C. 566=38 C.W.N. 1008=1934 Cal. 730.

POWER.—*See* S. 2, cl. (*f*), *supra*.

Cl. (k): ENGLISH ACT.—Under the English Act the expression "machinery" includes any driving strap or band (S. 156). The expression "*mill-gearing*" comprehends every shaft, whether upright, oblique or horizontal, and every wheel, drum or pulley or other appliance by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process. (*Ibid.*)

Cl. (l).—[*See also* Notes under S. 70 *infra.*] "OCCUPIER".—The word "occupier" in general means a person who occupies the factory either by himself or his agent. He may be an owner, he may be a lessee or even a mere licensee, but he must have the right to occupy the property and dictate how it is to be managed. 55 B. 366 =32 Cr.L.J. 1063 (1)=33 Bom.L.R. 309 =1931 B. 308. *See also* Rat. 902. The definition of "occupier" in the Act is not an exhaustive definition and there is nothing in it which in any way limits the normal meaning of the word "occupier" as indicating a person who is in actual possession and control of a factory. 50 B. 34=27 Bom.L.R. 1405=27 Cr.L.J. 165=1926 B. 57. The word "*Munim*" as commonly used does connote agency, and persons dealing with the chief authority in charge of the factory where it is situated would look upon him as the agent of the owner or occupier. If there is a special contract of service or agency between him and his master, he must prove it. 19 N.L.J. 247. The word "occupier" bears the same meaning in this Act as it bears in similar enactments in England, that is, a person who regulates a factory and controls the work that is done there. 20 I.C. 144=14 Cr. L. J. 384=15 Bom.L.R. 328. The question who is the occupier of a factory must depend among others, upon these considerations, namely:—Who alone has the right of using the factory for the purposes for which it is constructed and worked; who has the right of regulating and controlling it; whose is the predominant possession of and general superintendence over it. 10 Bom. L. R. 38=7 Cr.L.J. 44. The manager of a factory who resides in a part of the premises in which the factory is, is not an occupier of the factory within the meaning of the Act. 29 B. 423=7 Bom.L.R. 454; 2 Cr. L.J. 428.

OWNER'S LIABILITY.—Even if the accused, who is the owner of a factory, shows that he knows nothing about the management of the factory and that he has left the whole conduct of its affairs to a manager appointed by him for the purpose, he is not free from the liability imposed on him by S. 41 (*a*) of the Factories Act. 55 B. 366=32 Cr.L.J. 1063 (1)=33 Bom.L.R. 309=1931 B. 308. In order to fix liability on any

References to time of day.

3. References to time of day in this Act or references—

(*a*) in British India, [1][* *] to Indian Standard Time, which is five and a half hours ahead of Greenwich Mean Time, and

(*b*) [2][* * * * * * *]

Provided that for any area in British India in which Indian Standard Time is not ordinarily observed the Provincial Government may make rules—

(i) specifying the area;

(ii) defining the local mean time ordinarily observed therein; and

(iii) permitting such time to be observed in all or any of the factories situated in the area.

Seasonal factories.

4. (1) For the purposes of this Act, a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, the decortication of ground-nuts, the manufacture of coffee, indigo, lac, rubber, sugar (including *gur*) or tea, or any manufacturing process which is incidental to or connected with any of the aforesaid processes, is a seasonal factory:

Provided that the Provincial Government may, by notification in the Official Gazette, declare any such factory in which manufacturing processes are ordinarily carried on for more than one hundred and eighty working days in the year, not to be a seasonal factory for the purposes of this Act.

(2) The Provincial Government may, by notification in the Official Gazette, declare any specified factory in which manufacturing processes are ordinarily carried on for not more than one hundred and eighty working days in the year and cannot be carried on except during particular seasons or at times dependent on the irregular action of natural forces, to be a seasonal factory for the purposes of this Act.

Power to apply provisions applicable to factories to certain other places.

[3][5. (1) The Provincial Government may, by notification in the Official Gazette, declare that all or any of the provisions of this Act applicable to factories shall apply to any place wherein a manufacturing process is being carried on or is ordinarily carried on whether with or without the use of power whenever ten or more workers are working therein or have worked therein on any one day of the twelve months immediately preceding.

LEG. REF.

[1] Words 'excluding Burma' omitted by A.O., 1937.

[2] Cl. (*b*) of S. 3 omitted by *ibid*.

[3] S. 5 substituted by Act XVI of 1941.

NOTES.

person other than the occupier of a factory, it is incumbent upon the latter to give the strictest proof of circumstances exonerating himself, and it is plain on the face of the section that the burden of proving absence of knowledge or consent on his part lies entirely upon him. 25 C. 454.

Sec. 3.—"The general acceptance of standard time has rendered a modification of S. 51 (1) desirable." (Statement of Objects and Reasons.)

Sec. 4: THIS SECTION IS NEW.—"The Labour Commission recommended differential treatment for seasonal and non-seasonal factories in the matter of adult hours and in other respects. This clause is based on their recommendation". (Statement of Objects and Reasons.)

Sec. 5: STATEMENT OF OBJECTS AND REASONS.—"This clause reproduces the provision contained in S. 2 (3) of the old Act empowering Local Governments to bring workshops not using power and the smaller power-factories within the scope of the Act; but certain changes have been made. On the recommendation of the Labour Commission it is proposed that Local Governments should be empowered to apply the Act to workshops in full or in part; at present they have no choice between applying the whole of the Act or none in such cases. Provision has been made in sub-S. (2) for the notification of classes of premises, where necessary; and sub-S. (3) is designed to ensure that a notification of the Local Government does not remain in force after the conditions justifying its issue have ceased to apply." The changes made by the Select Committee are consequential upon the alteration of the definition of "factory" contained in cl. 2 (*j*). (Rep. of

(2) A notification under sub-section (1) may be made in respect of any one such place or in respect of any class of such places or generally in respect of all such places.

(3) Notwithstanding anything contained in clause (*j*) of section 2, a place, to which all or any of the provisions of this Act applicable to factories are for the time being applicable in pursuance of a declaration under sub-section (1), shall, to the extent to which such provisions are so made applicable but not otherwise, be deemed to be a factory.]

Power to declare departments to be separate factories.

6. The Provincial Government may, by order in writing, direct that the different departments or branches of a specified factory shall be treated as separate factories for all or any of the purposes of this Act.

Power to exempt on a change in the factory.

7. Where the Provincial Government is satisfied that, following upon a change of occupier of a factory or in the manufacturing processes carried on therein, the number of workers for the time being working in the factory is less than twenty and is not likely to be twenty or more on any day during the

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Sel. Com.) The Notification of the Central Provinces Government No. 2022644 VII, dated 17th January 1939, which declares that all places in Central Provinces, wherein manufacturing process is carried on with the aid of power and wherein on any one day of the twelve months preceding the date of the notification ten or more workers were employed, to be factories under the Factories Act is *intra vires* of the power given to the Provincial Government by S. 5 (1) of the Factories Act. The notification is not universal but selective and it does not render S. 5 (1) of the Act nugatory inasmuch as the Act applies to the whole of British India while the notification applies only to Central Provinces. 190 I.C. 438=1941 N.L.J. 471=1941 Nag. 337.

Sec. 6: STATEMENT OF OBJECTS AND REASONS.—"This reproduces in substance S. 53 of the old Act; but it is proposed that notifications should be limited to specified factories as there is no occasion for notifications applicable to classes of factories." The Select Committee have omitted reference to the control of the Governor-General in Council, which is in this connexion unnecessary.

EXTENT OF A FACTORY.—Subject to certain specified exceptions the area of the factory or workshop is the whole space contained within its walls. *Back* v. *Dick,* (1906) A. C. 325. "In the case of factories........ etc., the walls or fences built around the factory........fix the boundaries and determine the area." *Back* v. *Dick,* (1906) A. C. 325, *per* Lord Atkinson, at p. 334.

MORE THAN ONE FACTORY IN A SINGLE BUILDING.—More than one factory or workshop may be contained in a single building or group of buildings; and different parts of the same building may constitute separate factories or workshops. (*See* 14 Hals. Laws of England, pp. 559-570.) "I cannot help thinking that we should be in great difficulties if we were to hold that the mere fact of one factory overlapping another caused them to be within the same curtilage." *Per* Kennedy, J., in *Brass* v. *London County Council,* (1924) 2 K. B. 336. In *Vines* v. *Inglis,* (1915) S.C. (J.) 18; 24 Digest 902 (*b*), a building consisted of a retail shop on the ground floor a millinery room in which no mechanical power was used on the next floor, and a non-textile factory for dress-making on the top floor, in which mechanical power was used, but not in respect of the millinery work. It was held that the millinery room was not a factory. A part of a factory may, under circumstances, be declared for the purposes of the Act to be a separate factory or workshop. [English Factories Act, 1901, S. 149, ci. (2).] Different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Act, be treated as if they were different factories or workshops. (English Factories Act, 1901, S. 150.)

SEPARATE BUILDINGS CONSTITUTING SAME FACTORY.—Separate buildings, even though a considerable distance apart, may, if used for one continuous manufacturing process, constitute a single factory or workshop. [English Factories Act, 1901, S. 149, cl. (4).] The place where the product of a factory is delivered, even if directly connected with the place of production, is not necessarily a part of the factory. *Spacey* v. *Dowlais,* (1905) 2 K.B. 879 (C.A.).

ROOMS USED SOLELY FOR SLEEPING PURPOSES.—Rooms used solely for sleeping purposes and places within the precincts of a factory solely used for some purpose other than the manufacturing process are excluded from the operation of the Factories Act. [English Factories Act, 1901, S. 149, cl. (4). *Lewis* v. *Gilbertson,* (1904) 91 L.T. 377.]

Sec. 7: STATEMENT OF OBJECTS AND REA-ensuing twelve months, it may, by order in writing, exempt such factory from the operation of this Act:

Provided that any exemption so granted shall cease to have effect on and after any day on which twenty or more workers work in the factory.

Power to exempt during public emergency.

8. [*Cf.* Ss. 56 and 57, Old Act.] In any case of public emergency the [1][Provincial Government] may, by notification in the Official Gazette, exempt any factory from any or all of the provisions of this Act for such period as [2][it] may think fit.

Notice to Inspector before commencement of work.

9. [*Cf.* S. 33, Old Act.] (1) Before work is begun in any factory after the commencement of this Act, or before work is begun in any seasonal factory each season, the occupier shall send to the Inspector a written notice containing—

(*a*) the name of the factory and its situation,

(*b*) the address to which communications relating to the factory should be sent,

(*c*) the nature of the manufacturing processes to be carried on in the factory,

(*d*) the nature and amount of the power to be used, and

(*e*) the name of the person who shall be the manager of the factory for the purposes of this Act.

(2) Whenever another person is appointed as manager, the occupier shall send to the Inspector a written notice of the change, within seven days from the date in which the new manager assumes charge.

(3) During any period for which no person has been designated as manager of a factory under this section, or during which the person designated does not manage the factory, any person found acting as manager, or, if no such person is found, the occupier himself, shall be deemed to be the manager of the factory for the purposes of this Act.

CHAPTER II.

THE INSPECTING STAFF.

Inspectors.

10. [*Cf.* S. 4, Old Oct.] (1) The Provincial Government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act within such local limits as it may assign to them respectively.

(2) The Provincial Government may, by notification as aforesaid, appoint any person to be a Chief Inspector, who shall, in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the province.

(3) No person shall be appointed to be an Inspector under sub-section (1) or a Chief Inspector, under sub-section (2) or, having been so appointed, shall continue to hold office, who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith.

(4) Every District Magistrate shall be an Inspector for his district.

LEG. REF.

[1] Substituted for 'Governor-General in Council' by A.O., 1937.

[2] Substituted by A.O. for "he".

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SONS.—"This is a new clause designed to enable the Local Government to exempt from the Act premises which by reason of a change in their use should no longer be treated as factories."

Sec. 8: STATEMENT OF OBJECTS AND REASONS.—Exceptional power given under this section is intended only for a serious general emergency such as might be caused by a war.

(5) The Provincial Government may also, by notification as aforesaid, appoint such public officers as it thinks fit to be additional Inspectors for all or any of the purposes of this Act, within such local limits as it may assign to them respectively.

(6) In any area where there are more Inspectors than one, the Provincial Government may, by notification as aforesaid, declare the powers which such Inspectors shall respectively exercise, and the Inspector to whom the prescribed notices are to be sent.

(7) Every Chief Inspector and Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code and shall be officially subordinary to such authority as the Provincial Government may specify in this behalf.

Powers of Inspector.

11. [*Cf.* S. 5, Old Act.] Subject to any rules made by the Provincial Government in this behalf, an Inspector may, within the local limits for which he is appointed,—

(*a*) enter, with such assistants (if any), being persons in the [1][service of the Crown] or of any municipal or other public authority, as he thinks fit, any place which is, or which he has reason to believe to be, used as a factory or capable of being declared to be a factory under the provisions of section 5;

(*b*) make such examination of the premises and plant and of any prescribed registers, and take on the spot or otherwise such evidence of any persons as he may deem necessary for carrying out the purposes of this Act; and

(*c*) exercise such other powers as may be necessary for carrying out the purposes of this Act:

Provided that no one shall be required under this section to answer any question or give any evidence tending to criminate himself.

Certifying surgeons.

12. [*Cf.* Ss. 6 to 8, Old Act.] (1) The Provincial Government may appoint such registered medical practitioners as it thinks fit to be certifying surgeons for the purposes of this Act within such local limits as it may assign to them respectively.

(2) A certifying surgeon may authorise any registered medical practitioner to exercise any of his powers under this Act:

Provided that a certificate of fitness for employment granted by such authorized practitioner shall be valid for a period of three months only, unless it is confirmed by the certifying surgeon himself after examination of the person concerned.

Explanation.—In this section a "registered medical practitioner" means any person registered under the Medical Act, 1858, or any subsequent enactment amending it, or under any Act of any legislature in British India providing for the maintenance of a register of medical practitioners, and includes, in any area where no such register is maintained, any person declared by the Provincial Government, by notification in the Official Gazette, to be a registered medical practitioner for the purposes of this section.

CHAPTER III.

HEALTH AND SAFETY.

Cleanliness.

13. [*Cf.* Ss. 9 (*a*) and 37 (2) (*e*), Old Act and S. 1, English Act.] Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and shall be cleansed at such times and by such methods as may be prescribed, and

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LEG. REF.

[1] Substituted for 'employment of Government' by A.O., 1937.

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Sec. 12: REPORT OF SELECT COMMITTEE.—Only registered medical practitioners may be appointed as certifying surgeons.

Sec. 13: REPORT OF SELECT COMMITTEE.—Local Government is given discretion to make or not to make detailed provision by rules for the time and methods of cleansing a factory.

these methods may include lime-washing, or colour-washing, painting, varnishing, disinfecting and deodorising.

Ventilation.

14. [*Cf.* Ss. 9 (*c*), 10 and 37 (2) (*e*), Old Act and Ss. 1, 7 and 74, English Act.] (1) Every factory shall be ventilated in accordance with such standards and by such methods as may be prescribed.

(2) Where gas, dust or other impurity is generated in the course of work, adequate measures shall be taken to prevent injury to the health of workers.

(3) If it appears to the Inspector that in any factory gas, dust or other impurity generated in the course of work is being inhaled by the workers to an injurious extent, and that such generation or inhalation could be prevented by the use of mechanical or other devices, he may serve on the manager of the factory an order in writing, directing that mechanical or other devices for preventing such generation or inhalation shall be provided before a specified date, and shall thereafter be maintained in good order and used throughout working hours.

(4) The Provincial Government may make rules for any class of factories requiring mechanical or other devices to be provided and maintained for preventing the generation or inhalation of gas, dust or other impurities, which may be injurious to workers and specifying the nature of such devices.

Artificial humidification.

15. [*Cf.* Ss. 9 (d), 12 and 37 (2) (g), Old Act and Ss. 90-96, English Act.] (1) The Provincial Government may make rules—

(*a*) prescribing standards for the cooling properties of the air in factories in which the humidity of the air is artificially increased;

(*b*) regulating the methods used for artificially increasing the humidity of the air; and

(*c*) directing prescribed tests for determining the humidity and cooling properties of the air to be carried out and recorded.

(2) In any factory in which the humidity of the air is artificially increased, the water used for the purpose shall be taken from a public supply or other source of drinking water, or shall be effectively purified before it is so used.

(3) If it appears to the Inspector that the water used in a factory for increasing humidity which is required to be effectively purified under sub-

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Sec. 14: STATEMENT OF OBJECTS AND REASONS.—Sub-clauses (1) and (2) are based on S. 9 (*c*) and S. 37 (2) (*g*) of the old Act XII of 1911, while sub-cl. (3) is based on old S. 10. Sub-cl. (4) is designed to enable Local Governments to do by rules for classes of factories what Inspectors under sub-cl. (3) can do by orders for single factories.

REPORT OF SELECT COMMITTEE.—Exercise of the power here conferred has now been confined to the Chief Inspector. We have provided in cl. 31 (now S. 31) that an order under this clause shall be suspended during the hearing of the appeal if any appeal is preferred against it.

Sec. 15: STATEMENT OF OBJECTS AND REASONS—SUB-CL. (1).—S. 9 (*d*) of the old Act at present requires that the atmosphere shall not be rendered so humid by artificial means as to be injurious to the health of the workers, and S. 37 (2) (*g*) gives the Local Governments power to prescribe standards of artificial humidification and the methods to be adopted to secure their observance. It is now established that humidity, by itself, affords no measure of the degree of danger or discomfort; the cooling power, a factory dependent on the temperature, the humidity and the movement of the air, is a much more reliable criterion. Moreover, the Labour Commission has called attention to the fact that the existing Act gives inadequate power to protect the worker from acute discomfort. It is therefore proposed to omit the prohibition of excess humidity and, in sub-cl. (1), to enable the Local Government to prescribe standards of cooling power, in place of standards of humidification, and to regulate the methods used for artificial humidification. Sub-cls. (2) and (3) reproduce the substance of S. 12.

REPORT OF THE SELECT COMMITTEE.—"The alteration made by the Select Committee enables standards to be prescribed either generally or for a particular class of work."

Cl. (1) (c) has been added by the Select Committee as a necessary supplementary provision to enable tests to be prescribed.

section (2) is not effectively purified, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

Cooling.

16. [*Cf.* S. 6, English Act.] If it appears to the Chief Inspector or to an Inspector specially authorized in this behalf by the Provincial Government that the cooling properties of the air in any factory are at times insufficient to secure workers against injury to health or against serious discomfort, and that they can be to a great extent increased by measures which will not involve an amount of expense which is unreasonable in the circumstances, the Chief Inspector may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

Overcrowding.

17. [*Cf.* Ss. 1 and 3, English Act and Ss. 9 (*b*) and 37 (2) (*f*), Old Act.] In order that no room in a factory shall be crowded during working hours to a dangerous extent or to an extent which may be injurious to the health of the workers, the proportion which the number of cubic feet of space in a room and the number of superficial feet of its floor area bears to the number of workers working at any time therein shall not be less than such standards as may be prescribed either generally or for the particular class of work carried on in the room.

Lighting.

18. [*Cf.* S. 11, Old Act.] (1) A factory shall be sufficiently lighted during all working hours.

(2) If it appears to the Inspector that any factory is not sufficiently lighted, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) The Provincial Government may make rules requiring that all factories of specified classes shall be lighted in accordance with prescribed standards.

Water.

19. [*Cf.* S. 75, English Act and Ss. 14 and 37 (2) (*i*), Old Act.] (1) In every factory a sufficient supply of water fit for drinking shall be provided for the workers at suitable places.

(2) The supply required by sub-section (1) shall comply with such standards as may be prescribed.

(3) In every factory in which any process involving contact by the workers with injurious or obnoxious substances is carried on, a sufficient supply of

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Sec. 16: STATEMENT OF OBJECTS AND REASONS.—"This is based on a recommendation of the Labour Commission who give in their report the previous history of the legislative proposals for protecting workers against the effects of excessive heat."

ENGLISH LAW.—In textile factories other than cotton factories 600 cubic feet of fresh air per hour per individual are required to be supplied.—*St. R. & O. Rev.*, 1902, *Vol. IV*.

REASONABLE TEMPERATURE.—This is a question of fact and may vary with the circumstances of the particular case. See *Deane* v. *Barnes,* (1901) 65 J.P. 235; *Peter* v. *Plowden,* (1903) 67 J.P. 152. In *Bennet* v. *Hardinge,* (1900) 2 Q.B. 397, Channel, J., said: "It seems to me that the phrase 'workers in attendance' means persons who are in fact on the premises for any substantial period, and I do not think that they are any the less in attendance on the premises because they are there as customers. It does not seem to me that the purpose or object for which they are there affects the matter one way or the other."

Sec. 17: STATEMENT OF OBJECTS AND REASONS.—This combines the provisions of old S. 9 (*b*) and S. 37 (2) (*f*) with an addition enabling the Local Government to prescribe standards of floor space.

Sec. 18: STATEMENT OF OBJECTS AND REASONS.—Sub-cls. (1) and (2) reproduce the substance of old S. 11. In sub-cl. (3) it is proposed to enable the Local Governments to prescribe standards of lighting by rule for particular classes of factories.

Sec. 19: STATEMENT OF OBJECTS AND REASONS.—Sub-cl. (1) combines old Ss. 14 and 37 (2) (*i*); sub-cl. (2) is new and is based on a recommendation of Labour Commission. The change made by the Select Committee is designed to ensure that drinking water is supplied whether standards are prescribed or not.

water suitable for washing shall be provided for the use of workers, at suitable places and with facilities for its use, according to such standards as may be prescribed.

Latrines and urinals.

20. [*Cf.* S. 9, English Act and Ss. 13 and 37 (2) (*h*), Old Act.] For every factory sufficient latrines and urinals, according to the prescribed standards, shall be provided, for male workers and for female workers separately, of suitable patterns and at convenient places as prescribed, and shall be kept in a clean and sanitary condition during all working hours.

Doors to open outwards.

21. [*Cf.* S. 16, English Act and S. 15, Old Act.] In every factory the doors of each room in which more than twenty persons are employed shall, except in the case of sliding doors, be constructed so as to open outwards, or, where the door is between two rooms, in the direction of the nearest exit from the building, and no such door shall be locked or obstructed while any work is being carried on in the room.

Precautions against fire.

22. [*Cf.* Ss. 16, 17 and 37 (2), Old Act.] In every factory such precautions against fire shall be taken as may be prescribed.

Means of escape.

23. [*Cf.* S. 16, Old Act and S. 14, English Act.] (1) Every factory shall be provided with such means of escape in the case of fire as can reasonably be required in the circumstances of each factory.

(2) If it appears to the Inspector that any factory is not so provided, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) The means of escape shall not be obstructed while any work is being carried on in the factory.

Fencing.

24. [*Cf.* S. 10, English Act and S. 18, old Act.] (1) In every factory the following shall be kept adequately fenced, namely:—

(*a*) every exposed moving part of a prime mover and every flywheel directly connected to a prime mover;

(*b*) every hoist or lift, hoist-well, or lift-well, and every trap-door or similar opening near which any person may have to work or pass; and

(*c*) every part of the machinery which the Provincial Government may prescribe.

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Sec. 20: STATEMENT OF OBJECTS AND REASONS.—This combines old Ss. 13 and 37 (2) (*h*). The proviso to the former section has been omitted in accordance with a recommendation of the Labour Commission.

Sec. 21: STATEMENT OF OBJECTS AND REASONS.—*Cf.* old S. 15. The maximum number of persons who may occupy a room in which the doors open inwards has been reduced to 20 and the saving in favour of factories erected before 1912 has been omitted.

Sec. 23: ENGLISH LAW—FIRE.—Factories and workshops are to be furnished with a certificate that they are provided with such means of escape in case of fire as can reasonably be required. It is the duty of the district council to ascertain whether factories and workshops are provided with such means of escape from fire and where necessary to require its provision. The County Court has jurisdiction, on application, to apportion the cost of complying with the requirement between the owner and the occupier of the factory or workshop in a just and equitable manner (S. 14). See *Monk* v. *Arnold,* (1902) 1 K.B. 761; *Horner* v. *Franklin,* (1904) 2 K.B. 877; (1905) 1 K.B. 479 [S. 14, *English Factory and Workshop Act* (1901)].

Sec. 24: REPORT OF SELECT COMMITTEE.—Sub-cl. (3) has been expanded so as to apply to any fencing which may be required in pursuance of an order under S. 26 (1) and to make it clear that fencing may be removed for necessary attention to machinery.

SAFETY PROVISIONS IN ENGLISH LAW.—The Act contains many most valuable provisions for securing the safety of the per-

(2) If it appears to the Inspector that any other part of the machinery in a factory is dangerous if not adequately fenced, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) All fencing required by or under this section or under sub-section (1) of section 26 shall be maintained in an efficient state at all times when the workers have access to the parts required to be fenced except where they are under repair or are under examination in connexion with repair or are necessarily exposed for the purpose of cleaning or lubricating or altering the gearing or arrangements of the machinery.

(4) Such further provisions as may be prescribed shall be made for the protection from danger of persons employed in attending to the machinery in a factory.

25. [*Cf.* Ss. 17-19, English Act.] If it appears to the Inspector that any building or part of a building, or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the manager of the factory an order in writing requiring him before a specified date—

Power to require specifications of defective parts or tests of stability.

NOTES.

sons employed and also of the public. Thus, it is provided that in every factory every hoist or teagle and every fly-wheel directly connected with the steam, or water, or other mechanical power, whether in the engine house or not, and every part of any water-wheel or engine worked by such power, must be securely fenced. Every wheel-race not otherwise secured must be securely fenced close to the edge. All dangerous parts of the machinery must either be securely fenced or be in such position or of such construction as to be equally safe to every person as they would be if securely fenced. The fencing is to be maintained in an efficient state. [As to the extent of obligation to fence, see *Redgrave* v. *Lloyd*, (1895) 1 Q.B. 876 and *Hindle* v. *Britwistle*, (1897) 1 Q.B. 192. *See also* S. 10, English Factory and Workshop Act (1901) and Rules.] The fact that the machinery is so situated that there is little or no danger of accidents happening is no justification for not carrying out the requirements of a statute as to fencing [see *Doel* v. *Shepherd*, (1856) 25 L.J.Q.B. 124]; but it is only necessary to keep up the fence when the parts required to be fenced are in motion for some manufacturing process [*Coe* v. *Platt*, (1851) 6 Ex. 252]; but the obligation to fence machinery is absolute [*Watkins* v. *Naval Colliery Co.*, (1921) A.C. 693; *Purcell* v. *Talbot (Clement), Ltd.*, (1914) 79 J.P. 1] and is unaffected by the fact that, with regard to some particular machine, it may be commercially impracticable or mechanically impossible to fence it securely [*Davies* v. *Oven (Thomas) & Co.*, (1919) 2 K.B. 39. See also *Jackson* v. *Mulliner Motor Body & Co.*, (1911) 1 K.B. 546.] Moreover, the defence of common employment is not applicable where the injury has been caused by the neglect of the employer to carry out his statutory obligations to fence his machinery (*Britton* v. *G. W. R.* 7 Ex. 130); nor where the employer has failed to maintain or repair the fencing for his machinery [*Holmes* v. *Clarke*, (1862) 31 L.J. Ex. 356; *Groves* v. *Wimborne (Lord)*, (1898) 2 Q.B. 402], and in fact that the statute imposes a penalty for omission to fence does not bar an action for damages by the workman. (*Ibid.*) Sub-S. (2) includes all machinery in a factory and it is for the Court to say if it is dangerous. [*Redgrave* v. *Lloyd*, (1895) 1 Q.B. 876.] Machinery is dangerous if in the ordinary course of human affairs danger may reasonably be anticipated from the use of it without protection. [*Hindle* v. *Birtwistle*, (1897) 1 Q.B. 192]. *See* Encyclopædia of the Laws of England, 2nd Ed., Title "Factories". The numerous provisions in the Procedure Code for service of notices or orders are intended to make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected. A mere knowledge that proceedings may be instituted or something of that sort is not sufficient to take the place of the imperative directions in the Code as to service on the actual individual. The words in S. 18 (2) "serve on the Manager an order in writing" mean that such an order as is referred to in Form O should be served definitely on the manager of the factory and that it should specify exactly what measures the manager is to take in order to remove the danger. But a mere note of a visit is not such an order as is contemplated therein. 85 I.C. 226=26 Bom.L.R. 1245=26 Cr.L.J. 482=1925 Bom. 143. As to the necessity for order or notice by Inspector, *see* 12 Bom.L.R. 225.

Sec. 25: STATEMENT OF OBJECTS AND REASONS.—Inspectors have already power under S. 18-A, which is substantially reproduced in Cl. 27 [*See* now Ss. 25 and 26 (1)] to issue orders requiring action to (*a*) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or

(*b*) to carry out such tests as may be necessary to determine the strength or quality of any specified parts and to inform the Inspector of the results thereof.

Safety of buildings and machinery.

26. [*Cf.* Ss. 17 to 19, English Act and 18-A, Old Act.] (1) If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it is dangerous to human life or safety, he may serve on the manager of the factory an order in writing specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(2) If it appears to the Inspector that the use of any building or part of a building or of any part of the ways, machinery or plant in a factory involves imminent danger to human life or safety, he may serve on the manager of the factory an order in writing prohibiting its use until it has been properly repaired or altered.

Restrictions on work near machinery in motion.

27. [*Cf.* S. 13, English Act.] (1) No woman or child shall be allowed to clean or oil any part of the machinery of a factory while that part is in motion under power, or to work between moving parts or between fixed and moving parts of any machinery which is in motion under power.

(2) The Provincial Government may, by notification in the Official Gazette, prohibit, in any specified factory or class of factories, the cleaning or oiling by any person of specified parts of machinery when these parts are in motion under power.

Power to exclude children.

28. [*Cf.* Ss. 76 to 78, English Act and S. 19-A, Old Act.] (1) The Provincial Government may make rules prohibiting the admission to any specified class of factories, or to specified parts thereof, of children who cannot be lawfully employed therein.

NOTES.

be taken where the machinery or plant has become dangerous and prohibiting the use of dangerous machinery or plant pending repairs in cases of necessity. But an Inspector may have reason to fear that the use of certain machinery or plant involves danger without having sufficient evidence to warrant him in issuing definite orders requiring its alteration or repair. Cl. 26, embodying a recommendation of the Labour Commission, has therefore been added to enable Inspectors to secure the requisite information when necessary. *See also* S. 33 (4).

REPORT OF SELECT COMMITTEE.—The Select Committee have provided in both sub-clauses for the service of orders in writing in order to enable appeal to be made.

Sec. 27: STATEMENT OF OBJECTS AND REASONS.—This is based on old S. 19; but it is proposed to extend to the oiling of machinery the prohibition which at present applies to the cleaning of machinery and to extend it to work done between moving parts as well as between fixed and moving parts. As to what is cleaning machinery, see *Tailor* v. *Mark,* (1911) 1 K.B. 145.

S. 28: STATEMENT OF OBJECTS AND REASONS.—Sub-Cl. (2) reproduces the substance of old S. 19-A. In sub-Cl. (1) it is proposed to give the Local Governments general powers to exclude non-working children with a view to their protection.

ENGLISH LAW.—A child is not allowed to clean, in a factory, any part of any machinery, or any place under any machinery, other than overhead mill-gearing, while it is in motion by the aid of steam, water or other mechanical power. A young person is not allowed to clean any dangerous part of machinery while it is so in motion. Neither a woman nor a young person is allowed to clean mill-gearing machinery when in motion. [S. 13, English Factory and Workshop Act, 1901; *Pearson* v. *Belgian Mills Co.*, (1896) 1 Q.B. 244.] A young person employed in a mill oiled part of the machinery during meal times, contrary to orders and for his own amusement. The occupier of the mill was held to have committed an offence. [*Prior* v. *Slaithwaite Spinning Co.*, (1898) 1 Q.B. 881. But see *Robinson* v. *Melville,* (1890) 17 R. 62. See also *Graves* v. *Duncan,* (1891) 1 F. 72.]

(2) If it appears to the Inspector that the presence in any factory or part of a factory of children who cannot be lawfully employed therein may be dangerous to them or injurious to their health, he may serve on the manager of the factory an order in writing directing him to prevent the admission of such children to the factory or any part of it.

Prohibition of employment of women and children near cotton-openers.

29. [*Cf.* S. 20, Old Act and S. 24, English Act.] No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work:

Provided that, if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof, or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed-end is situated.

Notice of certain accidents.

30. [*Cf.* S. 34, Old Act and Ss. 19-22, English Act.] Where in any factory an accident occurs which causes death, or which causes any bodily injury whereby any person injured is prevented from resuming his work in the factory during the forty-eight hours after the accident occurred, or which is of any nature which may be prescribed in this behalf, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time, as may be prescribed.

Appeals.

31. [*Cf.* S. 50, Old Act.] (1) The manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Chapter, or the occupier of the factory, may, within thirty days of the service of the order, appeal against it to the Provincial Government, or to such authority as the Provincial Government

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NOTES.

Sec. 29.—The provisions of the section are not fulfilled if there is a door made in a partition between the two portions of the room and that door is shown to be open at a particular time, or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room or prohibited area. 94 I.C. 949=50 B. 34=27 Bom.L.R. 1405=27 Cr. L.J. 165=1926 Bom. 57.

Sec. 30: STATEMENT OF OBJECTS AND REASONS.—This reproduces old S. 34 with a small amendment to secure that notices are given of all accidents resulting in death or serious injury, including those in which injury is caused to persons not employed in the factory.

REPORT OF THE SELECT COMMITTEE.—The small change made by the Select Committee is intended to show that reference is made to injury to a person employed on work in the factory. It might not be possible for the manager of the factory to ascertain in the case of an outsider whether he was able to resume his ordinary work if that work were outside the factory.

"PERSONS" INCLUDES PLURAL—SINGLE ACCIDENT—SEVERAL INJURED—FAILURE TO NOTIFY—SINGLE OFFENCE.—The word "person" includes the plural and consequently where as a result of a single accident more persons than one are injured the accident cannot be split up into as many persons injured and the notice contemplated is single notice of the accident which the manager is required to submit to the authorities and therefore contravention of this rule is one offence which cannot in its turn be split up into as many offences as the number of casualties. 31 Cr.L.J. 869=125 I.C. 380=1930 Lah. 658. The duty to inform the authority under the Factories Act under S. 34 is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention. A.I.R. 1930 Lah. 658.

MANAGER'S ABSENCE FROM DUTY NOT NOTIFIED—LIABILITY FOR INFRINGEMENT.—Where the person, who is charged with offences under the Factories Act, was absent from his duties as manager at the time when the alleged infringements of the Act took place, he cannot be prosecuted for infringements of the Act which took place during his absence although the absence was not notified to the authorities as required by law, for which non-compliance the occupier could be held liable. 152 I.C. 506=38 C. W.N. 1008=1934 Cal. 730.

Sec. 31: STATEMENT OF OBJECTS AND REASONS.—This is based on old S. 50. A minor modification has been made in the conclusion of the last sub-section, and provision is made for appeals in all cases in which an order in writing is issued by an Inspector.

may appoint in this behalf, and the Provincial Government or appointed authority may, subject to rules made in this behalf by the Provincial Government, confirm, modify or reverse the order.

(2) The appellate authority, may, and if so required in the petition or appeal shall, hear the appeal with the aid of assessors, one of whom shall be appointed by the appellate authority and the other by such body representing the industry concerned as the Provincial Government may prescribe in this behalf:

Provided that if no assessor is appointed by such body, or if the assessor so appointed fails to attend at the time and place fixed for hearing the appeal, the appellate authority may, unless satisfied that the failure to attend is due to sufficient cause, proceed to hear the appeal without the aid of such assessor, or, if it thinks fit, without the aid of any assessor.

(3) In the case of an appeal against an order under section 16 the appellate authority shall, and in any other case except an appeal against an order under sub-section (2) of section 26 or sub-section (2) of section 28 the appellate authority may, suspend the order appealed against pending the decision of the appeal, subject however to such conditions as to partial compliance or the adoption of temporary measures as it may choose to impose in any case.

Power of Provincial Government to make rules to supplement this Chapter.

32. The Provincial Government may make rules—

(*a*) providing for any matter which, according to any of the provisions of this Chapter, is or may be prescribed;

(*b*) requiring the managers of factories to maintain stores of first-aid appliances and provide for their proper custody;

(*c*) providing against danger arising from the use of mechanical transport in factories, other than railways subject to the Indian Railways Act, 1890;

(*d*) prescribing the manner of the service of orders under this Chapter on managers of factories;

(*e*) regulating the procedure to be followed in presenting and hearing appeals under section 31, and the appointment and remuneration of assessors;

(*f*) regulating the exercise by Inspectors of their powers under this Chapter; and

(*g*) providing for any other matter which may be expedient in order to give effect to the provisions of this Chapter.

Additional power to make health and safety rules relating to—
shelters during rest,—

33. [*Cf.* Ss. 73-79, English Act.] (1) The Provincial Government may make rules requiring that in any specified factory, wherein more than one hundred and fifty workers are ordinarily employed, an adequate shelter shall be provided for the use of workers during periods of rest, and such rules may prescribe the standards of such shelters.

NOTES.

REPORT OF SELECT COMMITTEE.—We have extended the period within which an appeal may be made, and have provided against an *ex parte* hearing where sufficient cause exists for failure by an assessor to attend. We have also provided for the suspension of an order under S. 14 until an appeal against the order is disposed of.

Sec. 32: STATEMENT OF OBJECTS AND REASONS.—Sub-Cl. (*b*), (*c*) and (*d*) are new provisions and are all based on recommendations of the Labour Commission.

REPORT OF SELECT COMMITTEE.—"We have added a general rule-making power and have omitted the power to make rules regarding returns of wages. This was in any case inappropriate in a Chapter concerned with Health and Safety, and is not really germane to a law "regulating labour in factories". We have provided in Cl. 47 (S. 47) for securing the recording of such particulars relating to wages as are needed for the purposes of this Act and consider that if general statistics of wages are to be collected, provision should be mde for it by separate legislation.

Sec. 33: STATEMENT OF OBJECTS AND REASONS.—The Labour Commission recommended that Local Governments should be empowered in general terms to pass rooms for children,—

(2) The Provincial Government may also make rules—

(*a*) requiring that in any specified factory, wherein more than fifty women workers are ordinarily employed, a suitable room shall be reserved for the use of children under the age of six years belonging to such women, and

(*b*) prescribing the standards for such rooms and the nature of the supervision to be exercised over the children therein.

certificates of stability,—

(3) The Provincial Government may also make rules, for any class of factories and for the whole or any part of the province, requiring that work on a manufacturing process carried on with the aid of power shall not be begun in any building or part of a building erected or taken into use as a factory after the commencement of this Act, until a certificate of stability in the prescribed form, signed by a person possessing the prescribed qualifications, has been sent to the Inspector.

hazardous operations.

(4) Where the [1][Provincial Government] is satisfied that any operation in a factory exposes any persons employed upon it to a serious risk of bodily injury, poisoning or disease, [2][it] may make rules applicable to any factory or class of factories in which the operation is carried on—

(*a*) specifying the operation and declaring it to be hazardous;

(*b*) prohibiting or restricting the employment of women, adolescents or children upon the operation;

(*c*) providing for the medical examination of persons employed or seeking to be employed upon the operation and prohibiting the employment of persons not certified as fit for such employment; and

(*d*) providing for the protection of all persons employed upon the operation or in the vicinity of the places where it is carried on.

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

[2] Substituted for "he" by A.O., 1937.

NOTES.

orders applicable to particular classes or groups of factories relating to welfare. In addressing Local Governments the Government of India suggested that such a wide extension of rule-making powers was undesirable and that it would be more in consonance with the principles underlying the Act that fresh requirements of this kind should have the approval of the Legislature. This view has been generally accepted and the Government of India have therefore included no general rule-making power relating to "welfare" in the Act. They propose [*cf*. Cls. 21 (2), 33 (*h*) and sub-Cls. (1) and (2) of this clause] to empower Local Governments to make provision only for those matters to which the Labour Commission specifically directed attention."

Sub-Clause (4) is designed to enable Local Governments to secure the protection of the worker against special hazards arising from the use of particular processes. The present Act already contains in S. 19-B and the Schedule provisions designed to protect women and young persons against dangers from lead-poisoning, and S. 38-A confers on the Government of India power to make rules for the disinfection of wool which may be infected with anthrax spores. But with the constant elaboration of factory processes the existing Act has already proved inadequate; and the steady accumulation of knowledge of the best methods for protection against dangers due to special processes render it desirable that Government should be able to make and to modify from time to time the necessary regulations. Sub-Cl. (4) is based on a recommendation of the Labour Commission, and is designed along with the provisions of Cls. 26 and 27, to protect workers against dangers arising from the use for factory purposes of unstable buildings. It is limited to new factories and extensions.

REPORT OF SELECT COMMITTEE.—"We think that provision for a children's room is necessary only in the case of children under the age of six, and have made the necessary alteration in sub-Cl. (2). Sub-Cl. (3) has been recast so as to confine the need for the certificate here provided for to factories erected or taken into use after this provision comes into force."

CHAPTER IV.

RESTRICTIONS ON WORKING HOURS OF ADULTS.

Weekly hours.

34. [*Cf.* Old section 27.] No adult worker shall be allowed to work in a factory for more than fifty-four hours in any week, or, where the factory is a seasonal one, for more than sixty hours in any week:

Provided that an adult worker in a non-seasonal factory engaged in work which for technical reasons must be continuous throughout the day may work for fifty-six hours in any week.

Weekly holiday.

35. [*Cf.* Old section 22.] (1) No adult worker shall be allowed to work in a factory on a Sunday unless—

(*a*) he has had or will have a holiday for a whole day on one of the three days immediately before or after that Sunday; and

(*b*) the manager of the factory has, before the Sunday or the substituted day, whichever is earlier,—

(i) delivered a notice to the office of the Inspector of his intention to require the worker to work on the Sunday and of the day which is to be substituted; and

(ii) displayed a notice to that effect in the factory:

Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day.

(2) Notices given under sub-section (1) may be cancelled by a notice delivered to the office of the Inspector and a notice displayed in the factory not later than the day before the Sunday or the holiday to be cancelled, whichever is earlier.

(3) where, in accordance with the provisions of sub-section (1), any worker works on a Sunday and has had a holiday on one of the three days immediately, before it, that Sunday shall, for the purpose of calculating his weekly hours of work, be included in the preceding week.

Daily hours.

36. [*Cf.* Old section 28.] No adult worker shall be allowed to work in a factory for more than ten hours in any day:

Provided that a male adult worker in a seasonal factory may work for eleven hours in any day.

Intervals for rest.

37. [*Cf.* Old Act, section 21.] The periods of work of adult workers in a factory during each day shall be fixed either—

NOTES.

Sec. 34: PERSONS EMPLOYED IN A FACTORY—MEANING OF.—Persons who are actually engaged in work in a factory in any of the ways enumerated in S. 2 must be presumed to be employed in the factory. 61 C. 332=35 Cr.L.J. 1401=38 C.W.N. 801 =1934 C. 546.

"ALLOWED TO WORK IN A FACTORY."—The section is not confined to any act which the section is not confined to any act which the includes an allowance by a servant or agent of the occupier. *See* In re *Crab Tree,* 85 L.T. 549.

Sec. 35: STATEMENT OF OBJECTS AND REASONS.—*Cf.* old S. 22, sub-Cl. (2) providing for the cancellation of notices on the part of the employer is new.

REPORT OF SELECT COMMITTEE.—We have provided for delivery of the notice under sub-Cl. (1) (*b*) at the office of the Inspector instead of to the Inspector personally.

Secs. 36 and 43.—Where an Inspector of Factories approves a system of working a particular factory, he has power under S. 21 of General Clauses Act to cancel the approval. If an appeal is pending from the order of cancellation it is not desirable to institute a criminal prosecution in respect of the factory having been worked in contravention during the pendency of the appeal. 59 I.C. 857=22 Cr.L.J. 153 (Lah.).

Sec. 37.—"This is based on old S. 21, but certain changes have been made. That section is defective in that, where two intervals of half an hour are given, a manager (*a*) so that no period shall exceed six hours, and so that no worker shall work for more than six hours before he has had an interval for rest of at least one hour;

(*b*) so that no period shall exceed five hours and so that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour, or for more than eight and a half hours before he has had at least two such intervals.

Spread over.

38. [New.] The periods of work of an adult worker in a factory shall be so arranged that along with his intervals for rest under section 37, they shall not spread over more than thirteen hours in any day, save with the permission of the Provincial Government and subject to such conditions as it may impose, either generally or in the case of any particular factory.

Notice of Periods for Work for adults and preparation thereof.

39. [*Cf.* Old Act, sections 26 and 36.] (1) There shall be displayed and correctly maintained in every factory in accordance with the provisions of sub-section (2) of section 76 a Notice of Periods for Work for Adults showing clearly the periods within which adult workers may be required to work.

(2) The periods shown in the Notice required by sub-section (1) shall be fixed beforehand in accordance with the following provisions of this section and shall be such that workers working for those periods would not be working in contravention of any of the provisions of sections 34, 35, 36, 37 and 38.

(3) Where all the adult workers in a factory are required to work within the same periods, the manager of the factory shall fix those periods for such workers generally.

(4) Where all the adult workers in a factory are not required to work within the same periods, the manager of the factory shall classify them into groups according to the nature of their work.

(5) For each group which is not required to work on a system of shifts, the manager of the factory shall fix the periods within which the group may be required to work.

NOTES.

who closes his factory before the second interval is due infringes the law. In addition, the present law makes the request of the employees concerned necessary before the rest interval can be split up into two half hours, and places two additional limitations on the reduction of the interval to half-an-hour where the working day is 8½ hours or less, *viz.*, the sanction of the Local Government must be obtained, and this reduction can only be permitted in the case of male workers. It is proposed to remove all these restrictions. With a short working day it is better that the extra half hour should be spent in the worker's home than in the precincts of the factory, and this applies with, if anything, more force to women than to men. Old S. 52 which allowed in certain circumstances unexpected interruptions of work to count as intervals has been omitted. The Labour Commission recommended that it should also be possible to split up the intervals into periods of less than half-an-hour. But as there is virtually no demand for this refinement, and its introduction would add appreciably to administrative difficulties, it has not been included."—*Statement of Objects and Reasons*.

Sec. 38.—"This is based on a recommendation of the Labour Commission and is designed to prevent the hours of work being so arranged that the worker does not get a reasonably long period away from the factory on each day."—*Statement of Objects and Reasons*.

REPORT OF SELECT COMMITTEE.—We have omitted the concluding words as unnecessary for the protection of the workers and likely to cause difficulty in changing shifts, and have provided for the relaxation of the clause in cases where the Local Government considers this desirable.

Sec. 39.—"This embodies the principle of old S. 26, but the opportunity has been taken, by inserting separate sub-sections relating to the various methods by which factory hours are arranged to make it clear that hours need not be fixed separately for each individual worker."—*Statement of Objects and Reasons.*

Secs. 39 and 40.—This is based on S. 36. In order to prevent the evasion of the Act,

(6) Where any group is required to work on a system of shifts and the relays are not to be subject to predetermined periodical changes of shift, the manager of the factory shall fix the periods within which each relay of the group may be required to work.

(7) Where any group is to work on a system of shifts and the relays are to be subject to predetermined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts whereunder the periods within which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day.

(8) The Provincial Government may make rules prescribing forms for the Notice of Periods for Work for Adults and the manner in which it shall be maintained.

Copy of Notice of Periods for Work to be sent to Inspector.

40. [*Cf.* Old Act, section 36.] (1) A copy of the Notice referred to in sub-section (1) of section 39 shall be sent in duplicate to the Inspector within fourteen days after the commencement of this Act, or, if the factory begins work after the commencement of this Act, before the day on which it begins work.

(2) Any proposed change in the system of work in a factory which will necessitate a change in the Notice shall be notified to the Inspector in duplicate

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NOTES.

it is proposed to provide that changes should be notified to the Inspector before they are made, and that his previous sanction should be required if a change has to be made within a week of the previous change.

REPORT OF SELECT COMMITTEE.—We have re-drafted and re-arranged the provisions contained in Cls. 40 and 41 of the Bill (Ss. 39 and 40 of this Act) as introduced with a view to expressing more clearly the intention of those clauses. The latter part of sub-Cl. (4), Cl. 39, formerly sub-Cl. (3) of Cl. 40, has been omitted as not relevent to the preparation of the notice, and as covered by the provisions of Cl. (41).

Sec. 39: OBJECT OF THE SECTION.—The main object of the section is not to ensure that the manager and no one else should fix the hours but that the hours should be fixed and regular hours of employment are to be fixed; they are not to be subject to sudden or casual alteration at any one's discretion or caprice. 58 Bom. 137=35 Cr.L.J. 542 =35 Bom.L.R. 1167=1934 Bom. 43.

SCOPE OF SECTION—CHANGING SYSTEM OF "SPECIAL HOURS"—LEGALITY.—A continuously changing system of hours "specified" is something altogether different from what is contemplated by a fixation of special hours. The former course is not permitted by the section. 134 I.C. 881=35 C.W.N. 1108=1931 C. 639.

WORK OUTSIDE FIXED HOURS.—Where men work during a time which is admittedly outside the time fixed for employment of each person employed in the factory, the owner of the factory is guilty under the section. 52 A. 444=31 Cr.L.J. 1220=1930 A.L.J. 459=1930 A. 214.

EXTRA WORK NOT DONE IN OR ABOUT FACTORY—PROHIBITION OF SECTION IF APPLIES.—Where the manager of an ice factory had fixed only 7½ hours a day for employees but it appeared that persons who had finished their work used to take ice to ships in the docks when required. *Held,* that the extra work was not work done in or about the factory and that it did not fall within the prohibitory provisions of the Act. 134 I.C. 881=35 C.W.N. 1108=1931 C. 639.

Secs. 39, 42 and 60.—Failure to comply with old S. 36 would not in itself amount to a breach of the provisions of this section or justify the conviction under S. 60. 58 B. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167 =1934 B. 43. A factory which is exempt from the provisions of S. 37 under the rules framed under S. 43 (2) (*d*) cannot be held to be exempt also from the provisions of Ss. 39 and 40. Therefore where there is a breach of the provisions of S. 42 read with S. 39, the fact that under the rules the factory is exempt from the provisions of S. 37 does not afford any defence to a prosecution under S. 60 (*b*) (i). I.L.R. (1937) Bom. 175=38 Bom.L.R. 1181=38 Cr.L.J. 304=1937 Bom. 52.

POWER OF CHANGING WORKING HOURS CANNOT BE EXERCISED BY MANAGER AFTER MILL STARTS WORKING.—The manager and he alone can change the working hours on complying with the conditions stated in old S. 36 (3) of the Act, but that power of change cannot be exercised by the manager after the mill starts working on the period fixed by him. Any change subsequently made therein could not be covered by the change in the standing orders as contemplated by S. 36 (3), but would be an unauthorised departure from the fixed period on a particular day. Although the hours fixed on the night in question were 12-30 A.M. to 5-30 A.M. the mills stopped work-before the change is made, and except with the previous sanction of the Inspector, no such change shall be made until one week has elapsed since the last change.

Register of Adult Workers.

41. [*Cf.* Old Act, sections 35 and 37 (2).] (1) The manager of every factory shall maintain a Register of Adult Workers showing—

(*a*) the name of each adult worker in the factory;

(*b*) the nature of his work;

(*c*) the group, if any, in which he is included;

(*d*) where his group works on shifts, the relay to which he is allotted;

(*e*) such other particulars as may be prescribed:

Provided that, if the Inspector is of opinion that any muster roll or register maintained as part of the routine of a factory gives in respect of any or all of the workers in the factory the particulars required under this section, he may, by order in writing, direct that such muster roll or register shall to the corresponding extent be maintained in place of and be treated as the Register of Adult Workers in that factory:

Provided further that, where the Provincial Government is satisfied that the conditions of work in any factory or class of factories are such that there is no appreciable risk of contravention of the provisions of this Chapter in the case of that factory or factories of that class, as the case may be, the Provincial Government may, by written order, exempt, on such conditions as it may impose, that factory or all factories of that class, as the case may be, from the provisions of this section.

(2) The Provincial Government may make rules prescribing the form of the Register of Adult Workers, the manner in which it shall be maintained and the period for which it shall be preserved.

Hours of work to correspond with notice under section 39 and Register under section 41.

42. [*Cf.* section 26.] No adult worker shall be allowed to work otherwise than in accordance with the Notice of Periods for Work for Adults displayed under sub-section (1) of section 39 and the entries made beforehand against his name in the Register of Adult Workers maintained under section 41.

NOTES.

ing for about 15 minutes on account of a break-down and the manager extended the closing hour to 5-45 A.M. and issued an order to that effect and informed the workmen and the Inspector of Factories of that change and its reason, *held,* that the accused must be convicted under old S. 41 (now S. 60). 58 Bom. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 B. 43.

Sec. 41.—"Sub-Cl. (1) is based on old S. 35. But the main part of the clause has been remodelled and the first proviso to the existing section has been omitted, on the ground that it is desirable that at least a record of the workers should be maintained in all factories. Sub-Cl. (2) is based on old S. 37 (2) (1); the addition relating to the preservation of the register is new."—*Objects and Reasons.*

REPORT OF SELECT COMMITTEE.—"Small verbal alterations have been made in the interests of clarity. The power of exemption given by the Indian Factories Act, 1911, **but omitted in the Bill as introduced,** has been restored in a slightly modified form." The section is mandatory, and it makes the position clear that in the absence of an order by the Inspector, one register in a prescribed form of all persons employed and of the hours and nature of their employments must be kept. It cannot be supplemented by a time-sheet. 152 I.C. 566=38 C.W.N. 1008=1934 C. 730.

Sec. 42: REPORT OF THE SELECT COMMITTEE.—"The prohibition contained in this clause was contained by implication in clause 60 of the Bill as introduced. We have inserted it explicitly in this new clause, and in clause 57, the analogous clause relating to children, with a view to the simplification of clause 60 relating to penalties". It is no defence to a breach of the provisions of this section, that the factory has been exempted from the provisions of S. 37 under rules framed under S. 43 (2) (*d*). I.L.R. (1937) Bom. 175=38 Cr.L.J. 304 =38 Bom.L.R. 1181=1937 Bom. 52. *See also* 1938 N.L.J. 217=1938 Nag. 406=I.L.R. (1940) Nag. 257.

Power to make rules exempting from restrictions.

43. [*Cf*. Old Act, sections 29, 30, 32 and 32-A.] (1) The Provincial Government may make rules defining persons who hold positions of supervision or management or are employed in a confidential position in a factory, and the provision of this Chapter [1][other than the provisions of clause (*b*) of sub-section (1) of section 45 and of the provisos to that sub-sectinn], shall not apply to any person so defined.

(2) The Provincial Government may make rules for adult workers providing for the exemption, to such extent and subject to such conditions as may be prescribed in such rules,—

(*a*) of workers engaged on urgent repairs—from the provisions of sections 34, 35, 36, 37 and 38;

(*b*) of workers engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of the factory—from the provisions of sections, 34, 36, 37 and 38;

(*c*) of workers engaged in work which is necessarily so intermittent that the intervals during which they do not work while on duty ordinarily amount to more than the intervals for rest required under section 37—from the provisions of sections 34, 36, 37 and 38;

(*d*) of workers engaged in any work which for technical reasons must be carried on continuously throughout the day—from the provisions of sections 34, 35, 36, 37 and 38;

(*e*) of workers engaged in making or supplying articles of prime necessity which must be made or supplied every day—from the provisions of section 35;

LEG. REF.

[1] Inserted by Act XI of 1935.

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Sec 43.—"Sub-clause (1) is based on old S. 29; sub-clause (2) is based on old Ss. 30 (1) and 30 (3), 32 and 32-A (*a*). The main change proposed is that these exemptions should in future be made by rules under the Act and not merely by notification. In addition it is proposed that exemptions should not be granted from the weekly holiday in the case of workers engaged in intermittent work, and the definition of such work has been made more specific." The remaining sub-clauses are new. Sub-clause (3) has been found to be necessary in order to enable the factory management to avail itself of other exemptions that may be given. Sub-clause (4) provides for the fixing of absolute limits to overtime, a matter now covered by rules under the Act. Sub-clause (5) embodies a recommendation of the Labour Commission and is designed to ensure that exemptions and the conditions upon which they are granted are reviewed at intervals of not less than three years.—*Objects and Reasons*.

REPORT OF SELECT COMMITTEE.—"We have added a power which seems clearly necessary to exempt workers specified in item (*d*) of sub-clause (2) from the provisions fixing a weekly maximum of hours of work. Under the clause as it previously stood it would have been impossible to permit a worker in a continuous process factory to stay on after his 56 hours if his relief failed to appear promptly. We have omitted reference to maximum limits for daily hours of work in sub-clause (4), as the weekly limitation on hours should give adequate protection. The concluding words of sub-clause (5) and of clause 45 (3) have been omitted so as to make it possible to bring rules into force from any date that may be specified in them"

Sec. 43 (2) (*d*).—Exemption of a factory from provisions of S. 37, under rules made under this clause, does not operate as exemption under the provisions of Ss. 39 and 40 also. Where, therefore, several hands are found working at a time shown as period of rest in the notice displayed under S. 39 (1), there is clear breach of terms of S. 42, and an offence under S. 60 (*b*) (i) is committed. Exemption from provisions of S. 37 is no valid defence. I.L.R. 1937 Bom. 175=38 Bom.L.R. 1181=38 Cr.L.J. 304=1937 Bom. 52. The provisions of R. 112 (*c*) (5) (1) and R. 112 (*c*) (5) (*iii*) are not alternative in the sense that if the provisions of sub-R. 5 (*iii*) are observed it is not necessary to observe the requirements of sub- R. 5 (1) of R. 112 (*c*) of Bihar and Orissa Factory Rules framed under S. 43 of the Factories Act. The word "or" occurring between one sub-clause and another in R. 112 (*c*) cannot be interpreted in such a way as to make the sub-rules alternative. 1938 P.W.N. 903 =40 Cr.L.J. 160=A.I.R. 1939 Pat. 163.

(*f*) of workers engaged in a manufacturing process which cannot be carried on except during fixed seasons—from the provisions of section 35;

(*g*) of workers engaged in a manufacturing process which cannot be carried on except at times dependent on the irregular action of natural forces—from the provisions of section 35 and section 37; and

(*h*) of workers engaged in engine-rooms or boiler-houses—from the provisions of section 35.

(3) Rules made under sub-section (2) providing for any exemption may also provide for any consequential exemption from the provisions of sections 39 and 40 which the Provincial Government may deem to be expedient, subject to such conditions as it may impose.

(4) In making rules under this section the Provincial Government shall prescribe the maximum limits for the weekly hours of work for all classes of workers, and any exemption given, other than an exemption under clause (*a*) of sub-section (2), shall be subject to such limits.

(5) Rules made under this section shall remain in force for not more than three years.

Power to make orders exempting from restrictions.

44. [*Cf.* Old Act, section 30 (2).] (1) Where the Provincial Government is satisfied that, owing to the nature of the work carried on or to other circumstances, it is unreasonable to require that the periods of work of any adult workers in any factory or class of factories should be fixed beforehand, it may, by written order, relax or modify the provisions of sections 39 and 40 in respect of such workers to such extent and in such manner as it may think fit, and subject to such conditions as it may deem expedient to ensure control over periods of work.

(2) The Provincial Government, or subject to the control of the Provincial Government the Chief Inspector, may, by written order, exempt, on such conditions as it or he may deem expedient, any or all of the adult workers in any factory, or group or class of factories, from any or all of the provisions of sections 34, 35, 36, 37, 38, 39 and 40, on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

(3) Any exemption given under sub-section (2) in respect of weekly hours of work shall be subject to the maximum limits prescribed under sub-section (4) of section 43.

(4) An order under sub-section (2) shall remain in force for such period as it may specify, but in no case for more than two months from the date on which notice thereof is given to the manager of the factory.

Further restrictions on the employment of women.

45. [*Cf.* Old Act sections 24, 51 (2) and 32-A.] The provisions of this Chapter shall, in their application to women workers in factories, be supplemented by the following further restrictions, namely:—

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Sec. 44.—"This provides for certain exemption which cannot suitably be made by rules. Sub-clause (1) is designed to meet the case of those factories where the fixing of hours beforehand would impose an unreasonable limitation on the working of the factory: for example, there are factories where work comes in at unexpected times and has to be done with extreme edpedition. Sub-clause (2) is based on old S. 30 (2), but it is proposed that the power to grant exemptions should be exercised by the Chief Inspector, subject to the control of the Local Government. Sub-clauses (3) and (4) are designed to secure that the limits prescribed by Local Governments for overtime apply to such exemptions and that they do not remain in force for an unreasonable period." *Objects and Reasons.*

REPORT OF SELECT COMMITTEE.—"We have extended to the Local Government the power given by sub-clause (2) to the Chief Inspector. The change in sub-clause (3) is consequential on the omission made in clause 43 (4)".

Sec. 45.—"Sub-clause (1) is based on old S. 24 but it is proposed to change from 5-30 A.M. TO 6 A.M. the hour before which woman may not normally be employed. The (*a*) no exemption from the provisions of section 36 may be granted in respect of any women; and

(*b*) no woman shall be allowed to work in a factory except between 6 A.M. and 7 P.M.:

Provided that the Provincial Government may, by notification in the Official Gazette, in respect of any class or classes of factories and for the whole year or any part of it, vary the limits laid down in clause (*b*) to any span of thirteen hours between 5 A.M. and 7-30 P.M.:

Provided further that, in respect of any seasonal factory or class of seasonal factories in a specified area, the Provincial Government may make rules imposing a further restriction by defining the period or periods of the day within which women may be allowed to work, such that the period or periods so defined shall lie within the span fixed by clause (*b*) or under the above proviso and shall not be less than ten hours in the aggregate.

(2) The Provincial Government may make rules providing for the exemption from the above restrictions, to such extent and subject to such conditions as it may prescribe, of women working in fish-curing or fish-canning factories where the employment of women beyond the said hours is necessary to prevent damage to or deterioration in any raw material.

(3) Rules made under sub-section (2) shall remain in force for not more than three years.

Special provision for night-shifts.

46. [New.] Where a worker works on a shift which extends over midnight, the ensuing day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted towards the previous day:

Provided that the Provincial Government may, by order in writing, direct that in the case of any specified factory or any specified class of workers therein the ensuing day shall be deemed to be the period of twenty-four hours beginning

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object is to secure for women a night rest of not less than 11 hours, which is the period prescribed by the International Convention relating to this subject and recommended by the Labour Commission. The latter's proposal to extend the period within which a factory may employ woman to the hours between 5 A.M. and 10 P.M- has been strongly criticised and is not embodied in the Bill. The first proviso is based on old sec. 51 (2) and the second on a recommendation of the Labour Commission. It is applicable only to seasonal factories, and is intended to enable Local Governments to enforce the legal hours in rural factories where repeated infringements have shown the necessity for further limitation. Its application will not reduce the maximum hours for which women may work, but will limit further the hours within which they may be employed. Sub-clause (2) is based on old S. 32-A (*b*), but provides for exemption by rules instead of by notification. Sub-clause (3) has the same objects as sub-clause (5) of clause 43". —*Objects and Reasons.*

GINNING FACTORIES.—All that the law authorises the Inspector to do in the case of a ginning factory is to express his opinion and not to issue orders. The Inspector has no right to issue a general prohibition against the employment of women at night without going into the question whether the staff is sufficient. 61 I.C. 225=19 A. L. J. 503=22 Cr.L.J. 369 =1921 All. 229.

Sec. 46.—"This is a new provision designed to meet the difficulties of factories working on shifts. For example, a factory worker who works up till 4 A.M. on Sunday morning and then gets 40 hours of rest, commencing work again at 8 P.M. on Monday night, has at present to be exempted from the provisions relating to the weekly holiday."—*Objects and Reasons.*

REPORT OF SELECT COMMITTEE.—"The rigid application of the clause as it originally stood would have made certain schemes of shifts, which involved no additional hardships on the workers, impossible in continuous process factories and we have therefore inserted a proviso enabling the week to be reckoned from the beginning instead of the end of the final night shift."

POWERS OF INSPECTOR.—An owner of a factory is prohibited from employing women for night work except with the opinion of the Inspector of Factories and one who does so, is guilty of an infringement of the Act. But the Inspector has no right to issue a general prohibition against the employment of women on night duty. 19 A.L.J. 503=22 Cr.L.J. 369=61 I.C. 225.

when such shift begins and that the hours worked before midnight shall be counted towards the ensuing day.

Extra pay for overtime.

47. [*Cf.* Old Act, section 31.] (1) Where a worker in any factory works for more than sixty hours in any week,

or where a worker in a factory other than a seasonal factory works for more than ten hours in any day,

he shall be entitled in respect of the overtime worked to pay at the rate of one-and-a-half times his ordinary rate of pay.

(2) Where a worker in a factory other than a seasonal factory works for more hours in any week than are permitted under section 34, he shall be entitled, in respect of the overtime worked excluding any overtime in respect of which he is entitled to extra pay under sub-section (1), to pay at the rate of one-and-a-quarter times his ordinary rate of pay.

(3) Where any workers are paid on a piece rate basis, the Provincial Government in consultation with the industry concerned may, for the purposes of this section, fix time rates as nearly as possible equivalent to the average rate of earnings of those workers, and the rates so fixed shall be deemed to be the ordinary rates of pay of those workers for the purposes of this section.

(4) The Provincial Government may prescribe the registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.

Restriction on double employment.

48. No adult worker shall be allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

Control of overlapping shifts.

49. The Provincial Government may make rules providing that in any specified class or classes of factories work shall not be carried on by a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time, save with the permission of the Provincial Government and subject to such conditions as it may impose, either generally or in the case of any particular factory.

CHAPTER V.

SPECIAL PROVISIONS FOR ADOLSCENTS AND CHILDREN.

Prohibition of employment of young children.

50. [*Cf.* section 62, Eng. Act.] No child who has not completed his twelfth year shall be allowed to work in any factory.

Non-adult workers to carry tokens giving reference to certificates of fitness.

51. [*Cf.* sections 62 and 63, Eng. Act.] No child who has completed his twelfth year and no adolescent shall be allowed to work in any factory unless—

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Sec. 47.—"Sub-cls. (1) and (2) replace old S. 31 and embody the Labour Commission's recommendation that work in excess of 60 hours in the week should be paid at the rate of time and a half. It is proposed to make similar provision for work done in excess of the daily limit of hours in a non-seasonal factory and, in sub-cl. (3), to provide for similar payment for all work done by virtue of an exemption from the weekly holiday".—*Objects and Reasons*.

REPORT OF SELECT COMMITTEE.—"The small change in sub-cl. (2) expresses more accurately the intention of this provision. We have omitted sub-cl. (3) of the clause as it stood in the Bill when introduced, on the ground that payment at overtime rates is not justified when the worker gets a holiday in exchange for the Sunday or substituted day. We have added a provision dealing with rates of overtime pay for workers paid on a piece-rate basis, and have provided for the maintenance of registers to serve as a check on the operation of the provisions for payment of overtime pay".

(*a*) a certificate of fitness granted to him under section 52 is in the custody of the manager of the factory, and

(*b*) he carries while he is at work a token giving a reference to such certificate.

Certificates of fitness.

52. [*Cf*. sections 63 to 67, Eng. Act.] (1) A certifying surgeon shall, on the application of any young person who wishes to work in a factory, or of the parent or guardian of such person, or of the manager of the factory in which such person wishes to work, examine such person and ascertain his fitness for such work.

(2) The certifying surgeon, after examination, may grant to such person, in the prescribed form,—

(*a*) a certificate of fitness to work in a factory as a child, if he is satisfied that such person has completed his twelfth year, that he has attained the prescribed physical standards (if any), and that he is fit for such work; or

(*b*) a certificate of fitness to work in a factory as an adult, if he is satisfied that such person haas completed his fifteenth year and is fit for a full day's work in a factory.

(3) A certifying surgeon may revoke any certificate granted under sub-section (2) if, in his opinion; the holder of it is no longer fit to work in the capacity stated therein in a factory.

(4) Where a certifying surgeon or a practitioner authorized under sub-section (2) of section 12 refuses to grant a certificate or a certificate of the kind requested, or revokes a certificate, he shall, if so requested by any person who could have applied for the certificate, state his reasons in writing for so doing.

Effect of certificate granted to adolescent.

53. [*Cf*. Ss. 63-67, Eng. Act.] (1) An adolescent who has been granted a certificate of fitness to work in a factory as an adult, under clause (*b*) of sub-section (2) of section 52, and who, while at work in a factory, carries a token giving reference to the certificate shall be deemed to be an adult for all the purposes of Chapter IV.

(2) An adolescent who has not been granted a certificate of fitness to work in a factory as an adult, under sub-section (2) of section 52, shall, notwithstanding his age, be deemed to be a child for the purposes of this Act.

Restrictions on the working hours of a child.

54. [*Vide* Old S. 23 (*b*), S. 1 (2) and S. 25; also Ss. 23-30 of the Eng. Act.] (1) No child shall be allowed to work in a factory for more than five hours in any day.

(2) The hours of work of a child shall be so arranged that they shall not spread over more than seven-and-a-half hours in any day.

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Sec. 52: MADRAS AMENDMENT.—For sub-S. (1) of S. 52 of the Factories Act, 1934, the following sub-section shall be substituted namely:—"(1) A certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory." (Madras Act VI of 1941).

Sec. 52: REPORT OF SELECT COMMITTEE.—The Changes in sub-cls. (2) and (3) are designed to make it clear that the certificates relate to factory work generally and not to work in a particular factory. Even in the case of a child of fourteen there is need for a certificate. 31 Bom.L.R. 544=30 Cr.L.J. 793=1929 Bom. 272. On this section *see also* 58 Bom. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 Bom. 43. Where children were employed for purposes of sorting ground-nuts in a yard close to a room where machinery for decortication of ground-nuts was used. *Held*, that the children were employed in a factory. 50 Mad. 834=28 Cr.L.J. 267=1927 Mad. 345=52 M.L.J. 207.

(3) No child shall be allowed to work in a factory except between 6 A.M. and 7 P.M.:

Provided that the Provincial Government may, by notification in the Official Gazette, in respect of any class or classes of factories and for the whole year or any part of it, vary these limits to any span of thirteen hours between 5 A.M. and 7-30 P.M.

(4) The provisions of section 35 shall apply also to child workers, but no exemption from the provisions of that section may be granted in respect of any child.

(5) No child shall be allowed to work in any factory on any day on which he has already been working in another factory.

Notice of Periods for Work for Children.

55. [*Cf.* S. 32, Eng. Act.] (1) There shall be displayed and correctly maintained in every factory, in accordance with the provisions of sub-section (2) of section 76, a Notice of Periods for Work for Children, showing clearly the periods within which children may be required to work.

(2) The periods shown in the Notice required by sub-section (1) shall be fixed beforehand in accordance with the method laid down for adults in section 39 and shall be such that children working for those periods would not be working in contravention of section 54.

(3) The provisions of section 40 shall apply also to the Notice of Periods for Work for Children.

(4) The Provincial Government may make rules prescribing forms for the Notice of Periods for Work for Children and the manner in which it shall be maintained.

Register of Child Workers.

56. [*Cf.* Ss. 39-41, *supra.*] (1) The manager of every factory in which children are employed shall maintain a Register of Child Workers showing—

(*a*) the name of each child worker in the factory,
(*b*) the nature of his work,
(*c*) the group, if any, in which he is included,
(*d*) where his group works on shifts, the relay to which he is allotted,
(*e*) the number of his certificate of fitness granted under section 52, and
(*f*) such other particulars as may be prescribed.

(2) The Provincial Government may make rules prescribing the form of the Register of Child Workers, the manner in which it shall be maintained, and the period for which it shall be preserved.

Hours of work to correspond with Notice and Register.

57. [*Cf.* S. 32, Eng. Act.] No child shall be allowed to work otherwise than in accordance with the notice of Periods for Work for Children displayed under sub-section (1) of section 55 and the entries made beforehand against his name in the Register of Child Workers maintained under sub-section (1) of section 56.

Power to require medical examination.

58. [*Vide* S. 8-A of the Old Act.] Where an Inspector is of opinion—

(*a*) that any person working in a factory without a certificate of fitness is a child or an adolescent, or

(*b*) that a child or adolescent working in a factory with a certificate is no longer fit to work in the capacity stated therein,

he may serve on the manager of the factory a notice requiring that such person, or that such child or adolescent, as the case may be, shall be examined

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Secs. 55 and 56: REPORT OF SELECT COMMITTEE.—"The re-draft of these clauses follows the lines adopted in our re-draft of cls. 39 and 40". The reason for the insertion of this section is the same as is given under S. 42. *See* Statement of Objects and Reasons).

by a certifying surgeon or by a practitioner authorised under sub-section (2) of section 12, and such person, child or adolescent shall not, if the Inspector so directs, be allowed to work in any factory until he has been so examined and has been granted a certificate of fitness, or a fresh certificate of fitness, as the case may be.

Power to make rules.

59. [*Cf*. S. 126, Eng. Act.] The Provincial Government may make rules—

(*a*) prescribing the forms of certificates of fitness to be granted under section 52, providing for the grant of duplicates in the event of loss of the original certificates, and fixing the fees which may be charged for such certificates and such duplicates.

(*b*) prescribing the physical standards to be attained by children and adolescents;

(*c*) regulating the procedure of certifying surgeons under this Chapter, and specifying other duties which they may be required to perform in connexion with the employment of children and adolescents in factories; and

(*d*) providing for any other matter which may be expedient in order to give effect to the provisions of this Chapter.

[1]CHAPTER VA.

SMALL FACTORIES.

Small factories.

59-A. (1) In this Act, unless there is anything repugnant in the subject or context, "small factory" means any premises including the precincts thereof whereon ten or more but less than twenty workers are working or were working on any day of the preceding six months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923:

Provided that the Provincial Government may by notification in the Official Gazette, declare any premises to be a small factory, notwithstanding that less than ten workers are working thereon, if such premises would otherwise be a small factory.

(2) For the purposes of this Chapter an adolescent holding a certicate granted under this Act to work as an adult shall be deemed to be an adult.

Certain provisions of this Act to apply to small factories wherein child labour is employed.

59-B. (1) All the provisions of this Act, except clause (*j*) of section 2, sections 4, 5, 6 and 7; sub-section (1) and (4) of section 14, sections 15, 21, 22 and 25, sub-sections (1), (2) and (3) of section 33 and Chapter IV shall apply to, and in relation to, all small factories wherein any worker who is not, or is not deemed to be, an adult is employed; and in the provisions hereby made so applicable every reference to a factory shall be deemed to include, so far as may be, a reference to a small factory.

(2) The aforesaid provisions shall cease to apply to a small factory on the expiry of six months from the receipt by the Inspector of a notice in writing from the occupier that he has ceased to employ therein any worker who is not, or is not deemed to be, an adult, unless any such worker is employed therein on any day of the said six months:

Provided that if any such worker is thereafter employed in the small factory, the said provisions of this Act shall again apply thereto.

Certain other provisions of law not barred.

59-C. The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of the Employment of Children Act, 1938.

LEG. REF.

[1] Chap. V-A, inserttd by Act XVII of 1940.

CHAPTER VI.

PENALTIES AND PROCEDURE.

Penalty for contraventions of Act and rules.

60. [*Cf.* Ss. 135-138, Eng. Act and Ss. 41 to 44-A of the old Act.] If in any factory—

(*a*) there is any contravention—

(i) of any of the provisions of sections 13 to 29 inclusive, or

(ii) of any order made under any of the said sections, or

(iii) of any of the said sections read with rules made in pursuance thereof under clause (*a*) of section 32, or

(iv) of any rule made under any of the said sections or under clause (*b*), clause (*c*), or clause (*g*) of section 32 or section 33, or

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Sects. 60 to 69.—These embody with the necessary consequential additions, secs. 41 to 44-A of the Old Act. Sec. 43-A which provided for the grant of compensation to injured workers out of fines has been omitted, as adequate provision has been made by the Workmen's Compensation Act. (*Objects and Reasons*).

REPORT OF SELECT COMMITTEE.—"We have re-cast in a more succinct form the list of offences contained in the clause. We have also provided both here and in cl. 65 that where the manager and occupier were held jointly responsible for the breach of the law, the combined penalty shall not be in excess of the maximum penalty that might be inflicted on either of them."

Sec. 60: CONSTRUCTION OF SECTION.—The section is penal one, it ought to be construed strictly. The occupier and manager both or either of them can be required to pay a fine which may extend to Rs. 200 (now Rs. 500) but between the two they cannot be required to pay any sum exceeding that limit for each offence. (45 Bom. 220=1921 Bom. 322). See now the change in the present Code explained in the Report of the Select Committee. *See also* sec. 65, *infra*. Factory Act should be properly enforced for protection of workmen, but on the other hand one must also bear in mind that the employer's position has to be considered too. It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence then it would seem only fair that the matter should be clearly brought home to them. 26 Bom.L.R. 1245=26 Cr.L.J. 482=1925 Bom. 143. The Act is a special Act, and the absence of definite evidence to show that a boy seven or 8 years old, was employed or allowed to work in contravention of the provisions of the Act, a conviction under the Act is illegal. 49 I.C. 860=20 Cr.L.J. 236=17 A.L.J. 223.

LIABILITY OF MANAGER AND OCCUPIER JOINT AND SEVERAL.—The Act provides that both the occupier and manager shall be jointly and severally liable to fine for any of the offences committed under the Act. This joint and several fine imposed on both the occupier and manager is irrespective of the fact as to which of the two had committed the offence. The duty to inform the authority under the Act is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened his provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention. 31 Cr.L.J. 869 (2)=125 I.C. 380 (2)=1930 Lah. 658. *See also* 55 Bom. 366=32 Cr.L.J. 1063=33 Bom.L.R. 309. *See also* Report of Select Committe. The word "occupier" denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and control its working. He may or may not actually occupy the building and even if he carries on the work through an agent he does not cease to be the occupier. He cannot therefore be any one who is a mere servant charged with specific duties either in regard to the control of the machinery, workmen or office. A ***mukaddam*** is really a foreman of the operatives and a servant of the factory. He is neither a managing agent nor a person authorised to represent the occupier. He cannot therefore be regarded as an occupier or manager. He cannot be tried jointly with the manager for an offence under sec. 41 (*a*) of the old Act but can be tried under S. 42 (1) on the complaint of the manager. 34 Cr.L.J. 821=29 Nag.L.R. 72=1932 Nag. 100. If more than one person is unlawfully employed the manager and agent are liable for as many offences as there are persons so employed. 45 Bom. 220=1921 Bom. 322.

OMITTING TO FENCE ENGINE WITHIN PREMISES.—The manager of the concern is liable to be prosecuted for not properly fencing the engine found in the premises. 31 Cr.L.J. 1094=32 Bom.L.R. 329=1930 Bom. 162.

PRACTICE AND PROCEDURE.—Where the manager is prosecuted under sec. 60 (*b*) (*i*) read with sec. 42 for allowing work to be done beyond the prescribed period it is no defence to plead that the accused acted in good faith honestly believing in the clock in the factory to be correct and that he is protected by sec. 81. It is enough in a prosecution under the Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that accused

(v) of any condition imposed under sub-section (3) of section 31, or

(*b*) any person is allowed to work in contravention—

(i) of any of the provisions of sections 34 to 38 inclusive, 42, 45 and 48, or

(ii) of any rule made under any of the said sections, or under section 49, or

(iii) of any condition attached to any exemption granted under section 43 or section 44 or section 45 or to any permission granted under section 38 or section 49, or

(*c*) there is any contravention of any of the provisions of sections 39 to 41 inclusive or of any rule made under section 39, section 41 or section 47, or of any condition attached to any exemption granted under section 41 or to any modification or relaxation made under section 44, or

(*d*) any person is not paid any extra pay to which he is entitled under the provisions of section 47, or

(*e*) any adolescent or child is allowed to work in contravention of any of the provisions of sections 50, 51, 54, 55, 57 and 58 or

(*f*) there is any contravention of section 55 or section 56 or of any rules made under either of these sections, or under clause (*d*) of section 59, the manager and occupier of the factory shall each be punnishable with fine which may extend to five hundred rupees:

Provided that if both the manager and the occupier are convicted, the aggregate of the fines inflicted in respect of the same contravention shall not exceed this amount.

Enhanced penalty in certain cases after previous conviction.

61. [*Cf*. S. 45 of the old Act and S. 143, Eng. Act.] If any person who has been convicted of any offence punishable under clauses (*b*) to (*f*) inclusive of section 60 is again guilty of an offence involving a contravention of the same provision, he shall be punishable on the second conviction with fine which may extend to seven hundred and fifty rupees and shall not be less than one hundred rupees, and if he is again so guilty, shall be punishable on the third or any subsequent conviction with fine which may extend to one thousand rupees and shall not be less than two hundred and fifty rupees:

Provided that for the purposes of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

NOTES.

intended to infringe the Act or the rules. 1938 N.L.J. 217=A.I.R. 1938 Nag. 406. *See also* I.L.R. (1940) Nag. 257. It is not necessary that an order or notice from the Inspector of Factories should be issued to a person, who has not conformed to the rules made under the Act, before he can be charged for any offence under it. It is the duty of such person to obey the rules, and in case of his disobedience, he becomes liable to conviction whether there was any order or not from the Inspector, calling upon him to obey the rules. 12 Bom.L.R. 225. *See also* L.B.R. (1893-1900) 407. Management acting in good faith—Launching of prosecution as test case—Propriety of. Where the authorities themselves are doubtful about the applicability of certain provisions of the Act, but the management act reasonably and shows a genuine desire to meet any complaint and to rectify irregularities, and there is no absence of good faith, the launching of a test case in respect of trial and technical infringements of the provisions of the Act is uncalled for. 152 I.C. 566=38 C.W.N. 1008=1934 Cal. 730. Penalties in cases against factory owners who are exploiting labour must be deterrent, especially in view of the fact that detection is frequently avoided. 19 N.L.J. 247.

Sec. 61: STATEMENT OF OBJECTS AND REASONS.—This follows a recommendation of the Labour Commission and is designed to secure in suitable cases adequate penalties in the case of repeated offences.

REPORT OF SELECT COMMITTEE.—We have provided for a gradual increase of the penalty in the case of repeated offences, and we have limited the operation of the whole clause to offences relating to the provisions of Chapters IV and V, and it is only in respect of such offences that the need of such a provision has been felt.

Provided further that the Court, if it is satisfied that there are exceptional circumstances warranting such a course, may, after recording its reasons in writing, impose a smaller fine than is required by this section.

Penalty for failure to give notice of commencement of work or of change of manager.

62. An occupier of a factory who fails to give any notice required by sub-section (1) or sub-section (2) of section 9 shall be punishable with fine which may extend to five hundred rupees.

Penalty for obstructing Inspector.

63. [*Cf*. S. 43, old Act.] Whoever wilfully obstructs an Inspector in the exercise of any power under section 11, or fails to produce on demand by an Inspector any registers or other documents in his custody kept in pursuance of this Act or of any of the rules made thereunder, or conceals or prevents any worker in a factory from appearing before or being examined by an Inspector, shall be punishable with fine which may extend to five hundred rupees.

Penalty for failure to give notice of accidents.

64. [*Cf*. S. 41 (*j*), Old Act.] A manager of a factory who fails to give notice of an accident as required under section 30 shall be punishable with fine which may extend to five hundred rupees.

Penalty for failure to make returns.

65. [*Cf*. S. 41, Old Act.] If in respect of any factory any return is not furnished as required under section 77, the manager and the occupier of the factory shall each be liable to fine which may extend to five hundred rupees:

Provided that if both the manager and the occupier are convicted, the aggregate of the fines inflicted shall not exceed this amount.

Penalty for smoking or using naked light in vicinity of inflammable material.

66. [S. 43, Old Act.] Whoever smokes, or uses a naked light or causes or permits any such light to be used in the vicinity of any inflammable material in a factory shall be punishable with fine which may extend to five hundred rupees.

Exception.—This provision does not extend to the use, in accordance with such precautions as may be prescribed, of a naked light in the course of a manufacturing process.

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Sec. 63.—No sort of vicarious responsibility is recognized by this Act in respect of offences referred to in this section. Where the Assistant Manager failed to produce register on demand by the Inspector, alleging that the same was with the Manager who had left the office, the Manager cannot be convicted under this section even if he was really hiding himself in the factory in order to avoid meeting the Inspector. 41 C.W.N. 740.

Sec. 64.—*See* 1930 L. 658; L.B.R. (1893-1900) 407 cited under sec. 70, *infra*.

Sec. 65: LIABILITY OF OCCUPIER AND MANAGER.—Liability of the occupier and manager of a factory to be sentenced for an offence under sec, 41 is joint and several. Where, therefore, both are tried jointly for an offence under the section they cannot each be sentenced to the maximum penalty provided by the section but their joint liability to pay fine should not exceed the maximum. 21 Cr.L.J. 728=58 I.C. 152=45 B. 220=22 Bom.L.R. 904. *See also* 10 Bom.L.R. 38=7 Cr.L.J. 44. *See also* notes under sec. 60. *supra*.

CASE-LAW UNDER THE OLD ACT.—Separate sentences of fine on the occupier and manager in one trial under sec. 41 of the Act are illegal. An occupier is the controller for the time being of a factory and may be either an owner of a lessee or a mortgagee with possession. The manager merely carries out the occupier's orders to work the factory. If there is no manager, the occupier himself is deemed to be the manager (*Le Rossignol, J.*). 13 P.R. (Cr.) 1918=45 I.C. 159=19 Cr.L.J. 495. The manager of a mill who employs a number of workmen to work in his mill after 7 p.m., is liable to be convicted and sentenced separately in respect of each such workmen under the provisions of sec. 41 (*a*) read with sec. 29 (i) of the Factories Act. (*Shah and Hayward, JJ.*). 53 I.C. 935=20 Cr.L.J. 837=21 Bom.L.R. 1059. *See also* 44 B. 88. On this section *see also* 45 B. 220=1921 B. 322 cited under sec. 60, *supra*.

Penalty for using false certificate.

67. [*Cf.* S. 139, Eng. Act and S. 44 Old Act.] Whoever knowingly uses or attempts to use, as a certificate granted to himself under section 52, a certificate granted to another person under that section, or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use it to be made by another person, shall be punishable with fine which may extend to twenty rupees.

Penalty on guardian for permitting double employment of a child.

68. [*Cf.* S. 148, Eng. Act.] If a child works in a factory on any day on which he has already geen working in another factory, the parent or guardian of the child or the person having custody or control over him, or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to twenty rupees, unless it appears to the Court that the child so worked without the consent, connivance or wilful default of such parent, guardian or person.

Penaty for failure to display certain notices.

69. [*Cf.* S. 41 (1), Old Act.] A manager of a factory who fails to display the notice required under sub-section (1) of section 76 or by any rule made under this Act, or to display or maintain any such notice as required by sub-section (2) of that section, shall be punishable with fine which may extend to five hundred rupees.

Determination of "occupier" for purposes of this Chapter.

70. [*Vide* Ss. 140 and 141, Eng. Act.] (1) Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable:

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Sec. 70: STATEMENT OF OBJECTS AND REASONS.—There is a new section designed to ensure that wherever possible the person responsible as occupier is clearly designated. (Objects and Reasons).

REPORT OF SELECT COMMITTEE.—"We have provided **that the member** of the firm or association to be nominated as occupier of a factory must be a resident in British India, in order that he may at all times be amenable to control by law."

WHO IS OCCUPIER—LIABILITY OF OCCUPIER —OLD CASES.—The term "occupier" generally means a person who controls the factory or workshop and the work that is done there, and includes the owner of the factory. 15 Bom.L.R. 328=20 I.C. 144=14 Cr.L.J. 384. The word 'occupier' denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and control its working. He may or may not actually occupy the building and even if he carries on the work through an agent he does not cease to be the occupier. He cannot therefore be any one who is a mere servant charged with specific duties either in regard to the control of the machinery, workmen, or office. A *mukaddam* is really a foreman of the operatives and servant of the factory. He is neither a managing agent nor a person authorised to represent the occupier. He cannot therefore be regarded as an occupier or manager. He cannot be tried jointly with the manager for an offence under sec. 41 (*a*) of the Old Act but cannot be tried under sec. 42 (*i*) on the complaint of the manager. 144 I.C. 693=34 Cr.L.J. 821=1933 N. 100. The word "occupier" in general means a person who occupies the factory either by himself or his agent. He may be an owner, he may be a lessee or even a mere licensee but he must have the right to occupy the property and dictate how it is to be managed. 55 B. 366=32 Cr.L.J. 1063 (1). 33 Bom.L. R. 309=1931 B. 308. Even if the accused, who is the owner of a factory shows that he knows noting about the management of the factory and that he has left the whole conduct of its affairs to a manager appointed by him for the purpose, he is not free from the liability imposed on him by sec. 41 (*a*) of the Old Act. (*Ibid.*) Several persons may at the same time be occupiers of premises within the meaning of the Act for different purposes. *Wearings* v. *Kirk*, (1904) 1 K. B. 213 (C.A.). *Per* Mathew, L.J., at p. 217. The proprietor of a factory who lives for the greater part of the year in a house on the factory premises is an occupier for the purposes of the Act. Rat. 901. But *see* 29 B. 423; 7 Bom.L.R. 454 (*contra*). The provisions of Factories Act throw upon the occupier the responsibility of keeping the register. The responsibility is personal; and he cannot get rid of it by saying that he had delegated the duty to another person. 11 Bom.L.R. 12=9 Cr.L.J. 160=1 I.C. 102. The mere fact that a Municipality and the Factory were jointly responsible to keep a

Provided that the firm or association may give notice to the Inspector that it has nominated one of its number who is resident in British India to be the occupier of the factory for the purposes of this Chapter, and such individual shall so long as he is so resident be deemed to be the occupier for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.

(2) Where the occupier of a factory is a company, any one of the directors thereof, or, in the case of a private company, any one of the shareholders thereof, may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable:

Provided that the company may give notice to the Inspector that it has nominated a director, or, in the case of a private company, a shareholder who is resident in either case in British India, to be the occupier of the factory for the purposes of this Chapter, and such director or shareholder shall so long as he is so resident be deemed to be the occupier of the factory for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director or shareholder.

Exemption of occupier or manager from liability in certain cases.

71. [Ss. 140 and 141, Eng. Act and S. 42, Old Act.] (1) Where the occupier or manager of a factory is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for the hearing of the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory proves to the satisfaction of the Court—

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factory in a cleanly state will not discharge the occupier from his liability under Factories Act. The provision of old sec. 17 is of a highly penal character and must be construed strictly in favour of the accused. 25 C. 454. Though the duty to inform the authority about accident is laid on the manager by sec. 34 (Old Act), the occupier and manager are made jointly and severally responsible for the contravention under this clause. 1930 L. 658. *See also* L.B.R. (1893—1900) 407.

Sec. 71: SCOPE OF SECTION.—By this section "*a prima facie* liability is imposed upon the occupier or manager or dominus from which, however, he can extricate himself: otherwise he remains liable. The scheme of the Act is first to find the *de facto* employer: An information may be laid against the occupier. His way of escape is provided for by this section. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the English Sale of Food and Drugs Act. He may show that the offence was not committed by his fault. To do this he must bring the real offender before the Court". *Ward* v. *Smith,* (1913) 3 K.B. 154. (*Phillimore, J.*). *See also* 45 I.C. 159=13 P.R. 1918 (Cr.)=19 Cr.L.J. 495. This section provides a remedy for an occupier or manager who is the victim of some other person's neglect; but he must take a certain step to assure the culprit's conviction and not merely attempt to exculpate himself.

PRACTICE AND PROCEDURE.—The structure of sec. 42 of the old Factories Act (1911) indicates that one proceeding is split up into two proceedings; and while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceedings in which the manager or the occupier is the complainant he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This must mean that the manager or occupier *qua* complainant must give evidence himself. There is no substance in the objection that the manager or occupier who initially is charged with an offence against the Act cannot go into the witness-box and give evidence himself, because he goes into the witness-box as an accused in the case originally started against him, but in his own right as a complainant on his complaint against the other person or persons whom he has brought in. It is not a material irregularity to dispose of the two matters by one judgment or to record the evidence in the two matters together. 30 Cr. L.J. 818=56 C. 400=32 C.W.N. 922=1928 C. 557. Where a complaint is lodged by an accused under sec. 71 of the Act, the *Factory Inspector, as complainant in the original complaint, can cross-examine the accused* when he goes into the witness-box to prove his own complaint. The effect of sec. 71 is that when an occupier or manager is charged and the Inspector proves that an offence has been committed, a special statutory defence open to (*a*) that he has used due diligent to enforce the execution of this Act, and

(*b*) that the said other person committed the offence in question without his knowledge, consent or connivance,

that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager shall be discharged from any liability under this Act.

(2) When it is made to appear to the satisfaction of the Inspector at any time prior to the institution of the proceedings—

(*a*) that the occupier or manager of the factory has used all due diligence to enforce the execution of this Act, and

(*b*) by what person the offence has been committed; and

(*c*) that it has been committed without the knowledge, consent or connivance of the occupier or manager, and in contravention of his orders;

the Inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier or manager of the factory, and such person shall be liable to the like fine as if he were the occupier or manager.

72. [*Cf.* S. 46, Old Act.] If a child over the age of six years is found inside any part of a factory in which children are working, he shall, until the contrary is proved, be deemed to be working in the factory.

Presumption as to employment.

NOTES.

the occupier or manager, which such statutory defence involves his lodging complaint against a third party which complaint has to be heard at the same time as the original complaint. The two complaints are both in connection with the same offence and must be dealt with together. In the interests of justice, the Factory Inspector should have the ***right to cross examine*** a person whom he has charged if that person chooses to go into the witness-box to set up a statutory defence. I.L.R. (1940) Bom. 420=42 Bom.L.R. 482=1940 Bom. 265. But *see also* 43 C.W.N. 1223. Under S. 71 of the Factories Act, the person who claims the exemption from liability on the ground that he used due diligence and that another person than himself was responsible for the offence, has the onus on him to show that he comes within the provisions of the section. 1938 P.W.N. 903=40 Cr.L.J. 160=1939 Pat. 163.

PROCEDURE—DISCHARGE OF OWNER OR OCCUPIER AND CONVICTION OF ACTUAL OFFENDER ON LATTER PLEADING GUILTY—LEGALITY.—If a complaint is made by the Inspector of Factories against the manager or occupier of a factory charging him with an offence under the Factories Act, the latter is entitled under S. 71 of that Act to complain against the actual offender, and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against. The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed. Both parties complained against are entitled to cross examine the prosecution witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence, both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under the Act. S. 71, however, affords him an opportunity of escaping liability, provided he can give satisfactory proof of the matters set out in Cls. (*a*) and (*b*) of S. 71 (1), *viz.*, that he had used due diligence and that the actual offender had committed the offence without his knowledge. The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender would be entitled to call evidence, but not give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus of positive proof required by S. 71 (1) (*a*) and (*b*), and in all probability he alone is capable of proving certain facts of which proof is thereby required. The Crown which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence. The Magistrate has no power to convict the actual offender or

Evidence as to age.

73. [*Cf.* S. 147, Eng. Act and S. 47, Old Act.] (1) When an act or omission would, if a person were under or over a certain age, be an offence punishable under this Act, and such person is in the opinion of the Court apparently under or over such age, the burden shall be on the accused to prove that such person is not under or over such age.

(2) A declaration in writing by a certifying surgeon relating to a worker that he has personally examined him and believes him to be under or over the age set forth in such declaration shall, for the purposes of this Act, be admissible as evidence of the age of that worker.

Cognizance of offences.

74. [*Cf.* S. 48, Old Act.] (1) No prosecution under this Act, except a prosecution under section 66, shall be instituted except by or with the previous sanction of the Inspector.

(2) No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class shall try any offence against this Act or any rule or order made thereunder, other than an offence under section 66 or section 67.

Limitation of prosecutions.

75. [*Cf.* S. 146, Eng. Act and section 49, Old Act.] No Court shall take cognizance of any offence under this Act or any rule or order thereunder, other than an offence under section 62 or section 64, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed:

Provided that when the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within twelve months of the date on which the offence is alleged to have been committed.

CHAPTER VII.

SUPPLEMENTAL.

Display of factory notices.

76. [*Cf.* S. 128, Eng. Act and section 36, cl. (1), Old Act.] (1) In addition to the notices required to be displayed in any factory by this Act or the rules made thereunder, there shall be displayed in every factory a notice containing such abstracts of this Act and of the rules made thereunder in English and in the vernacular of the majority of the workers, as the Provincial Government may prescribe.

(2) All notices required to be displayed in a factory shall be displayed at some conspicuous place at or near the main entrance to the factory, and shall be maintained in a clean and legible condition.

Power of Provincial Government to make rules.

77. [*Cf.* S. 37, Old Act.] The [1][Provincial Government] may make rules requiring occupiers or managers of factories to submit such returns, occasional or periodical, as may in [2][its] opinion be required for the purposes of this Act.

LEG. REF.

[1] Substituted for Governor-General in Council' by A.O., 1937.

[2] Substituted by A.O., for "his".

NOTES.

discharge the occupier or manager until the proof envisaged by S. 71 (1) (*a*) and (*b*) is before him, although the former pleads guilty to the charge against him. I.L.R. (1940) 1 Cal. 120=43 C.W.N. 1223=1939 Cal. 724.

Sec. 75: REPORT OF THE SELECT COMMITTEE.—"We have extended the period of limitation in the case of an offence committed in disobedience of written order of an inspector, as offences of the character frequently fail to come to light within six months of their commission".

Sec. 76.—It is no offence, where an employer is being prosecuted for supplying incorrect particulars to show that the workmen could easily have ascertained their falsity. (*Nussey* v. *Britwistle*, (1894) 58 J.P. 735).

Sec. 77.—The rules framed under the Factories Act do not require that a place, like a pit containing hot water, for silting wood in a rice factory, which is used for the purposes of the factory, should be

Control of rules made by Local Governments.

78. [1][* * * *].

Publication of rules.

79. [*Cf.* Ss. 39 and 40, Old Act.] (1) All rules made under this Act shall be subject to the condition of previous publication, and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than three months from the date on which the draft of the proposed rules was published.

(2) All such rules shall be published in [2][* * * *] the official Gazette [2][* * * *] and shall, unless some later date is appointed, come into force on the date of such publication.

Application to Crown factories.

80. [*Cf.* S. 150, Eng. Act.] This Act shall apply to factories belonging to the Crown.

Protection to persons acting under this Act.

81. [*Cf.* S. 58, Old Act.] No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Repeal and savings.

82. [*Repealed* by Act XX of 1937.]

SCHEDULE—(*Repealed by Act XX of* 1937.)

THE FACTORIES (MADRAS AMENDMENT) ACT (VI OF 1941).

[9*th February*, 1941.

An Act further to amend the Factories Act, 1934, *in its application to the Province of Madras.*

WHEREAS it is expedient further to amend the Factories Act, 1934, in its application to the Province of Madras, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE FACTORIES (MADRAS AMENDMENT) ACT, 1941.

Amendment of S. 52, Act XXV of 1934.

2. For sub-section (1) of section 52 of the Factories Act, 1934, the following sub-section shall be substituted, namely:—

"(1) A certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of

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LEG. REF.

[1] S. 78 omitted by A.O. 1937.

[2] Words 'the Gazette of India or' and 'as the case may be' omitted by *ibid*.

NOTES.

fenced in such manner as to be completely unapproachable. It is sufficient if it is fenced in such a way that nobody would cross that way and fall into the pit by accident. Where the pit, which contained hot water and into which an employee in the factory fell and was fatally scaled was fenced on three sides but the fourth side was left open for approach and did not ordinarily contain very hot or other injurious substance. *Held,* that the manager was not liable to be convicted for not observing R. 72 (1) of the Rules framed under the Factories Act and for failing to fence the pit, because, firstly, the pit was fenced and secondly, it was not a pit which ordinarily contained any hot or injurious substance. 1939 Pat. 46=20 Pat.L.T. 95=1939 P.W.N. 133.

Sec. 79: REPORT OF THE SELECT COMMITTEE.—"We have separated these provisions from the preceding clause and have provided that rules made by the Government of India shall also be subject to the condition of prior publication".

Sec. 81.—This section does not apply to a manager; it was inserted, primarily, if not entirely for the benefit of the inspecting staff. It cannot be said that the manager is acting under the Act. 1938 N.L.J. 217 =1938 Nag. 406.

a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory."

THE FATAL ACCIDENTS ACT (XIII OF 1855)[1]

Year.	No.	Short title.	Amendments.
1855	XIII	The Indian Fatal Accidents Act, 1855.	Repealed in part, IX of 1871; X of 1914.

Short title given, Act XIV of 1897.
Rep. in pt., Act IX of 1871.
Ss. 1, 4 rep. in pt., Act X of 1914.
Declared in force—

Throughout B. I., except as regards the. Scheduled Districts, Act XV of 1874, S. 3; in the Santal Parganas, Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Angul District, Reg. III of 1913, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

[27th March, 1855.

An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

Preamble.

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default may have caused the death of another person, and it is often-times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; It is enacted as follows:—

Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.

1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to

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LEG. REF.

[1] Short title, "The Indian Fatal Accidents Act; 1855". *See* the Indian Short Titles Act (XIV of 1897).

Based on the Fatal Accidents Act, 1846 (9 & 10 Vict., c. 93).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

NOTES.

Sec. 1.—To establish civil liability under the Act against any person, it must be proved either that he actually committed the wrongful act himself, or at least, that he actively aided or abetted its commission and so took part directly in causing it. 16 I.C. 491=117 P.R. 1912. It is not enough that he knew that the Act was likely to be committed or that it was committed in the prosecution of a common object. (*Ibid.*) Under Act XIII of 1855, in order that damages may be claimed, it is sufficient if a person by his wrongful act, neglect or default shall have caused the death of another person. These words do not mean that death must be the direct result of the injury caused. Damages may be claimed where the death was due to the injury caused by the striking having become septic. 144 I.C. 820=34 P.L.R. 656=1933 L. 770. Where a death is caused by wrongful act, the right of heirs of deceased to sue for damages is governed by the principle of the Act even where the Act is not in force. 64 I.C. 311. If a person who has obtained a decree under the Fatal Accidents Act dies after decree, his legal representatives are entitled to the benefit of the decree. 103 I.C. 297. The word "representative" in the Act has not the same meaning as "legal representative" under the Civil Procdure Code. It does not mean only executor or an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

NOTES.

administrator, but includes all or any of the persons for whose benefit a suit can be brought under the Act. 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410.

BASIS OF COMPENSATION.—"No very definite rule has been laid down as to how many years' income should be allowed as compensation to the heirs of the deceased in a suit under the Act. Every thing is to be taken into account, possibility of the earner's death, his age and earning capacity for calculating the amount of damages. 101 I.C. 642=1927 L. 417. *See also* 59 M. 402=1936 M. 247 =70 M.L.J. 115. In asserting the damages which have to be awarded in respect of a fatal accident many factors have to be considered in arriving at the amount which the claimant or dependent of the deceased is entitled to in respect of his or her future maintenance,The possibility of his or her early death, the possibility of the deceased dying from other causes and the possibility of the deceased losing the employment on which he was engaged and being unemployed. The defendant is not entitled to a sum calculated on a number of years from the moment of her loss. Allowance must also be made for the fact that the defendant is receiving a lump sum. 1938 Mad. 117=1937 M.W.N. 921=46 L.W. 452. Assessment of damages under the Fatal Accidents Act must necessarily be rough and approximate, but it should not be arbitrary or whimsical. The assessment of damages should not be made merely with reference to the plaintiff's requirements, but where the evidence establishes that the plaintiff's requirements were being fairly met by the deceased on whom they were dependent, the Court would be justified in assessing the damages on that basis. (1939) 1 M.L.J. 143=1938 M.W.N. 1241=48 L.W. 865=1939 Mad. 261. Where a person is run over by a motor car and killed on account of the negligent driving of the car, and the relatives of the deceased sue for damages under the Fatal Accidents Act, the rule is that the damages must be fixed solely with reference to the pecuniary loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiffs must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted. If no such evidence is adduced and there is no proof of pecuniary loss, no compensation can be awarded. 59 M. 402=42 L.W. 327=1936 M. 247=70 M.L.J. 155. In a suit by the heirs of a deceased dying as a result of motor accident, for recovery of damages under the Fatal Accidents Act, although the deceased is proved to have been guilty of negligence, nevertheless, the claim in the suit will succeed, if the effect of the deceased's negligence could have been avoided by the exercise of reasonable care on the part of the driver of the vehicle. 163 I.C. 957 =1936 R. 295. In cases arising under Fatal Accidents Act, actuarial tables of Insurance Company afford a good basis for calculation of "normal expectation of life" of the deceased. 162 I.C. 336=1936 L. 362. Reasonable sum and not actual loss is to be awarded. Length of life and value to the plaintiffs determine the amount of compensation. 96 I.C. 403=1926 N. 271. *See also* 59 M. 402=43 L.W. 327=1936 M. 247=70 M.L. J. 155. Value of life depends on the earning capacity of the deceased. 96 I.C. 681 =1926 A. 703 (1922 C. 317, Foll.). The principle on which compensation under the Act will be awarded is the same as that under Lord Campbell's Act in England. It is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy, had the man not been killed. [38 T.L.R. 899 and (1922) 1 K.B. 329, Rel. on] 29 Bom.L.R. 402=102 I.C. 400=1927 B. 357. Where the sole source of income of the deceased was cultivation by personal labour, the probable duration of the capacity of the deceased to supply labour for cultivation must be taken into consideration while assessing damages for his death. 1927 A. 684, following 42 L.J. Ex. 153. In a suit for damages, any fine realised from the defendant and paid to the plaintiff in the criminal case against the defendant should be taken into consideration. 1927 A. 684. In a suit for damages under the Act no sentimental considerations are relevant. The plaintiff cannot get higher damages because the deceased was brutally murdered by the defendant than if the death had been due merely to an error of judgment. 1927 A. 684. *See also* 4 M.L.T. 238. In assessing damages under the Act, one cannot take into consideration the mental suffering of the survivors. The fact therefore that the widow of the deceased, being a Brahmin, cannot re-marry, cannot have children and is thus left at the early age of 16 years a widow for the rest of her life is for this purpose an irrelevant consideration. 1937 Nag. 354=I.L.R. (1938) Nag. 54. Appellate Court should not set aside award of lower Court unless it is capricious or unreasonable. *See* 96 I.C. 278=1926 A. 702. High Court would not interfere if the amount awarded is sufficient protection or reasonable compensation. 96 I.C. 681=1926 A. 703. Whilst the erection of a wall upon land is an ordinary user of the land, nevertheless it is an uncommon occurrence for a wall to fall, and when it does fall an explanation should be forthcoming from those who are responsible for its repair. Where the owner of the

[1][* * *]Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

LEG. REF.

The words "And it is enacted further that" were repealed by Act X of 1914, Sch. II.

NOTES.

wall fails to carry out the necessary repairs which are required, allowing to get into a serious defective condition, he fails to use ordinary care and skill, and is guilty of a breach of duty and neglect. If as a result the wall falls and cause death to persons using a public latrine built against the wall and adjoining it, the owner of the wall is liable in damages to the wife, husband or children of the persons killed under S. 1 of the Act. 1937 M.W.N. 921=46 L.W. 452 =I.L.R. (1938) Mad. 233=1938 Mad. 117. Liability for damages under—Motor car—Accident causing death—Mortgagee without possession of car not liable he not being its "owner". 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410.

COMPENSATION — FUNERAL EXPENSES.—funeral expenses and expenses allegded to have been incurred in the Police Court cannot be recovered in an action under the Act. 61 C. 480=38 C.W.N. 520=1934 C. 655.

WHO CAN INSTITUTE SUIT—SCALE OF COMPENSATION.—"Representative", meaning of *See* 28 M. 479=15 M.L.J. 363. The word "representative" in the Act has a special meaning of its own. It has not the same maning as "legal representative" in the C. P. Code. It means and includes all or any of the persons for whose benefit a suit under the Act could be maintained. It is not a surplusage in the case of Europeans and Eurasians and where there is no executor or administrator, the wife and children are entitled to maintain the action. 38 C.W.N. 520 =61 C. 480=1934 C. 655. Court has powers to divide damage claimed and award between some only of the parties for whose benefit the claim is made. 1922 C. 317. Compensation for death caused by railway accident—Discretionary with Court in apportioning among relatives—Circumstances to be taken into consideration — "Child" — Meaning. 22 I.C. 846=52 P.R. 1914. For purposes of awarding compensation under this section a son adopted after the death of the deceased is not a "child" within the meaning of the section (*Ibid.*) A coparcener of the deceased man is not entitled to compensation under the Act. Compensation should be awarded looking to the members of the family of the deceased. 105 P.R. 1915=32 I.C. 18. *See also* 70 M.L.J. 155. In a claim for damages under the Act the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a jury and damages assessed as the probable pecuniary loss thereby occasioned. 69 I.C. 854. Landlord and tenant—Dwelling house in a bad state of repair—Licence to the privies—Privy portion collapsing—Tenant killed—Right of heirs to sue for damages. 29 Bom.L.R. 78. The fact that the deceased in some way provoked the quarrel as a result of which he died, is immaterial so far as regards the claim for damages under the Act is concerned. (*Ibid.*) The test of injury under this section, is not the legal liability alone, but the reasonable expectation of pecuniary advantage by the deceased's remaining alive. 112 P.R. 1913=20 I.C. 425. The reasonableness of the expectation is largely founded upon a record of pecuniary benefit received in the past and there must be something more than a mere speculation in the future. (*Ibid.*) (16 B. 254, Expl.). *See also* 1 A. 60. Nothing can be allowed to the survivors as compensation for mental suffering. *See* 4 M.L.T. 238 and cases referred to therein. 1927 A. 684. Effect of contributory negligence. *See* 85 P.R. 1894. In estimating the amount of damages to be awarded in an action under the Act, the Court must take into account all the circumstances which are material for considering the pecuniary loss sustained. The Court must view the matter broadly. 52 C. 602=89 I.C. 679= 1925 C. 893. Death caused by negligence of Railway—Legal representatives—Suit for loss of currency notes in possession of deceased—Maintainability. 6 L. 451=90 I.C. 1026=1925 L. 636..

PLAINT—AVERMENTS IN.—A plaint in a suit under the Act has to be very carefully drawn and should give full particulars of the person or persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. 61 C. 480=38 C. W. N. 520=1934 C. 655. *See also* 38 C.W.N. 551=1934 C. 632=59 C.L.J. 391. If all the persons for whose benefit the suit should have been brought are the plaintiffs and no further action can be brought

Not more than one suit to be brought.

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint [1][* * * *]:

Claim for loss to estate may be added.

Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recovery any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

Plaintiff shall deliver particulars, etc.

3. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Interpretation clause.

4. The following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say [2][* * *] the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother[3] and grandfather and grandmother; and the word "child" shall include son and daughter and grandson and grand-daughter and step-son and step-daughter.

THE FEDERAL COURT ACT (XXV OF 1937).

[7th October, 1937.

An Act to empower the Federal Court to make rules for regulating the service of processes issued by the Court.

WHEREAS it is expedient to confer upon the Federal Court a supplemental power which is necessary for the purpose of enabling the Court more effectively

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LEG. REF.

[1] The words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" were repealed by the Limitation Act (IX of 1871). For limitation, *see* now the Indian Limitation Act (IX of 1908).

[2] Certain words repealed by Act X of 1914.

[3] Step-father and Step-mother are designedly omitted.

NOTES.

in respect of the same subject-matter of the complaint, the purpose of the Act is served. So a suit by the wife and children is in order even if it is expressed to be for the benefit of the wife alone, where the children have agreed to forego their claim to compensation. 61 C. 480=38 C.W.N. 520=1934 C. 655. Suit for damages against several wrong-doers—No joint tort—Joint decree against all is justified. *See* I.L.R. (1939) Mad. 306=(1939) 1 M.L.J. 143=1939 M. 261=1938 M.W.N. 1241..

SCALE OF COSTS FOR PLEADER, in case where damages are awarded under this Act: *see* 52 C. 602=89 I.C. 679=1925 C. 893.

Secs. 1 and 2.—The cause of action for a suit under the Act is the loss resulting to the plaintiffs from the death of the deceased; and "loss" means the loss of pecuniary benefit which the plaintiffs would have got from the deceased if he had not died. The action is purely compensatory, and plaintiffs are entitled to compensation in respect of their reasonable expectation of the value of the services of the deceased which have been lost to them for ever. 1935 B. 333=37 Bom. L.R. 410=159 I.C. 363.

Sec. 2.—Act does not create fresh liability but only provides procedure for enforcing the liability under the ordinary law. 6 L. 451=90 I.C. 1026=1925 L. 636. The section has no application to a suit instituted against the wrong-doer. 23 M.L.J. 255=17 I.C. 226 (13 B. 677; 28 M. 487, Foll.).

Sec. 3: PLAINT—CONTENTS OF—PARTICULARS.—The plaint in a suit under the Act should not only give full particulars of the person or persons for whose benefit or on whose behalf the suit is brought, but also the particulars of the nature of the loss for which damages are claimed. 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410. The failure to give particulars of all the beneficiaries in a suit for a claim under the Fatal Accidents Act is defective in form. 38 C. W.N. 551=59 C.L.J. 391=1934 C. 632. *See also* 61 C. 480=1934 C. 655=151 I.C. 680.

PAUPER APPLICATION FOR LEAVE TO SUE UNDER FATAL ACCIDENTS ACT.—An application for leave to file a suit, under the Fatal Accidents Act, *in forma pauperis*, which does not state the full particulars of the beneficiaries as reqlired by S. 3 of the Act, is liable to be rejected. 59 C.L.J. 394=1934 C. 712.

[1][* * *]Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

LEG. REF.

The words "And it is enacted further that" were repealed by Act X of 1914, Sch. II.

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wall fails to carry out the necessary repairs which are required, allowing to get into a serious defective condition, he fails to use ordinary care and skill, and is guilty of a breach of duty and neglect. If as a result the wall falls and cause death to persons using a public latrine built against the wall and adjoining it, the owner of the wall is liable in damages to the wife, husband or children of the persons killed under S. 1 of the Act. 1937 M.W.N. 921=46 L.W. 452 =I.L.R. (1938) Mad. 233=1938 Mad. 117. Liability for damages under—Motor car—Accident causing death—Mortgagee without possession of car not liable he not being its "owner". 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410.

COMPENSATION — FUNERAL EXPENSES.—funeral expenses and expenses allegded to have been incurred in the Police Court cannot be recovered in an action under the Act. 61 C. 480=38 C.W.N. 520=1934 C. 655.

WHO CAN INSTITUTE SUIT—SCALE OF COMPENSATION.—"Representative", meaning of See 28 M. 479=15 M.L.J. 363. The word "representative" in the Act has a special meaning of its own. It has not the same maning as "legal representative" in the C. P. Code. It means and includes all or any of the persons for whose benefit a suit under the Act could be maintained. It is not a surplusage in the case of Europeans and Eurasians and where there is no executor or administrator, the wife and children are entitled to maintain the action. 38 C.W.N. 520 =61 C. 480=1934 C. 655. Court has powers to divide damage claimed and award between some only of the parties for whose benefit the claim is made. 1922 C. 317. Compensation for death caused by railway accident—Discretionary with Court in apportioning among relatives—Circumstances to be taken into consideration — "Child" — Meaning. 22 I.C. 846=52 P.R. 1914. For purposes of awarding compensation under this section a son adopted after the death of the deceased is not a "child" within the meaning of the section (*Ibid.*) A coparcener of the deceased man is not entitled to compensation under the Act. Compensation should be awarded looking to the members of the family of the deceased. 105 P.R. 1915=32 I.C. 18. *See also* 70 M.L.J. 155. In a claim for damages under the Act the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a jury and damages assessed as the probable pecuniary loss thereby occasioned. 69 I.C. 854. Landlord and tenant—Dwelling house in a bad state of repair—Licence to the privies—Privy portion collapsing—Tenant killed—Right of heirs to sue for damages. 29 Bom.L.R. 78. The fact that the deceased in some way provoked the quarrel as a result of which he died, is immaterial so far as regards the claim for damages under the Act is concerned. (*Ibid.*) The test of injury under this section, is not the legal liability alone, but the reasonable expectation of pecuniary advantage by the deceased's remaining alive. 112 P.R. 1913=20 I.C. 425. The reasonableness of the expectation is largely founded upon a record of pecuniary benefit received in the past and there must be something more than a mere speculation in the future. (*Ibid.*) (16 B. 254, Expl.). *See also* 1 A. 60. Nothing can be allowed to the survivors as compensation for mental suffering. *See* 4 M.L.T. 238 and cases referred to therein. 1927 A. 684. Effect of contributory negligence. *See* 85 P.R. 1894. In estimating the amount of damages to be awarded in an action under the Act, the Court must take into account all the circumstances which are material for considering the pecuniary loss sustained. The Court must view the matter broadly. 52 C. 602=89 I.C. 679=1925 C. 893. Death caused by negligence of Railway—Legal representatives—Suit for loss of currency notes in possession of deceased—Maintainability. 6 L. 451=90 I.C. 1026=1925 L. 636..

PLAINT—AVERMENTS IN.—A plaint in a suit under the Act has to be very carefully drawn and should give full particulars of the person or persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. 61 C. 480=38 C. W. N. 520=1934 C. 655. *See also* 38 C.W.N. 551=1934 C. 632=59 C.L. J. 391. If all the persons for whose benefit the suit should have been brought are the plaintiffs and no further action can be brought

Not more than one suit to be brought.

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint [1][* * * *]:

Claim for loss to estate may be added.

Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recovery any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

Plaintiff shall deliver particulars, etc.

3. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Interpretation clause.

4. The following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say [2][* * *] the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother[3] and grandfather and grandmother; and the word "child" shall include son and daughter and grandson and grand-daughter and step-son and step-daughter.

THE FEDERAL COURT ACT (XXV OF 1937).

[7th October, 1937.

An Act to empower the Federal Court to make rules for regulating the service of processes issued by the Court.

WHEREAS it is expedient to confer upon the Federal Court a supplemental power which is necessary for the purpose of enabling the Court more effectively

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LEG. REF.

[1] The words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" were repealed by the Limitation Act (IX of 1871). For limitation, *see* now the Indian Limitation Act (IX of 1908).

[2] Certain words repealed by Act X of 1914.

[3] Step-father and Step-mother are designedly omitted.

NOTES.

in respect of the same subject-matter of the complaint, the purpose of the Act is served. So a suit by the wife and children is in order even if it is expressed to be for the benefit of the wife alone, where the children have agreed to forego their claim to compensation. 61 C. 480=38 C.W.N. 520=1934 C. 655. Suit for damages against several wrong-doers—No joint tort—Joint decree against all is justified. *See* I.L.R. (1939) Mad. 306=(1939) 1 M.L.J. 143=1939 M. 261=1938 M.W.N. 1241.

SCALE OF COSTS FOR PLEADER, in case where damages are awarded under this Act: *see* 52 C. 602=89 I.C. 679=1925 C. 893.

Secs. 1 and 2.—The cause of action for a suit under the Act is the loss resulting to the plaintiffs from the death of the deceased; and "loss" means the loss of pecuniary benefit which the plaintiffs would have got from the deceased if he had not died. The action is purely compensatory, and plaintiffs are entitled to compensation in respect of their reasonable expectation of the value of the services of the deceased which have been lost to them for ever. 1935 B. 333=37 Bom. L.R. 410=159 I.C. 363.

Sec. 2.—Act does not create fresh liability but only provides procedure for enforcing the liability under the ordinary law. 6 L. 451=90 I.C. 1026=1925 L. 636. The section has no application to a suit instituted against the wrong-doer. 23 M.L.J. 255=17 I.C. 226 (13 B. 677; 28 M. 487, Foll.).

Sec. 3: PLAINT—CONTENTS OF—PARTICULARS.—The plaint in a suit under the Act should not only give full particulars of the person or persons for whose benefit or on whose behalf the suit is brought, but also the particulars of the nature of the loss for which damages are claimed. 1935 B. 333 =159 I.C. 363=37 Bom.L.R. 410. The failure to give particulars of all the beneficiaries in a suit for a claim under the Fatal Accidents Act is defective in form. 38 C. W.N. 551=59 C.L.J. 391=1934 C. 632. *See also* 61 C. 480=1934 C. 655=151 I.C. 680.

PAUPER APPLICATION FOR LEAVE TO SUE UNDER FATAL ACCIDENTS ACT.—An application for leave to file a suit, under the Fatal Accidents Act, *in forma pauperis*, which does not state the full particulars of the beneficiaries as reqlired by S. 3 of the Act, is liable to be rejected. 59 C.L.J. 394=1934 C. 712.

to exercise the jurisdiction conferred upon it by or under the Government of India Act, 1935; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FEDERAL COURT ACT, 1937.

Power of Federal Court to make rules.

2. The Federal Court may make rules for regulating the service of processes issued by the Court, including rules requiring a High Court from which an appeal has been preferred to the Federal Court to serve any process issued by the Federal Court in connection with that appeal.

THE FEDERAL COURT ACT (XXI OF 1941).

PREFATORY NOTE: STATEMENT OF OBJECTS AND REASONS.—The Government of India (Adaptation of Laws) Order, 1937, added Ss. 111-A and O. 45, r. 17 to the Civil Proceure Code thereby made the procedure of Privy Council Appeals applicable to Federal Court Appeals. The aforesaid procedure is cumbersome and dilatory, menat for appeals to a Court six thousand miles away and should not be applicable to a Court of appeal situated in India. Moreover, the addision of these provisions to the Civil Procedure Code have derogated from the powers of the Federal Coure to regulate its own practice and procedure under section 214 of the Government of India Act and has been commented on unfavourably by the Federal Court in its decision in case No. 15 of 1939, Lachmeshwar Prasad Shukul *v.* Basdeo Chaudhury. It is desirable therefore both from the points of view of simplifying procedure in Federal Court Appeals and restoring to the Federal Court its powers to regulate practice and pocedure that the new additions to the Civil Procedure Code should cease to be operative. (*Fort St. Geo. Gazette, Part III dated* 15*th April,* 1941 p. 119).

[26*th November,* 1941.

An Act to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court.

WHEREAS it is expedient to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court, and for that purpose to repeal those provisions of the Code of Civil Procedure, 1908, which now regulate that matter;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE FEDERAL COURT ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Repeal of section 111-A and rule 17 of Order XLV of the First Schedule, Act V of 1908.

2. Section 111-A of the Code of Civil Procedure, 1908, and rule 17 of Order XLV of the First Schedule to the said Code shall be omitted.

Power of Federal Court to make rules.

3. The Federal Court may, with the approval of the Governor-General in his discretion, make rules for regulating the presentation and prosecution of appeals lying to that Court, including rules relating to the furnishing of security for costs, the proceedings, if any, to be had in High Courts in connection with such appeals, and the preparation and transmission to the Federal Court of the records in such appeals.

THE INDIAN FINANCE ACT (V OF 1928.)

[*Repealed by Act VIII of* 1930.]

THE INDIAN FINANCE ACT (VI OF 1929.)

[*Repealed by Act XXXII of* 1934. *Sch. III.*]

NOTES.

See 1938 P.W.N. 582; 1938 P.W.N. 609; 3 Fed.L.J. 67=1940 M. W .N. 1197; 1940 F.C. 26.

THE INDIAN FINANCE ACT (XV OF 1930).

[*Amended by Acts XXXII of* 1934 *and XX of* 1937.]

An Act [1][*.. * *] *to fix rates of income-tax* [1* * *] [*28th March*, 1930.

WHEREAS it is expedient [1][* *] [1][* *] to fix rates of income-tax; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1930.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) [*Omitted by Act XX of* 1937].

2. [*Omitted by Act XX of* 1937].

3. [*Omitted by Act XX of* 1937].

4. Amendment of Schedules II and III to Act VIII of 1894. [*Omitted by Act XXXII of* 1934]

4-A. Amendment of Schedule II, Act VIII of 1894. [*Omitted by Act XXXII* of 1934].

5. [*Omitted by Act XX of* 1937].

Income-tax and super-tax.

6. (1) Income-tax for the year beginning on the 1st day of April, 1930, shall be charged at the rates specified in Part I of the Third Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1930, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Third Schedule.

(3) For the purposes of the Third Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

7. [*Omitted by Act XX of* 1937.]

8. [*Omitted by Act XX of* 1937.]

9. [*Omitted by Act XX of* 1937.]

SCHEDULE I.

[*Omitted by Act XXXII of* 1934.]

SCHEDULE II.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

[*Omitted by Act XX of* 1937.]

[*See* section 5.]

SCHEDULE III.

[*See* section 6.]

PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	RATE.
When the total income is less than Rs. 2,000.	*Nil.*
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Five pies in the rupe
(3) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Six pies in the rupee.
(4) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	Nine pies in the rupee.
(5) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	Ten pies in the rupee.
(6) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and one pie in the rupee.
(7) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and four pies in the rupee.

LEG. REF.

[1] Omitted Act XX of 1937; sub-S. (3) of S. 1 and Ss. 2; 3, 5, 7, 8, 9 and Sch. II omitted by Act XX of 1937.

(8) When the total income is 40,000 or upwards	One anna and seven pies in the rupee.
B. In the case of every company and registered firm whatever its total income.	One anna and seven pies in the rupee.

PART II.

RATES OF SUPER-TAX.

	RATE.
In respect of the excess over fifty thousand rupees of total income—	
(*a*) in the case of every company ..	One anna in the rupee.
(*i*) in respect of the first twenty-five thousand rupees of the excess.	*Nil.*
(*ii*) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and one pie in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company, for every rupee of the first fifty thousand rupees of such excess.	One anna and one pie in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the second fifty thousand rupees of such excess.	One anna and seven pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and one pie in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and seven pies in the rupee.
(iv) or every rupee of the next fifty thousand rupees of such excess.	Three annas and one pie in the rupee.
(*v*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and seven pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and one pie in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and seven pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and one pie in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and seven pies in the rupee.
(*x*) for every rupee of the remainder of the excess.	Six annas and one pie in the rupee.

THE INDIAN FINANCE ACT (1931).

[*N.B.*—Amended by the Indian Finance (Supplementary and Extending Act, 1931; Act XXVIII of 1933; Act XXXII of 1934 and Act XX of 1937.]

PREFATORY NOTE.—The necessity for the passing of this Act has been explained as follows in the Statement of Objects and Reasons:—

"The object of this Bill is to continue certain provisions of the Indian Finance Act, 1930, which would otherwise cease to have effect from the 1st April, 1930, and to provide the additional resources referred to in my speech introducing the budget for 1931-32 by varying the existing scale of customs duties, excise duties, income-tax and super-tax.

2. Clauses 2, 5 and 9 provide for the continuance, for a further period of one year, of the existing provisions regarding salt duty, inland postage rates and the credit to revenue of interest on securities forming part of the Paper Currency Reserve.

3. Clauses 3 and 4 seek to vary the customs duties on the lines indicated in paragraphs 61 to 67 of my budget speech. The exact variations in the tariff have been detailed in Schedules I and II.

4. Clauses 6, 8 and 10 respectively provide for increases in the exercise duties on motor spirit, kerosene and silver, corresponding to the increases in the customs duties on the same articles.

5. Clause 7 provides for the continuance, for another year, of the levy of income-tax and super-tax, with the alterations as to rates mentioned in paragraphs 69 and 70 of my budget speech.

6. A comparison between the existing and the proposed rates and the estimated financial effect of the alterations in each case will be found in the Financial Secretary's Explanatory Memorandum."—*Statement of Objects and Reasons.*

An Act [1][*   *   *] to fix rates of income-tax and super-tax [1][*   *   *].

WHEREAA it is expedient [1][* * *] to fix rates of income-tax and super-tax [1][* * *]; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1931.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas

2. [*Omitted by Act XX of* 1937.]

3. Amendment of Schedule II to Act VIII of 1894. [*Repealed by Act XXXII of* 1934, *Sch. III.*]

4. Additional customs duties. [*Repealed by Act XXXII of* 1934.]

5. [*Omitted by Act XX of* 1937.]

6. [*Omitted by Act XX of* 1937.]

Income-tax and super-tax.

7. (1) Income-tax for the year beginning on the 1st day of April, 1931, shall be charged at the rates specified in Part I of the Fourth Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1931, shall, for the purposes of S. 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Fourth Schedule.

(3) For the purposes of the Fourth Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

8. [*Omitted by Act XX of* 1937.]

9. [*Omitted by Act XX of* 1937.]

10. [*Omitted by Act XX of* 1937.]

SCHEDULE I

[*Repealed by Act XXXII of* 1934.]

SCHEDULE II.

[*Repealed by Act XXXII of* 1934, *Sch.* III.]

SCHEDULE III.

[*Omitted by Act* XX *of* 1937.]

SCHEDULE IV.

[*See* section 7.]

PART I.

RATES OF INCOME-TAX.

	RATE.
A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is less than Rs. 2,000	*Nil.*
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(3) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(4) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(5) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(6) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(7) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(8) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(9) When the total income is Rs. 1,00,000 or upwards	Two annas and two pies in the rupee.
B. In the case of every company and registered firm, whatever its total income.	Two annas and two pies in the rupee.

LEG. REF.

[1] Omitted by Act XX of 1937.

PART II.

RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—	RATE.
(1) in the case of every company—	
(*a*) in respect of the first twenty thousand rupees of such excess.	*Nil.*
(*b*) for every rupee of the remainder of such excess.	One anna in the rupee.
(2) (*a*) in the case of every Hindu undivided family—	
(*i*) in respect of the first forty-five thousand rupees of such excess.	*Nil.*
(*ii*) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(*iv*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(*v*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(*x*) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

THE INDIAN FINANCE (SUPPLEMENTARY AND EXTENDING) ACT, 1931.

[*N.B.*—Amended by Act IV of 1932; Act IX of 1934; Act XXXII of 1934; Act XX of 1937; *see also* Act XVI of 1940 and Criminal Law Amendment Act, 1935].

[*28th November*, 1931.

An Act to supplement the Indiaan Finance Act, 1931, *and to extend the operation of its temporary provisions.*

WHEREAS it is expedient to supplement the Indian Finance Act, 1931, and to extend the operation of its temporary provisions to the financial year beginning on the 1st April, 1932: It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN FINANCE (SUPPLEMENTARY AND EXTENDING) ACT, 1931.

Extension to the next financial year of the operation of the temporary provisions of the Indian Finance Act, 1931.

2. The operation of section 2 of the Indian Finance Act, 1931, fixing the rate of salt duty for the year beginning on the 1st April, 1931, of section 5 of the said Act and the Third Schedule thereto as amended by section 6 of this Act, fixing inland postage rates for the said year, and of section 7 of the said Act and the Fourth Schedule

thereto as amended by sections 7, 8 and 9 of this Act, fixing rates of income-tax and super-tax for the said year, is hereby extended to the 31st day of March, 1933.

3. Amendment of the Second Schedule to the Indian Tariff Act, 1894, and the Indian Finance Act, 1931. [*Repealed by Act XXXII of* 1934, *Sch. III.*]

4. Additional customs duties. [*Repealed by Act XXXII of* 1934, *Sch. III.*]

Additional excise and other duties.

5. Where any salt, motor spirit, kerosene or silver chargeable with duty under the Indian Salt Act, 1882, or under the Motor Spirit (Duties) Act, 1917, or under the Indian Finance Act, 1922, or under the Silver (Excise Duty) Act, 1930, or under any of the said Acts read with any other enactment or with any notification of the Central Government for the time being in force, is assessed to duty, there shall be levied and collected, as an addition to and in the same manner as the total amount so chargeable, a sum equal to one-quarter of such total amount.

6. [*Omitted by Act XX of* 1937.]

Lowering of limits of total income liable to income-tax.

7. (1) In Part I of Schedule IV to the Indian Finance Act, 1931, for the item—

"When the tital income is less than Rs. 2,000 — *Nil.*"

The following shall be substituted, namely:—

"When the total income is Rs. 1,000 or upwards but is less than Rs. 2,000. — Four pies in the rupee"

Provided that for the year beginning on the first day of April, 1931, the rate chargeable on any such total income shall be two pies in the rupee only.

(2) For the purpose of assessing and collecting the tax imposed by the proviso to sub-section (1),—

(*a*) the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part I of Schedule II to this Act, and

(*b*) the Central Board of Revenue may make rules—

(i) making such further adaptations in the Indian Income-tax Act, 1922, as may seem to it to be necessary to secure that the tax shall be equitably levied, and

(ii) regulating the procedure of income-tax authorities in securing the assessment and collection of the tax and the granting of refunds arising therefrom.

[1][(3) For the purpose of assessing and collecting the taxes imposed by sub-section (1), the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part I-A of Schedule II to this Act.]

Additional income-tax and super-tax for the current financial year.

8. (1) In respect of the year beginning on the first day of April, 1931, each rate of income-tax and super-tax specified in Schedule IV to the Indian Finance Act, 1931, excluding the rate imposed by section 7, shall be increased by one-eighth of its amount.

(2) For the purpose of assessing and collecting the additional tax imposed by sub-section (1)—

(*a*) the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part II, of Schedule II to this Act, and

(*b*) the Central Board of Revenue may make rules—

(i) making such further adaptations in the Indian Income-tax Act, 1922, as may seem to it to be necessary to secure that the additional tax shall be equitably levied, and

(ii) regulating the procedure of income-tax authorities in securing the assessment and collection of the tax and the granting of refunds arising therefrom.

LEG. REF.

[1] Sub-S. (3) of S. 7 inserted by Act IV of 1932.

Additional income-tax and super-tax for the next financial year.

9. In respect of the year beginning on the first day of April, 1932, each rate of income-tax and super-tax specified in Schedule IV to the Indian Finance Act, 1931, excluding the rate imposed by S. 7, shall be increased by one-fourth of its amount.

10. [*Omitted by Act XX of* 1937.]

SCHEDULE I.

[*Repealed by Act XXXII of* 1934.]

SCHEDULE II.

Adaptations of the Indian Income-tax Act, 1922.

PART I.

(See *section* 7.)

Adaptations for the assessment and collection of income-tax in the current financial year on total incomes of Rs. 1,000 *and upward and less than Rs.* 2,000.

1. For the purposes of the proviso to sub-section (2) of S. 18 of the Indian Income-tax Act, 1922, any person responsible for paying any income less than Rs. 2,000 chargeable under the head "Salaries" shall be deemed to have failed to deduct income-tax at the time of making all payments made before the commencement of this Act, and such person may make the adjustments permitted by that proviso.

2. Notwithstanding that the Income-tax Officer has assessed the total income of an assessee under S. 23 of the Indian Income-tax Act, 1922, and has found that nothing is payable thereon, he may proceed to determine the sum payable by such assessee by virtue of S. 7 of this Act, and such sum shall, for the purposes of the Indian Income-tax Act, 1922, be deemed to be a sum determined under S. 23 of that Act.

[1][PART I-A.

(See *section* 7.)

Adaptations to provide for the summary assessment of such incomes.

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under section 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing, the amount of the tax, if any payable by the assessee, and such determination shall be final:

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under section 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1932-33 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1931-32.]

PART II.

(See *section* 8.)

Adaptations for the assessment and collection of additional income-tax and super-tax in the current financial year.

1. For the purposes of the proviso to sub-section (2) of S. 18 of the Indian Income-tax Act, 1922, any person responsible for paying any income chargeable under the head "Salaries" shall be deemed to have made a deficient deduction in respect of the additional income-tax imposed by S. 8 of this Act at the time of making all payments made before the commencement of this Act, and such person may make the adjustments permitted by that proviso.

2. Notwithstanding that the Income-tax Officer has assessed the total income of an assessee and has determined the sum payable thereon under section 23 of the Indian Income-tax Act, 1922, he may proceed to determine the further sum payable by such assessee

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LEG. REF.

[1] Part I-A, inserted by Act IV of 1932.

by virtue of section 8 of this Act, and such further sum shall, for the purposes of the Indian Income-tax Act, 1922, be deemed to be a sum determined under section 23 of that Act.

This Bill has been consented to by the Council of State.

The 27th November, 1931.

H. MONCRIEFF SMITH,

President, Council of State.

I assent to this Bill.

The 28th November, 1931.

WILLINGDON,

Viceroy and Governor-General.

This Act has been made by me as Governor-General under the provisions of section 67-B of the Government of India Act.

The 28th November, 1931.

WILLINGDON,
Viceroy and Governor-General.

WHEREAS I, Freeman, Earl of Willingdon, am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance (Supplementary and Extending) Act, 1931, being an Act made by me under the provisions of S. 67-B of the Government of India Act, shall come into operation forthwith;

NOW, THEREFORE, in exercise of the power conferred by the proviso to sub-section (2) of that section, I do hereby direct accordingly.

The 28th November, 1931.

WILLINGDON,
Viceroy and Governor-General.

THE INDIAN FINANCE (SUPPLEMENTARY AND EXTENDING) AMENDMENT ACT (IV OF 1932).

[5*th March,* 1932.

[*An Act to amend the Indian Finance (Supplementary and Extending) Act,* 1931, *for a certain purpose.*]

[*Omitted by Act XX of* 1937.]

THE INDIAN FINANCE ACT (VII OF 1933.)

[*N.B.—Amended by Acts XXXII of* 1934 *and XX of* 1937.]

[31*st March,* 1933.

An Act [1][* * *] *to fix rates of income-tax and super-tax* [* * *][1]

WHEREAS it is expedient [1][* * * * * *] to fix rates of income-tax and super-tax, [1][* * * *]. It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1933.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. [*Omitted by Act XX of* 1937.]

3. Amendment of Schedule II to Act VIII of 1894. [*Omitted by Act XXXII of* 1934, *Sch. III.*]

4. [*Omitted by Act XX of* 1937.]

Income-tax and super-tax.

5. (1) Income-tax for the year beginning on the 1st day of April, 1933, shall be charged at the rates specified in Part I of the Second Schedule, increased in each case, except in the case of total incomes of less than two thousand rupees, by one-fourth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1933, shall, for the purposes of section 55 of the Indian Income-tax

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LEG. REF.

[1] Omitted by Act XX of 1937.

Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-fourth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second Schedule.

6. [*Omitted by Act XX of* 1937.]

SCHEDULE I.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

[*See section* 4.]

THE FIRST SCHEDULE. [*Omitted by Act XX of* 1937.]

SCHEDULE II.

[*See section* 5.]

PART I.

RATES OF INCOME-TAX.

	RATE.
A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500.	**Two pies in the rupee: (Provided that for the purpose of any assessment to be made for the year ending 31st March, 1934, the rate of income-tax applicable to such part of the total income of an assessee as is derived from salaries or from interest on securities paid in the financial year 1932-33 shall be four pies in the rupee, and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1933, or of payments made in the said year of interest on securities or salaries, the rate applicable to the total income of the person claiming refund shall be at the rate of four pies.)**
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	**Four pies in the rupee.**
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	**Six pies in the rupee.**
(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	**Nine pies in the rupee.**
(5) When the total income is Rs. 10,000 or upwards, but ~~is less than Rs. 15,000.~~	**One anna in the rupee.**
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	**One anna and four pies in the rupee.**

(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
B. In the case of every company and registered firm; whatever its total income.	Two annas and two pies in the rupee.

PART II.

Rates of Super-tax.

In respect of the excess over thirty thousand rupees of total income—	
(1) in the case of every company—	
(*a*) in respect of the first twenty thousand rupees of such excess.	*Nil.*
(*b*) for every rupee of the remainder of such excess	One anna in the rupee.
(2) (*a*) in the case of every Hindu undivided family—	
(*i*) in respect of the first forty-five thousand rupees of such excess.	*Nil.*
(*ii*) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being registered firm or a company—	
(*i*) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	Two anna and three pies in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(*iv*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(*v*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(*x*) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

PART III.

Adaptations of the Indian Income-tax Act, 1922, *to provide for the summary assessments of income-tax on total incomes of less than Rs.* 2,000.

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee ~~may produce, and such other evidence as the Income-tax Officer may require, determine, by~~ order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final:

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of S. 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under S. 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1933-34 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1932-33.

THE INDIAN FINANCE ACT (IX OF 1934).

[*N.B.*—Amended by Acts, XXXII of 1934 and XX of 1937.]

[29*th March*, 1934.

An Act [1][* * *] *to fix rates of income-tax and super-tax,* [1][* * *].

WHEREAS it is expedient, [* * * *][1] to fix rates of income-tax and super-tax, [1][* * * *]. It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. [*Omitted by Act XX of* 1937.]

3. [*Repealed by Act XXXII of* 1934, *Sec.* 13 *and Sch. III.*]

4. [*Omitted by Act XX of* 1937.]

Income-tax and super-tax.

5. (1) Income-tax for the year beginning on the 1st day of April, 1934, shall be charged at the rates specified in Part I of the Second Schedule, increased in each case, except in the case of total incomes of less than two thousand rupees, by one fourth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1934, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-fourth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income-tax or of super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second schedule.

6. [*Omitted by Act XX of* 1937.]

7. [*Omitted by Act XX of* 1937.]

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*Omitted by Act XX of* 1937.]

SCHEDULE II.

[*See Section* 5.]

PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—

LEG. REF.

[1] Omitted by Act XX of 1937; also Ss. 2, 4, 6, 7 and Sch. I omitted by Act XX of 1937.

	RATE.
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500.	Two pies in the rupee.
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	Four pies in the rupee.
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(5) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
B. In the case of every company and registered firm, whatever its total income.	Two annas and two pies in the rupee.

PART II.

RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—	RATE.
(1) in the case of every company—	
(*a*) in respect of the first twenty thousand rupees of such excess.	*Nil.*
(*b*) for every rupee of the remainder of such excess.	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—	
(*i*) in respect of the first forty-five thousand rupees of such excess.	*Nil.*
(*ii*) for every rupee of the next twenty--five thousand rupees of such excess.	One anna and three pies in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(*iv*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(*v*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(*x*) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

PART III.

ADAPTATIONS OF THE INDIAN INCOME-TAX ACT, 1922, TO PROVIDE FOR THE SUMMARY ASSESSMENTS OF INCOME-TAX ON TOTAL INCOMES OF LESS THAN Rs. 2,000.

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of S. 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made, may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final:

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under section 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1934-35 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1933-1934.

THE INDIAN FINANCE ACT, 1935.

[*N.B.* Repealed in part by Act XX of 1937.]

Statement of Objects and Reasons.—"The object of this Bill is to continue for a further period of one year certain duties and taxes imposed under the Indian Finance Act, 1934, which would otherwise cease to have effect from the 1st April, 1935, to reduce the income-tax on incomes of Rs. 1,000 or upwards but less than Rs. 2,000; to reduce the surcharges on income-tax and super-tax;

* * * * * *

4. Clause 5 provides for the continuance for a further period of one year of the existing rates of income-tax and super-tax with the following alterations:—

(*a*) The rate of income-tax when the total income is Rs. 1,000 or upwards but is less than Rs. 1,500 is reduced from two pies to 1½ pies;

(*b*) The rate of income-tax when the total income is Rs. 1,500 or upwards, but less than Rs. 2,000 is reduced from four pies to 2 2|3 pies; and

(*c*) The surcharges on income-tax and super-tax are reduced from one-fourth to one-sixth. As it is proposed to retain the tax on incomes of Rs. 1,000 and upwards but below Rs. 2,000 per annum at a reduced rate, clause 5 (4) provides for the continuance of the existing procedure for the assessment of such incomes which has already been approved by the Legislature.

Clause 5 (5) provides that incomes from salaries and interest on securities should be finally taxed for purposes of income-tax and not super-tax at the rates applicable to a total income of like amount which was in force at the time when the taxation at source on these incomes took place; otherwise salary earners, for example, will be able not only to secure the advantage of reduced rates during 1935-36 but also to obtain a refund of part of the tax which had been deducted from their salaries during 1934-35. It also makes a similar provision for purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1935, or of payments made in the said year of salaries or of interest on securities. These provisions form the counterpart of a concession that has been allowed from time to time in the past when rates of income-tax were being enhanced.

The following Act, which has been assented to by the Central Government under the provisions of clause (*b*) of sub-section (1) of section 67-B of the Government of India Act, and has been expressed to be made by the Central Government under the provisions of sub-section (2) of the same section, is published in the Official Gazette, dated the 27th April, 1935.

An Act [1][* * *]*to fix rates of income-tax and super-tax* [1][* * *].

WHEREAS it is expedient [1][* * *] to fix rates of income-tax and super-tax [1][* * *]; It is hereby enacted as follows:

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1935.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. [*Omitted by Act XX of* 1937.]

3. [*Omitted by Act XX of* 1937.]

4. [*Omitted by Act XX of* 1937.]

Income-tax and super-tax.

5. (1) Income-tax for the year beginning on the 1st day of April, 1935, shall be charged at the rates specified in Part I of the Second Schedule, increased in each case, except in the case of total incomes of less than two thousand rupees falling under heading A in the said Part, by one-sixth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1935, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-sixth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income-tax, or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second Schedule.

(5) For the purpose of any assessment to be made for the year ending 31st March, 1936, the rate of income-tax applicable to such part of the total income of any person as is derived from salaries or from interest on securities paid in the year ending 31st March, 1935, shall be the previous year's rate, and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1935, or of payments made in the said year of salaries or of interest on securities the rate applicable to the total income of the person claiming refund shall be the previous yar's rate.

Explanation.—In this sub-section the term "previous year's rate" with reference to any person means the rate of income-tax which would have been applicable to his total income if he had been assessed for the year ending 31st March, 1935, on a total income equal to that on which he is assessable for the year ending 31st March, 1936.

6. [*Omitted by Act XX of* 1937.]

SCHEDULE I.

[*Omitted by Act XX of* 1937.]

SCHEDULE II.

[*See section* 5.]

PART I.

RATES OF INCOME-TAX.

	RATE.
A. In the case of every individual Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500.	One and one-third pies in the rupee.
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	Two and two-third pies in the rupee.
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.

LEG. REF.

[1] Omitted by Act XX of 1937.

(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(5) When the total income in Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
B. In the case of every company and registered firm, whatever its total income.	Two annas and two pies in the rupee.

PART II.

RATES OF SUPER-TAX.

	RATE.
In respect of the excess over thirty thousand rupees of total income—	
(1) in the case of every company—	
(a) in respect of the first twenty thousand rupees of such excess.	*Nil.*
(b) for every rupee of the remainder of such excess.	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—	
(i) in respect of the first forty-five thousand rupees of such excess.	*Nil.*
(ii) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(iii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(iv) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(v) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(vi) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(x) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

PART III.

Adaptations of the Indian Income-tax Act, 1922, to provide for the summary assessments of Income-tax on total incomes of less than Rs. 2,000.

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made, may within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the sancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final:

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under section 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1935-36 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year, 1934-35.

THE INDIAN FINANCE ACT, 1936.

[*N.B.*—Repealed in part by Act XXXII of 1940.]

An Act [1][* * *] *to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. *Fixation of salt duty.* [Repealed by Act XXXII of 1940.]

3. *Inland Postage Rates.* [Repealed by Act XXXII of 1940.]

Income-tax and super-tax.

4. (1) Income-tax for the year beginning on the 1st day of April, 1936, shall be charged at the rates specified in Part I of the Second Schedule, increased in each case by one-twelfth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1936, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-twelfth of the amount of the rate.

(3) For the purposes of the Second Schedule 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case may be in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of any assessment to be made for the year ending 31st March, 1937, the rate of income-tax applicable to such part of the total income of any person as is derived from salaries or from interest on securities paid in the year ending 31st March, 1936, shall be the previous year's rate, and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1936 or of payments made in the said year of salaries or of interest on securities, the rate applicable to the total income of the person claiming refund shall be the previous year's rate.

Explanation.—In this sub-section the term 'previous year' with reference to any person means the rate of income-tax which would have been applicable to his total income if he had been assessed for the year ending 31st March, 1936, on a total income equal to that on which he is assessable for the year ending 31st March, 1937.

LEG. REF. I.

[1] Repealed by Act XXXII of 1940, Sch.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 3.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[Repealed by Act XXXII of 1940.]

SCHEDULE II.

[*See* section 4.]

PART I.

Rates of Income-tax.

	Rate.
A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(2) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(3) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(4) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(5) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(6) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(7) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(8) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
B. In the case of every company and registered firm, whatever its total income.	Two annas and two pies in the rupee.

PART II.

Rates of Super-tax.

	Rate.
In respect of the excess over thirty thousand rupees of total income—	
(1) In the case of every company—	
(*a*) in respect of the first twenty thousand rupees of such excess.	*Nil.*
(*b*) for every rupee of the remainder of such excess.	One anna in the rupee.
(2) (*a*) in the case of every Hindu undivided family—	
(*i*) in respect of the first forty-five thousand rupees of such excess.	*Nil.*
(*ii*) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(*iv*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.

	Rate.
(*v*) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(*x*) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

This Bill has been consented to by the Council of State.

M. B. DADABHOY,
President, Council of State.

The 31*st March,* 1936.

I assent to this Bill.

WILLINGDON,
Viceroy and Governor-General.

The 31*st March,* 1936.

This Act has been made by me as Governor-General under the provisions of section 67-B of the Government of India Act.

WILLINGDON,
Viceroy and Governor-General.

The 31*st March,* 1936.

WHEREAS I, Freeman, Earl of Willingdon, am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance Act, 1936, being an Act made by me under the provisions of section 67-B of the Government of India, Act, shall come into operation forthwith.

NOW, THEREFORE, in exercise of the power conferred by the proviso to sub-section (2) of that section, I do hereby direct accordingly.

WILLINGDON,
Viceroy and Governor-General.

The 31*st March,* 1936.

THE INDIAN FINANCE ACT, 1937.

(*Made by the Governor-General on the* 31*st March,* 1937.)

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the excise duty on sugar leviable under the Sugar (Excise Duty) Act, 1934, *to vary certain duties leviable under the Indian Tariff Act,* 1934, *to vary the excise duty on silver leviable under the Silver (Excise Duty) Act,* 1930, *to fix maximum rates of postage under the Indian Post Office Act,* 1898, *and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the excise duty on sugar leviable under the Sugar (Excise Duty) Act, 1934, to very certain duties leviable under the Indian Tariff Act, 1934, to vary the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India [1][* * * *] be construed as if, for the year beginning on the 1st day of April, 1937, they imposed such duty at the rate of one rupee and four annas per

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LEG. REF.

[1] The words "other than Burma or Aden" omitted by A.O., 1937.

maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Amendment of section 3, Act XIV of 1934.

[1]3. In sub-section (2) of section 3 of the Sugar (Excise Duty) Act, 1934,—

(*a*) in clause (*i*), for the words "ten annas" the words "one rupee and five annas" shall be substituted, and

(*b*) in clause (*ii*), for the words "one rupee and five annas" the words "two rupees" shall be substituted.

Amendment of the First Schedule to Act XXXII of 1934.

[1]4. In the First Schedule to the Indian Tariff Act, 1934,—

(*a*) in Item No. 17, for the words and figures "Rs. 9-1 per cwt." in the fourth column, the following words and figures shall be substituted, namely:—

"the rate at which excise duty is for the time being leviable on sugar, other than *khandsari* or palmyra sugar, produced in British India *plus* Rs. 7-4 per cwt.";

(*b*) in Items Nos. 61 (2) and 62 (1), for the words "two annas per ounce" in the fourth column, the words "three annas per ounce" shall be substituted.

Amendment of section 3, Act XVIII of 1930.

[1]5. In sub-section (1) of section 3 of the Silver (Excise Duty) Act, 1930, for the words "two annas" the words "three annas" shall be substituted.

Inland Postage rates.

6. For the year beginning on the 1st day of April, 1937, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

7. (1) Income-tax for the year beginning on the 1st day of April, 1937, shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1936.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1937, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates, increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1936.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax, Act, 1922.

THE SCHEDULE.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

(*See section* 6.)

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(*See* section 7.)

	Rate.
Letters.	
For a weight not exceeding one tola ..	One anna.
For every tola, or fraction thereof, exceeding one tola ..	Half an anna.
Postcards.	
Single ..	Nine pies.
Reply ..	One and a half annas.

LEG. REF.

[1] This section came into effect on the 28th February, 1937, by virtue of a declaration inserted in the Bill under the Provisional Collection of Taxes Act (XVI of 1931).

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ..	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas.	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas.	Half an anna.

Parcels.

For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ..	Four annas."

THE INDIAN FINANCE ACT, 1938.

[26*th March*, 1938.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, *and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1938.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India be construed as if, for the year beginning on the 1st day of April, 1938, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Inland postage rates.

3. For the year beginning on the 1st day of April, 1938, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

4. (1) Income-tax for the year beginning on the 1st day of April, 1938, shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1938, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates, increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax Act, 1922.

THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 3.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

Letters.	
For a weight not exceeding one tola ..	One anna.
For every tola, or fraction thereof, exceeding one tola ..	Half an anna.
Postcards.	
Single ..	Nine pies.
Reply ..	One and a half annas.
Book, Pattern and Sample Packets.	
For the first two and a half tolas or fraction thereof ..	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas ..	Three pies.
Registered Newspapers.	
For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ..	Half an anna.
Parcels.	
For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ..	Four annas."

THE INDIAN FINANCE ACT, 1939.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the incidence and rate of excise duty on khandsari *sugar leviable under the Sugar (Excise Duty) Act,* 1934, *to vary certain duties leviable under the Indian Tariff Act,* 1934, *to fix maximum rates of postage under the Indian Post Office Act,* 1898, *and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the incidence and rate of excise duty on *khandsari* sugar leviable under the Sugar (Excise Duty) Act, 1934, to vary the duty on raw cotton leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1939.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1939, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule under that section.

Excise duty on *khandsari* sugar.

3. In the Sugar (Excise Duty) Act, 1934,—

(*a*) in clause (*a*) of section 2, the words "wherein, or within the precincts of which, twenty or more workers are working or were working on any day of the preceding twelve months, and" shall be omitted.

(*b*) in clause (*i*) of sub-section (2) of section 3, for the words "one rupee and five annas" the words "eight annas" shall be substituted.

Import duty on raw cotton.

4. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 46 (3), for the words "six pies per lb." in the fourth column, the words "one anna per lb." shall be substituted.

Inland postage rates.

5. For the year beginning on the 1st day of April, 1939, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

6. (1) Subject to the provisions of sub-section (2)—

(*a*) income-tax for the year beginning on the 1st day of April, 1939, shall be charged at the rates specified in Part I of Schedule II, and

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1939, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of Schedule II.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates specified in Schedule II.

(3) For the purpose of this section and of Schedule II, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), where more than half of the total income of any individual or Hindu undivided family consists of income from salaries, interest on securities or dividends in respect of which the individual or Hindu undivided family is deemed, under the provisions of section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, or consists of income falling under more than one of those heads—

(*a*) income-tax for the year beginning on the 1st day of April, 1939, shall be charged in respect of such total incomes at the rates of income-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, and

(*b*) in cases in which super-tax has been deducted under the provisions of section 18 of the said Act or would have been so deductible had the Indian Income-tax (Amendment) Act, 1939, come into force on the 1st day of April, 1938, the rates of super-tax for the year beginning on the 1st day of April, 1939, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates of super-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, as the case may be.

(5) In respect of income to which sub-section (4) applies, the provisions of section 17 of the Indian Income-tax Act, 1922, shall apply to the assessment to be made for the year beginning on the 1st day of April, 1939, as though the Indian Income-tax (Amendment) Act, 1939, had not been passed.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 5.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

Letters.

For a weight not exceeding one tola ..	One anna.
For every tola, or fraction thereof, exceeding one tola ...	Half an anna.

Postcards.

Single ..	Nine pies.
Reply ..	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ..	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas ..	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ..	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas ..	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas ..	Quarter of an anna.

Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.

Parcels.

For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ..	Four annas."

SCHEDULE II.

[*See* section 6.]

PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

	Rate.
1. On the first Rs. 1,500 of total income ..	*Nil.*
2. On the next Rs. 3,500 of total income ..	Nine pies in the rupee.
3. On the next Rs. 5,000 of total income ..	One anna and three pies in the rupee.
4. On the next Rs. 5,000 of total income ..	Two annas in the rupee.
5. On the balance of total income ..	Two annas and six pies in the rupee.

Provided that—

(*i*) no income-tax shall be payable on a total income which does not exceed Rs. 2,000;

(*ii*) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2,000.

B. In the case of every company and local authority, and in every case in which, under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.
On the whole of total income ..	Two annas and six pies in the rupee.

PART II.

RATES OF SUPER-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraph B of this Part applies—

	Rate.
1. On the first Rs. 25,000 of total income ..	*Nil.*
2. On the next Rs. 10,000 of total income ..	One anna in the rupee.
3. On the next Rs. 20,000 of total income ..	Two annas in the rupee.
4. On the next Rs. 70,000 of total income ..	Three annas in the rupee.
5. On the next Rs. 75,000 of total income ..	Four annas in the rupee.
6. On the next Rs. 1,50,000 of total income ..	Five annas in the rupee.
7. On the next Rs. 1,50,000 of total income ..	Six annas in the rupee.
8. On the balance of total income ..	Seven annas in the rupee.

B. In the case of every company and local authority—

	Rate.
On the whole of total income ..	One anna in the rupee.

THE INDIAN FINANCE ACT (XVI OF 1940).

[6th April, 1940.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of excise duty on sugar other than khandsari *or palmyra sugar leviable under the Sugar (Excise Duty) Act, 1934, to vary the rate of the excise and customs duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, and the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of excise duty on sugar other than *khandsari* or palmyra sugar, leviable under the Sugar (Excise Duty) Act, 1934, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, to vary the rate of the customs duty on motor spirit leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1940.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1940, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule under that section.

Excise duty on sugar.

3. For clause (*ii*) of sub-section (2) of section 3 of the Sugar Excise Duty Act, 1934, the following shall be substituted, namely:—

"(*ii*) on all other sugar except palmyra sugar at the rate—

(*a*) of two rupees per cwt., in the case of sugar produced on or before the 29th day of February, 1940, and either issued out of a factory on or after that date or used within a factory on or after that date in the manufacture of any commodity other than sugar; and

(*b*) of three rupees per cwt. in the case of sugar produced on or after the 1st day of March, 1940."

Excise duty on motor spirit.

4. In sub-section (1) of section 3 of the Motor Spirit (Duties) Act, 1917, for the words "eight annas" the words "twelve annas" shall be substituted, and the provisions of section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, so far as they relate to the levy of an additional duty on motor spirit shall cease to have effect.

Import duty on motor spirit.

5. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 27 (6), for the words " Ten annas per Imperial gallon " in the fourth column, the following words shall be substituted, namely :—

"The rate at which excise duty is for the time being leviable on motor spirit."

Inland postage rates.

6. For the year beginning on the 1st day of April, 1940, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

7. (1) Subject to the provisions of sub-section (2)—

(*a*) income-tax for the year beginning on the 1st day of April, 1940, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939;

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1940, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939:

Provided that in the case of an association of persons being a Co-operative Society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1940, shall be—

(1) On the first Rs. 25,000 of total income ..	*Nil.*
(2) On the balance of total income ..	One anna in the rupee.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates imposed by sub-section (1).

(3) For the purpose of this section and of the rates of tax imposed by sub-section (1), the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 6.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

Letters.

For a weight not exceeding one tola ..	One anna.
For every tola, or fraction thereof, exceeding one tola ..	Half an anna.

Postcards.

Single ..	Nine pies.
Reply ..	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ..	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas ..	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ..	Half an anna.

In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas ..	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas ..	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	

Parcels.

For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas or fraction thereof, exceeding forty tolas ..	Four annas."

THE INDIAN FINANCE ACT (VII OF 1941).

[31*st March*, 1941.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1941.

(2) It extends to the whole of British India.

Fixation of Salt Duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1941, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Excise Duty on Matches.

3. For section 4 of the Matches (Excise Duty) Act, 1934, the following section shall be substituted, namely:—

"4. The duty payable under section 3 shall be levied at the following rates, namely:—

(*a*) on matches in boxes or booklets containing on an average not more than eighty—

(*i*) if the average number is forty or less, at the rate of two rupees per gross of boxes or booklets, (*ii*) if the average number is more than forty, but not more than sixty, at the rate of three rupees per gross of boxes or booklets, and

(*iii*) if the average number is more than sixty, at the rate of four rupees per gross of boxes or booklets;

(*b*) on all other matches, at such rate as the Central Government may prescribe."

Excise Duty on Mechanical Lighters.

4. In section 3 of the Mechanical Lighters (Excise Duty) Act, 1934, for the words "one rupee and eight annas" the words "three rupees" shall be substituted.

Import Duty on Artificial Silk Yarn and Thread.

5. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 47 (2), for the entry "25 per cent. *ad valorem* or 3 annas per lb., whichever is higher" in the fourth column the following entry shall be substituted, namely:—

"25 per cent. *ad valorem* or 5 annas per lb., whichever is higher".

Inland Postage rates.

6. For the year beginning on the 1st day of April, 1941, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and Super-tax.

7. (1) Subject to the provisions of sub-sections (2) and (3)—

(*a*) income-tax for the year beginning on the 1st day of April, 1941, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate;

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1941, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939, increased—

(*i*) in the case of the rate applicable to a company, by a surcharge amounting to one-third of that rate, and

(*ii*) in the case of every other rate, by a surcharge for the purposes of the Central Government amounting to one-third of each such rate:

Provided that in the case of an association of persons being a co-operative society, other than the Sanikatta Salt owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1941, shall be the rates of super-tax specified in the proviso to clause (*b*) of sub-section (1) of section 7 of the Indian Finance Act, 1940, increased in each case by a surchage for the purposes of the Central Government amounting to one-third of each such rate.

(2) In making any assessment for the year ending on the 31st day of March, 1942,—

(*a*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income;

(*b*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-section (2) of this section where applicable.

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

Continuance of and rate of Excess Profits Tax.

8. (1) In sub-clause (*a*) of clause (6) of section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1941," the words and figures "31st day of March, 1942," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 6.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(*See* section 7.)

Letters.

For a weight not exceeding one tola ..	One and a quarter annas.
For every tola, or fraction thereof, exceeding one tola ..	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first five tolas or fraction thereof ..	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas. ..	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ..	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas ..	Half an anna.

For every additional five tolas, or fraction thereof, in excess of ten tolas ..	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	
Parcels.	
For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ..	Four annas."

THE INDIAN FINANCE ACT (XII OF 1942).

[26*th March*, 1942.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, *to vary the rate of the excise duty on kerosene leviable under section* 5 *of the Indian Finance Act,* 1922, *to vary the rate of the excise duty on silver leviable under the Silver (Excise Duty) Act,* 1930, *to levy customs duties in addition to the duties of customs leviable under the Indian Tariff Act,* 1934, *to fix maximum rates of postage under the Indian Post Office Act,* 1898, *to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, to vary the rate of the excise duty on kerosene leviable under section 5 of the Indian Finance Act, 1922, to vary the rate of the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930, to levy customs duties in addition to the duties of customs leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1942.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1942, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Excise duty on motor spirit.

3. In sub-section (1) of section 3 of the Motor Spirit (Duties) Act, 1917, for the words "twelve annas" the words "fifteen annas" shall be substituted.

Excise duty on kerosene.

4. In the proviso to section 5 of the Indian Finance Act, 1922, for the words "of two annas and three pies" the words "at which customs duty is for the time being leviable under the Indian Tariff Act, 1934, read with any other enactment for the time being in force" shall be substituted.

Excise duty on silver.

5. In sub-section (1) of section 3 of the Silver (Excise Duty) Act, 1930, for the words "three annas" the words "three annas and seven and one-fifth pies" shall be substituted.

Additional customs duties.

6. Where any goods chargeable with a duty of cuustoms under the First Schedule to the Indian Tariff Act, 1934, or under the said Schedule read with any notification of the Central Government for the time being in force, are assessed to duty, there shall up to the 31st day of March, 1943, be levied and collected as an addition to and in the same manner as the total amount so chargeable, a sum equal to one-fifth of such amount:

Provided that such addition of duty shall not be levied and collected on—

(*a*) salt comprised in Item No. 25 (1) of the said Schedule;

(*b*) motor spirit comprised in Item No. 27 (6) of the said Schedule;

(*c*) raw cotton comprised in Item No. 46 (3) of the said Schedule, so long as the additional duty of customs imposed by the Cotton Fund Ordinance, 1942, continues to be leviable;

(*d*) machinery comprised in Items Nos. 72, 72 (1), 72 (2) and 72 (3) of the said Schedule;

(*e*) the following, when the Customs-collector is satisfied that they are the produce or manufacture of Burma, namely:—

(i) potatoes and onions comprised in Item No. 7 of the said Schedule,

(ii) coffee comprised in Item No. 9 of the said Schedule,

(iii) spices comprised in Item No. 9 (3) of the said Schedule,

(iv) betelnuts comprised in Item No. 9 (5) of the said Schedule,

(*v*) cutch and gambier comprised in Item No. 13 (2) of the said Schedule,

(vi) sugar excluding confectionary comprised in Item No. 17 of the said Schedule,

(vii) cigars comprised in Item No. 24 (1) of the said Schedule,

(viii) matches comprised in Item No. 34 (4) (*a*) of the said Schedule.

Inland postage rates.

7. For the year beginning on the 1st day of April, 1942, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

8. (1) Subject to the provisions of sub-sections (2) and (3),—

(*a*) income-tax for the year beginning on the 1st day of April, 1942, shall be charged at the rates specified in Part I of Schedule II increased in the cases to which sub-paragraph (*b*) of paragraph A and paragraph B of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1942, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of Schedule II increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1943,—

(*a*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusions bears to his total income;

(*b*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-section (2) of this section where applicable.

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (2) no tax shall be payable in cases to which sub-paragraph (*a*) of paragraph A of Part I of Schedule II applies where the assessee deposits with the Central Government in such manner and in accordance with such conditions as the Central Goverment may by rule prescribe for the purposes of this sub-section an amount representing not less than one rupee for every complete unit of twenty-five rupees by which his total income exceeds seven hundred and fifty rupees:

Provided that where the total income includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the amount to be deposited by the assessee in order to obtain the exemption conferred by this sub-section shall be an amount bearing to the minimum required to be deposited under the foregoing provisions of this sub-section the same proportion as the amount of his total income diminished by the amount of such inclusions bears to the amount of his total income.

(6) A deposit made in accordance with the provisions of sub-section (5) shall not in any way be capable of being charged and shall not be liable to attchment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the depositor and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on such deposit.

(7) Where the total income of an assessee referred to in sub-paragraph (*b*) of paragraph A of Part I of Schedule II does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the deductions, if any, allowed under the second proviso to sub-section (1) of section 7, section 15 and sub-section (1) of section 58-F of the Indian Income-tax Act, 1922, shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix:

Provided that nothing in this sub-section shall apply to any part of total income to which clause (*a*) of sub-section (2) applies.

Explanation.—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

Continuance of and rate of Excess Profits Tax.

9. (1) In sub-clause (*a*) of clause (6) of section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1942", the words and figures "31st day of March, 1943" shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1942, be an amount equal to sixty-six and two thirds per cent of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

Funding of one-tenth of Excess Profits Tax.

10. (1) If before the 1st day of July, 1942, or within thirty days of the date on which any excess profits tax, charged under the provisions of the Excess Profits Tax Act, 1940, at the rate of sixty-six and two-thirds per cent. becomes payable, whichever of these dates is later, a further sum not exceeding one-fifth of the amount of the said excess profits tax is deposited with the Central Government, the Central Government shall repay, at such date and subject to such conditions as it may hereafter determine, so much of the said excess profits tax as shall be equal to one-tenth of the amount thereof or to one-half of such further sum deposited, whichever is the less:

Provided that, if the said excess profits tax is thereafter reduced, whether by relief given in respect of a deficiency of profits, or by relief given in respect of double excess profits taxation or otherwise, and whether by refund or otherwise, the portion of the tax to be repaid under this section shall be correspondingly reduced:

Provided further that if the said excess profits tax is so reduced, the maximum sum that may be deposited with the Central Government under this section shall also be correspondingly reduced:

Provided further that the provisions of this section shall apply in respect of excess profits tax to which the section applies which became payable before the commencement of this Act if the further sum referred to herein is deposited before the 1st day of July, 1942:

Provided further that in relation to excess profits tax payable under the Excess Profits Tax Act, 1940, in respect of any profits which are also liable to assessment to excess profits tax under the law in force in the United Kingdom it shall be unnecessary to deposit the further sum referred to in this section, and the amount repayable by the Central Government under this section shall, subject to the first proviso, be one-tenth of the amount of the excess profits tax payable at the rate of sixty-six and two-thirds per cent. under the Excess Profits Tax Act, 1940.

(2) Any sum deposited with the Central Government under sub-section (1) shall carry simple interest at the rate of two per cent. per annum and shall be repaid within twelve months of the date of termination of the present hostilities.

(3) The Central Government may, by notification in the official Gazette, make rules for carrying out the purposes of this section and for prescribing the manner and conditions referred to in sub-section (5) of section 8.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

(*See* section 7.)

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(*See* section 7.)

Letters.

For a weight not exceeding one tola	One and a half annas.
For every tola, or fraction thereof, exceeding one tola ..	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first five tolas or fraction thereof ..	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas ..	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas. ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ..	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas ..	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas ..	Quarter of an anna.
Povided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office	

Parcels.

For a weight not exceeding forty tolas ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas.	Four annas".

SCHEDULE II.

(*See* section 8.)

PART I.

Rates of Income-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

(*a*) Where the total income does not exceed Rs. 2,000—

	Rate.
1. On the first Rs. 750 of total income ..	*Nil.*
2. On the next Rs. 1,250 of total income ..	Six pies in the rupee.

Provided that no tax shall be payable on a total income which does not exceed Rs. 1,500.

(*b*) Where the total income exceeds Rs. 2,000—

	Rate.	Surcharge.
1. On the first Rs. 1,500 of total income.	*Nil.*	*Nil.*
2. On the next Rs. 3,500 of total income.	Nine pies in the rupees.	Six pies in the rupee.
3. On the next Rs. 5,000 of total income.	One anna and three pies in the rupee.	Nine pies in the rupees.
4. On the next Rs. 5,000 of total income.	Two annas in the rupee.	One anna and two pies in the rupee.
5. On the balance of total income.	Two annas and six pies in the rupee.	One anna and three pies in the rupee.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.	Surcharge.
On the whole of total income.	Two annas and six pies in the rupee.	One anna and three pies in the rupee.

PART II.

Rates of Super-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	*Nil.*	*Nil.*
2. On the next Rs. 10 000 of total income.	One anna in the rupee.	Six pies in the rupee.
3. On the next Rs. 20,000 of total income.	Two annas in the rupee.	One anna in the rupee.
4. On the next Rs. 70,000 of total income.	Three annas in the rupee.	One anna and six pies in the rupee.
5. On the next Rs. 75,000 of total income.	Four annas in the rupee.	Two annas in this rupee.
6. On the next Rs. 1,50,000 of total income.	Five annas in the rupee.	Two annas and six pies in the rupee.
7. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income.	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority—

	Rate.	Surcharge.
On the whole of total income.	One anna in the rupee.	Six pies in the rupee.

C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	*Nil.*	*Nil.*
2. On the balance of total income.	One anna in the rupee.	Six pies in the rupee.

D.—In the case of every company—

	Rate.	
On the whole of total income.	One anna and six pies in the rupee.	..

THE FOREIGNERS ACT (III OF 1864).[1]

[*See also* Registration of Foreigners Act XVI of 1939 and the Foreigners Act II of 1940.]

[12*th February,* 1864.

[Rep. in part by Acts XII of 1876 and X of 1914; Amended by Acts XII of 1891 and III of 1915. *See also* Act XVI of 1939 and Act II of 1940.]

An Act to give the Government certain powers with respect to Foreigners.

Preamble.

WHEREAS it is expedient to make provision to enable the Government to prevent the subjects of Foreign States from residing or sojourning in British India, or from passing through or travelling therein, without the consent of the Government; it is enacted as follows:—

LEG. REF.

[1] Short title, "the Foreigners Act, 1864". *See* the Indian Short Titles Act, 1897 (XIV of 1897).

For special direction from Parliament to pass this Act, *see* S. 84 of the Government of India Act, 1833 (III and IV Will. IV, c. 85), Coll. Stats., Ind., Vol. I.

For the Statement of Objects and Reasons of the Bill which became Act III of 1864, *see* Calcutta Gazette, 1863, p. 2163; for proceedings relating to the Bill, see *ibid.*, Supplement, p. 581, and *Gazette of India,* 1864, Supplement, p. 41.

The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared in force in—

Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), S. 4 (1) and Sch. I, Bur. Code, Vol. I but its application to Chins in the Chin Hills has been barred by the Chin Hills Regulation, 1896 (V of 1896), Bur.

Interpretation.

1. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say:—

[1][* * * * *]

"Foreigner."

The word "foreigner" shall denote a person:—

[2][(*a*) who is not a natural born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, or

(*b*) who has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in British India:

Provided that any British subject who, under any law for the time being in force in British India, ceases to be a British subject, shall thereupon be deemed to be a foreigner];

"Magistrate of the district."

the words "the Magistrate of the district" shall denote the chief officer charged with the executive administration of a district and exercising the powers of a Magistrate, by whatever designation the chief officer charged with the executive administration is styled, or, in the absence of such officer from the

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LEG. REF.

Code, Vol. I, and to hill tribes in a hill-tract to which the Regulation applies by the Kachin Hill Tribes Regulation 1895 (I of 1895), Bur. Code, Vol. I.

The Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Santhal Parganas Justice and Laws Regulation (III of 1899), B. and O. Code, Vol. I.

The Arakan Hill Districts by the Arakan Hill District Laws Regulation 1916 (I of 1916), S. 2, Bur. Code, Vol. I.

British Baluchistan by the British Baluchistan Laws Regulation, 1913 (II of 1913), S. 3, Bal. Code;

Angul District by the Angul Laws Regulation, 1913 (III of 1913), S. 3, B. and O. Code, Vol. I.

It has been declared, by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

Sind, *see* Gazette of India, 1878, Pt. I, p. 482.

Aden, *see* Gazette of India, 1879, Pt. I, p. 434.

West Jalpaiguri, the Western Dvars, the Western Hills of Darjiling, the Darjiling Tarai, and the Damson Sub-division of the Darjiling District, *see* Gazette of India, 1881, Pt. I, p. 74.

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhum, *see* Gazette of India, 1881, Pt. I, p. 504.

The Purhat Estate in the Singhbhum District, *see* Gazette of India, 1897, Pt. I, p. 1059,

The Scheduled portion of the Mirzapur District, *see* Gazette of India, 1879, Pt. I, p. 383.

Jaunsar Barwar, *see* Gazette of India, 1879, Pt. I, p. 382.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. (*Portions of the District of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province, see* Gazette of India, 1901 *Pt.* 1, *p.* 857, *and* ibid., 1902, *Pt. I, p.* 575; *but its application in that part of the Hazara District known as Upper Tanawal has been barred by the Hazara (Upper Tanawal) Regulation,* 1900 (*II of* 1900). (*Punjab and N.W. Code*), *see* Gazette of India, 1886, Pt. I, p. 48.

The District of Lahaul, *see* Gazette of India, 1886, Pt. I, p. 301.

The Scheduled Districts of the Central Provinces, *see* Gazette of India, 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam, *see* Gazette of India, 1898, Pt. I, p. 870.

The District of Sylhet, *see* Gazette of India, 1879, Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills), *see* Gazette of India, 1897, Pt. I, p. 299.

It has been extended by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely:—

Kumaon and Garhwal, *see* Gazette of India, 1876, Pt. I, p. 606.

The Tarai of the Province of Agra, *see* Gazette of India, 1876, Pt. I, p. 505.

[1] Definitions of 'British India' and 'Local Government' omitted by A.O., 1937.

[2] These words were substituted for the words "not being either a natural-born subject of Her Majesty within the meaning of the Statute 3 and 4 William IV, Chap. 85, S. 81, or a Native of British India" by S. 2 of the Foreigners (Amendment) Act, 1915 (III of 1915).

station at which his Court is usually held, the senior officer at the station exercising the powers of a Magistrate as defined in the Code of Criminal Procedure:

"Vessel."

[1]the word "vessel" shall include anything made for the conveyance by water of human beings or property;

[*Number.*] *Rep. by Act X of* 1914.

[*Gender.*] *Rep. by Act X of* 1914.

Proof of being a foreigner.

2. If a question shall arise whether any person alleged to be a foreigner and to be subject to the provisions of this Act is a foreigner or not, or is or is not subject to the provisions of this Act, the onus of proving that such person is not a foreigner, or is not subject to the provisions of this Act, shall lie upon such person.

Government may order any foreigner to remove himself.

3. The Central Government may, by writing, order any foreigner to remove himself in British India, or to remove himself therefrom by a particular route to be specified in the order; [2][* * * * *].

LEG. REF.

[1] *Cf.* definition in S. 3 (56) of the General Clauses Act, 1897.

[2] Words referring to Local Government omitted by A.O., 1937.

NOTES.

Sec. 2: EFFECT OF TRANSFER OF TERRITORY—CESSION OF TERRITORY BY BRITAIN TO ANOTHER STATE—BRITISH SUBJECT CEASES TO BE SUCH ON CESSION.—A relinquishment by the Government of a territory is not only a relinquishment of the right to soil or territory, but also of the rights over the inhabitants of the country. The distinction between a right of election of which sovereign he will become the subject and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former sovereign, seems somewhat fine; but the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign; there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions to indicate his previous election. Any inhabitant of the ceded or separated territory has not the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation. The common law of England embodying the above rules is the law for the time being in force in British India within the meaning of the proviso to S. 1. 90 I.C. 310=1925 B. 489. [18 Cal. 620 (P.C.) and 42 Mad. 589 (P.C.), Foll.], The applicant was born in Ramdupati which was in British territory. In that village he had some lands and owned a house in which his family resided permanently. He however, came to Bombay for purposes of trade. Ramdupati was subsequently ceded to the Maharaja of Benares by the British Government. The applicant continued to live in Bombay for trade before as well as after the cession. *Held,* that the applicant was a "foreigner" by virtue of the proviso to S. 2 of Act III of 1915, amending the Foreigners Act, 1864. 90 I.C. 310=49 B. 804=27 Bom.L.R. 1043=26 Cr.L.J. 1526=1925 B. 489.

Secs. 3 and 3-A: PROCEDURE.—Government must issue orders about detention or release or removal without delay—Commissioner of Police cannot do any such thing without such orders. 85 I.C. 138=49 B. 222 =1925 B. 139.

Secs. 3 and 4.—Act III of 1864 is not *ultra vires* of the Governor-General of India in Council. 18 B. 636. Per *Bayley, J.*—The Act applies to all foreigners, although their residence in Bombay may not be likely to affect or endanger the peace and security of British India. (*Ibid.*) Per *Starling, J.*—The Government would be the sole Judges of what was necessary for the peace and security of British India, and if they acted in accordance with the letter of the Act, the High Court could not enquire into the sufficiency or otherwise of their reasons for so acting. (*Ibid.*) A warrant issued under Ss. 3 and 4 of Act III of 1864 should not comprise two distinct orders, one to the foreigner to remove himself from British India, the other to arrest him in case it is not duly obeyed. There should be a separate order directing him to remove himself from British India which should be duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there should be a further order by the Government authorizing his arrest and detention in jail. The persons named in the warrant should be described with sufficient certainty and particularity. The particular route to be specified in the order referred to in S. 3 of Act III of 1864 is intended to be a route in British India and

Foreigner may be apprehended and detained pending order of removal.

[1][3-A. (1) Whenever in a Presidency town the Commissioner of Police or elsewhere the Magistrate of the District, considers that the [2][Central Government] should be moved to issue an order under section 3 in respect of any foreigner who is within the limits of such Presidency town or of the jurisdiction of such Magistrate, he may report the case to the [2][Central Government] and at the same time issue a warrant for the apprehension of such foreigner.

(2) Any officer issuing a warrant under sub-section (1) may, in his discretion, direct by endorsement on the warrant that if such foreigner executes a bond with or without sureties for his attendance at a specified place and time, the person to whom the warrant is directed shall take such security and release such foreigner from custody.

(3) Any person executing a warrant under sub-section (1) may search for and apprehend the foreigner named in such warrant; and, subject to any direction issued under sub-section (2), shall forthwith cause such foreigner when apprehended to be produced before the officer issuing the warrant.

(4) When a foreigner for whose apprehension a warrant has been issued under sub-section (1) is produced or appears before the officer issuing such warrant, such officer may direct him to be detained in custody pending the orders of the [2][Central Government], or may release him on his executing a bond with or without sureties to appear at a specified place and time and thereafter if and when required until such orders are obtained.

(5) Any officer who has in accordance with the provisions of sub-section (4), ordered a foreigner to be detained or released on his executing a bond shall forthwith report the fact to the [2][Central Government]. On the receipt of a report under this sub-section the [2][Central Government] shall without delay either direct that the foreigner be discharged or make an order for the removal of such foreigner in accordance with the provisions of section 3.]

Foreigner refusing to remove, or returning without license after removal, may be apprehended and detained.

4. If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse so to do, or if any foreigner, having removed himself from British India in consequence of an order issued under any of the provisions of this Act, or having been removed from British India under any of the said provisions, shall wilfully return thereto without a license in writing granted by the Central Government [3][* * * *] such foreigner may be apprehended and detained in safe custody, until he shall be discharged therefrom by order of the Central Government, [3][* * *] upon such terms and conditions as the said Central Government [3][* * *] shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States.

LEG. REF.

[1] S. 3-A was inserted by S. 3 of the Foreigners (Amendment) Act, 1915 (III of 1915).

[2] Substituted for 'Local Government' by A.O., 1937.

NOTES.

not a route beyond the High Seas. In the absence of statutory provision, the absence of a seal will render a warrant void. (*Ibid.*) *See also* 18 C.W.N. 705=15 Cr.L.J. 328 =23 I.C. 678=1 L.W. 989 (P.C.).

Central Government may order all the provisions of this Act to be in force in British India or in any part thereof.

5. Whenever the Central Government shall consider it necessary to take further precautions in respect of foreigners residing or travelling in British India or any part thereof, it shall be lawful for the Central Government, by a notification published in the Official Gazette, to order that the provisions of this and the subsequent sections of this Act shall be in force in British India, or in such part thereof as shall be specified in such notification, for such period as shall be therein declared; and thereupon, and for such period, the whole of this Act including this and the subsequent sections shall have full force and effect in British India or such part thereof as shall have been so specified. The Central Government may, from time to time, by a notification published as aforesaid, cancel or alter any former notification which may still be in force, or may extend the period declared therein: Provided that none of the provisions of this or the subsequent sections of this Act shall extend to any foreign minister duly accredited by his Government; to any consul or vice-consul; to any person under the age of fourteen years; or to any person in the service of Her Majesty.

Proviso.

Every foreigner to report his arrival in India in certain cases.

6. Every foreigner on arriving in any part of British India in which all the provisions of this Act are for the time being in force under an order issued as provided in the last preceding section, from any port or place not within British India, or from any port or place within British India, where all the provisions of this Act are not in force, shall if he arrive at a presidency-town, forthwith report himself to the Commissioner of Police of such town, or, if he arrive at any other place, then he shall forthwith report himself to the Magistrate of the district, or to such other officer as shall be appointed to receive such reports, by the Central Government [1][* * *].

What to be stated in the report.

7. The report shall be in writing, and shall be signed by the person reporting himself, and shall specify his name or names, the nation to which he belongs, the place from which he shall have come, the place or places of his destination, the object of his pursuit, and the date of his arrival in such presidency-town or other place. The report shall be recorded by the officer to whom it is made.

Foreigners, being masters of vessels or employed therein, to report themselves when they cease to be so employed.

8. The provisions of the last two preceding sections shall not extend to any person being the master or commander of a vessel or employed therein, but if any such person shall be in any part of British India in which all the provisions of this Act are for the time being in force, after he shall have ceased to be actually employed in a vessel, he shall forthwith report himself in manner aforesaid.

Foreigners neglecting to report themselves, may be dealt with in like manner as foreigners travelling without a license.

9. If any foreigner shall neglect to report himself as required by this Act, he may be dealt with in the manner hereinafter provided in respect of foreigners travelling without a license.

No foreigner to travel in India without a license.

10. No foreigner shall travel in or pass through any part of British India in which all the provisions of this Act are for the time being in force without a license.

Grant of licenses.

[2][11. Licenses under this Act may be granted by the Central Government or by officers specially authorized by that Government.]

LEG. REF.

[1] Reference to Local Government omitted by A.O., 1937.

[2] S. 11 substituted by A.O., 1937.

What to be stated in license.

12. Every such license shall state the name of the person to whom the license is granted, the nation to which he belongs, the district or districts through which he is authorized to pass or the limits within which he is authorized to travel, and the period (if any) during which the license is intended to have effect.

License may be granted subject to conditions and may be revoked.

13. The license may be granted subject to such conditions as the Central Government [1][* * *] may direct, or as the officer granting the license may deem necessary. Any license may be revoked at any time by the Central Government [1][* * *] or by the officer who granted the license.

Foreigner travelling without or contrary to the conditions of license may be apprehended.

14. If any foreigner travel in or attempt to pass through any part of British India without such license as aforesaid, or beyond the districts or limits mentioned therein, or after such license shall have been revoked, or shall violate any of the conditions therein specified, he may be apprehended without warrant by any officer exercising any of the powers of a Magistrate, or by any European commissioned officer in the service of Her Majesty, or by any member of a volunteer corps enrolled by authority of [2][the Central Government] whilst on duty, or by any police-officer.

Procedure upon apprehension.

Magistrate to report to Government.

15. If any person be apprehended by a person not exercising any of the powers of a Magistrate and not being a police-officer, he shall be delivered over as soon as possible to a police-officer, and forthwith carried before the Magistrate of the district. Whenever any person shall be apprehended by or taken before the Magistrate of the district, such Magistrate shall immediately report the case to the [3][Central Government] and shall cause the person brought before him to be discharged, or to be conveyed to one of the presidency-towns, or pending the orders of such Government to be detained.

Persons apprehended, may be admitted to bail.

16. Any person apprehended or detained under the provisions of this Act may be admitted to bail by the Magistrate of the district, or by any officer authorized to grant licenses, and shall be put to as little inconvenience as possible during his detention in custody.

Removal of persons apprehended.

[4][17. The Central Government may order any person apprehended or detained under the provisions of this Act to remove himself from any part of British India by sea or by such other route as the Central Government may direct; or the Central Government may cause him to be removed from that part of British India by such route and in such manner as to that Government may seem fit.]

Central Government may prohibit persons not being natural-born subjects from travelling or passing through any part of India without a license.

18. The Central Government may by order prohibit any person or any class of persons not being natural-born subjects of Her Majesty within the meaning of the [5]Statute 3 and 4 William IV, Chap. 85, section 81, from travelling in or passing through any part of British India in which all the provisions of this Act may, for the time being, be in force, and from passing from any part thereof to another without a license to be granted by such

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LEG. REF.

[1] Omitted by A.O., 1937.

[2] Substituted for 'Government' by A. O., 1937.

[3] Substituted for 'Local Government to which he is subordinate' by *ibid*.

[4] S. 17 substituted for old S. 17 by *ibid*.

[5] The Government of India Act, 1833 (3

officer or officers as shall be specified in the order; and, if any person so prohibited shall wilfully disobey such order, he may be apprehended without warrant by any of the officers specified in section 14 of this Act, and carried before the Magistrate of the district, and dealt with under the provisions of section 17 in the same manner as if he were a foreigner and the Central Government may order such person to be detained in safe custody or under the surveillance of the police so long as it may be deemed necessary for the peace and security of British India or any part thereof.

19. [1][* * * * * * *]

Certain officers may board vessels to ascertain whether foreigners are on board.

Masters of vessels to furnish list of passengers, and to give information respecting them.

Foreigner, refusing to give account of himself, not to be allowed to disembark.

20. It shall be lawful for the Commissioner of Police, or for the Magistrate of the district, or for any officer appointed to receive reports as mentioned in the sixth section of this Act, or for any police-officer under the authority of such Commissioner or Magistrate, to enter any vessel in any port or place within British India in which all the provisions of this Act may, for the time being, be in force, in order to ascertain whether any foreigner bound to report his arrival under the said section 6 of this Act is on board of such vessel; and it shall be lawful for such Commissioner of Police, Magistrate or other officer as aforesaid to adopt such means as may be reasonably necessary for that purpose; and the master or commander of such vessels shall also, before any of the passengers are allowed to disembark, if he shall be required so to do by such Commissioner of Police, Magistrate, or other officer as aforesaid deliver to him a list in writing of the passengers on board, specifying the ports or places at which they embarked, and the ports or places of their disembarkation, or intended disembarkation, and answer to the best of his knowledge all such questions touching the passengers on board the said vessel, or touching those who may have disembarked in any part of British India, as shall be put to him by the Commissioner of Police, Magistrate, or other officer as aforesaid. If any foreigner on board such vessel in any part of British India shall refuse to give an account of his objects of pursuit in India, or if his account thereof shall not be satisfactory the officer may refuse to allow him to disembark, or he may be dealt with in the same manner as a foreigner travelling in British India without a license.

Penalty for false answer or report.

21. If the master or commander of a vessel shall wilfully give a false answer to any question which by section 20 of this Act he is bound to answer, or shall make any false report, he shall be held to have committed the offence specified in section 177 of the Indian Penal Code.

Penalty for neglect by master of vessel to comply with requisitions of Act.

22. If the master or commander of any vessel shall wilfully neglect or refuse to comply with the requisitions of this Act, he shall, on conviction before the Magistrate of the district or a Justice of the Peace, be liable to a fine not exceeding two thousand rupees.

LEG. REF.

and 4 Will, IV c. 85) is now repealed excepting S. 112 by the Government of India Act (9 and 10 Geo. 5, c. 101). For definition of "natural-born British Subject,' *see* S. 1 of British Nationality and Status of Aliens Act 1914 (4 and 5 Geo. V, c. 17), Coll. Stats., Ind., Vol. III.

[1] S. 19 omitted by A.O., 1937.

Penalty for obstructing officers.

23. Whoever intentionally obstructs any officer in the exercise of any of the powers vested in him by this Act shall be held to have committed the offence specified in section 186 of the Indian Penal Code.

24. [*Fines imposed under this Act how to be recovered.*] *Rep. by Act X of* 1914.

Persons may be exempted from provisions of this Act.

25. The Central Government [1][* * *] may [2]exempt any person, or any class of persons, either wholly or partially, or temporarily or otherwise, from all or any of the provisions of this Act contained in any of the sections subsequent to section 5, and may at any time revoke any such exemption.

THE FOREIGNERS ACT NO. (II OF 1940).

[23*rd February,* 1940.

An Act to provide for the imposition of restrictions on foreigners.

WHEREAS it is expedient to provide for the imposition of restrictions on the entry of foreigners into British India, their presence therein and their departure therefrom; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called THE FOREIGNERS ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall be in force during the continuance of the present war and for a period of six months thereafter.

Definitions.

2. In this Act,—

(*a*) "foreigner" has the meaning assigned to it in the Foreigners Act, 1864, except that it does not include—

(i) any ruler or subject of any Indian State; or

(ii) any native of the tribal areas;

(*b*) "prescribed" means prescribed by orders made under this Act;

(*c*) "specified" means specified by direction of a prescribed authority.

Power to make orders.

3. (1) The Central Government may, by order, make provision, either generally with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into British India or their departure therefrom or their presence or continued presence therein.

(2) In particular, and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(*a*) shall not enter British India, or shall enter British India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(*b*) shall not depart from British India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

LEG. REF.

[1] Reference to Local Government omitted by A.O., 1937.

[2] For exemption, *see* Gazette of India, 1914, Pt. I, pp. 1329 and 1905.

(*c*) shall not remain in British India, or in any prescribed area therein;

(*d*) shall remove himself to, and remain in, such area in British India as may be prescribed;

(*e*) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impression to be taken and to furnish specimens of his hand-writing and signature to such authority and at such time and place as may be prescribed or specified;

(v) prohibiting him from association with persons of a prescribed or specified description;

(vi) prohibiting him from engaging in activities of a prescribed or specified description;

(vii) prohibiting him from using or possessing prescribed or specified articles; or

(viii) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(*f*) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; or

(*g*) shall be arrested and detained or confined;

and may make provision for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

Internees.

4. (1) Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time determine.

(2) No person shall—

(*a*) knowingly assist an internee to escape from custody or knowingly harbour an escaped internee; or

(*b*) give an escaped internee any assistance with intent thereby to prevent, hinder or interfere with the apprehension of the internee.

(3) The Central Government may, by order, provide for regulating access to, and the conduct of persons in, places in British India where internees are detained and for prohibiting or regulating the despatch or conveyance from outside such places to or for internees therein of such articles as may be prescribed.

(4) No proceedings shall be taken by virtue of sub-section (2) or sub-section (3) against any person in respect of any act done by him when he is himself an internee.

Change of name.

5. (1) No foreigner who was in British India on the date on which this Act came into force shall, while in British India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date.

(2) Where, after the date on which this Act came into force, any foreigner carries on or purports to carry on (whether alone or in association with any

other person) any trade or business under any name or style other than that under which that trade or business was being carried on immediately before the said date, he shall, for the purposes of sub-section (1), be deemed to be using a name other than that by which he was ordinarily known immediately before the said date.

(3) In relation to any foreigner who, not having been in British India on the date on which this Act came into force, thereafter enters British India, sub-sections (1) and (2) shall have effect as if for any reference, in those sub-sections to the date on which this Act came into force there were substituted a reference to the date on which he first enters British India thereafter.

(4) For the purposes of this section—

(*a*) the expression "name" includes a surname, and

(*b*) a name shall be deemed to be changed if the spelling thereof is altered.

(5) Nothing in this section shall apply to the assumption or use—

(*a*) of any name in pursuance of a Royal licence; or

(*b*) by any married woman, of her husband's name.

Obligations of masters of vessels, etc.

6. Any District Magistrate and any Commissioner of Police, or, where there is no Commissioner of Police, any Superintendent of Police, may, for any purpose connected with the enforcement of this Act or any order made thereunder, enter, with such assistance as he may think fit any vessel or aircraft at any port or place in British India and may—

(*a*) direct the master of the vessel or the pilot of the aircraft, as the case may be.—

(i) before any passenger disembarks, or before the vessel or aircraft leaves such port or place, as the case may be, to furnish a list in writing of the passengers who are on board or who have been carried on board at any time since the vessel or aircraft commenced its journey, or who have signified their intention of departing from British India on board such vessel or aircraft, setting out the ports or places at which they embarked, the ports or places of their disembarkation or intended disembarkation, and such other particulars as may be prescribed; and

(ii) to answer to the best of his ability any question relating to the passengers who are on board or who have disembarked in any part of British India; and

(*b*) if any foreigner seeking to enter British India on board such vessel or aircraft does not give satisfactory reasons for entering British India, either—

(i) refuse to allow such foreigner to disembark from such vessel or aircraft, or

(ii) place him under such restraint as may be prescribed or specified.

Burden of proof.

7. If any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

Power to exempt from application of Act.

8. The Central Government may, by order, declare that any or all of the provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be speci-

fied, to or in relation to any individual foreigner or any class or description of foreigner.

Power to give effect to orders, directions, etc.

9. (1) Any authority empowered by or under or in pursuance of the provisions of this Act to give any direction or to exercise any other power, may, in addition to any other action expressly provided for in this Act, take or cause to be taken, such steps and use, or cause to be used, such force as may, in its opinion, be reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof, or for the effective exercise of such power, as the case may be.

(2) Any police officer may take such steps and use such force as may, in his opinion, be reasonably necessary for securing compliance with any order made or direction given under or in pursuance of the provisions of this Act or for preventing or rectifying any breach of such order or direction.

(3) The power conferred by this section shall be deemed to confer upon any person acting in exercise thereof a right of access to any land or other property whatsoever.

Power to delegate authority.

10. Any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act.

Attempts, etc., to contravene the provisions of this Act, etc.

11. (1) Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, the provisions of this Act or of any order made or direction given thereunder, or fails to comply with any direction given in pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or of any order made or direction given thereunder, gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere with his arrest, trial or punishment for the said contravention, shall be deemed to have abetted that contravenion.

(3) The master of any vessel or the pilot of any aircraft, as the case may be, by means of which any foreigner enters or leaves British India in contravention of any order made under, or direction given in pursuance of, section 3 shall, unless he proves that he exercised all due diligence to prevent the said contravention, be deemed to have contravened this Act.

Penalties.

12. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (*f*) of sub-section (2) of section 3, his bond shall be forfeited, any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

Protection to persons acting under this Act.

13. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Application of other laws not barred.

14. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864, the Registration of Foreigners Act 1939, and of any other enactment for the time being in force.

Repeal and saving.

15. (1) The Foreigners Ordinance, 1939, is hereby repealed.

(2) Notwithstanding such repeal, all orders made, directions given, things done and action taken under the said Ordinance, shall be deemed to have been made, given, done or taken under the provisions of this Act, as if this Act had come into force on the 26th day of August, 1939, references to the said Ordinance in any rule made under any enactment shall be construed as references to this Act, and offences committed against or proceedings commenced under the said Ordinance may be punished or may be continued and completed as if such offences were committed against or such proceedings were commenced under this Act.

THE INDIAN FOREIGN MARRIAGE ACT (XIV OF 1903).[1]

PREFATORY NOTE.—This Act is intended to give effect to Foreign Marriages Order in Council (*see* Statement of Objects and Reasons).

The following are the remarks of the Hon'ble Mr. Arundale in moving for leave to introduce the Bill:—"On several occasions difficulties have arisen in connection with the intended marriage of British subjects under the provisions of the Foreign Marriage Act and Foreign Marriages Order in Council, 1892, in cases where one of the parties has been resident in India.

"The Foreign Marriages Order in Council requires that in cases where one of the parties has not been resident within the district of the Marriage Officer, who is to celebrate the marriage, that party shall produce a certificate from the Marriage Officer of the place in which he or she has been the resident, and that proper notice has been given of the marriage; but these requirements of the Order in Council relate only to foreign countries and to the United Kingdom, while no instructions are given concerning notice of marriage by persons resident in India."

After some correspondence between the Secretary of State and the Government of India, an Order in Council was issued on the 12th March, 1903, to the following effect:—

1. The following further modifications of the requirements of the Foreign Marriage Act, 1892, as to residence and notice which appear to His Majesty to be consistent with the observance of due precautions against the solemnization of clandestine marriages shall have effect in cases where one only of the parties has dwelt within the district of the Marriage Officer and the other of such parties has dwelt in a Colony or in India, that is to say—

(*i*) If the Marriage Officer is satisfied that such notice has been given by the party dwelling in such Colony or in India as may be provided by any law in that Colony or of the Governor-General of India in Council (as the case may be), giving effect to this order;

(*ii*) In any such case the oath, affirmation or declaration required by section 7 of the Foreign Marriage Act shall be made subject to the modifications thereof to which effect is given by Art. 6 of the Foreign Marriages Order in Council, 1892.

2. A law enacted by the Legislature of a Colony or by the Governor-General of India in Council shall be deemed to give effect to this Order if it makes provision (in whatever terms expressed) as follows:

(*i*) That a notice of a marriage intended to be solemnized under the Foreign Marriage Act may be given by one of the parties intending such marriage who has had his or her usual place of abode for three consecutive weeks immediately preceding in some place in that Colony or in India (as the case may be) to such Marriage Registrar or other officer as may be designated by the law in this behalf;

(*ii*) that such notice shall be published either by proclamation of bans or in such other manner, as the law may provide; and

(*iii*) that such Marriage Registrar or other officer, unless he is aware of any impediment or objection which should obstruct the solemnization of the marriage, shall, on payment of such fee, if any, as the law may provide, give a certificate that the said notice has been so given and published as aforesaid.

LEG. REF.

[1] For Statement of Objects and Reasons, *see* **Gazette of India, 1903, Part V, p. 466;** for proceedings in Council, *see ibid.*, Part VI, pp. 157 and 165.

"This Bill which I beg for leave to introduce is intended to give effect to this Order in Council. It extends to the whole of British India, and applies to all British subjects and to all servants of the King, whether British subjects or not, in the territories of any Native Prince or State in India. The Bill is purely permissive and nothing in it affects a valid marriage solemnized outside its provisions."

(*See* Proceedings of the Council of the Governor-General of India, dated, 28th August, 1903.)

[*23rd October,* 1903

An Act to give effect to the Foreign Marriages Order in Council, 1903.

WHEREAS it is expedient to give effect to the Foreign Marriages Order in Council, 1903; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE INDIAN FOREIGN MARRIAGE ACT, 1903.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas, the Shan States and the Pargana of Spiti; and

(3) It applies also to all British subjects and to all servants of the King, whether British subjects or not, in [1][any Indian State.]

Notice of marriage intended to be solemnized under 55 and 56 Vict, c. 23.

2. (1) Notice in writing of a marriage which it is intended to solemnize under the Foreign Marriage Act, 1892, may be given by one of the parties intending such marriage, to—

(*a*) a Marriage Registrar appointed under the Indian Christian Marriage Act, 1872, where either of such parties is a person professing the Christian religion;

(*b*) a District Magistrate, Chief Presidency Magistrate or Political Agent, where neither of such parties is a person professing the Christian religion:

Provided that the party giving such notice as aforesaid shall have had his usual place of abode for not less than three consecutive weeks immediately preceding the giving of notice within the local limits of the area for which the Marriage Registrar, Magistrate or Political Agent to whom the notice is given, is appointed.

(2) Every notice given under this section shall state—

(*a*) the name, surname, age and profession or condition of each of the parties intending marriage;

(*b*) the residence of each of them;

(*c*) the time during which each of them has dwelt there; and

(*d*) the place in which the intended marriage is to be solemnized;

and it shall contain a declaration by the party giving the notice to the effect that he believes that there is no impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage.

(3) A copy of every notice given under this section shall be published by being affixed in some conspicuous place in the office of the officer to whom the notice is given.

(4) On the expiration of four clear days after such notice as aforesaid has been published in the manner prescribed by sub-section (3), the officer to whom the notice is given, unless he is aware of any impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended

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LEG. REF.

[1] Substituted for the words "the territories of any Native Prince or State in India," by A.O., 1937.

marriage shall, on payment of such fee (if any) as [1][the Provincial Government for each Province and the Central Government for British subjects and servants of the Crown in any Indian State] may fix in this behalf, furnish the party by whom the notice was given, with a certificate, under his hand and seal, to the effect that the notice has been so given and published.

THE FOREIGN RELATIONS ACT (XII OF 1932).[2]

[8th April, 1932.

An Act to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States.

WHEREAS it is expedient to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE FOREIGN RELATIONS ACT, 1932.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Power of Central Government to prosecute in certain cases of defamation.

2. Where an offence falling under Chapter XXI of the Indian Penal Code is committed against a Ruler of a State outside but adjoining India, or against the consort or son or principal minister of such Ruler, the Central Government may make, or authorise any person to make, a complaint in writing of such offence, and notwithstanding anything contained in S. 198 of the Code of Criminal Procedure, 1898, any Court competent in other respects to take cognizance of such offence may take cognizance thereof on such complaint.

[3][* * * * * * *].

Power to forfeit certain publications or to detain them in the course of transmission through post.

3. The provisions of Ss. 99-A to 99-G of the Code of Criminal Procedure, 1898, and of Ss. 27-B to 27-D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter which is defamatory of the Ruler of a State outside but adjoining India or of the consort or son or principal minister of such Ruler and tends to prejudice the maintenance of friendly relations between His Majesty's Government and the Government of such State, in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections:

Provided that for the purposes of this section the said provisions shall be construed as if for the words "Provincial Government" wherever they occur the words "Central Government" were substituted.

Proof of status of persons defamed.

4. Where, in any trial of an offence upon a complaint under S. 2, or in any proceeding before a High Court arising out of S. 3, there is a question whether any person is a Ruler of any State, or is the consort or son or principal minister of such Ruler, a certificate under the hand of a Secretary to the [4][Central Government] that such person is such Ruler, consort, son or principal minister shall be conclusive proof of that fact.

LEG. REF.

[1] Substituted for "the Governor-General in Council" by A.O. 1937.

[2] For statement of Objects and Reasons, *see* Gazette of India, 1931, Pt. v, p. 108, for Report of Select Committee, *see ibid.*, 1932, Pt. v, p. 99.

[3] Repealed by A.O., 1937.

[4] Substituted for "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

(THE INDIAN FOREST ACT (XVI OF 1927).

Year.	No.	Title.	Amendments.
1927	XVI	The Indian Forest Act, 1927.	Amended, XXVI of 1930; and III of 1933.

PREFATORY NOTE.—The general law relating to forests in British India was contained in the Indian Forest Act, 1878, and its amending Acts. The present Act brings the law together within the scope of one enactment. The Act is a straightforward consolidating Bill, but the original Act having been passed before the General Clauses Act 1897 (X of 1897), it had been found possible to shorten the language of the Act by taking advantage of that Act. The ambiguous language of the second paragraph of section 42 of Act VII of 1878 had been altered in section 43 (2) so as to bring it into conformity with what appeared to have been the original intention of the law. The only other point which may call for further notice is the extent clause. The original Act extended to the Province of Assam, but by Regulation VII of 1891 the Indian Forest Act, 1878, was repealed as far as it related to Assam. This Act accordingly omits Assam from the extent clause. (*See* Statement of Objects and Reasons.)

CONTENTS.

PRELIMINARY.

SECTIONS.

1. Short title and extent.
2. Interpretation clause.

CHAPTER II.

OF RESERVED FORESTS.

3. Power to reserve forests.
4. Notification by Provincial Government.
5. Bar of accrual of forest rights.
6. Proclamation by Forest Settlement-officer.
7. Inquiry by Forest Settlement-officer.
8. Powers of Forest Settlement-officer.
9. Extinction of rights.
10. Treatment of claims relating to practice of shifting cultivation.
11. Power to acquire land over which right is claimed.
12. Order on claims to rights of pasture or to forest produce.
13. Record to be made by Forest Settlement-officer.
14. Record where he admits claim.
15. Exercise of rights admitted.
16. Commutation of rights.
17. Appeal from order passed under section 11, section 12, section 15, or section 16.
18. Appeal under section 17.
19. Pleaders.
20. Notification declaring forest reserved.
21. Publication of translation of such notification in neighbourhood of forest.
22. Power to revise arrangement made under section 15 or section 18.
23. No right acquired over reserved forest except as here provided.
24. Rights not to be alienated without sanction.

SECTIONS.

25. Powers to stop ways and water courses in reserved forests.
26. Acts prohibited in such forests.
27. Power to declare forest no longer reserved.

CHAPTER III.

OF VILLAGE-FORESTS.

28. Formation of Village-forests.

CHAPTER IV.

OF PROTECTED FORESTS.

29. Protected forests.
30. Power to issue notification reserving trees, etc.
31. Publication of translation of such notification in neighbourhood.
32. Power to make rules for protected forests.
33. Penalties for acts in contravention of notification under section 30, or of rules under section 32.
34. Nothing in this Chapter to prohibit acts done in certain cases.

CHAPTER V.

OF THE CONTROL OVER FORESTS AND LANDS, NOT BEING THE PROPERTY OF GOVERNMENT.

35. Protection of forests for special purposes.
36. Power to assume management of forests.
37. Expropriation of forests in certain cases.
38. Protection of forests at request of owners.

CHAPTER VI.

OF THE DUTY ON TIMBER AND OTHER FOREST PRODUCE.

39. Power to impose duty on timber and other forest produce.

SECTIONS.

40. Limit not to apply to purchase-money or royalty.

CHAPTER VII.

OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

41. Power to make rules to regulate transit of forest produce.
41-A. Powers of Central Government as to movements of timber across customs frontier.
42. Penalty for breach of rules made under section 41.
43. Crown and forest-officers not liable for damage to forest-produce at depot.
44. All persons bound to aid in case of accident at depot.

CHAPTER VIII.

OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

45. Certain kinds of timber to be deemed property of Government until title thereto proved and may be collected accordingly.
46. Notice to claimants of drift timber.
47. Procedure on claim preferred to such timber.
48. Disposal of unclaimed timber.
49. Crown and its officers not liable it was committed.
50. Payments to be made by claimant before timber is delivered to him.
51. Power to make rules and prescribe penalties.

CHAPTER IX.

PENALTIES AND PROCEDURE.

52. Seizure of property liable to confiscation.
53. Power to release property seized under S. 52.
54. Procedure thereupon.
55. Forest-produce, tools., etc., when liable to confiscation.
56. Disposal on conclusion of trial for forest offence of produce in respect of which it was committed.
57. Procedure when offender not known or cannot be found.
58. Procedure as to perishable property seized under section 52.
59. Appeal from orders under section 55, section 56 or section 57.
60. Property when to vest in Government.
61. Saving of power to release property seized.
62. Punishment for wrongful seizure.
63. Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary marks.
64. Power to arrest without warrant.
65. Power to release on a bond a person arrested.
66. Power to prevent commission of offence.
67. Power to try offences summarily.
68. Power to compound offences.
69. Presumption that forest-produce belongs to Government.

CHAPTER X.

CATTLE-TRESPASS.

70. Cattle-Trespass Act, 1871, to apply.
71. Power to alter fines fixed under that Act.

CHAPTER XI.

OF FOREST-OFFICERS.

72. Provincial Government may invest forest-officers with certain powers.
73. Forest-officers deemed public servants.
74. Indemnity for acts done in good faith.
75. Forest-officers not to trade.

CHAPTER XII.

SUBSIDIARY RULES.

76. Additional powers to make rules.
77. Penalties for breach of rules.
78. Rules when to have force of law.

CHAPTER XIII.

MISCELLANEOUS.

79. Persons bound to assist forest-officers and police officers.
80. Management of forests, the joint property of Government and other persons.
81. Failure to perform service for which a share in produce of Government forest is enjoyed.
82. Recovery of money due to Government.
83. Lien on forest produce for such money.
84. Land required under this Act to be deemed to be needed for a public purpose under the Land Acquisition Act, 1894.
85. Recovery of penalties due under bond.
85-A. Saving for rights of Central Government.
86. *Repeals.*
THE SCHEDULE Enactments repealed.

(THE INDIAN FOREST ACT (XVI OF 1927).

[*21st September, 1927.*

An Act to consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest-produce.

WHEREAS it is expedient to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and extent. (Old Act, S. 1.)

1. (1) This Act may be called THE INDIAN FOREST ACT, 1927.

(2) It extends to Bombay, Bengal, Bihar and Orissa, the United Provinces, the Punjab, the Central Provinces and the North-West Frontier Province (except the District of Hazara).

(3) The Provincial Government of any other province may, by notification in the Official Gazette extend this Act to the whole or any specified part of the province. (*Cf.* Act XXXVIII of 1920, S. 2 and Sch. I.).

Interpretation clause, (old Act, S. 2.).

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "cattle" includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids;

(2) "forest-officer" means any person whom [1][* *] the Provincial Government or any officer empowered by [1][* *] the Provincial Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made threunder to be done by a forest-officer;

(3) "forest-offence" means an offence punishable under this Act or under any rule made thereunder;

(4) "forest-produce" includes—

(*a*) the following whether found in, or brought from, a forest or not that is to say:—(*Cf.* Act V of 1890, S. 2.)

LEG. REF.

SEC. 1.—For the forest law in force in the Hazara Districts, *see* the Hazara Forest Regulation, 1893 (VI of 1893), P. and N. W. Code.

For Madras Ajmere-Merwara, Burma, British Baluchistan and Assam there are special forest laws—*see* Madras Forest Act, 1882 (V of 1882), Madras Code; the Ajmere Forest Regulation, 1874 (VI of 1874), Ajmere Code; the Burma Forest Act, 1902 (IV of 1902); the British Baluchistan Forest Regulation, 1890 (V of 1890), Bal. Code; the Assam Forest Regulation, 1891 (VII of 1891), E. B. and A. Code.

In the Punjab, the Land Preservation (Chos.) Act, 1900 (Punjab Act II of 1900), is to be read with and taken as part of this Act, *see* P. and N.W. Code. For rules for the conservancy of forests and jungles in the hill district of the Punjab-territories, *see* appendix to *ibid*. These rules are also in force in the North-West Frontier Province, *see* S. 4 and second schedule to Reg. VII of 1901, *ibid*.

SEC. 2.—For notification appointing Forest Officers for the Santhal Parganas and empowering them to compound for offences mentioned in S. 67 within certain specified areas, see *Calcutta Gazette,* 1901, Pt. I, p. 28; in the North-West Frontier Province for certain specified forest for all purposes of the Act, see *Gazette of India,* 1904, Pt. II, p. 113; in the Punjab, for Rawalpindi Forest division for the purpose of carrying out the duties of Forest-officer, see *Punjab Gazette,* 1907, Pt. I, p. 32.

[1] Words 'the Governor-General in Council, or' omitted by A.O., 1937.

NOTES.

Sec. 1.—The Act does not oust jurisdiction of Civil Courts to decide whether certain land is forest land or waste land. 7 Bom.L.R. 496. This Act is one that curtails proprietary rights. *See* 55 P.L.R. 1901 (Cr.) (where the scope and nature of this Act is discussed).

INFRINGEMENT OF THE FOREST RULES.—not provided for in the rules should be tried under the Penal Code. 4 P.R. 1869 (Cr.). If a person is found with a gun and ammunition in a Reserved Forest it may be presumed until the contrary is shown that hunting was being engaged in. 1929 M.W.N. 808.

Sec. 2.—Forest-officer is a public servant. 10 B. 124. Forest Settlement-officer, whether a Civil Court, 17 Mad. 193; Karkones who issue process if Forest-officers, *see* 2 Bom.L.R. 675 (679). Forest produce—Stems of trees are such produce, 1 Weir 757, but not logs fastened to buildings. 9 M. 373.

timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds [2][,kuth] and myrabolams, and (*See* Act XV of 1911, S. 2.)

(*b*) the following when found in, brought from, a forest, that is to say,—

(*i*) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees,

(*ii*) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(*iii*) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and

(*iv*) peat, surface soil, rock; and minerals (including limestone, laterite, mineral oils and all products of mines or quarries);

[2][(4-A) "owner" includes a Court of Wards in respect of property under the superintendence or charge of such Court];

(5) "river" includes any stream, canal, creek or other channels, natural or artificial;

(6) "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not; and [*see* Act V of 1890, S. 2, cl. (2)].

(7) "tree" includes palms, bamboos, stumps brush-wood and canes. [*See* Act V of 1890, S. 2, cl. (1).]

CHAPTER II.

OF RESERVED FORESTS.

Power to reserve forests (Old Act, S. 3.)

3. The Provincial Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

Notification by Provincial Government. (Old Act S. 4.)

4. (1) Whenever it has been decided to constitute any land a reserved forest, the Provincial Government shall issue a notification in the Official Gazette—

(*a*) declaring that it has been decided to constitute such land a reserved forest;

(*b*) specifying, as nearly as possible, the situation and limits of such land; and

(*c*) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this Chapter.

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[2] Inserted by Act III of 1933.

NOTES.

Sec. 3.—As to application of provisions relating to reserved forests (1) to village-forests, *see* S. 27, last paragraph; (2) to forests and lands not the property of the Government, *see* Ss. 36, 38; (3) to forest waste lands or produce the joint property of the Government and other persons, *see* S. 79.

Sec. 4: SCOPE OF SECTION.—29 B. 480; power of Government to reserve forest—What is reserved forest. 29 B. 484; Jenmis can claim compensation for land notified as reserved forest. 7 M.L.J. 13. Absence of notification—Effect of. 1 Weir 759.

Explanation.—For the purpose of clause (*b*), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges, or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (*c*) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the Provincial Government from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act.

Bar of accrual of forest rights (old Act, S. 5).

5. After the issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or [1][on behalf of the Crown] or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Provincial Government in this behalf.

Proclamation by Forest Settlement-officer. (Old Act, S. 6 and S. 5 of Act V of 1890).

6. When a notification has been issued under section 4, the Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation—

(*a*) specifying, as nearly as possible, the situation and limits of the proposed forest;

(*b*) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(*c*) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section 4 or section 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

Inquiry by Forest Settlement-officer. (Old Act, S. 7.).

7. The Forest Settlement-officer shall take down in writing all statements made under section 6, and shall at some convenient place inquire into all claims duly preferred under that section, and the existence of any rights mentioned in section 4 or section 5 and not claimed under section 6 so far as the same may be ascertainable from the records of Government and the evidence of any persons likely to be acquainted with the same.

Powers of Forest Settlement-officer. (Old Act, S. 8.

8. For the purpose of such inquiry, the Forest Settlement-officer may exercise the following powers, that is to say:—

LEG. REF.

[1] Substituted for on behalf of 'Government' by A.O., 1937.

NOTES.

Sec. 5.—When a person cuts trees in a plot marked as waste number, the prosecution should lie not under the Forest Act, but under the Land Revenue Code of the rule framed thereunder. Rat. 873=Cr. Reg. 49 of 1896. *See also* 22 P.R. 1876 (Cr.).

Sec. 6 (c).—As to presumption from long possession and enjoyment and as to burden of proof in such cases, *see* 15 M. 315; 7 M.L.T. 241; 3 M.L.J. 231.

Sec. 8.—As to the powers of Forest Settlement-officer, *see* 14 M. 247. Notification closing forest for an indefinite period is not bad for indefiniteness, when it is not (*a*) power to enter, by himself or any officer authorised by him for the purpose upon any land, and to survey, demarcate and make a map of the same; and

(*b*) the powers of a Civil Court in the trial of suits.

Extinction of rights. (Old Act, S. 9.)

9 Rights in respect of which no claim has been preferred under section 6, and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless, before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not preferring such claim within the period fixed under section 6.

Treatment of claims relating to practice of shifting cultivation. (S. 5 of Act V of 1890).

10. (1) In the case of a claim relating to the practice of shifting cultivation, the Forest Settlement-officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the Provincial Government, together with his opinion as to whether the practice should be permitted or prohibited wholly or in part.

(2) On receipt of the statement and opinion, the Provincial Government may make an order permitting or prohibiting the practice wholly or in part.

(3) If such practice is permitted wholly or in part, the Forest Settlement-officer may arrange for its exercise—

(*a*) by altering the limits of the land under settlement so as to exclude land of sufficient extent, of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or

(*b*) by causing certain portions of the land under settlement to be separately demarcated, and giving permission to the claimants to practice shifting cultivation therein under such conditions as he may prescribe.

(4) All arrangements made under sub-section (3) shall be subject to the previous sanction of the Provincial Government.

(5) The practice of shifting cultivation shall in all cases be deemed a privilege subject to control, restriction and abolition by the Provincial Government.

Power to acquire land over which right is claimed. (Old Act, S. 10.).

11. (1) In the case of a claim to right in or over any land, other than a right-of-way or right-of-pasture, or a right to forest-produce or a water-course, the Forest Settlement-officer shall pass an order admitting or ejecting the same in whole or in part.

(2) If such claim is admitted in whole or in part, the Forest Settlement-officer shall either—

(*i*) exclude such land from the limits of the proposed forest; or

(*ii*) come to an agreement with the owner thereof for the surrender of his rights; or

(*iii*) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894.

(3) For the purpose of so acquiring such land—

NOTES.

known at that time, how long it may be necessary to close the forest. 19 P. R. 1880 (Cr.).

Sec. 11.—As to acquisition of land over which riparian rights are claimed, *see* 20 M. 279; as to claim on mortgage, *see* 21 B. 396. As to burden of proof on questions of title, *see* 3 M.L.J. 231; 15 M. 315; 7 M.L.T. 241; 1929 Nag. 190.

(*a*) the Forest Settlement-officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1894;

(*b*) the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under section 9 of the Act;

(*c*) the provisions of the preceding sections of that Act shall be deemed to have been complied with; and

(*d*) the collector, with the consent of the claimant, or the Court, with the consent of both parties, may award compensation in land, or partly in land, and partly in money.

Order on claims to rights to pasture or to forest-produce. (Old Act S. 11.).

12. In the case of a claim to rights of pasture or to forest-produce, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

Record to be made by Forest Settlement-officer. (Old Act S. 12.)

13. The Forest Settlement-officer, when passing any order under section 12, shall record, so far as may be practicable,—

(*a*) the name, father's name, caste, residence and occupation of the person claiming the right; and

(*b*) the designation, position and area of all fields or groups of fields (if any) and the designation and position of all buildings (if any) in respect of which the exercise of such rights is claimed.

Records where he admits claim. (Old Act S. 13.)

14. If the Forest Settlement-officer admits in whole or in part any claim under section 12, he shall also record the extent to which the claim is so admitted, specifying the number and description of the cattle which the claimant is from time to time entitled to graze in the forest, the season during which such pastue is pemitted, the quantity of timber and other forest-produce which he is from time to time authorised to take, or receive, and such other particulars as the case may require. He shall also record whether the timber or other forest-produce obtained by the exercise of the rights claimed may be sold or bartered.

Exercise of rights admitted. (Old Act, S. 14.)

15. (1) After making such record the Forest Settlement-officer shall, to the best of his ability, and having due regard to the maintenance of the reserved forest in respect of which the claim is made, pass such orders as will ensure the continued exercise of the right so admitted.

(2) For this purpose the Forest Settlement-officer may—

(*a*) set out some other forest-tract of sufficient extent, and in a locality reasonably convenient, for the purposes of such claimants, and record an order conferring upon them a right of pasture or to forest-produce (as the case may be) to the extent so admitted; or

(*b*) so alter the limits of the proposed forest as to exclude forest land of sufficient extent, and in a locality reasonably convenient, for the purposes of the claimants; or

(*c*) record an order, continuing to such claimants, a right of pasture or to forest-produce, as the case may be, to the extent so admitted, at such seasons within such portions of the proposed forest, and under such rules, as may be made in this behalf by the Provincial Government.

Commutation of rights. (Old Act, S. 15.)

16. In case the Forest Settlement-officer finds it impossible, having due regard to the maintenance of the reserved forest, to make such settlement under section 15 as shall ensure the continued exercise of the said rights to the extent so admitted, he shall, subject to such rules as the Provincial Government may make in this behalf, commute such rights, by the payment to such persons of a

sum of money in lieu thereof, or by the grant of land, or in such other manner as he thinks fit.

Appeal from order passed under S. 11, S. 12, S. 15 or S. 16. (Old Act, S. 16).

17. Any person who has made a claim under this Act, or any forest-officer or other person generally or specially empowered by the Provincial Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement-officer under section 11, section 12, section 15 or section 16, present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Collector, as the Provincial Government may, by notification in the Official Gazette, appoint to hear appeals from such orders:

Provided that the Provincial Government may establish a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the Provincial Government, and when the Forest Court has been so established, all such appeals shall be presented to it.

Appeal under S. 17. (Old Act, S. 17.)

18. (1) Every appeal under section 17 shall be made by petition in writing and may be delivered to the Forest Settlement-officer who shall forward it without delay to the authority competent to hear the same.

(2) If the appeal be to an officer appointed under section 17, it shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to land-revenue.

(3) If the appeal be to the Forest Court, the Court shall fix a day and a convenient place in the neighbourhood of the proposed forest for hearing the appeal, and shall give notice thereof to the parties, and shall hear such appeal accordingly.

(4) The order passed on the appeal by such officer or Court, or by the majority of the members of such Court, as the case may be, shall, subject only to revision by the Provincial Government, be final.

Pleaders. (Old Act, S. 18.)

19. The Provincial Government, or any person who has made a claim under this Act, may appoint any person to appear, plead and act on its or his behalf before the Forest Settlement-officer, or the appellate officer or Court, in the course of any inquiry or appeal under this Act.

Notification declaring forest reserved. (Old Act, S. 19.).

20. (1) When the following events have occurred, namely:—

(*a*) the period fixed under section 6 for preferring claims has elapsed, and all claims, if any, made under that section or section 9 have been disposed of by the Forest-Settlement-officer;

(*b*) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

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Sec. 17.—*See* 17 M. 193; power to excuse delay in filing appeal, *see* 10 M. 210.

Sec. 18 (4).—Where an appellate order rejecting the claim of a person to land included within a proposed forest has become final under S. 18 (4) of the Forest Act, the Civil Court has no power to restore that land or to grant compensation in respect thereto to him or to his successor-in-interest. 46 C.W.N. 347.

Sec. 18 and 21.—Contract to work Government forest—Partnership of contractor with third person—Not void. *See* 117 I.C. 298 (case-law discussed).

Sec. 20.—*See* 12 M. 226; removal of grass from Government land, when offence. 1 Weir 492. On the publication of a notification declaring a forest reserved under S. 20 of the Forest Act, all rights in respect of which no claim has been preferred under S. 6 and of the existence of which no knowledge has been acquired by inquiry under S. 7 become extinguished by virtue of the provisions of S. 9. 46 C. W. N. 347.

(*c*) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894, have become vested in the Government under section 16 of that Act, the Provincial Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

Publication of translation of such notification in the neighbourhood of forest (Old Act, S. 20.)

21. The Forest-officer shall, before the date fixed by such notification, cause a translation thereof into the local vernacular to be published in every town and village in the neighbourhood of the forest.

Power to revise arrangement made under S. 15 or S. 18. (Old Act, S. 21.)

22. The Provincial Government may, within five years from the publication of any notification under section 20, revise any arrangement made under section 15 or section 18, and may for this purpose rescind or modify any order made under section 15 or section 18 and direct that any one of the proceedings specified in section 15 be taken in lieu of any other of such proceedings, or that the rights admitted under section 12 be commuted under secion 16.

No right acquired over reserved forest, except as here provided. (Old Act, S. 22.)

23. No right of any description shall be acquired in or over a reserved forest except by succession or under a grant or contract in writing made by or on behalf of the [1][Crown] or some person in whom such right was vested when the notification under section 20 was issued.

Rights not to be alienated without sanction. (Old Act, S. 23.)

24. (1) Notwithstanding anything contained in section 23, no right continued under clause (*c*) of sub-section (2) of section 15 shall be alienated by way of grant, sale, lease, mortgage or otherwise, without the sanction of the Provincial Government:

Provided that, when any such right is appendant to any land or house, it may be sold or otherwise alienated with such land or house.

(2) No timber or other forest-produce obtained in exercise of any such right shall be sold or bartered except to such extent as may have been admitted in the order recorded under section 14.

25. The forest-officer may, with the previous sanction of the Provincial

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LEG. REF.

[1] Substituted for 'Government' by A.O., 1937.

SEC. 26.—For rules made under this clause for—

(1) Bombay, *see* Bom. R. and O.;

(2) Central Provinces, *see* C.P.R. and O.; and

(3) United Provinces, *see* p. 59 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894.

SEC. 26 (1).—For notification prohibiting the killing, injuring or capturing of any rhinoceros in reserved forests in the Jalpaiguri and Darjiling Districts, *see* Calcutta Gazette, 1899, Pt. I, p. 1368. For rules under this clause in conjunction with S. 75 (*d*) as to hunting, shooting, fishing, etc., in reserved forests in the United Provinces, *see* United Provinces Gazette, 1906, Pt. I, p. 651; *ibid*., for Central Provinces, *see* C. P. Gazette, 1907, Pt. I, p. 678.

NOTES.

Sec. 25.—S. 25 pre-supposes the existence of public rights of way before a forest is reserved and that such public rights are recognised; and the powers given to deal with them are exceptional powers hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. The alternatives referred to cannot be clogged with any restriction such as the imposition of a transit fee for cattle. 1938 Nag. 415.

Power to stop ways and water-courses in reserved forests. (Old Act. S. 24.)

Government or of any officer duly authorised by it in this behalf, stop any public or private way or water-course in a reserved forest, provided that a substitute for the way or water-course so stopped, which the Provincial Government deems to be reasonably convenient, already exists, or has been provided or constructed by the forest-officer in lieu thereof.

Acts prohibited in such forests. (Old Act, S. 25; Act V of 1890, S. 7.)

26. (1) Any person who—

(*a*) makes any fresh clearing prohibited by section 5, or

(*b*) sets fire to a reserved forest, or, in contravention of any rules made by the Provincial Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest;

or who, in a reserved forest—

(*c*) kindles, keeps or carries any fire except at such seasons as the forest-officer may notify in this behalf;

(*d*) trespasses or pasture cattle, or permits cattle to trespass;

(*e*) causes any damage by negligence in felling any tree of cutting or dragging any timber;

(*f*) fells, girdles, lops, taps or burns any tree or strips off the bark or leaves, from, or otherwise damages, the same;

(*g*) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce;

NOTES.

Sec. 26, Cl. (b): PUNJAB GOVERNMENT NOTIFICATIONS—"SETS FIRE TO"—MEANING OF.—A person sets fire to a thing if he puts a match to it or sets it on fire directly, and not if it catches fire as an indirect consequence of his act. The accused kindled a fire in his master's garden which spread to an unclassed forest, and then to a reserved forest. The accused should not be said to have set fire to either of the forests within the meaning of S. 25 (*b*). 30 P. R. (Cr.) 1916=17 Cr.L.J. 458=36 I.C. 138.

Cl. (c): POSSESSION OF FLINT OR STEEL. —The mere possession of a flint or steel within forest limits does not constitute an offence under S. 25 (*c*). 4 Bom. L. R. 935.

Cl. (d).—The trespass of a human being in a reserved forest is punishable under S. 25 (*d*). Rat. 602. *See also* 87 I.C. 918=26 Cr.L.J. 1030. The words of S. 25 (*d*) clearly apply only to the person who does any of the acts mentioned therein. 16 Cr.L.J. 485=29 I.C. 325=11 N.L.R. 76. A person's cattle were found grazing in the Government forest in charge of a boy. Where the person had not authorized either directly or indirectly the boy to graze the cattle in the forest, he could not be convicted. (11 N.L.R. 76, Ref.) 120 I.C. 414 (1)=1930 N. 64. The question whether the owner of cattle, whose animals trespass in a reserved forest is criminally liable for committing an offence under S. 25, depends upon the whole circumstances of each case. 16 P.R. 1909 (Cr.). In a great many cases the question will resolve itself into, 'did he or did he not take proper precautions to prevent such trespass,' and it does not depend upon the presence of the owner at the moment. 16 P. R. 1909 (Cr.). The levy of pound fines under Act I of 1871, S. 12, in respect of an offence of allowing cattle to trespass in a reserved forest is not a punishment, and does not, therefore, bar a prosecution, under S. 25 of the Forest Act. 19 P.R. 1885 (Cr.).

Berar grazing Rules do not enforce a liability on a master for the acts of his servants. 87 I.C. 918=26 Cr.L.J. 1030. *See also* 1938 Nag. 365=39 Cr.L.J. 700; 1926 N. 73. Cattle are instrumental in the theft of grass which they eat and in the damage to grass and young trees which they cause in grazing and such cattle used in committing an offence under S. 26 (*d*) of the Forest Act are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber. 39 Cr.L.J. 700=175 I.C. 795=1938 Nag. 365.

Sec. 26 Cl. (f).—A person felling a number of trees in a forest is guilty of as many offences under S. 25 (*f*) as the number of the trees felled by him. 19 Cr.L.J. 161=43 I.C. 577 (A). There is no provision, either in the Act or the rules framed there under, to award compensation for damages in respect of the protected forest. 8 Bom. L.R. 987=15 Cr.L.J. 9. In the absence of anything in a Special Act (like the Forest Act) to exclude the operation to the general criminal law, an intention on the part of the legislature to exclude it should not be inferred. Further, S. 66 negatives any such intention. Theft of wood from a Government forest to which the Forest Act had not been applied, is punishable under the Penal Code. 10 P.R. 1885 (Cr.) [22 P.R. 1876 (Cr.). Disapproved] (*h*) clears or breaks up any land for cultivation or any other purpose;

(*i*) in contravention of any rules made in this behalf by the Provincial Government hunts, shoots, fishes, poisons water or sets traps or snares; or

(*j*) in any area in which the Elephants' Preservation Act, 1879, is not in force, kills or catches elephants in contravention of any rules so made;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

(2) Nothing in this section shall be deemed to prohibit—

(*a*) any act done by permission in writing of the forest-officer, or under any rule made by the Provincial Government; or

(*b*) the exercise of any right continued under clause (*c*) of sub-section (2) of section 15, or created by grant or contract in writing made by or on behalf of [1][the Crown] under section 23.

LEG. REF.

[1] Substituted for 'Government' by A.O., 1937.

NOTES.

Cl. (h).—Where it is clear from evidence that the accused has been cultivating land alleged to be part of a Government forest for at least seven years and the probabilities are that his father had done the same before him he cannot be held to have cleared or broken up the land for cultivation or any other purpose and his conviction under S. 26 (*h*) cannot be sustained. 1929 N. 190. Where the charge against the accused is that he has made an encroachment on Government forest land, the onus is on the prosecution to establish that the land forms part of the Government forest. 1929 N. 190.

Cl. (i).—The word 'hunt' implies motion, a chase and a pursuit. Hence any person who is one of the party beating up game in a reserved forest in this fashion is a member of the hunt, and even though he himself may not be within the prohibited area he is guilty of the offence along with the rest of the hunt. 1935 N. 23. Hunting and shooting without a permit in a reserved forest is punishable under S. 25. 40 A. 38=15 A.L.J. 824=19 Cr.L.J. 10. Hunting and killing a tiger in a reserved forest even though it be for killing the tiger which killed the cattle of the accused, amounts to hunting. 42 B. 406=19 Cr. L.J. 610=20 Bom.L.R. 384. A conviction recorded under S. 25 (*i*), for shooting in a reserved forest in contravention of any rules which the Local Government from time to time prescribes, is illegal where no such rules have been passed by the Government Rat. 684=Cr. Rg. 50 of 1893. Accused who had license for a gun was going along the District Board road running through a reserve forest with the gun loaded. On this he was convicted under S. 26 (1) (*i*). *Held*, that from the mere fact that accused was carrying a loaded gun it did not follow that he was going with intention of shooting. *Held, further*, that what is made penal is not the intention to shoot but actual shooting itself and that unless accused was alleged to have been found shooting or hunting in the forest he could not be convicted. 145 I.C. 735=34 Cr.L.J. 1050=1933 A.L.J. 704=1933 A. 630.

MISCELLANEOUS CASES UNDER THE OLD ACT—CONVICTION UNDER THE ACT—ORDER FOR CONFISCATION.—An order for confiscation cannot be regarded as an order incidental to a conviction under the Act. The confiscation is by the terms of S. 54 declared to be a punishment, for it is in addition to any other punishment prescribed for the offence, the order for confiscation should be passed simultaneously with the punishment for the offence. 24 C. 450 (4 A. 417, R.). It is illegal to impose a fine where the Forest Act provides the penalty of confiscation. Col. Dig. Cr. 69 of 1877. Payment of rewards out of fines and confiscations is not a part of the sentence, but is a matter for the Executive Government to deal with in the exercise of the power vested in them by the rules framed under the Act. Rat. 950. These rules give the Government the power to pay one half of the proceeds of fines and confiscations by way of reward without any order of the convicting Court, but more than one half cannot, however, be paid unless the Magistrate so directs. Rat. 950.

FOREST OFFENCE — COURT-FEES—COURT-FEES ACT, SEC. 31.—Where persons convicted of an offence under the Forest Act, where each is sentenced to pay a fine of thirteen annas, or in default to suffer one day's simple imprisonment, and all of them were ordered to pay annas five as compensation for the loss of forest fuel or wood and Rs. 1-4-0 as Court-fees expenses under S. 31 of the Court-Fees Act, *held*, that the order as to payment of Court-fees was not a valid order. 10 P.R. 1885 (Cr.).

SUMMONS CASE—ACQUITTAL.—FURTHER ENQUIRY—REVISION.—A case under S. 25 is a "Summons case" and the Tahsildar, if he did not find the accused guilty, was bound to acquit him, and no order under S. 437, Cr.P. Code, directing further en-

(3) Whenever fire is caused wilfully or by gross negligence in a reserved forest the Provincial Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion thereof the exercise of all rights of pasture or to forest-produce shall be suspended for such period as it thinks fit.

Power to declare forest no longer reserved. (Old Act. S. 26 and Act XV of 1911, S. 3.)

27. (1) The Provincial Government may, [1][* *] by notification in the Official Gazette, direct that, from a date fixed by such notification, any forest or any portion thereof reserved under this Act shall cease to be a reserved forest.

(2) From the date so fixed, such forest or portion shall cease to be reserved; but the rights (if any) which have been extinguished therein shall not revive in consequence of such cessation.

CHAPTER III.

OF VILLAGE-FORESTS.

Formation of village forests. (Old Act, S. 27.)

28. (1) The Provincial Government may assign to any village-community the rights of Government to or over any land which has been constituted a reserved forest, and may cancel such assignment. All forest so assigned shall be called village forests.

(2) The Provincial Government may make rules for regulating the management of village forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the potection and improvement of such forest.

(3) All the provisions of this Act relating to reserved forest shall (so far as they are not inconsistent with the rules so made) apply to village-forests.

CHAPTER IV.

OF PROTECTED FORESTS.

Protected forests. (Old Act, S. 28.).

29. (1) The Provincial Government may, by notification in the Official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest, but which is the property of Government, or over which the Government has proprietary rights or to the whole or any part of the forest-produce of which the Government is entitled.

(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest".

(3) No such notification shall be made, unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the Provincial Government thinks

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LEG. REF.

[1] Words 'subject to the control of the Governor-General in Council' omitted by A. O., 1937.

NOTES.

quiry, could be passed. The order of the District Magistrate and conviction and sentence were set aside. 50 P.L.R. 1900 (Cr.)=19 P.R. 1900 (Cr.).

Secs. 29, 30 and 33.—*See* 7 Bom.L.R. 462; 45 A. 128=1924 A. 539. Where a notification regarding a reserved forest does not state the date from which it shall come into force, the notification is invalid, and consequently nothing on which to base an offence under S. 33. A Forest-officer is not entitled to arrest a person for the breach of S. 30 (*a*) and that his custody cannot be said to be lawful. 54 C. 296=28 Cr. L.J. 562=1927 C. 516.

sufficient. Every such record shall be presumed to be correct until the contrary is proved:

Provided that, if, in the case of any forest-land or waste-land, the Provincial Government thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the Provincial Government may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

Power to issue notification reserving trees, etc. (Old Act, S. 29.)

30. The Provincial Government may, by notification in the Official Gazette,—

(*a*) declare any trees or class of trees in a protected forest to be reserved from a date fixed by the notification;

(*b*) declare that any portion of such forest specified in the notification shall be closed for such term, not exceeding thirty years, as the Provincial Government thinks fit, and that the rights of private persons, if any, over such portion shall be suspended during such term, provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the rights suspended in the portion so closed; or

(*c*) prohibit, from a date fixed as aforesaid, the quarrying of stone, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest-produce in any such forest, and the breaking up or clearing for cultivation, for building, for heading cattle or for any other purpose, of any land in any such forest.

Publication of translation of such notification in neighbourhood. (Old Act, S. 30).

31. The Collector shall cause a translation into the local vernacular of every notification issued under section 30 to be affixed in a conspicuous place in every town and village in the neighbourhood of the forest comprised in the notification.

Power to make rules for protected forests. (Old Act, S. 31.)

32. The Provincial Government may make rules to regulate the following matters, namely:—

(*a*) the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce, from protected forests;

(*b*) the granting of licenses to the inhabitants of towns and villages in the vicinity of protected forests to take trees, timber or other forest produce for their own use, and the production and return of such licences by such persons;

(*c*) the granting of licences to persons felling or removing trees or timber or other forest-produce from such forests for the purposes of trade, and the poduction and return of such licences by such persons;

(*d*) the payments, if any, to be made by the persons mentioned in clauses (*b*) and (*c*) for permission to cut such trees, or to collect and remove such timber or other forest-produce;

(*e*) the other payments, if any, to be made by them in respect of such trees, timber and produce, and the places where such payment shall be made;

(*f*) the examination of forest-produce passing out of such forest;

LEG. REF.

Sec. 32—For *rules under this section* for—

(1) Bombay, *see* Bom.R and O.

(2) for protected Forests of Naini Tal, Ranikhet and Lallipur, *see* p. 62 of the North Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894;

(3) for rules made by the Government of Bengal under this section and S. 41 for the protected forests in the Sonthal Parganas, *see* Calcutta Gazette, 1901, Pt. I, p. 571; in the Sundarbans, *see* Calcutta Gazette, 1906, Pt. I, p. 1973; in the Angul Protected Forests, *see* Calcutta Gazette, 1901, Pt. I, p. 879;

(4) or protected forests in the Punjab, *see* Punjab Gazette, 1904, Pt. I, p. 76.

(*g*) the clearing and breaking up of land for cultivation or other purposes in such forests;

(*h*) the protection from fire of timber lying in such forests and of trees reserved under section 30;

(*i*) the cutting of grass and pasturing of cattle in such forests;

(*j*) hunting, shooting, fishing, poisoning water and setting traps or snares in such forests, and the killing or catching of elephants in such forests in areas in which the the Elephants' Preservation Act, 1879, is not in force;

(*k*) the protection and management of any portion of a forest closed under section 30; and

(*l*) the exercise of rights referred to in section 29.

Penalties for acts in contravention of notification under S. 30 or of rules under S. 32. (Old Act S. 32.

33. (1) Any person who commits any of the following offences, namely:—

(*a*) fells, girdles, lops, taps or burns any tree reserved under section 30, or strips off the bark or leaves from, or otherwise damages, any such tree;

(*b*) contrary to any prohibition under section 30, quarries any stone, or burns any lime or charcoal, or collects, subjects to any manufacturing process, or removes any forest-produce;

(*c*) contrary to any prohibition under section 30, breaks up or clears for cultivation or any other purpose any land in any protected forest;

(*d*) sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any reserved under section 30, whether standing, fallen or felled, or to any closed portion of such forest;

(*e*) leaves burning any fire kindled by him in the vicinity of any such tree or closed portion;

(*f*) fells any tree or drags any timber so as to damage any tree reserved as aforesaid;

(*g*) permits cattle to damage any such tree;

(*h*) infringes any rule made under section 32;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(2) Whenever fire is caused wilfully or by gross negligence in a protected forest, the Provincial Government may, notwithstanding that any penalty has been inflicted under this section, direct that in such forest or any portion thereof the exercise of any right of pasture or to forest-produce shall be suspended for such period as it thinks fit. (*Cf.* Act V of 1901, S. 2.)

Nothing in this Chapter to prohibit acts done in certain cases. (Old Act, S. 33; *cf.* also Act V of 1901, S. 3.)

34. Nothing in this Chapter shall be deemed to prohibit any act done with the permission in writing of the Forest-officer, or in accordance with rules made under section 32, or, except as regards any portion of a forest closed under section 30, or as regards any rights the exercise of which has been suspended under section 33, in the exercise of any right recorded under section 29.

NOTES.

Sec. 32, Cl. (g).—Mere 'clearing' does not amount to 'breaking' of ground where the notification issued under the Forest Act prohibited 'breaking' of ground in a protected forest, and where the evidence only showed that the accused had cleared the ground. *Held,* that no offence was committed. 49 A. 291=28 Cr.L.J. 151=1927 A. 121. *See also* 102 I.C. 559=28 Cr.L.J. 591. On this section, *see* 11 A.L.J. 340=20 I.C. 408.

Sec. 33, Cl. (c).—Where breaking of ground only is forbidden by notification under the Forest Act, no offence is committed when there has been only 'clearing'. 102 I.C. 559=28 Cr.L.J. 591; 49 A. 291 =99 I.C. 407=1927 A. 121.

CHAPTER V.

OF THE CONTROL OVER FORESTS AND LANDS NOT BEING THE PROPERTY OF GOVERNMENT.

Protection of forest for special purposes. (Old Act, S. 35.)

35. (1) The Provincial Government may, by notification in the Official Gazette, regulate or prohibit in any forest or waste-land—

(*a*) the breaking up or clearing of land for cultivation;

(*b*) the pasturing of cattle; or

(*c*) the firing or clearing of the vegetation;

when such regulation or prohibition appears necessary for any of the following purposes:—

(i) for protection against storms, winds, rolling stones; floods and avalanches;

(ii) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of land slips or of the formation of ravines and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel;

(iii) for the maintenance of a water-supply in springs, rivers and tanks;

(iv) for the protection of roads, bridges, railways and other lines of communication;

(v) for the preservation of the public health.

(2) The Provincial Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the Provincial Government.

Power to assume managecent of forests. (Old Act, S. 36.)

36. (1) In case of neglect of, or wilful disobedience to, any regulation or prohibition under section 35, or if the purposes of any work to be constructed under that section so require, the Provincial Government may, after notice in writing to the owner of such forest or land and after considering his objections, if any, place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to reserved forests shall apply to such forest or land.

(2) The net profits, if any, arising from the management of such forest or land shall be paid to the said owner.

Expropriation of forest in certain cases. (Old Act, S. 37.)

37. (1) In any case under this Chapter in which the Provincial Government considers that, in lieu of placing the forest or land under the control of a Forest-officer, the same should be acquired for public purpose, the Provincial Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894.

(2) The owner of any forest or land comprised in any notification under section 35 may, at any time not less than three or more than twelve years from the date thereof, require that such forest or land shall be acquired for public purposes, and the Provincial Government shall acquire such forest or land accordingly.

Protection of forests at request of owners. (Old Act, S. 38.)

38. (1) The owner of any land or, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector their desire—

(*a*) that such land be managed on their behalf by the Forest-officer as a reserved or a protected forest on such terms as may be mutually agreed upon; or

(*b*) that all or any of the provisions of this Act be applied to such land.

(2) In either case, the Provincial Government may, by notification in the Official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants.

CHAPTER VI.

OF THE DUTY ON TIMBER AND OTHER FOREST-PRODUCE.

Power to impose duty on timber and other forest produce. Old Act, S. 39; *cf.* Act V of 1890, S. 8 (2).

39. (1) The [1][Central Government] may levy a duty in such manner, at such places and at such rates as it may declare by notification in the Official Gazette on all timber or other forest-produce—

(*a*) which is produced in British India, and in respect of which the [2][Crown] has any right;

(*b*) which is brought from any place outside British India:

[3][* * * * * *]

(2) In every case in which such duty is directed to be levied *ad valorem* the [1][Central Government] may fix by like notification the value on which such duty shall be assessed.

(3) All duties on timber or other forest-produce which, at the time when this Act comes into force in any territory, are levied therein under the authority of the Provincial Government, shall be deemed to be and to have been duly levied under the provisions of this Act.

[4][Until provision to the contrary is made by the Central Legislature any Provincial Government which was, immediately before the commencement of Part III of the Government of India Act, 1935, levying a duty on any timber or other forest-produce produced in that Province may continue to levy that duty on such timber or forest-produce;

Provided that nothing in this sub-section authorizes the levy of any duty which as between timber or other forest-produce of the Province and similar produce of the locality outside the Province, discriminates in favour of the former, or which, in the case of timber or other forest-produce of localities outside the Province, discriminates between timber or other forest-produce of one locality and similar timber or other forest-produce of another locality.]

Limit not to apply to purchase-money or royalty. (Old Act, S. 40.)

40. Nothing in this Chapter shall be deemed to limit the amount, if any chargeable as purchase-money or royalty on any timber or other forest-produce, although the same is levied on such timber or produce while in transit, in the same manner as duty is levied.

CHAPTER VII.

OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

41. (1) The control of all rivers and their banks

LEG. REF.

[1] Substituted for 'Local Government' by A.O., 1937.

[1] Substituted for 'Government' by A.O., 1937.

[3] Proviso repealed by A.O., 1937.

[4] Sub-sec. (4) of S. 39 inserted by *ibid*.

NOTES.

Secs. 39-41.—*See* 76 I.C. 104=1925 L. 225.

Sec. 41.—*See* 21 Cr.L.J. 659=57 I.C. 816 (C.). The words "Timber" and "Forest produce" in this section are used in

Power to make rules to regulate transit of forest-produce. (Old Act, S. 41; *see also* Act V of 1890, S. 8. Cls. 3 and 4.)

as regards the floating of timber, as well as the control of all timber and other forest-produce in transit by land or water, is vested in the Provincial Government, and it may make rules to regulate the transit of all timber and other forest-produce.

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(*a*) prescribe the routes by which alone timber or other forest-produce may be imported, exported or moved into, from or within [1][the Province];

(*b*) prohibit the import or export or moving of such timber or other produce without a pass from an officer duly authorised to issue the same, or otherwise than in accordance with the conditions of such pass;

(*c*) provide for the issue, production and return of such passes and for the payment of fees therefor;

(*d*) provide for the stoppage, reporting, examination and marking of timber or other forest-produce in transit, in respect of which there is reason to believe that any money is payable to [2][the Crown] on account of the price thereof, or on account of any duty, fee, royalty or charge due thereon, or to which it is desirable for the purposes of this Act to affix a mark;

(*e*) provide for the establishment and regulation of depots to which such timber or other produce shall be taken by those in charge of it for examination, or for the payment of such money, or in order that such marks may be affixed to it; and the conditions under which such timber or other produce shall be brought to, stored at and removed from such depots;

(*f*) prohibit the closing up or obstructing of the channel or banks of any river used for the transit of timber or other forest-produce, and the following of grass, brushwood, branches or leaves into any such river or any act which may cause such river to be closed or obstructed;

(*g*) provide for the prevention or removal of any obstruction of the channel or banks of any such river, and for recovering the cost of such prevention or removal from the person whose acts or negligence necessitated the same;

(*h*) prohibit absolutely or subject to conditions, within specified local limits, the establishment of saw-pits, the converting, cutting, burning, concealing or making of timber, the altering or effacing of any marks on the same, or the possession or carrying of marking hammers or other implements used for marking timber;

(*i*) regulate the use of property marks for timber, and the registration of such marks; prescribe the time for which such registration shall hold good; limit the number of such marks that may be registered by any one person, and provide for the levy of fees for such registration.

(3) The Provincial Government may direct that any rule made under this section shall not apply to any specified class of timber or other forest-produce or to any specified local area.

LEG. REF.

[1] Substituted for 'British India, by A.O., 1937.

[2] Substituted for 'Government' by A.O., 1937.

NOTES.

their widest sense. *See* 106 I.C. 790=1928 L. 80.

RULE FRAMED BY GOVERNMENT OF BOMBAY UNDER S. 41 (*b*)—ULTRA VIRES.—RULE 4 of the rules for Sind framed by the Government of Bombay under S. 41 (*b*) of the Act, prohibiting the moving of timber from private land without a certificate from the holder or manager of such land is *ultra vires;* consequently a conviction for a breach of that rule under S. 42 of the Act cannot stand. 17 Cr.L.J. 364=35 I.C. 668=10 S.L.R. 9.

COMPENSATION IN ADDITION TO IMPOSITION OF FINE.—Where a person is convicted of an offence under Rr. 21, 26, framed under S. 41, compensation cannot be awarded in addition to the imposition of fine. 5 Bom. L.R. 126. On this section, *see* 1925 L. 225; 1924 B. 489=84 I.C. 250=26 Cr.L.J. 250.

Powers of Central Government as to movements of timber across customs frontiers.

[2][41-A. Notwithsanding anything in section 41, the Central Government may make rules to prescribe the route by which alone timber or other forest-produce may be imported, exported or moved into or from British India across any customs frontier as defined by the Central Government, and any rules made under section 41 shall have effect subject to the rules made under this section.]

Penalty for breach of rules made under section 41. (Old Act, S. 42).

42. (1) The Provincial Government may by such rules prescribe as penalties for the contravention thereof imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

(2) Such rules may provide that penalties which are double of those mentioned in sub-section (1) may be inflicted in cases where the offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority, or where the offender has been previously convicted of a like offence.

Crown and Forest-officers not liable for damage to forest-produce at depot. (Old Act, S. 43.)

43. The [2][Crown] shall not be responsible for any loss or damage which may occur in respect of any timber or other forest-produce while at a depot established under a rule made under section 41, or while detained elsewhere, for the purposes of this Act; and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently

All persons bound to aid in case of accident at depot. (Old Act, S. 44.).

44. In case of any accident or emergency involving danger to any property at any such depot, every person employed at such depot, whether by the [2][Crown] or by any private person, shall render assistance to any Forest-officer or Police-officer demanding his aid in averting such danger or securing such property from damage or loss.

CHAPTER VIII.

OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

Certain kinds of timber to be deemed property of Government until title thereto proved, and may be collected accordingly. (Old Act, S. 45.)

45. (1) All timber found adrift, beached, stranded or sunk;

all wood or timber bearing marks which have not been registered in accordance with the rules made under section 41, or on which the marks have been obliterated, altered or defaced by fire or otherwise; and

in such areas as the Provincial Government directs, all unmarked wood and timber;

shall be deemed to be the property of Government, unless and until any person establishes his right and title thereto, as provided in this Chapter.

(2) Such timber may be collected by any Forest-officer or other person entitled to collect the same by virtue of any rule made under section 51, and may be brought to any depot which the Forest-officer may notify as a depot for the reception of drift timber.

(3) The Provincial Government may, by notification in the Official Gazette, exempt any class of timber from the provisions of this section.

LEG. REF.

[1] *See* 41-A inserted by A.O., 1937.

[2] Substituted for 'Government' by A.O.,

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Sec. 45.—13 P.R. 1883 (Cr.).

Notice to claimants of drift-timber. (Old Act, S. 46.).

46. Public notice shall from time to time be given by the Forest-Officer of timber collected under section 45 Such notice shall contain a description of the timber, and shall require any person claiming the same to present to such officer, within a period not less than two months from the date of such notice, a written statement of such claim.

Procedure on claim preferred to such timber. (Old Act, S. 47.)

47. (1) When any such statement is presented as aforesaid, the Forest-officer may, after making such inquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to the claimant.

(2) If such timber is claimed by more than one person, the Forest-officer may either deliver the same to any of such persons whom he deems entitled thereto, or may refer the claimants to the Civil Courts, and retain the timber pending the receipt of an order from any such Court for its disposal.

(3) Any person whose claim has been rejected under this section may, within three months from the date of such rejection, institute a suit to recover possession of the timber claimed by him: but no person shall recover any compensation or costs against the [1][Crown], or against any Forest-officer, on account of such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section.

(4) No such timber shall be subject to process of any Civil, Criminal or Revenue Court until it has been delivered, or a suit has been brought, as provided in this section.

Disposal of unclaimed timber. (Old Act, S. 48 and Act V of 1890, S. 10).

48. If no such statement is presented as aforesaid, or if the claimant omits to prefer his claim in the manner and within the period fixed by the notice issued under section 46, or on such claim having been so preferred by him and having been rejected, omits to institute a suit to recover possession of such timber within the further period fixed by section 47, the ownership of such timber shall vest in the Government, or, when such timber has been delivered to another person under section 47, in such other person free from all encumbrances not created by him.

Crown and its officers not liable for damage to such timber. (Old Act, S. 49.)

49. The [1][Crown] shall not be responsible for any loss or damage which may occur in respect of any timber collected under section 45, and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

Payments to be made by claimant before timber is delivered to him. (Old Act, S. 50.).

50. No person shall be entitled to recover possession of any timber collected or delivered as aforesaid until he has paid to the Forest-officer or other person entitled to receive it such sum on account thereof as may be due under any rule made under section 51.

Power to make rules and prescribe penalties. (Old Act, S. 51.)

51. (1) The Provincial Government may make rules to regulate the following matters, namely:—

LEG. REF.

[1] Substituted for 'Government' by A.O. 1937.

NOTES.

Sec. 51.—A warrant drawn up in the name of a Forester can be validly endorsed by him to a Forest Watcher. Per *Curiam*.—In order to justify the action of a Police or Forest-officer in arresting without warrant a person suspected of a forest offence he must either have refused to give his name or must have given a false name and residence or there must have been reason to believe that he would abscond. In the ab-

(a) the salving, collection and disposal of all timber mentioned in section 45;

(b) the use and registration of boats used in salving and collecting timber;

(c) the amounts to be paid for salving, collecting, moving, storing or disposing of such timber; and

(d) the use and registration of hammers and other instruments to be used for marking such timber.

(2) The Provincial Government may prescribe, as penalties for the contravention of any rules made under this section, imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

CHAPTER IX.

PENALTIES AND PROCEDURE.

Seizure of property liable to confiscation. (Old Act, S. 52.)

52. (1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-Officer or Police-officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

Power to release property seized under S. 52 (Act I of 1918, S. 3.)

53. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose subordinate, has seized any tools, boats, carts or cattle under section 52, may release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made.

Procedure thereupon. (Old Act, S. 53.)

54. Upon the receipt of any such report, the Magistrate shall, with all convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

55. (1) All timber of forest-produce which is not the property of Govern-

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NOTES.

sence of any of these conditions, no Police-officer or Forest-officer could lawfully arrest a person without a warrant. 1928 M.W.N. 310.

Sec. 52: SUB-ASSISTANT CONSERVATOR OF FOREST—SEIZURE AND DETENTION OF TIMBER—WANT OF VALID PASS.—Where a Sub-Assistant Conservator of Forest seized timber under the suspicion that it was property stolen from the Government forests, *held,* that he could justify the seizure on the ground of the commission of a forest offence arising from the want of a valid pass. 15 B. 229. According to S. 52, a Forest-officer cannot justify the detention of goods on the ground of an offence against the forest laws, where he had not taken the course which that section prescribes of taking the matter before a Magistrate. 15 B. 229. Under S. 52 the forest produce alone can be seized in relation to which a forest offence is believed to have been committed, and no forest offence can be said to have been committed in relation to any forest produce unless it is definitely established that the produce belonged to Government. 41 P.L.R. 423=1939 Lah. 469.

Sec. 55.—*N.B. See also* notes under S. 26 and S. 33.

SCOPE AND OBJECT.—The object of the legislature in enacting S. 55 is to make the owner liable to a certain extent for the acts of his servant, civilly, not criminally. In

Forest-produce, tools, etc., when liable to confiscation.

ment and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest-offence, shall be liable to confiscation.

(2) Such confiscation may be in addition to any other punishment prescribed for such offence.

Disposal, on conclusion of trial for forest-offence, of produce in respect of which it was committed. (Old Act, S. 55.)

56. When the trial of any forest-offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest-officer, and, in any other case, may be disposed of in such manner as the Court may direct.

Procedure when offender not known, or cannot be found, (Old Act, S. 56 and Act V of 1890, S. 11.)

57. When the offender is not known or cannot be found, the Magistrate may, if he finds that an offence has been committed, order the property in respect of which the offence has been committed to be confiscated and taken charge of by the Forest-officer, or to be made over to the person whom the Magistrate deems to be entitled to the same:

Provided that no such order shall be made until the expiration of one month from the date of seizing such property, or without hearing the person, if any, claiming any right thereto, and the evidence, if any, which he may produce in support of his claim.

NOTES.

the case of cattle trespassing in Government forest unless duly licensed, the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forest, unless he permits the cattle so to graze by some overt acts or by some negligent omission. Where a large herd of cattle is entrusted to a youth and two children, in the vicinity of a closed forest, it might be held to amount to such negligence as to suggest connivance at a breach of the law. 175 I.C. 795=1938 Nag. 365.

CONFISCATION OF FOREST-PRODUCE, ETC., THE PROPERTY OF GOVERNMENT.—No confiscation order is necessary or can be made, in respect of forest-produce, which is the property of Government, and regarding which a forest-offence has been committed. All that need be done is, to direct that it should be taken by some Forest-officer. 4 A. 417; Rat. 361. Cattle are instrumental in the theft of grass which they eat and in the damage to grass and young trees which they cause in grazing and such cattle used in committing an offence under S. 26 (*d*) of the Act are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber. 175 I.C. 795=1938 Nag. 365.

POWER TO CONFISCATE.—It is only in respect of forest-produce with regard to which an offence has been committed, that power to direct confiscation is given by law. Such an order, regarding forest-produce not belonging to Government, can only be made at the time when the offender is convicted. 4 A. 417 followed in 27 C. 450.

REWARD — FOREST-PRODUCE. — Since there can be no legal confiscation of Government property, a reward cannot be paid out of such property. Rat. 620.

Sec. 56.—*See also* notes under S. 33.

DISPOSAL OF PROPERTY.—Under S. 55, the property, regarding which an offence is committed, should be awarded to Government. 5 Bom.L.R. 124.

GOVERNMENT FOREST-PRODUCE, OFFENCE RELATING TO—PROPER ORDER.—When the forest-produce, in respect of which an offence is committed, is found to be the property of Government the only order which the Magistrate can legally make regarding it, under S. 56 is that it should be taken charge of by a Forest-officer. An order for its sale and the payment of a reward to the informer from its proceeds is therefore illegal. Rat. 361; 4 A. 417; Rat. 620.

Sec. 57: FORFEITURE FOR FOREST-OFFENCE WHEN A GOOD TITLE HAS VESTED IN A THIRD PERSON.—Under the orders issued by the Collector of Kandesh, certain Bhils entered the forest, brought from it teak logs under the customary passes, and sold them in open market to applicants who purchased in good faith. The Government sought to forfeit them on the ground that a forest-offence had been committed in respect of them, inasmuch as the permission under which the Bhils acted, only allowed them to cut deadwood and the logs did not fall under the description. *Held,* ordering the logs to be restored to the custody of purchasers, that it was clear from the terms of S. 57 that a forfeiture was not a consequence of a forest-offence under the conditions stated in that section, where a good title has vested in a third person. 2 Bom.L.R. 675.

Procedure as to perishable property seized under S. 52. (Old Act, S. 57.)

58. The Magistrate may, notwithstanding anything hereinbefore contained, direct the sale of any property seized under section 52 and subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold.

Appeal from orders under S. 55, S. 56 or S. 57. (Old Act, S. 58.)

59. The officer who made the seizure under section 52, or any of his official superiors, or any person claiming to be interested in the property so seized, may, within one month from the date of any order passed under section 55, section 56 or section 57, appeal therefrom to the Court to which orders made by such Magistrate are ordinarily appealable, and the order passed on such appeal shall be final.

Property when to vest in Government. (Old Act, S. 59.)

60. When an order for the confiscation of any property has been passed under section 55 or section 57, as the case may be and the period limited by section 59 for an appeal from such order has elapsed, and no such appeal has been preferred, or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the Government free from all incumbrances.

Saving of power to release property seized. (Old Act, S. 60.)

61. Nothing hereinbefore contained shall be deemed to prevent any officer empowered in this behalf by the Provincial Government from directing at any time the immediate release of any property seized under section 52.

Punishment for wrongful seizure. (Old Act, S. 61.)

62. Any forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on pretence of seizing property liable to confiscation under this Act shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary marks. (Old Act, S. 62.)

63. Whoever, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code—

(*a*) knowingly counterfeits upon any timber or standing tree a mark used by Forest-officers to indicate that such timber or tree is the property of the Government or of some person, or that it may lawfully be cut or removed by some person; or

(*b*) alters, defaces or obliterates any such mark placed on a tree or on timber by or under the authority of a Forest-officer; or

(*c*) alters, moves, destroys or defaces any boundary-mark of any forest or waste-land to which the provisions of this Act are applied,

shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

NOTES.

Sec. 59: REVISION BY HIGH COURT OF AN ORDER OF A SUBORDINATE TRIBUNAL.—The terms of S. 59 do not exclude the ordinary revisional powers of the High Court over a subordinate tribunal in the exercise of its criminal jurisdiction, where there had been judicial proceedings. 4 A. 417. Under S. 59 even a third person who was not a party to the proceedings in the original Court and whose claim for relief from confiscation was not adjudicated upon is entitled to prefer an appeal. The phrase "any person claiming to be interested in the property so seized" in S. 59 cannot be construed as limited to the case contemplated by S. 57. And, the words "so seized" refer to the seizure under S. 52. 34 C.W.N. 956= 1930 C. 577.

Power to arrest without warrant, (Old Act, S. 63; Act I of 1918, S. 4 and Act V of 1890, S. 12.)

64. (1) Any Forest-officer or Police-officer may, without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest-offence punishable with imprisonment for one month or upwards.

(2) Every officer making an arrest under this section shall, without unnecessary delay and subject to the provisions of this Act as to release on bond, take or send the person arrested before the Magistrate having jurisdiction in the case, or to the officer in charge of the nearest police station.

(3) Nothing in this section shall be deemed to authorise such arrest for any act which is an offence under Chapter IV unless such act has been prohibited under clause (*c*) of section 30.

Power to release on a bond a person arrested. (Act I of 1918, S. 5.)

65. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose subordinate, has arrested any person under the provisions of section 64, may release such person on his executing a bond to appear, if and when so required, before the Magistrate having jurisdiction in the case, or before the officer in charge of the nearest police station.

Power to prevent commission of offence. (Old Act, S. 64.)

66. Every Forest-officer and Police-officer shall prevent, and may interfere for the purpose of preventing, the commission of any forest-offence.

Power to try offences summarily. (Old Act, S. 65.)

67. The District Magistrate or any Magistrate of the first class specially empowered in this behalf by the Provincial Government may try summarily, under the Code of Criminal Procedure, 1898, any forest-offence punishable with imprisonment for a term not exceeding six months, or fine not exceeding five hundred rupees, or both.

Power to compound offences. (Act V of 1890, S. 13.)

68. (1) The Provincial Government may, by notification in the Official Gazette, empower a Forest-Officer—

(*a*) to accept from any person against whom a reasonable suspicion exists that he has committed any forest-offence, other than an offence specified in section 62 or section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(*b*) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A Forest-officer shall not be empowered under this section unless he is a Forest-officer of a rank not inferior to that of a Ranger and is in receipt of a monthly salary amounting to at least one hundred rupees, and the sum of money accepted as compensation under clause (*a*) of sub-section (1) shall in no case exceed the sum of fifty rupees.

Presumption that forest produce belongs to Government. (Old Act, S. 68.)

69. When in any proceedings taken under this Act, or in consequence of anything done under this Act, a question arises as to whether any forest produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved.

NOTES.

Sec. 68.—*See* Rat. 591.

CHAPTER X.

CATTLE TRESPASS.

Cattle Trespass Act, 1871 to apply. (Old Act, S. 69.)

70. Cattle trespassing in a reserved forest or in any portion of a protected forest which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of section 11 of the Cattle Trespass Act, 1871, and may be seized and impounded as such by any Forest-officer or Police-officer.

Power to alter fines fixed under that Act. (Old Act, S. 70.)

71. The Provincial Government may, by notification in the Official Gazette, direct that, in lieu of the fines fixed under section 12 of the Cattle Trespass Act, 1871, there shall be levied for each head of cattle impounded under section 70 of this Act such fines as it thinks fit, but not exceeding the following, that is to say:

For each elephant ..	**ten rupees.**
For each buffalo or camel ..	**two rupees.**
For each horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer ..	**one rupee.**
For each calf, ass, pig, ram, ewe, sheep, lamb, goat or kid ..	**eight annas.**

CHAPTER XI.

OF FOREST-OFFICES.

Provincial Government may invest Forest-officers with certain powers. (Old Act, S. 71.)

72. (1) The Provincial Government may invest any Forest officer with all or any of the following powers, that is to say:—

(*a*) power to enter upon any land and to survey, demarcate and make a map of the same;

(*b*) the powers of a Civil Court to compel the attendance of witnesses and the production of documents and material objects;

(*c*) power to issue a search-warrant under the Code of Criminal Procedure, 1898; and

(*d*) power to hold an inquiry into forest-offences, and, in the course of such inquiry, to receive and record evidence.

(2) Any evidence recorded under clause (*d*) of sub-section (1) shall be admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.

Forest-officers deemed public servants. (Old Act, S. 72.)

73. All Forest-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Indemnity for acts done in good faith. (Old Act, S. 73.)

74. No suit shall lie against any public servant for anything done by him in good faith under this Act.

Forest-officers not to trade. (Old Act, S. 74.)

75. Except with the permission in writing of the Provincial Government, no Forest-officer shall, as principal or agent, trade in timber or other forest-produce, or be or become interested in any lease of any forest or in any contract for working any forest, whether in or outside British India.

NOTES.

Sec. 70.—Liability for cattle straying in reserved forest. 22 B. 933.

CHAPTER XII.

SUBSIDIARY RULES.

Additional powers to make rules. (Old Act, S. 75.)

76. The Provincial Government may make rules[1]—

(*a*) to prescribe and limit the powers and duties of any Forest-officer under this Act;

(*b*) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscation under this Act;

(*c*) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(*d*) generally, to carry out the provisions of this Act.

Penalties for breach of rules. (Old Act, S. 76.)

77. Any person contravening any rule under this Act, for the contravention of which no special penalty is provided, shall be punishable with imprisonment for a term which may extend to one month, or fine which may extend to five hundred rupees, or both.

LEG. REF.

[1] For rules made under this section for—

(1) Bombay, *see* Bom. R. and O.;

(2) Central Provinces, *see* C.P.R. and O. and Central Provinces Gazette, 1900, Pt. I, p. 214;

(3) United Provinces, *see* pp. 68 to 70 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894. *See also* North-Western Provinces and Oudh Gazette, 1899, Pt. I, p. 494; *ibid.*, 1900 Pt. I, p. 491; U. P. Gazette, 1907, Pt. I, p. 189.

(4) Punjab, *see* Punjab Gazette, 1899, Pt. I, p. 748.

For notification declaring that certain officers shall exercise the powers of Forest-officers under certain sections, *see* Calcutta Gazette, 1901, Pt. I, p. 28.

For rules made by the Government of Bengal, *see* Calcutta Gazette, 1906, Pt. I, p. 1094.

For rules under this clause as to measurement and registration of boats in the Sundarban Division, *see* Calcutta Gazette, 1906, Pt. I, p. 1657.

See also notes under S. 26.

NOTES.

Sec. 76.—Interpretation of section—Excise law—Confiscation in the owner's absence. *See* 12 C.W.N. 139. Any rule made by the Provincial Government under S. 76 which deals with the disposal of trees not belonging to Government will be *ultra vires*. 42 P.L.R. 423=1939 Lah. 469.

RULES FRAMED UNDER THE ACT BY LOCAL GOVERNMENT.—When the Local Government has framed rules under the Forest Act prohibiting hunting and shooting in reserved forest during such periods and in such portions as the conservator may appoint, the conservator, in notifying periods and localities left unascertained by the Local Government cannot be said to be exercising the authority delegated to the Local Government by the Act. 19 P.R. 1880 (Cr.).

PASS—CONTRACTOR—AUTHORITY.—Of the rules framed under the Forest Act, R. 13, prohibits the removal of forest-produce beyond certain limits without a pass from the Conservator or some person duly authorised in that behalf under R. 13, *held,* that a contractor under the Forest Department to whom the Forest-officer has given a pass book containing passes bearing the office seal with an endorsement that he might thereby remove timber was sufficiently authorised under R. 13 to issue passes. Rat. 424.

OFFENCE UNDER THE SECTION, WHAT CONSTITUTES.—The offence under S. 75 of the Forest Act is only committed under the express terms of the Act and rules, when the trees cut are the property of Government. The Court, before convicting, is bound to satisfy itself of Government proprietary rights in the usual modes and by means of the usual materials recognised in Courts. The declared opinion of the executive Government merely as such can have no more weight with the Court than that of the humblest of Her Majesty's subjects. 18 B. 670 (Rat. 828, Foll.). Rules made by Bombay Government prohibiting a person who has made a tender from withdrawing it, valid. *See* 49 B. 759=1925 B. 485.

Sec. 77.—*See* 18 B. 670 cited under S. 75 and *see also* notes under S. 75 and S. 26, *supra*.

RULES FRAMED UNDER THE ACT—MISQUOTING OF THE SECTION—APPEAL.—A misquoting of the section of the Act under which a rule otherwise valid has been framed, does not render the rule void. 19 P.R. 1880 (Cr.). Where a conviction and sentence proceeds under the provisions of the Act it is not competent to a Magistrate to pass an order of reward to the complainant for detecting the offence. Cr. Reg. 48 of 1896.

Rules when to have force of law. (Old Act, S. 77.)

78. All rules made by the Provincial Government under this Act shall be published in the Official Gazette, and shall thereupon, so far as they are consistent with this Act, have effect as if enacted therein.

CHAPTER XIII.

MISCELLANEOUS.

Persons bound to assist Forest-officers and Police-officers. (Old Act, S. 78).

79. [1][(1)] Every person who exercises any right in a reserved or protected forest, or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and every person who is employed by any such person in such forest, and

every person in any village contiguous to such forest who is employed by the [2][Crown] or who receives emoluments from the [2][Crown] for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information he may possess respecting the commission of, or intention to commit, any forest-offence, and shall forthwith take steps, whether so required by any Forest-officer or Police-officer or not,—

(*a*) to extinguish any forest fire in such forest of which he has knowledge or information;

(*b*) to prevent by any lawful means in his power any fire in the vicinity of such forest of which he has knowledge or information from spreading to such forest, and shall assist any Forest-officer or Police-officer demanding his aid—

(*c*) in preventing the commission in such forest of any forest-offence; and

(*d*) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

[1][(2) Any person who, being bound so to do, without lawful excuse (the burden of proving which shall lie upon such person) fails—

(*a*) to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information required by sub-section (1);

(*b*) to take steps as required by sub-section (1) to extinguish any forest fire in a reserved or protected forest;

(*c*) to prevent, as required by sub-section (1), any fire in the vicinity of such forest from spreading to such forest; or

(*d*) to assist any Forest-officer or Police-officer demanding his aid in preventing the commission in such forest of any forest-offence, or, when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender;

shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.]

LEG. REF.

[1] S. 79 re-numbered and Cl. (2) added by Act I of 1928, S. 6.

[2] Substituted for 'Government' by A.O., 1937.

NOTES.

Sec. 79: REFUSAL TO SERVE AS MEMBER OF PANCH.—A person refusing to serve as member of a *panch* appointed for the purpose of drawing a *panchnama* with reference to certain wood alleged to have been illegally cut in the reserved forests, was held not to be liable to be convicted under S. 187, I.P. Code, as he was not shown to be a person contemplated in the provisions of the first three paragraphs of S. 78 of Act VII of 1878, and as the purpose for which he was called upon to give his assistence was also not one of the purposes mentioned in Cls. (*a*) and (*d*) of that section. 22 B. 769.

Management of forests the joint property of Government and other persons. (Old Act, S. 79.)

80. (1) If the Government and any person be jointly interested in any forest or waste-land, or in the whole or any part of the produce thereof, the Provincial Government may either—

(*a*) undertake the management of such forest, waste-land or produce, accounting to such person for his interests in the same; or

(*b*) issue such regulations for the management of the forest, waste-land or produce by the person so jointly interested as it deems necessary for the management thereof and the interests of all parties therein.

(2) When the Provincial Government undertakes under clause (*a*) of sub-section (1) the management of any forest, waste-land or produce, it may, by notification in the Official Gazette, declare that any of the provisions contained in Chapters II and IV shall apply to such forest, waste-land or produce, and thereupon such provisions shall apply accordingly.

Failure to perform service for which a share in produce of Government forest is enjoyed. (Old Act, S. 80.)

81. If any person be entitled to a share in the produce of any forest which is the property of Government or over which the Government has proprietary rights or to any part of the forest produce of which the Government is entitled, upon the condition of duly performing any service connected with such forest, such share shall be liable to confiscation in the event of the fact being established to the satisfaction of the Provincial Government that such service is no longer so performed:

Provided that no such share shall be confiscated until the person entitled thereto, and the evidence, if any, which he may produce in proof of the due performance of such service, have been heard by an officer duly appointed in that behalf by the Provincial Government.

Recovery of money due to Government. (Old Act, S. 81.)

82. All money payable to the Government under this Act, or under any rule made under this Act, or on account of the price of any forest-produce, or of expenses incurred in the execution of this Act in respect of such produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land-revenue.

Lien on forest-produce for such money. (Old Act, S. 82.)

83. (1) When any such money is payable for or in respect of any forest-produce, the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest-officer until such amount has been paid.

(2) If such amount is not paid when due, the Forest-officer may sell such produce by public auction, and the proceeds of the sale shall be applied first in discharging such amount.

(3) The surplus, if any, if not claimed within two months from the date of the sale by the person entitled thereto, shall be forfeited to His Majesty.

Land required under this Act to be deemed to be needed for a public purpose under the Land Acquisition Act, 1894. (Old Act, S. 83.)

84. Whenever it appears to the Provincial Government that any land is required for any of the purposes of this Act, such land shall be deemed to be needed for a public purpose within the meaning of section 4 of the Land Acquisition Act, 1894.

NOTES.

Sec. 83.—S. 83 expressly provides that the sale proceeds should be applied first in discharging the amount due. 31 I.C. 436 =9 S.L.R. 51.

Recovery of penalties due under bond. (*Cf.* Act V of 1890, S. 14 and Act V of 1918, S. 7.)

85. When any person, in accordance with any provision of this Act, or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in section 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue.

Saving for rights of Central Government.

[1][85-A. As from the commencement of Part III of the Government of India Act, 1935, nothing in this Act shall authorize any Provincial Government to make any order or to any other thing in relation to any Crown property not vested in His Majesty for the purposes of that Province or otherwise to prejudice any Crown rights, without the consent of the Government or authority concerned.

Repeals.

86. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

THE SCHEDULE.

(*See* section 86.)

ENACTMENTS REPEALED.

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
1878	VII	The Indian Forest Act, 1878..	So much as has not already been repealed.
1890	V	The Forest Act, 1890 ..	Do.
1891	XII	The Amending Act, 1891 ..	So much of Part I of Schedule II as relates to the Indian Forest Act, 1878.
1901	V	The Indian Forest (Amendment) Act, 1901. ..	So much as has not already been repealed.
1911	XV	The Indian Forest (Amendment) Act, 1911. ..	Do.
1914	X	The Repealing and Amending Act, 1914. ..	So much of the Second Schedule as relates to the Indian Forest Act, 1878, the Forest Act, 1890 and the Indian Forest (Amendment) Act, 1901.
1918	I	The Indian Forest (Amendment) Act, 1918. ..	The whole.
1920	XXXVIII	The Devolution Act, 1920	So much of Schedule I, Part I, as relates to the Indian Forest Act, 1878.

LEG. REF.

[1] S. 85-A inserted by A.O., 1937.

THE GENERAL CLAUSES ACT (X OF 1897).

Year.	No.	Short title.	Amendment.
1897	IX	The General Clauses Act, 1897.	Repealed in part, I of 1903. Repealed in part and amended, X of 1941; XVIII of 1919; XXI of 1920. Amended, I of 1903; XVII of 1914, S. 2; XXIV of 1917, S. 2; XI of 1923; XVIII of 1928, Govt. of India (Adaptation of Indian Laws) Order, 1937; Act XIX of 1936 and Act XXVII of 1940.

PREFATORY NOTE.—SCOPE AND NATURE OF ENACTMENT.—The first Act of the kind that was passed in England was an Act called Lord Brougham's Act, passed in 1851. That Act contained definitions of certain words which were continually used and defined in Acts of Parliament, and further contained one or two convenient rules of construction. Lord Brougham's Act was adopted and somewhat extended by the Indian Act of 1868. The Acts in both countries were found to be convenient and work well, and in 1887, the second Indian General Clauses Act was passed, further extending the same principle. The Act was drafted by Sir Courtney Ilbert, afterwards Parliamentary Counsel. When he went home, he carried the principle rather further, and he drafted the English Interpretation Act, 1889, which he carried on the same principle. In this General Clauses Act, the Government proposed, first to consolidate the previous two Indian Acts on the subject, and secondly to adopt some of the provisions of the English Interpretation Act, 1889, as were applicable to Indian Legislation and other circumstances. Mr. Chalmers on whom devolved the drafting of the Indian Bill consulted Sir Courtney Ilbert about it, and improved it in the light of his criticisms and advice on the provisions of the bill. The English Act was very carefully considered by a strong committee of the lawyers of the House of Lords, and its provisions were very carefully sifted by the committee. As to the general policy of the Act, it is always convenient to have one *prima facie* meaning for every term which is in constant use; and in all Acts, wherever possible, the same words should have the same meaning. But, of course, the definitions are only *prima facie* definitions. The Act provides that in future Acts, these particular terms defined in this Act will have the meaning given to them, unless a special Act otherwise provides in any particular Act. It is always open to give a special definition to any word or phrase, if it is required for the purposes of that Act. Certain general principles of construction have also been adopted from the English Interpretation Act. The Act is not one for creating new legislation, but may be described as one intended to prevent accidental slips in drafting future bills or as Mr. Chalmers put in when introducing the bill "a Drafting Accidents Prevention Bill."

The following extracts from the Statement of Objects and Reasons may also be noted:—

"This Bill does not propose to effect any change in the Law. Its object like that of the Acts it consolidates is to shorten the language of statutory enactments and to provide for uniformity of expression in cases where there is identity of subject-matter.

The first enactment of the kind was Lord Brougham's Act (13 and 14 Vict., c. 21). The provisions of that statute were adapted to India and somewhat amplified by the General Clauses Act (I of 1868) and the General Clauses Act (I of 1887) was a further extension of the same principle. It is obviously expedient that the Legislative dictionary, as it may be called, should be contained in a single enactment and that the two Acts above referred to should be consolidated, and it seems desirable to take the opportunity of making any additions that later experience may have suggested and in particular to incorporate such provisions of the Interpretation Act, 1889 (52 and 53 Vict., c. 64) as are applicable to India. That statute like the Indian Act of 1887 was drafted by Sir C. Ilbert and is in effect a careful revision and extension of the latter. For example, the definition of British India in the English Act of 1889 is merely an expansion of the definition given by the Indian Act of 1868. Its legal effect is the same, but it is more intelligible and it avoids a reference to another statute. The proposed measure will have this further advantage that it will secure uniformity of language and construction in Indian and in English legislation in so far as both have to deal with the same subject-matter."

N.B.—Act declared in force in the Sonthal Parganas, Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Chittagong Hill Tracts Reg. I of 1900, S. 4; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4; in British Baluchistan Reg. II of 1913, S. 3; in the Angul District, Reg. III of 1913, S. 3; in the Arakan Hill District, Reg. I of 1916, S. 2.

CONTENTS.

SECTIONS.

Preliminary.

1. Short title and commencement.
2. Repeal.

General Definitions.

3. Definitions.
4. Application of foregoing definitions to previous enactments.

4-A. Application of certain definitions to all Indian laws.

General Rules of Construction.

5. Coming into operation of enactments.

5-A. Coming into operation of Governor General's Act.

6. Effect of repeal.

6-A. Repeal of Act making textual amendment in Act or Regulation.

7. Revival of repealed enactments.
8. Construction of references to repealed enactments.
9. Commencement and termination of time.
10. Computation of time.
11. Measurement of distances.
12. Duty to be taken *pro rata* in enactments.
13. Gender and number.

13-A. References to the Sovereign.

Powers and Functionaries.

14. Powers conferred to be exercisable from time to time.
15. Power to appoint to include power to appoint *ex officio*.

SECTIONS.

16. Power to appoint to include power to suspend or dismiss.
17. Substitution of functionaries.
18. Successors.
19. Official chiefs and subordinates.

Provisions as to Orders, Rules, etc., made under enactments.

20. Construction of orders, etc., issued under enactments.
21. Power to make to include power to add to, amend, vary or rescind, orders, rules or by-laws.
22. Making of rules or by-laws and issuing of orders between passing and commencement of enactment.
23. Provisions applicable to making of rules or by-laws after previous publication.
24. Continuation of orders, etc., issued under enactments repealed and re-enacted.

Miscellaneous.

25. Recovery of fines.
26. Provision as to offences punishable under two or more enactments.
27. Meaning of service by post.
28. Citation of enactments.
29. Saving for previous enactments, rules and by-laws.
30. Application of Act to Ordinances.

30-A *Repealed.*

THE SCHEDULE.

THE GENERAL CLAUSES ACT (X OF 1897).[1]

N.B.—Throughout the Act, for "Acts of the Governor-General in Council" and "Act of the Governor-General in Council" the words "Central Acts" and "Central Act" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

[11*th March,* 1897.

An Act to consolidate and extend the General Clauses Acts, 1868 *and* 1887.

WHEREAS it is expedient to consolidate and extend the General Clauses Acts, 1868 and 1887; It is hereby enacted as follows:—

Preliminary.

Short title and commencement.

1. (1) This Act may be called THE GENERAL CLAUSES ACT, 1897; [*][2]

(2) [* * * *][2]

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1897, Pt. V, p. 38; for Report of Sel. Com., *see ibid.* p. 77; for Proceedings in Council, *see ibid.*, Part VI, pp. 35, 40, 56 and 76.

[2] Rep. by Act X of 1914, Sch. II.

Cl. (23.—*Cf.* The Indian Penal Code (Act XLV of 1860), and the Madras General Clauses Act, 1891 (Madras Act III of 1891).

NOTES.

Secs. 1 and 3: APPLICABILITY TO BOMBAY ABKARI ACT.—The General Clauses Act has no application to the Bombay Abkari Act, passed by the Governor of Bombay in Council. 1 Bom.L.R. 164 (16 B. 669 Foll.)

2. [*Repealed.*] *Rep. by the Repealing and Amending Act (I of* 1903).

General Definitions.

Definitions.

3. In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

"Abet".

(1) "abet" with its grammatical variations and cognate expressions shall have the same meaning as in the Indian Penal Code:

"Act".

(2) "act," used with reference to an offence or a civil wrong shall include a series of acts, and words which refer to acts done extend also to illegal omissions:

"Affidavit".

(3) "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:

"Assam Act."

[1] (3-*a*) "Assam Act" shall mean an Act made by the Chief Commissioner of Assam in Council under the Indian Councils Acts, 1861 to 1909,] [2][or the Government of India Act, 1915,] [3][or by the Local Legislature or the Governor of Assam under the Government of India Act,] [4][or by the Provincial Legislature or the Governor of Assam under the Government of India Act, 1935];

"Barrister",

(4) "barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland:

"Bengal Act".

[1][(5) "Bengal Act" shall mean in the case of Acts passed prior to the 1st April, 1912, an Act made by the Lieutenant Governor of Bengal in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909, and in the case of Acts passed after that date, an Act made by the Governor of the Presidency of Fort William in Bengal in Council under the Indian Councils Acts, 1861 to 1909.] [2][or the Government of India Act, 1915,] [3][or by the local Legislature or the Governor of the Presidency of Bengal under the Government of India Act,] [4][or by the Provincial Legislature or the Governor of Bengal under the Government of India Act, 1935]:

"Berar".

[4][(5-*a*) 'Berar' shall have the same meaning as in the Government of India Act, 1935:]

"Bihar and Orissa Act".

[1][(5-*b*)] [3]Bihar and Orissa Act" shall mean an Act made by the Lieutenant-Governor of Bihar and Orissa in Council under the Indian Councils Acts. 1861 to 1909] [2][or the Government of India Act, 1915] [4][or by the local Legislature or the Governor of Bihar and Orisa [4][or Bihar] under the Government of India Act]:

LEG. REF.

[1] Ins. by Act X of 1914.

[2] Ins. by Act XXIV of 1917, S. 2 and Sch. I.

[3] Ins. by Act XVIII of 1928, S. 2 and Sch. I.

[4] Ins. by A.O., 1937.

Cl. (3).—*Cf.* The definitions of "Oath" and "Swear" in sub-Ss. (36 and 55), respectively, *infra.* As to affidavits in civil proceedings, *see* Code of Civil Procedure (Act V of 1908), 1st Sch., Order XIX; as to Criminal Proceedings, *see* Code of Criminal Procedure (Act V of 1898).

Cl. (4).—(*Cf.* The Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), S. 19, Col. Stats. Ind., Vol. I.

[5] Substituted by A.O., 1937 for "51*a*".

NOTES.

This Act applies only to Acts passed by the Governor-General in Council and not to Acts passed by the Local Legislature. 1 Bom.L.R. 614. As to its applicability to Oudh Rent Act, *see* 16 O.C. 341.

"Bihar Act".

[1][(5-*c*) 'Bihar Act' shall mean an Act made by the Provincial Legislature or the Governor of Bihar under the Government of India Act, 1935:]

"Bombay Act".

(6) "Bombay Act" shall mean an Act made by the Governor of Bombay in Council under [2][the Indian Councils Act, 1861, or] the Indian Councils Acts, 1861 and 1892 [3][or the Indian Councils Acts, 1861 to 1909] [4][or the Government of India Act, 1915,] [5][or by the local Legislature or the Governor of the Presidency of Bombay under the Government of India Act] [1][or by the Provincial Legislature or the Governor of Bombay under the Government of India Act, 1935:]

"British India".

[6][(7) 'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions, which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar:]

"British possession."

(8) "British possession" shall mean any part of Her Majesty's dominions, exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemed to be one British possession:

"Burma Act".

[2](8-*a*) 'Burma Act' shall mean an Act made by the Lieutenant-Governor of Burma in Council under the Indian Councils Acts, 1861 and 1892,] [3][or the Indian Councils Acts, 1861 to 1909], [4][or the Government of India Act, 1915,] [5][or by the local Legislature or the Governor of Burma under the Government of India Act]:

"Central Act".

[1][(8-*aa*) 'Central Act' shall mean an Act of the Central Legislature, and shall include, except in section 5, an Act made by the Governor-General under section 67-B of the Government of India Act, or section 44 of the Government of India Act, 1935:]

"Central Government".

[1][(8-*ab*) 'Central Government' shall—

(*a*) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, mean the Federal Government; and

(*b*) in relation to anything done before the commencement of Part III of the said Act, mean the Governor-General in Council, or the authority competent at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor-General in Council:]

LEG. REF.

[1] Inserted by A.O., 1937.

[2] Inserted by Act I of 1903, S. 3 and Sch. II.

[3] Inserted by the Act X of 1914.

[4] Inserted by Act XXIV of 1917.

[5] Inserted by Act XVIII of 1928.

[6] Substituted for the original clause (7) by A.O., 1937.

CL. (7).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), S. 18 (4), Col. Stats. Ind., Vol. II. For definition of "India," *see infra*, sub-S. (27).

CL. (8).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vic., c. 63), S. 18 (2), Col. of Stats. Ind., Vol. II.

NOTES.

Sec. 3, Cl. (7).—*See* 6 P.R. 1878 (Cr.). Quetta does not form part of "British India" as defined in S. 3 of the General Clauses Act. It is what is known as an "administered area." 28 S.L.R. 54=1934 Sind 123. "Berar," if included in British India, *see* 39 Bom.L.R. 1287.

"Central Legislature".

[1][(8-*ac*) "Central Legislature" shall mean the Governor-General in Council acting in a legislative capacity under the Government of India Act, 1833, the Government of India Act, 1853, the Indian Councils Acts, 1861 to 1909, or any of those Acts, or the Government of India Act, 1915, the Indian Legislature acting under the Government of India Act, or the Government of India Act, 1935, or the Federal Legislature acting under the Government of India Act, 1935, as the case may require:]

"Central Provinces Act".

[2][(8-*b*) "Central Provinces Act" shall mean an Act made by the Chief Commissioner of the Central Provinces in Council under the Indian Councils Act 1861 to 1909,] [3][or the Government of India Act, 1915,] [4][or by the local Legislature or the Governor of the Central Provinces under the Government of India Act:]

"Central Provinces and Berar Act".

[1][(8-*c*) 'Central Provinces and Berar Act' shall mean an Act made by the Provincial Legislature or the Governor of the Central Provinces and Berar under the Government of India Act, 1935:]

"Chapter."

(9) "Chapter" shall mean a Chapter of the Act or Regulation in which the word occurs:

"Chief Controlling Revenue Authority".

[1][(9-a) 'Chief Controlling Revenue Authority' or 'Chief Revenue Authority' shall mean—

(*a*) in provinces where there is a Board of Revenue, that Board:—

(*b*) in provinces where there is a Revenue Commissioner, that Commissioner;

(*c*) in the Punjab, the Financial Commissioner; and

(*d*) elsewhere, such authority as, in relation to matters enumerated in List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government, and in relation to other matters, the Provincial Government, may by notification in the Official Gazette appoint:]

"Collector."

(10) 'Collector' shall mean, in a Presidency town, the Collector of Calcutta, Madras or Bombay, as the case may be and elsewhere the chief officer in charge of the revenue-administration of a district:

"Colony".

(11) 'Colony' shall mean any part of Her Majesty's dominions exclusive of the British Islands and of British India and, where parts of those dominions are under both a central and a local Legislature, all parts under the central Legislature shall for the purposes of this definition be deemed to be one colony: [1][Provided that in any Central Act passed after the commencement of Part III of the Government of India Act, 1935, 'Colony' shall not include any dominion as defined in the Statute of Westminster, 1931, any Province or State forming part of such a dominion, or British Burma:]

"Commencement".

(12) 'Commencement', used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force:

LEG. REF.

[1] Inserted by A.O., 1937.

[2] Inserted by Act XVII of 1914.

[3] Inserted by Act XXIV of 1917.

[4] Inserted by Act XVIII of 1928.

Cl. (11).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), S. 18 (3), Col. Stats. Ind., Vol. II.

Cl. (12).—For rules determining when any given Act is to come into force, *see* S. 5, *infra.*

"Commissioner."

(13) "Commissioner" shall mean the chief officer in charge of the revenue administration of a division:

"Consular officer."

(14) 'consular officer' shall include consul-general, consul, vice-consul, consular agent, pro-consul and any person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent:

"Crown contracts".

[1][(14-*a*) 'Crown contracts' and equivalent expressions shall include contracts made by or on behalf of the Secretary of State in Council, contracts made in the exercise of the executive authority of the Central or any Provincial Government, contracts made by the Federal Railway Authority, and contracts made in connection with the exercise of the functions of the Crown in its relations with Indian States:

"Crown debts".

(14-*b*) 'Crown debts' and equivalent expressions shall include debts due to the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown grants".

(14-*c*) 'A grant' (including a transfer of land or of any interests therein or a payment of money) shall be deemed to be made by the Crown if it is made by or on behalf of His Majesty, the Secretary of State in Council, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown liabilities".

(14-*d*) 'Crown liabilities' and equivalent expressions shall include the liabilities of the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown property".

(14-*e*) 'Crown property' and equivalent expressions shall include any property vested in His Majesty or otherwise held for the purposes of the Central or any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown Representative".

(14-*f*) 'Crown Representative' shall mean His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States:

"Crown revenues".

(14-*g*) 'Crown revenues' and equivalent expressions shall include any revenues vesting in His Majesty:]

"District Judge."

(15) 'District Judge' shall mean the Judge of a principal Civil Court of orignal jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction:

LEG. REF.

[1] Inserted by A.O., 1937.

Cl. (14).—*Cf.* The Consular Salaries and Fees Act, 1891 (54 and 55 Vict., c. 36), S. 3.

Cl. (15).—As to definition of High Court, *see* sub-S. (24), *infra*.

In Lower Burma the District Court is the Court of the District Judge as defined by this clause, *see* Lower Burma Courts Act (VI of 1900), S. 25 (*c*), Bur. Code.

NOTES.

Cl. (15).—As to status of High Court on Original Side, *see* 27 M.L.J. 645.

"Document."

(16) 'document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter:

"Eastern Bengal and Assam Act."

[1][(16-*a*) "Eastern Bengal and Assam Act" shall mean an Act made by the Lieutenant-Governor of Eastern Bengal and Assam in Council under the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909:]

"Enactment."

(17) 'enactment' shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code and shall also include any provision contained in any Act or in any such Regulation as aforesaid:

"Father."

(18) 'father,' in the case of any one whose personal law permits adoption, shall include an adoptive father:

"Federal Government."

[2][(18-*a*) 'Federal Government' shall—

(*a*) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, but before the establishment of the Federation, mean, as respects matters with respect to which the Governor-General is by and under the provisions of the said Act for the time being in force required to act in his discretion, the Governor-General, and as respects other matters, the Governor-General in Council; and

(*b*) in relation to anything done or to be done after the establishment of the Federation mean the Governor-General acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act;

and shall include—

(i) in relation to functions entrusted under section 124 (1) of the said Act to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioner's province, the Chief Commissioner acting within the scope of the authority given to him under section 94 (3) of the said Act:

"Federal Railway Authority".

(18-*b*) 'Federal Railway authority' shall mean the Federal Railway Authority constituted by the Government of India Act, 1935, or, before the establishment of that Authority, the Central Government:]

"Financial year."

(19) "financial year" shall mean the year commencing on the first day of April:

(20) a thing shall be deemed to be done in "good faith" where it is in

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LEG. REF.

Cl. (16).—*Cf.* Indian Evidence Act (I of 1872). As to definition of "written", *see* sub-S. (58).

[1] Inserted by Act X of 1914.

[2] Cls. (18-*a*) and (18-*b*) added by A.O., 1937.

Cl. (19).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vic., c. 63), S. 22, Col. Stats. Ind., Vol. II.

Cl. (20).—*Cf.* The Bills of Exchange Act, 1882 (45 and 46 Vic., c. 61), S. 90; and the Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), S. 62. *Cf. also* S. 52 of the Indian Penal Code (XLV of 1860).

As to discussion in Council regarding definition of "good faith", *see Gazette of India*, 1897, Pt. VI, pp. 56 to 62 and 76 to 79.

NOTES.

Cl. (20).—Per *Sen, J.*—Good faith as defined in S. 3 (20) is equivalent to honesty

"Good faith." fact done honestly, whether it is done negligently or not:

"Government." (21) "Government" or 'the Government' shall include [1][both the Central Government and any Provincial Government:]

"Government securities." (22) [1]['Government securities' shall mean securities of the Central or any Provincial Government and shall include sterling securities of the Secretary of State for India in Council or the Secretary of State:]

(23) [2][* * * * * * * * *]

"High Court." (24) "High Court," used with reference to Civil proceedings, shall mean the highest Civil Court of appeal [3][not including the Federal Court] in the part of British India in which the Act or Regulation containing the expression operates:

"Immovable property." (25) "immovable property" shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth:

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Repealed by Act XVIII of 1919.

[3] Inserted by A.O., 1937.

NOTES.

of dealing and does not entail upon the auction-purchaser the necessity of searching the registry. Even if there were facts indicative of negligence in investigating title that by itself is not predicative of lack of *bona fides*. 53 A. 334=1931 A. 277 (F. B.). *See* 13 I.C. 260=5 S.L.R. 181; 12 I.C. 809=4 Bur.L.T. 128.

Cl. (21).—As to definition of Local Government, *see* sub-S. (29), *infra; see* 6 P.W.R. 1913 (Cr.).

Cls. (21) and (40).—"THE GOVERNMENT"—WHETHER INCLUDES BRITISH GOVERNMENT—"SHALL INCLUDE"—MEANING.—The expression, "includes" or "shall include" is used in interpretation clauses in two senses. The ordinary and general sense in which it is used is to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. This expression is also susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to those words or expression. The expression in S. 3, Cls. 21 and 40, is used in the restricted sense as equivalents to mean and include. 28 S.L. R. 27=1934 Sind 96.

Cl. (25).—As to growing crops and timber so far as they are affected by the Indian Registration Act (XVI of 1908), *see* S. 2 (6) of that Act. Doors, whether immovable property. 16 M.L.T. 429=25 I.C. 837.

MORTGAGE OF FRUIT-BEARING TREES.—Whether or not a mortgage of fruit-bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit-bearing trees with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property and should be effected with the formalities prescribed by S. 59, T.P. Act. 54 All. 437=140 I.C. 491. Though trees are immovable property, there is no presumption that whenever the word "land" is used in an enactment, the trees standing thereon are included. 29 N.L.R. 1=1933 N. 53. The expression "benefits to arise out of land" in the Act was never intended to cover such a matter as the security held by a mortgagee under a simple mortgage bond, by such 'benefits' as the right to a ferry. L.R. 5 All. 674. A mortgage is not "a benefit to arise out of land" within the meaning of S. 3, Cl. (25). 57 Cal. 328=34 C.W.N. 605. *See also* 58 Cal. 136=1931 Cal. 223. Per *Lord Atkin.*—"Debts may be secured whether on immovable property or on merchandise; they may be wholly secured or

"Imprisonment."

(26) "imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code:

"India."

[1][(27) 'India' shall mean British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Central Government and the Central Legislature, declare to be part of India:]

"Indian law."

[2][(27-*a*) 'Indian law' shall include any law, ordinance, order, by-law, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British India:

"Indian State."

[3][(27-*b*) 'Indian State' shall mean any territory, not being part of British India, which His Majesty recognises as being such a State whether described as a State, an Estate, a Jagir or otherwise:]

"Local authority."

(28) "local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund:

(29) [*Omitted by the Government of India* (*Adaptation of Indian Laws*) *Order,* 1937.]

(30) "Madras Act" shall mean an Act made by the Governor of Fort St.

LEG. REF.

[1] Cl. (27) substituted for old Cl. (27) by A.O., 1937.

[2] Cl. (27-*a*) added by *ibid.*

[3] Cl. 27-*b* substituted by Act XXXII of 1940.

NOTES.

partly secured: the security may have been given when the debt was created or later, but in any case the debts exist as *movable* property and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The *separation between debts and security is well established.*" 34 C.W.N. 1034=1931 P.C. 245=61 M.L.J. 589 (P.C.). As to mortgagee's interest, *see* 51 All. 494. A Kolhu (*i.e.*, an iron sugar-cane press) fastened to the ground is immovable property. 23 I.C. 250. The term "immovable property" in the General Clauses Act may include a right of way, but is not always necessarily included. It is not excluded by T.P. Act, S. 3. 34 I.C. 450=20 C.W.N. 1158. Malikana, if immovable property, *see* 21 I.C. 779=19 C.W.N. 410. Standing crops are immovable property. 23 M.L.J. 623=17 I.C. 185; 25 M.L.J. 447=21 I.C. 213; also standing trees, 25 A.L.J. 199. Standing timber which has been cut and removed is movable property. 133 I.C. 157=1931 A.L.J. 608=1931 All. 392 (F.B.). A right to fishery is an interest in immovable property. 43 I.C. 962=14 N.L.R. 35. General fishery, 23 Bom.L.R. 939. A simple mortgage debt is to be attached as a debt and not as immovable property. 50 I.C. 157=21 O.C. 400. *See also* 47 All. 917. The interest of the mortgagee in the mortgaged property is manifestly a "benefit to arise out of land" and is therefore itself immovable property. 12 R. 370=1934 Rang. 253 (F.B.). As to money charged on immovable property, *see* 83 I.C. 555. A pugmill affixed to the earth is immovable property. 43 I.C. 625=11 Bur. L.T. 199. *Bazar dues constitute a benefit arising out of the land* and therefore a lease of bazar dues is a lease of immovable property within the meaning of S. 3 (25) of the Act. 1940 Oudh 409=16 Luck. 191. On this clause, *see also* 9 Rang. 303=1931 Rang. 109.

Cl. (26).—*See* 9 A. 240=7 A.W.N. 540.

Cl. (27).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), S. 18 (5). *See* 7 C.W.N. 635.

The definition of 'land' must be applied to the word 'land' as used in the C.P. Code and therefore 'land' in C.P. Code includes trees. 10 I.C. 473=7 N.L.R. 63.

Cl. (28).—*Cf.* The Local Authorities Loans Act (XI of 1879). The words "local authority" includes port trust. 44 L.W. 328=1936 M. 789.

"Madras Act."

George in Council under [1][the Indian Councils Act, 1861, or] the Indian Councils Acts, 1861 and 1892, [2][or the Indian Councils Acts, 1861 to 1909,], [3][or the Government of India Act, 1915], [4][or by the local Legislature or the Governor of the Presidency of Madras under the Government of India Act]; [5][or by the Provincial Legislature or the Governor of Madras under the Government of India Act, 1935:]

"Magistrate."

(31) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force:

"Master" (of a ship).

(32) "master," used with reference to a ship, shall mean any person (except a pilot or harbour-master) having for the time being control or charge of the ship:

"Month."

(33) "month" shall mean a month reckoned according to the British calendar:

"Movable property."

(34) "movable property" shall mean property of every description, except immovable property:

"North-West Frontier Province Act."

[5][(34-*a*) "North-West Frontier Province Act" shall mean an Act made by the Local Legislature or the Governor of the North-West Frontier Province under the Government of India Act, or by the Provincial Legislature or the Governor of the North-West Frontier Province under the Government of India Act, 1935:]

"North-Western Provinces and Oudh Act."

(35) "North-Western Provinces and Oudh Act" shall mean an Act made by the Lieutenant-Governor of the North-Western Provinces and Oudh in Council under [6][the Indian Councils Act, 1861 or] the Indian Councils Acts, 1861 and 1892:

"Oath."

(36) "oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:

"Offence."

(37) "offence" shall mean any act or omission made punishable by any law for the time being in force:

"Official Gazette."

[7][(37-*a*) "Official Gazette" or "Gazette" shall mean the Gazette of India, or, as the case may be, the official Gazette of a province:

LEG. REF.

[1] Inserted by Act I of 1903.

[2] Inserted by Act X of 1914.

[3] Inserted by Act XXIV of 1917.

[4] Inserted by Act XVIII of 1928.

[5] Inserted by A.O., 1937.

[6] Inserted by Act I of 1903, S. 3.

[7] Cls. (37-*a*) and (37-*b*) added by A.O. 1937.

NOTES.

Cl. (31).—The Code now in force i Act V of 1898. Village Munsif, if Magistrate, *see* 2 Mad. 5; 2 Weir 123=27 Mad 223; 2 Weir 208=14 M.L.J. 74; 2 Weir 577. Magistrate in the section is confined to Magistrate exercising jurisdiction under Cr.P. Code. *See* 56 M.L.J. 628.

Cl. (32).—*See* S. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vict., i. 60), Col. Stats. Ind., Vol. II.

Cl. (33).—*See* 15 C.W.N. 425.

Cl. (34).—For a comprehensive definition of the word 'property', *see* S. 168 of the Bankruptcy Act, 1883 (46 and 47 Vict., c. 52). Immovable property includes a debt. 4 L.W. 613=36 I.C. 833. Shares in company are goods but peculiar kind of movable property which cannot pass freely from hand to hand. 25 Bom.L.R. 414.

Cl. (35).—Read now "United Provinces of Agra and Oudh"; *see* S. 2 of the U.P. (Designation) Act (VIII of 1902) and *see* sub-S. 55-*a*, infra.

Cl. (37).—*See* a similar definition in S. 4 (*o*) of the Code of Criminal Procedure (V of 1898). Offence committed

"Orissa Act."

(37-*b*) "Orissa Act" shall mean an Act made by the Provincial Legislature, or the Governor of Orissa under the Government of India Act, 1935:]

"Part."

(38) "Part" shall mean a part of the Act or Regulation in which the word occurs:

"Person."

(39) "person" shall include any company or association or body of individuals, whether incorporated or not:

"Political Agent."

(40) "Political Agent" shall include—

(*a*) the principal officer representing the [4][Crown] in any territory or place beyond the limits of British India, and

(*b*) any officer [2][* * * * *] [2][* * * * *] appointed a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction [2][* * *];

"Presidency-town."

(41) "Presidency-town" shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be:

"Privy Council."

(42) "Privy Council" shall mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council:

"Province."

[3][(43) "Province" shall mean a Presidency, a Governor's Province, a Lieutenant-Governor's Province or a Chief Commissioner's Province:

"Provincial Government."

(43-*a*) "Provincial Government," as respects anything done or to be done after the commencement of Part III of the Government of India Act, 1935, shall mean—

(*a*) in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act; and

(*b*) in a Chief Commissioner's Province, the Central Government, and, as respects anything done before the commencement of Part III of the said Act, shall mean the authority or person authorized at the relevant date to administer executive government in the Province in question:]

LEG. REF.

[1] Substituted by A.O., 1937, for "Government".

[2] Omitted by *ibid*.

[3] Cls. (43) and (43-*a*) have been substituted by A.O., 1937.

NOTES.

under Stamp Act, 1862 (since repealed) while it was in force, is still an offence and may be tried under the Act. 7 M.H.C.R. App. 8.

Cl. (39).—The word 'person' clearly includes a firm and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return, 48 Mad. 602=1925 Mad. 1048=49 M.L.J. 124. A company is a 'person' and can sue through its liquidator *in forma pauperis*. 41 Mad. 624=34 M.L.J. 421=45 I.C. 164. "Person" includes a corporation. 72 I.C. 623.

Cl. (40).—"Shall include" meaning of. *See* 28 S.L.R. 27=1934 Cr. C. 821=1934 Sind 96. Cited under Cl. 21, *supra*.

Cl. (41).—*See* S. 4 (*b*) of the repealed Cr.P. Code (X of 1882) and *cf*. S. 3 (25) of the Mad. General Clauses Act (Mad. Act I of 1891).

Cl. (42).—*Cf*. S. 12 (5) of the Interpretation Act, 1889 (52 and 53 Vict., c. 63).

Cl. (43).—*Cf*. S. 4 (*g*) of the repealed Cr.C. Code (X of 1882).

"Public nuisance."

(44) "Public nuisance" shall mean a public nuisance as defined in the Indian Penal Code:

"Punjab Act."

[1][(44-*a*) "Punjab Act" shall mean an Act made by the Lieutenant-Governor of the Punjab in Council under the Indian Councils Acts, 1861 and 1892,] [or the Indian Councils Acts, 1861 to 1909,] [or the Government of India Act, 1915], [or by the local Legislature or the Governor of the Punjab under the Government of India Act,] [2][or by the Provincial Legislature or the Governor of the Punjab under the Government of India Act, 1935:]

"Registered."

(45) "registered", used with reference to a document, shall mean registered in British India under the law for the time being in force for the registration of documents:

"Regulation."

(46) "Regulation" shall mean a Regulation made [2][by the Central Government] under the Government of India Act, 1870, [3][or the Government of India Act, 1915,] [4][or the Government of India Act] [2][or under section 95 or section 96 of the Government of India Act, 1935:]

"Rule."

(47) "rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment:

"Schedule."

(48) "schedule" shall mean a schedule to the Act or Regulation in which the word occurs:

"Scheduled district."

(49) "Scheduled district" shall mean a "Scheduled district" as defined in the Scheduled Districts Act, 1874:

"Section."

(50) "section" shall mean a section of the Act or Regulation in which the word occurs:

"Ship."

(51) "ship" shall include description of vessel used in navigation not exclusively propelled by oars:

"Sign."

(52) "sign," with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark," with its grammatical variations and cognate expressions:

"Sind Act."

[5][(52-*a*) "Sind Act" shall mean an Act made by the Provincial Legislature or the Governor of Sind under the Government of India Act, 1935:]

LEG. REF.

[1] First brackets in Cl. (44-*a*) inserted by Act I of 1903, S. 3; second inserted by Act X of 1914; third added by Act XXIV of 1917; and 4th added by Act XVIII of 1928.

[2] Inserted by A.O., 1937.

[3] Added by Act XXIV of 1917.

[4] Inserted by Act XVIII of 1928.

[5] Cl. (52-*a*) added by O.A., 1937.

NOTES.

Cl. (45).—*Cf.* S. 3 (11) of the Mad. General Clauses Act (Mad. Act I of 1891). As to law now in force, *see* the Indian Registration Act (XVI of 1908).

Cl. (47).—The provisions of S. 20 to 24, *infra,* apply to rules defined in this subsection.

Cl. (51).—*Cf.* S. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60).

Cl. (52).—*See also* definition of "in sub-S. 58," *infra*. *See* 32 C. 550=2 Cr.L.J. 405. Mark by a person able to write. 78 I.C. 79. Meaning of signature. 50 C. 180. The writing of a word or expression as 'Sahi' at the foot of a document cannot be considered to be a 'mark' made by that person under S. 3 (52), in the absence of proof that in fact the particular person was unable to write his own name. 14 Luck. 393=1939 Oudh 96.

"Son."

(53) "son", in the case of any one whose personal law permits adoption, shall include an adopted son:

"Sub-section."

(54) "sub-section" shall mean a sub-section of the section in which the word occurs:

"Suits by or against the Crown."

[1][(54-*a*) "suits by or against the Crown" and equivalent expressions shall include suits by or against the Secretary of State, the Secretary of State in Council, the Central Government, a Provincial Government or the Crown Representative:]

"Swear."

(55) "swear," with its grammatical variations and cognate expressions, shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing:

"United Provinces Act."

[2][(55-*a*) "United Provinces Act" shall mean an Act made by the Lieutenant-Governor of the North-Western Provinces and Oudh (or of the United Provinces of Agra and Oudh) in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892,] [3][or the Indian Councils Acts, 1861 to 1909,] [4][or the Government of India Act, 1915,] [5][or by the Local Legislature or the Governor of the United Provinces under the Government of India Act,] [6][or by the Provincial Legislature or the Governor of the United Provinces under the Government of India Act, 1935:]

"Vessel."

(56) "vessel" shall include any ship or boat or any other description of vessel used in navigation:

"Will."

(57) "will" shall include a codicil and every writing making a voluntary posthumous disposition of property:

"Writing."

(58) expressions referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form: and

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LEG. REF.

[1] Cl. (54-*a*) added by A.O., 1937.
[2] Inserted by Act I of 1903, S. 3.
[3] Inserted by Act X of 1914.
[4] Inserted by Act XXIV of 1917.
[5] Added by Act XVIII of 1928.
[6] Inserted by A.O., 1937.

NOTES.

Cl. (53).—*See* 34 P.R. 1883. Where the personal law of the parties admits adoption the word 'son' will include an adopted son. Minor adopted son of deceased held to be a 'defendant' and therefore entitled to compensation under S. 2 (1) (*d*) of the Workmen's Compensation Act, 1923. 12 L. 50=1931 Lah. 661.

Cl. (55).—*See also* definition of "affidavit" and "oath" *supra*, sub-Ss. (3) and (36), respectively, and as to oath, *see* the Indian Oaths Act (X of 1873).

Cl. (56).—*Cf.* S. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60). This definition supplements the definition of ship in sub-S. (51), *supra*. *See also* definition of vessel in S. 48 of the Indian Penal Code, 1860 (Act XLV of 1860), and in S. 3 (4) of the Northern India Canal and Drainage Act (VIII of 1873) and in S. 3 (*f*) of the Sea Customs Act (VIII of 1878).

Cl. (57).—*See* the definition of "will" in S. 2 of the Indian Succession Act (XXXIX of 1925). Mere authority to adopt though revocable and taking effect on the death of a person, cannot be considered a will, though the document is styled a will. There must be a disposition of property in addition to the authority to adopt, if it is to be treated as a will. 9 L.W. 385 =49 I.C. 929. A mere direction for management of the property by a manager during minority is not a disposition by a will. (*Ibid.*)

Cl. (58).—*Cf.* S. 20 of the Interpretation Act, 1889 (52 and 53 Vict., c. 63).

"Year."

(59) "year" shall mean a year reckoned according to the British calendar.

Application of foregoing definitions to previous enactments.

4. (1) The definitions in section 3 of the following words and expressions, that is to say, "affidavit," "barrister," [1][* * * *] "District Judge," "father," [1][* * *] [2][* * *] [1][* * *] "immovable property," "imprisonment," [1][* * * *], "magistrate," "month," "movable property," "oath," "person," "section," "son," "swear," "will," and "year," apply also, unless there is anything repugnant in the subject or context, to all [3][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

(2) The definitions in the said section of the following words and expressions, that is to say, "abet," "chapter," "commencement," "financial year," "local authority," "master," "offence," "part," "public nuisance," "registered," "schedule," "ship," "sign," "sub-section," and "writing," apply also, unless there is anything repugnant in the subject or context, to all [3][Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

Application of certain definitions to all Indian laws.

[4][4-A. (1) The definitions in section 3 of the expressions "British India," "Central Act", "Central Government", "Central Legislature", "Chief Controlling Revenue Authority", "Chief Revenue Authority", "Crown contracts", "Crown debts", "Crown grants", "Crown liabilities", "Crown property", "Crown Representative", "Crown Revenues," "Federal Government," "Federal Railway Authority," "Gazette," "Government," "Government Securities," "High Court," "India," "Indian law," "Indian State," "Official Gazette," "Provincial Government," and "suits by or against the Crown," apply also, unless there is anything repugnant in the subject or context to all Indian laws.

(2) In any Indian law, references to the "Provincial Government" or "Central Government" in any provision conferring power to make appointments to the civil services of, or civil posts under, the Crown in India include references to such person as the Provincial Government or the Central Government, as the case may be, may direct, and in any provision conferring power to make rules prescribing the conditions of service of persons serving His Majesty in a civil capacity in India, include references to any person authorised by the Provincial Government or the Central Government, as the case may be, to make rules for the purpose.

(3) The references in any Indian law to servants of or under, or to service of or under, a Government or a Province, to property of, or belonging to, or vested in, the Secretary of State in Council or a Government or a Province, and to forfeitures to a Government or a Province, shall be construed as references respectively to persons in the service of the Crown, to the service of the Crown, to property vested in the Crown and to forfeitures to the Crown.]

General Rules of Construction.

5. (1) Where any [3][Central Act] is not expressed to come into operation

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LEG. REF.

[1] The words "British India", "Government of India," "High Court" and "Local Government" omitted by A.O., 1937.

[2] Words "'Her Majesty' or 'the Queen'" omitted by Act XVIII of 1919.

[3] Substituted by A.O., 1937.

[4] Added by *ibid*.

[1] Substituted by A.O., 1937.

NOTES.

Cl. (59).—As to "financial year," *see* sub-S. 19, *supra*. Where the probabilities are not, and the evidence does not show, that the parties usually went by the Gregorian Calendar, provisions of S. 3 (59) do not apply. 1922 Nag. 265.

Coming into operation of enactments.

on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General.

[1][(2) Where any [2][Central Act] is reserved, under section 68 of the Government of India Act, 1915, [3][or under section 32 of the Government of India Act, 1935,] for the signification of His Majesty's pleasure thereon, then, if no later date is expressed, it shall come into operation, if assented to by His Majesty, on the day on which that assent is duly notified.]

(3) Unless the contrary is expressed, a [2][Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

Coming into operation of Governor-General's Act.

[3][5-A. Where any Act made by the Governor-General under section 44 of the Government of India Act, 1935, is not expressed to come into operation on a particular day, it shall come into operation on the date on which it is enacted by the Governor-General.]

Effect repeal.

6. Where this Act, or any [1][Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

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LEG. REF.

[1] Substituted by Act XXIV of 1917.

[2] Substituted by A.O., 1937.

[3] Inserted by A.O., 1937.

NOTES.

Sec. 5, Cl. (3).—*Cf.* S. 36 (2) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). 1939 A.L.J. 7=1939 All. 154. As to power to make rules between the passing and commencement of an Act which does not come into force at once, *see* S. 22, *infra*. Section applies only to offences and sentences passed under Acts which came into force after General Clauses Act came into force. L.B.R. (1872-1892) 473; not to Acts and Regulations passed prior to passing of the Act. Rat. 57. *See also* 9 N.L.R. 49; 1939 A.L.J. 7=1939 All. 154.

Sec. 6.—*Cf.* S. 38 of the Interpretation Act, 1889 (52 and 53, Vic., c. 63). As to the effect and application of the section, *see* 15 R.D. 757=12 L.R. (Rev.) 351; 15 R. D. 710. This section applies only to cases where the change in the law is the result of the repeal of an enactment and does not extend where it is due to an addition to it. 13 I.C. 264=5 S.L.R. 184 (22 C. 767, Foll.). *See also* 58 A. 495. According to S. 6 the rights that have become secured under the old Act cannot be the subject of fresh re-examination in the light of subsequent legislation. 1939 A.L.J. (Supp.) 49=1939 R.D. 303. It is doubtful if an application for setting aside an *ex parte* decree comes under a right of privilege under S. 6. 37 I.C. 292=101 P.R. 1916. In the event of its being deemed to be a right, its acquisition must be under the C. P. Code and not under the Limitation Act. (*Ibid.*) A vested right under the old Code which had been repealed by the new Code is saved by S. 6 if the right had already vested before the coming into force of the new Code. 9 I.C. 337=14 O.C. 10; 8 Pat.L.T. 397. A new law of limitation or an amendment of such law cannot divest a person of a vested right under the old law. 1936 A.L.J. 1373=1936 All. 858. *See also* 20 C.W.N. 952=34 I.C. 27; 1 P. L.J. 214; 97 I.C. 608=1926 Pat. 561.

Cl. (b).—An acknowledgment of liability only extends the period of limitation and does not confer title and is not a thing done within S. 6 (*b*) of the Act. 35 All. 227=40 I.A. 74=25 M.L.J. 131 (P. C.) (affirming 32 A. 38=6 A.L.J. 931).

Cl. (c).—Where an execution sale was held under the old C. P. Code, 1882, the auction-purchaser had a contingent right to (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed.

Repeal of Act making textual amendment in Act or Regulation.

[1][6-A. Where any [2][Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [2][Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.]

Revival of repealed enactments.

7. (1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

LEG. REF.

[1] Added by Act XIX of 1936.

[2] Substituted by A.O., 1937.

NOTES.

sue for recovery of the purchased money in case the judgment-debtor had no saleable interest. 45 I.C. 109=40 M. 1009. The right is not affected by the new provision of O. 21, R. 93 which negatives a right of suit in such a case. (*Ibid.*) An agreement executed when Agra Tenancy Act II of 1901 was in force is not affected by the repeal of that Act. A document takes effect from the date of its execution, not of its attestation or registration. 14 L. R. 108 (Rev.)=17 R.D. 83.

Cl. (d).—Offence may be tried under repealed enactment if committed while the old Act was in force. 7 M.H.C.R. App. 89=1 Weir 781.

Cl. (e).—*See* 58 All. 495=160 I.C. 277=1936 A. 3. The rule laid down in S. 6 (*e*) applies to those cases only, where an Act or Ordinance has been repealed by a subsequent enactment. It has no reference to temporary or expiring statutes which automatically lapse at a certain date, or on the happening of a certain contingency, without fresh legislation. 43 P.L.R. 103=1941 Lah. 175. Trial of criminal cases to be in accordance with rules in force at time of commencement. 6 M. 836; what is a legal proceeding, 16 C. 267; includes both judicial and ministerial. 15 C. 357. Sanction obtained before amendment of S. 195, C. P. Code, in 1923—Amending Act abolishing provision as to sanction and revocation, effect of. *See* 91 I.C. 395=1925 M. 911. An agreement executed when Act II of 1901 was in force is not affected by the repeal of that Act. A document takes effect from the date of its execution, not of its attestation or registration. 14 L.R. 108 (Rev.)=17 R.D. 83. It is contrary to the long established practice of the Board to entertain appeals which have no relation to existing rights created or purported to be created; the Judicial Committee would therefore decline to hear arguments as to the validity of an Act which has, since the decision of the Court below, been repealed and cannot, therefore, be brought into operation—Such an appeal is of no practical interest. 1939 M.W.N. 142=1939 P.C. 53 (P.C.).

Secs. 6 and 30: APPLICABILITY TO TEMPORARY ORDINANCES.—No doubt the General Clauses Act would certainly be applicable to the two Ordinances 2 and 10 of 1932, but S. 6 is applicable to a case where a previous Ordinance has been "repealed" by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period, during which it is in operation, is over. Hence although S. 30 makes the Act applicable to the Ordinances, S. 6 has no application to such temporary Ordinances. (1933 Cal. 280, Dist.) 1933 A.L.J. 875=1933 All. 669 (F.B.).

Sec. 6-A.—Effect of the section on S. 7 of the Criminal Law Amendment Act. *See* (1938) 2 M.L.J. 863.

Sec. 7.—*Cf.* S. 11 of the Interpretation Act, 1889 (52 and 53, Vic., c. 63).

REPEAL OF A REPEALING ENACTMENT, EFFECT OF.—The mere repeal of a Repealing Act or the repealing portion of a Repealing Act does not, by itself, revive the original Act or the repealed portion thereof. 1 Weir 781=7 M.H.C.R. App. 8. *See also* 6 M. 336; 25 C. 333. The repeal of a statute repealing a certain enactment does

(2) This section applies also to all [1][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Construction of references to repealed enactments.

[2][8. (1)] Where this Act, or any [1][Central Act] or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

[2][(2) Where any Act of Parliament repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any [1][Central Act,] or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.]

Commencement and termination of time.

9. (1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

(2) This section applies also to all [1][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Computation of time.

10. (1) Where, by any [1][Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Re-numbered as S. 8 (1) and cl. (2) added by Act XVIII of 1919.

NOTES.

not revive the repealed enactment. The law on this point as embodied in S. 7 of Act X of 1897 is the same as in England. 25 C. 333=2 C.W.N. 11 (12 M. 94; 14 B. 381, Ref. and Appr.).

Sec. 8.—*Cf.* S. 38 (1) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). *See* a similar provision in S. 3 of the Code of Criminal Procedure (V of 1898). An amending section cannot be said to take retrospective effect so as to validate a pending action which would otherwise be barred under the old section. 35 C.W.N. 1147.

Sec. 9.—This section would not apply in terms to a decree or order of Court, but it is desirable that for the sake of uniformity the same interpretation should be given to an expression occurring in a judicial order as would be given to it in a statute. I.L.R. (1938) Bom. 734=40 Bom.L.R. 892=1938 Bom. 447.

Sec. 10.—*See* Madras General Clauses Act (Madras Act I of 1891), S. 11. *See* 2 Weir 200; 22 C. 176. This section is applicable to those cases where period of limitation has been given in the section and to the condition put in the decree. 41 A. 47=48 I.C. 353. This section does not apply to the period of grace allowed by S. 31 (1) of the Limitation Act. 36 B. 268 =12 I.C. 811. When a certain day is fixed for complying with an order of the Court the party is entitled to have reasonable opportunity of presenting his case or substantiating it in the proper course. 35 I.C. 650. S. 10 does not apply to an application under S. 54 of the Provincial Insolvency Act, though the same result is achieved by S. 4 of the Limitation Act. 1933 M.W.N. 1049. S. 10 applies to a case in which an act is allowed or ordered to be done by an Act of the Legislature; it does not apply to an act ordered to be done by a compromise decree. 17 Pat. 191=19 Pat.L.T. 825=1938 Pat. 451.

(2) This section applies also to all [1][Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

Measurement of distances.

11. In the measurement of any distance, for the purposes of any [1][Central Act] or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane.

Duty to be taken *pro rata* in enactments.

12. Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise, or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity.

Gender and number.

13. In all [1][Central Acts] and Regulations, unless there is anything repugnant in the subject or context—

(1) words importing the masculine gender shall be taken to include females; and

(2) words in the singular shall include the plural, and *vice versa.*

References to the Sovereign.

[2][13-A. In all [1][Central Acts] and Regulations, references to the Sovereign or to the Crown shall, unless a different intention appears, be construed as references to the Sovereign for the time being.]

Powers and Functionaries.

Powers conferred to be exercisable from time to time.

14. (1) Where, by any [1][Central Act] or Regulation made after the commencement of this Act, any power is conferred [3][* * * *], then, [4][unless a different intention appears,] that power may be exercised from time to time as occasion requires.

(2) This section applies also to all [1][Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

Power to appoint to include power to appoint *ex officio*.

15. Where, by any [1][Central Act] or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office.

16. Where, by any [1][Central Act] or Regulation, a power to make any

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LEG. REF.

[1] Substituted by A.O., 1937.
[2] Inserted by Act XVIII of 1919.
[3] Omitted by *ibid.*
[4] Inserted by *ibid.*

NOTES.

Sec. 11.—*Cf.* S. 34 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

Sec. 12.—As to definition of "enactment", *see* S. 3, sub-S. (17), *supra.*

Sec. 13: WORDS IN SINGULAR NUMBER.—The General Clauses Act provides that words in the singular shall include the plural and *vice versa*; this provision applies only where there is nothing repugnant in the subject or context. 33 C. 292=10 C.W.N. 32. The word "person" in Cr. P. Code, Ss. 234 and 239 does not include "persons". 63 I.C. 449=19 A.L.J. 798.

Sec. 15.—*See* similar provision in S. 39 of the Code of Criminal Procedure (V of 1898).

Power to appoint to include power to suspend or dismiss.

appointment is conferred, then, unless a different intention appears, the authority having [1][for the time being] power to make the appointment shall also have power to suspend or dismiss any person appointed [2][whether by itself or any other authority] in exercise of that power.

Substitution of functionaries.

17. (1) In any [3][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all [3][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Successors.

18. (1) In any [3][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

(2) This section applies also to all [3][Central Acts] made after the third day of January, 1863, and to all Regulations made on or after the fourteenth day of January, 1887.

Official chiefs and subordinates.

19. (1) In any [3][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior to prescribe the duty of the superior.

(2) This section applies also to all [3][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Provisions as to Orders, Rules, etc., made under Enactments.

Construction of orders, etc., issued under enactments.

20. Where, by any [3][Central Act] or Regulation, a power to issue any [4][notification], order, scheme, rule, form or bye-law is conferred, then expressions used in the [4][notification], order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power.

21. Where, by any [3][Central Act] or Regulation, a power to [issue noti-

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LEG. REF.

[1] Inserted by Act XVIII of 1928.

[2] Substituted for 'by it' by *ibid*.

[3] Substituted by A.O., 1937.

[4] Inserted by Act I of 1903, sec. 3—*Cf*. sec. 31 of the Interpretation Act, 1889 (52 and 53, Vic., 63), and sec. 10 of the Madras General Clauses Act (Madras Act I of 1891).

NOTES.

Sec. 17 (1).—It is competent to an acting Magistrate to grant sanction for the prosecution of an offence wherever the permanent Magistrate could have done so. 42 M. 69=35 M.L.J. 736=49 I.C. 161.

S. 21.—*Cf*. S. 32 (3) of the Interpretation Act, 1889 (52 and 53, Vic., c. 63). The Inspector of Factories approving a system of working a particular factory can, under S. 21, cancel the approval. 59 I.C. 857=22 Cr.L.J. 153. But where an appeal is pending from the order of cancellation, it is not desirable, so long as the appeal is pending, to institute a criminal prosecution in respect of the factory having been worked in contravention of the order of cancellation. 59 I.C. 857=22 Cr. L.J. 153.

Power to make to include power to add, to amend, vary or rescind, orders, rules or by-laws.

fications][1] orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add, to amend, vary or rescind any [2][notifications], orders, rules or bye-laws so [1][issued].

Making of rules or bye-laws and issuing of orders between passing and commencement of enactment.

22. Where, by any [3][Central Act] or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

Provisions applicable to making of rules or bye-laws after previous publication.

23. Where, by any [3][Central Act] or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely:—

(1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Central Government or the Provincial Government prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or bye-laws, and where the rules or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after

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LEG. REF.

[1] Substituted by Act I of 1903, S. 3.

[2] Inserted by Act I of 1903.

[3] Substituted by A.O., 1937.

NOTES.

Sec. 22.—*Cf.* S. 37 of the Interpretation Act, 1889 (52 and 53, Vic., c. 63). Where a notification was made under S. 3 of the Provincial Insolvency Act of 1907 investing certain officer with certain powers, the same remains in force without a fresh notification under the Act V of 1920, as S. 3 has been re-enacted word for word in the new Act. 80 I.C. 858=1925 C. 335. Where the accused, who had kept in their compound a larger number of cattle than they were permitted to do under the bye-laws framed under S. 142 (*r*) of the Municipal Act, were acquitted by the Magistrate on the ground that by S. 10 of Act I of 1931, S. 142 (*r*) had been deleted, with the result that the bye-laws were no longer in force. *Held*, that S. 9 of Act I of 1931 re-enacted the provisions of S. 142 (*r*) in S. 124 (*a*) of the Act and though no fresh bye-laws had been made under S. 124 (*a*), the bye-laws made under S. 142 (*r*) should be deemed to have been made under the re-enacted provisions under S. 24 of the General Clauses Act (I of 1898) and so in force throughout and the acquittal of the accused was erroneous. 11 R. 532=1934 R. 12. Subsequent passing of the Registration Act, 1908—Effect—Notification exempting agricultural leases. 28 I.C. 577=12 A.L.J. 792. Notifications under earlier Acts continue in force by implication. 32 C.W.N. 576.

previous publication shall be conclusive proof that the rule or bye-law has been duly made.

Continuation of orders etc., issued under enactments repealed and re-enacted.

24. Where any [1][Central Act] or Regulation is after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided,, any [2][appointment, notification] order, scheme, rule, form or bye-law, [2][made or] issued under the repealed Act or Regulation shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been [2][made or] issued under the provisions so re-enacted, unless and until it is superseded by any [2][appointment, notification,] order, scheme, rule, form or bye-law [2][made or] issued under the provisions so re-enacted [3][and when any [2][Central Act] or Regulation which, by a notification under section 5 or 5-A of the Scheduled Districts Act, 1874,[4] or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section].

Miscellaneous.

Recovery of fines.

25. Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

Provision as to offences punishable under two or more enactments.

26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Inserted by Act I of 1903, S. 3.

[3] Inserted by Act XVII of 1914—*Cf*. S. 18 of the Madras General Clauses Act (Madras Act I of 1891).

[4] Repealed by A.O., 1937.

NOTES.

Sec. 24.—An ordinance is not an enactment and an ordinance which has expired, is not an enactment which is repealed. A.I.R. 1941 Rang. 1. As to the applicability and scope of S. 24, *see also* 43 Bom.L.R. 99=1941 Bom. 100 (S. 24 would come into operation where a Central Act or Regulation has been repealed and re-enacted, and neither a Central Act or Regulation would include a rule made under an Act. 1941 Bom. 100).

Sec. 25.—*See* now S. 386, *et seq* of the Code of Criminal Procedure (Act V of 1898). *See* L.B.R. (1893-1900) 385; L.B.R. (1898-1900) 494; 1 L.B.R. 150: Mere temporary rights of a tenant-at-will to reap the produce as tenants are not "immovable property". 1 L. 567=58 I.C. 321. S. 25 if controls Sugarcane Act—Power of Court to award imprisonment in default of payment of fine. *See* 17 Pat.L.T. 806.

Sec. 26.—As to definition of "offence", *see supra*, sub-S. (37) of S. 3. L. B. R. 218 (F.B.). Where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either or both, but cannot be punished twice for the same act. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it. 53 A. 642=1932 A. 18. Where the accused was found in possession of a stolen revolver without licence, there is no legal bar to his being charged and convicted for two offences, one under S. 411 of the Penal Code and the other under S. 19 of the Arms Act. The offence under the latter section is the possession of a revolver without licence; that under the former is the possession of an article knowing it to be stolen. It is immaterial that the article in both cases happens to be a revolver. 1933 A.L.J. 523=1933 A. 461. Where an act for the abetment of which conviction takes place is not a separate offence under the Penal Code but is an offence exclusively under the Salt Act, 1882, S. 26 of the General Clauses Act is inapplicable. 1930 O. 497.

CRIMINAL TRIAL.—No two punishments

Meaning of service by post.

27. Where any [1][Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions, "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Citation of enactments.

28. (1) In any [1][Central Act] or Regulation and in any rule, bye-law, instrument or document made under, or with reference to any such Act or Regulation, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any [1][Central Act] or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

Saving for previous enactments, rules and by-laws.

29. The provisions of this Act respecting the construction of Acts, Regulations, rules or bye-laws made after the commencement of this Act shall not affect the construction of any Act, Regulation, rule or bye-law made before the com-

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LEG. REF.

[1] Substituted by A.O., 1937.

NOTES.

can be inflicted for the same act, though under two enactments. 76 I.C. 689=25 Cr. L.J. 225. *See also* 33 Bom.L.R. 648=1931 B. 409; 53 A. 642; 1941 M. W. N. 765 (conviction under S. 352, Penal Code and S. 3 (12) of Madras Town Nuisances Act). But the Court can impose a sentence of imprisonment in default of payment of fine imposed for breach of a statutory rule. 58 C. 1293=35 C.W.N. 865. Where a special enactment deals with an offence similar to the offence which is dealt with by a general enactment it does not follow that the provisions of the general enactment are repealed to that extent. 18 Cr.L.J. 992=42 I.C. 608. The prosecution in such a case may lie under either but not both of those enactments. 42 I.C. 608 (22 C. 131 at 139, Dist.) Where a person illegally sold a certain quantity of opium and retained possession of the residue after the sale, separate sentences for possession and sale under the Opium Act and the Bihar and Orissa Excise Act do not contravene S. 26 of the Act. 44 I.C. 974=3 P.L.J. 433. Where one Act constitutes two offences, separate punishment for each offence can be inflicted only if both offences are against the same law. 1 P.L.J. 373=38 I.C. 433. Section has no application if the offences are distinct. 138 I.C. 491=1932 M. 537. When the petitioner has been convicted for disobeying a previous notice to produce a child for vaccination, he cannot once more be convicted on the same facts under the same sub-section for failure to comply with a second notice to discontinue his breach of the previous notice. 131 I.C. 156=1931 Mad. 181 =60 M.L.J. 299. Offence falling under S. 24 of Cattle Trespass Act, 1871, and also under S. 380, I.P. Code—Procedure. *See* 1930 M.W.N. 529=1931 M. 18.

Sec. 27.—*Cf.* S. 26 of the Interpretation Act, 1889 (52 and 53, Vic., c. 63). *See* 24 I.C. 437=16 Bom.L.R. 204.

PRESUMPTION REGARDING LETTER SENT BY POST.—S. 63, Income-tax Act is to be read along with S. 27, General Clauses Act. The words "unless the contrary is proved" in S. 27 refer both to the service and the time. Consequently, when a notice has been posted properly addressed and pre-paid in a register cover, the presumption raised even as regards the service is not conclusive but is rebuttable. 54 All. 548=1932 A.L.J. 409 =1932 All. 374.

Sec. 28.—*Cf.* Sec. 35 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63. Short title has been conferred on the Unrepealed General Acts of the Governor-General in Council which had previously no short title —*See* The Indian Short Titles Act (XIV of 1897).

Sec. 29.—*Cf.* S. 40 of the Interpretation Act, 1889 (52 and 53 Vict, c. 63).

mencement of this Act, Regulation,, rule or by-law made after the commencement of this Act.

Application of Act to Ordinances.

[1][30. In this Act, the expression [2]["Central Act"] whereever it occurs, except in section 5, and the word 'Act' in clauses (9), (12), (38), (48) and 50 of section 3 and in section 25 shall be deemed to include an Ordinance made and promulgated by the Governor-General under section 23 of the Indian Councils Act, 1861] [or section 72 of the Government of India Act, 1915] [3][or section 42 or section 43 of the Government of India Act, 1935][4]

[3]30-A. [* * * *]. Rep. by A.O. 1937.

[3]31. [* * * * * *]. Rep. by A.O. 1937.

THE GENEVA CONVENTION IMPLEMENTING ACT, (XIV OF 1936).

[*27th October,* 1936.

An Act to implement Article 28 *of the Geneva Convention of the* 27*th day of July,* 1929.

WHEREAS India was a signatory to the International Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, drawn up in Geneva and dated the 27th day of July, 1929;

AND WHEREAS it is necessary to provide for the discharge of the obligations imposed by Article 28 of that Convention in so far as provision has not been made by the Geneva Convention Act, 1911;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE GENEVA CONVENTION IMPLEMENTING ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Prohibition of use of imitations of emblem of Red Cross on white ground.

2. No person shall use for the purposes of his trade or business or for any other purpose whatsoever any sign constituting a colourable imitation of the heraldic emblem of the red cross on a white ground formed by reversing the federal colours of Switzerland.

Prohibition of use of emblem of White Cross on red ground or imitations thereof.

3. No person shall use for the purposes of his trade or business the heraldic emblem of the white cross on a red ground, being the federal colours of Switzerland, or any sign constituting a colourable imitation of that heraldic emblem.

Penalty.

4. Any person contravening the provisions of S. 2 or S. 3 shall be punishable with fine which may extend to fifty rupees, and when such contravention is committed by a company, association or body of individuals, then, without prejudice to the liability of such company, association or body, every member thereof who is knowingly a party to the contravention shall be liable to the like penalty.

5. No criminal Court shall take cognizance of any offence punishable

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LEG. REF.

[1] This section was inserted by Act XVII of 1914.

[2] Substituted by A.O., 1937.

[3] Inserted by Act XVII of 1914.

[4] Inserted by Act XXIV of 1917.

NOTES.

Secs. 30 and 6: APPLICABILITY—TEMPORARY ORDINANCES.—No doubt the General Clauses Act would certainly be applicable to the two Ordinances 2 and 10 of 1932, but S. 6 is applicable to case where a previous Ordinance has been "repealed" by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expired after the period, during which it is in operation is over. Hence although S. 30 makes the Act applicable to the Ordinances, S. 6 has no application to such temporary Ordinances. (1933 Cal. 280, Dist.) 145 I.C. 683=34 Cr. L. J. 1030=1933 A. L. J. 875 =A.I.R. 1933 All. 669 (F.B.).

Previous sanction for prosecution. under this Act except with the previous sanction of the [Central Government] [1][* *].

Saving. 6. Nothing in the foregoing sections shall affect the right of any person, to continue to use for a period of two years from the commencement of this Act any sign or emblem which it was not unlawful for him to use at the commencement of this Act.

THE GOVERNMENT BUILDINGS ACT (IV OF 1899).[2]

[*Sec.* 1 *Rep. in pt. Act X of* 1914; *Am. Act, XXXVIII of* 1920; *Declared in force in the Sonthal Parganas Reg. III of* 1872, *Sec.* 3 *as amended by Reg. III of* 1899, *Sec.* 3; *Declared in force in British Baluchistan Reg. II of* 1913, *Sec.* 3.]

PREFATORY NOTE.—The provisions of the various Acts in force regarding the regulation of buildings in municipalities rest in the main on the necessity for controlling buildings and the maintenance of buildings with due regard to engineering and sanitary exigencies; and the powers conferred upon Municipal Committees with the object in the several Municipal Acts are wide, and more or less absolute. It has been on several occasions represented to the Government of India that in the case of Government buildings the necessity does not exist, as the requirements in question are secured by departmental regulations and the advice of the experts who are employed by the State for the proper execution and supervision of public works. Moreover, as regards works relating to imperial defence, it is evident that, if direct control is to be effectively exercised by Municipal Committees, the power of inspection must extend to the examination, on demand, of plans and records, which may be of a strictly confidential character, and this examination, is inconsistent with the secrecy which, for obvious reasons, is essential in these matters. It will be generally admitted that the Government cannot permit its designs for the improvement of its coast batteries, magazines, or arsenals to become practically public property, merely because such designs have to be carried out within a municipal area in which the local law requires their submission to the municipal authorities and admits of extraneous, and it may be, arbitrary interference with them.

The object of this Bill is therefore to exempt from such regulations all buildings which are situate within municipalities or which are to be erected upon land which is the property or in the occupation of the Government. The Government of India have, however, no desire to ignore the internal arrangements and general administration of municipalities. On the contrary they consider it incumbent on the administration to frame its projects with full consideration for the general plans of any municipal body concerned: and they consider it reasonable and right that municipal bodies should have opportunities of criticising such projects but the final judgment on objects and suggestions must rest with the Local Government which has undertaken them, and not with a Municipal Board, which is itself under the control of the Local Government. It is proposed in the Bill, therefore, to provide that reasonable notice of any work, which, if it is intended by the Government to undertake, shall be given to the municipality concerned, that the Municipal Committee shall be permitted, subject to suitable safeguards, to inspect the land and the plans; that any representation such municipal committee may think fit to make with reference thereto shall be received and considered by the Local Government; that the work shall be executed in strict accordance with the orders passed by the Local Government on such a representation, and that every order so passed shall be liable, in the last resort, to revision, by the Governor-General in Council. (*See* Statement of Objects and Reasons.).

[*3rd February,* 1899.

An Act to provide for the exemption from the operation of municipal building laws of certain buildings and lands which are the property, or in the occupation, of the Government and situate within the limits of a municipality.

WHEREAS it is expedient to provide for the exemption from the operation of municipal building laws, of certain buildings and lands which are the proper-

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LEG. REF.

[1] The words "or the Local Government omitted by the A.O., 1937.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1896, Pt. V, p. 256; for Report of the Select Committee, see *ibid.*, 1899, Pt. V, p. 15; and for Proceedings in Council, see *ibid.*, 1899, Pt. VII,

ty, or in the occupation, of the Government and situate within the limits of a municipality; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE GOVERNMENT BUILDINGS ACT, 1899.

(2) It extends to the whole of British India. [*][1]

(3) [* * *][1]

"Municipal authority" defined.

2. In this Act the expression "municipal authority" includes a municipal corporation or a body of municipal commissioners constituted by, or under the provisions of, any law or enactment for the time being in force.

Exemption of certain Government buildings from municipal laws to regulate the erection, etc., of buildings within municipalities.

3. Nothing contained in any law or enactment for the time being in force to regulate the erection, re-erection, construction, alteration, or maintenance of buildings within the limits of any municipality shall apply to any building used or required for the public service or for any public purpose, which is the property, or in the occupation of the [2][Crown] or which is to be erected on land which is the property, or in the occupation, of the [2][Crown]:

Provided that, where the erection, re-erection, construction or material structural alteration of any such building as aforesaid (not being a building connected with Imperial defence, or a building the plan or construction of which ought, in the opinion of the Government [3][concerned], to be treated as confidential or secret) is contemplated, reasonable notice of the proposed work shall be given to the municipal authority before it is commenced.

Objections or suggestions as to erection, etc., of certain Government buildings within municipalities how to be made and dealt with.

4. (1) In the case of any such building as is mentioned in the last preceding section (not being a building connected with Imperial defence or a building the plan or construction of which ought, in the opinion of the Government [3][concerned], to be treated as confidential or secret), the municipal authority, or any person authorized by it in this behalf, may, with the permission of the Provincial Government previously obtained, but not otherwise, and subject to any restrictions or conditions which may, by general or special order, be imposed by the Provincial Government, inspect the land and building and all plans connected with its erection, re-erection, construction or material structural alteration, as the case may be, and may submit to the Provincial Government a statement in writing of any objections or suggestions which such municipal authority may deem fit to make with reference to such erection, re-erection, construction or material structural alteration.

(2) Every objection or suggestion submitted as aforesaid shall be considered by the Provincial Government, which shall, after such investigation (if any) as it shall think advisable, pass orders thereon, and the building referred to therein shall be erected, re-erected, constructed or altered, as the case may be, in accordance with such orders:

Provided that, if the Provincial Government overrules or disregards any such objection or suggestion as aforesaid, it shall give its reasons for so doing in writing.

(3) [*Omitted by the Government of India (Adaptation of Indian Laws) Order,* 1937.]

LEG. REF.

pp. 2, 15 and 20. The Act has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation III of 1872, as amended by the Sonthal Parganas Justice and Laws Regulation, III of 1899, Ben. Code.

[1] Rep. by Act X of 1914, Sch. II.

[2] Substituted by A.O., 1937.

[3] Inserted by A.O., 1937.

THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT (X OF 1892).[1]

Year	No.	Short title	Amendments.
1892	X	The Government Management of Private Estates Act, 1892	Repealed in part, XIII of 1898, S. 18; X of 1914.

CONTENTS.

SECTIONS.
1. Title, extent and commencement.
2. Definitions.
3. Power to levy rate.
4. Power to levy special charges.
5. Saving as to special expenditure.

SECTIONS.
6. Validation of levy of past rates.
7. Powers to make rules.
8. Exemption from jurisdiction of Courts.
9. [*Repealed by Act X of* 1914.]

[*25th October*, 1892.

An Act to provide for the levy of a rate on private estates under the management of the Government to meet the cost of supervision and management.

WHEREAS it is expedient to provide for the levy of a rate on private estates under the management of the Government to cover the cost of all Government establishments in so far as they are employed in the supervision and management of such estates, other than establishments specially entertained for any particular estate or group of estates, and to meet all contingent expenditure incurred by the Government in connection with such supervision and management; it is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT, 1892.

(2) It extends to the whole of British India, inclusive of [2][* * *] British Baluchistan;[3] [*]

(3) [*Repealed by Act X of* 1914.]

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops or grass;

(2) "gross income" includes all receipts of every kind in produce or cash, except money borrowed, recoveries of principal and the proceeds of sale of immovable property or of movable property properly classed as capital; and

(3) "private estates under the Government management" include—

(*a*) estates under the Court of Wards;

(*b*) encumbered estates under Government management;

(*c*) estates attached for default of payment of Government revenue;

(*d*) minor's estates placed under the guardianship of a revenue-officer of the Government by a Civil Court;

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1892, Pt. V, p. 14; for Report of the Select Committee, see *ibid.*, 1892, Pt. V, p. 69 and for Proceedings in Council, see *ibid.*, 1892, Pt. VI, p. 73.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), *see* the First Schedule and S. 4, Bur. Code. The Act has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation, 1872 (III of 1872), S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, (III of 1899), S. 3, Bengal Code, Vol. I.

[2] The words "Upper Burma and" were repealed by the Burma Laws Act (XIII of 1898), Bur. Code.

[3] The word "and" omitted by Act X of 1914.

(*e*) estates managed by a Collector in pursuance of any order made under the Code of Civil Procedure; and

(*f*) all other estates made over to, or taken under the management of, a revenue-officer of the Government as such under any law for the time being in force or in virtue of any agreement.

Power to levy rate.

3. It shall be lawful. for the Provincial Government[1]

(1) to levy on all private estates under Government management a rate, not exceeding five per cent. on the gross income, calculated, as nearly as may be possible, to cover—

(*a*) the cost of all Government establishments in so far as they may be employed in the supervision or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates, and

(*b*) all contingent expenditure incurred in consequence of such supervision or management;

(2) from time to time to vary such rate; and

(3) to reduce or remit such rate in any special case or cases as may be equitable:

Provided that, in deciding the amount of the rate to be levied under this Act on any particular estate or group of estates, the Provincial Government shall consider the expenditure incurred on special establishments for such estate or estates.

Power to levy special charges.

4. In cases where an officer of the Government is employed to give legal advice or to audit accounts on behalf of any estate, the Provincial Government, if it considers the services rendered to be of a special nature, may, in its discretion, direct a special charge to be made against that estate on account of such services, irrespective of the rate leviable under the last foregoing section.

Saving as to special expenditure.

5. Nothing in this Act shall apply to the cost of establishments specially entertained or to expenditure of any description specially incurred in respect of any particular estate or estates.

Validation of levy of past rates.

6. All rates for general supervision or management levied by any Provincial Government before the commencement of this Act shall be deemed to have been levied under this Act.

Powers to make rules.

7. The [1]Provincial Government may make any rules[2] and issue any orders, which may be necessary for carrying this Act into effect, and which are consistent therewith.

Exemption from jurisdiction of Courts.

8. Where any Government establishment is employed in such supervision as aforesaid, the Provincial Government shall be the sole judge of the cost attributable to such employment, and its decision thereon shall not be questioned in any Court of law or otherwise.

9. Repeal. [*Repealed by the Repealing and Amending Act X of* 1914.)

LEG. REF.

[1] For instance of notification issued under the powers conferred by this section fixing a rate to be levied on any estate, *see* (Cent. Prov. R. and O. (List).

[2] For instances of rules made under the powers conferred by the section, *see* North-West Provinces and Oudh Gazette, 1893, Pt. I, p. 533 and Punj. List of Local R. & O., and for other Provinces, their respective Local Rules and Orders. S. 17 of the Court of Wards Act, 1879, (passed by the Lieutenant-Governor of Bengal in Council), and so much of Act III of 1881 also passed by the Lieutenant-Governor of Bengal in Council) as relates to S. 17 of the said Court of Wards Act, 1879, are hereby repealed.

THE GOVERNMENT OF INDIA ACT, 1919.

(9 & 10, Geo. V, Ch. 101.)

[*23rd December*, 1919.

An Act to make further provision with respect to the Government of India.

Preamble.

WHEREAS it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the general development of self-governing institutions, with a view to the progressive realization of responsible government in British India as an integral part of the Empire:

AND WHEREAS progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken:

NOTES.

The Preamble to the Government of India Act, 1919, was left unrepealed by the Government of India Act, 1935 (*see* S. 321).

The Act of 1935, has not, unlike the Act of 1919 a preamble indicating the intentions of Parliament in enacting this measure. Indian opinion keenly desired the insertion in the Act of some provision indicating the goal of India as the attainment of Dominion Status. But perhaps for reasons explained by Lord Peel in the House of Lords, His Majesty's Government were against the proposal. Lord Peel stated:

"I believe that if, following the request of many Indian leaders, you had put in the sacred words *Dominion Status*, you would have had a considerable amount of enthusiasm, but, apart from the fact that from the draftsman's point of view the phrase is not artistic, the words, while rousing feelings of satisfaction in political India, might also give rise to misunderstanding. Although the Indians may be emotional, and may respond to good will on our part, there are among them extremely acute and able lawyers. If you put this phrase in the Bill, those men would be constantly comparing the provisions of the Bill with the Constitutions of the self-governing Dominions and would draw most unfavourable comparisons between the powers granted to India and those enjoyed by the Dominions. The result—and a very dangerous result—would be that they would be led to charge us with that most terrible of all accusations, breach of faith, if we put the phrase into the Bill without perhaps fully appreciating all the deductions and inferences which could be drawn from it." (*Par. Deb. H. L. Vol.* 97, *Col.* 601).

The only concession that the Government were prepared to make was to retain, unrepealed the Preamble to the Act of 1919—notwithstanding that the Preamble therein referred to British India alone whereas this Act comprehends the Indian States in a Federation.

INTERPRETATION OF ACT—PRINCIPLES—DUTY OF COURT.—The constitution is not to be construed in any narrow or pedantic sense, and the Court will have regard to the fact that the subject-matter of the interpretation is a constitution—a mechanism under which laws are to be made and not a mere Act which declares what the Law shall be. 1939 F.C.R. 18=43 C.W.N. (F.C.R.) 1=49 L.W. 36=1939 F.C. 1=1939 M.L.J. (Supp.) 1.

INTERPRETATION OF ACT—WHITE PAPER AND REPORT OF JOINT SELECT COMMITTEE.—*Gwyer, C.J. and Jayakar, J.* The proposals for Indian Constitutional Reforms known as the White Paper and Report of the Joint Select Committee thereon are historical facts and their relation to the constitution Act is a matter of common knowledge to which the Court is entitled to refer. (1939) 1 M. L. J. Sup. 1.

Gwyer, C.J., and Sulaiman, J. The Legislative practice in India preceding the Constitution Act may be looked into, for Parliament must surely be presumed to have that in mind, and unless the context otherwise clearly requires not to have conferred a legislative power in a sense not understood by those to whom the Act was to apply. 1939 F.C.R. 18=43 C.W.N. (F.C.R.) 1=1939 (F.C.) 1=(1939) M.L.J. (Supp.) 1. The ministers of a province are not subordinate officers to the Governor within the meaning of the Government of India Act. I.L.R. (1939) 2 Cal. 411=43 C.W.N. 950=1939 Cal. 529 (S. B.). In the Constitution Act of India there is no statutory bar by which taxing clauses are forbidden from being introduced into measures dealing with other subjects. 1942 A.L.J. 112=1942 O.A. (Supp.) 94.

The reasons which led the Government to support the saving of the preamble to the 1919 Act from the repeal of it was thus explained in Parliament.

"The value of this Preamble is that it does express in terms to which the Government to-day still adhere, the intentions or policy of Parliament with regard to the progressive realisation of responsible Government in British India as an integral part of the Empire". (*Parl. Deb., Vol.* 300, *Col.* 1364).

"We desire to preserve the Preamble as a record of the intentions of Parliament; not the intentions of a party or of an individual or of a Minister, but the inten-

AND WHEREAS the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples:

AND WHEREAS the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility:

AND WHEREAS concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities:

Be it therefore enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

* * * *

THE GOVERNMENT OF INDIA ACT, 1935.

(26 GEO V, CH. 2.) (EXTRACTS.)

PART III.

CHAPTER IV.

[*N.B.*—Sections 88, 89 and 90 amended by 3 and 4, Geo. VI, Ch. 5, *see* S, 4, cited, *infra.*]

LEGISLATIVE POWERS OF GOVERNOR.

Power of Governor to promulgate ordinances during recess of Legislature.

88. (1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require:

NOTES.

tions of Parliament and, therefore, of the great English people with regard to the future of India.

Sec. 88: ORDINANCES DURING RECESS.—Dealing with the Ordinances under this section it was said: "We are dealing with ordinances made upon the advice of Ministers. They are ordinances made in the field of special responsibility by the Governor, which are the kind of Ordinances that would be made here by the Government in a time of emergency as to which the Government, of the day has to obtain parliamentary approval within a given time. I think the real check is the check of ministerial responsibility to the Provincial Council. These ordinances are made upon the advice of Ministers who are themselves responsible to the Provincial Council." (*Par. Deb. Vol.* 299, *Col.* 1532.)

Secs. 88, 89: GOVERNOR'S ORDINANCE.—The Governor-General is the sole judge as regards the exercise of his powers and he is not bound to give any reasons for promulgating an ordinance such as the Criminal Law Amendment Act of 1935, which when once promulgated becomes a lawful Act. 48 L.W. 813=(1938) 2 M. L. J. 863.

CASES UNDER GOVT. OF BURMA ACT.—The Court will not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only judge of that. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49. An ordinance duly promulgated has the same force and effect as an Act of the Legislature. 1941 Rang. L. R. 101=1941 Rang. 49.

ORDINANCE — PROMULGATION — DATE.—Promulgation of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. Promulgation of a new law takes place through the medium of the Official Gazette. It is wrong for the notifications which appear in the Gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; they should say "The Governor hereby promulgates the following ordinances." An ordinance therefore is promulgated on the date on which it is published in the Gazette. 193 I.C. 91=1941 Rang. 5.

ORDINANCES —PROMULGATION — PUBLICATION — RELATION BETWEEN?—Promulga-

Provided that the Governor—

(*a*) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; and

(*b*) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(*a*) shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council;

NOTES.

tion and publication in the Official Gazette are not synonymous. There is a distinction between the two. Publication in the Official Gazette is not *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. Reading of an ordinance by the speaker to the House of Representatives is sufficient promulgation. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49.

ORDINANCES—PREAMBLE — DESIRABILITY. It is not legally necessary that an ordinance should have a Preamble setting out that the Governor is satisfied as required by the terms of the section and also the purpose for which the ordinance is promulgated. Legally all that is necessary is that the Governor should declare that he promulgates the ordinance; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an ordinance. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49.

GOVERNOR'S POWERS—SCOPE OF—ORDINANCES—IMPLICATION UNDERLYING.—The Governor's functions are capable of being exercised in any of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters which are said to fall within the individual judgment of the Governor may fall within the second and third group according to the opinion formed by the Governor as to the course which he should take. Where therefore an ordinance issued is expressed to be under the powers conferred by S. 89 it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him. 1941 Rang.L.R. 101=193 I. C. 114=1941 Rang. 49. Whether ordinance has retrospective operations, *see* 1941 Rang. L.R. 321=1931 Rang. 151.

HIGH COURT, IF CAN GO INTO QUESTION AS TO AN ORDINANCE BEING WITHIN OR OUTSIDE THE POWERS OF THE GOVERNOR.—High Court is not precluded from enquiring whether an ordinance promulgated by the Governor is or is not within his powers. The Court can go into the question whether any provision or an ordinance promulgated is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature would not have been valid. 193 I.C. 91=1941 Rang. 5. Ordinance—Duration—Computation of time. *See* 1941 Rang. 49=1941 Rang. L.R. 101.

The rationale and necessity for the power conferred by this section was thus explained on behalf of the Government to the committee of the House of Commons.

"This Bill sets up substantially Provincial autonomy, and the administration is carried on by Ministers. The Committee has already passed a clause which places on the Governor certain special responsibilities. Obviously, you cannot place special responsibilities on a man unless you give him the means of fulfilling those responsibilities. So far as executive action is concerned, and any executive action taken is in his name, he can, of course, act in his individual judgment or discretion if the Bill empowers him to do so, but, obviously also, if you look at the special responsibilities placed upon him, occasions may arise where, in order to fulfil those responsibilities, it is necessary for him to proceed by ordinance. Therefore, everyone on the Committee, wherever he sits, and whatever his general views about democracy, must agree that, granted that these special responsibilities are to be placed on the Governor, it is quite clear that in (*b*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature assented to by the Governor; and

(*c*) may be withdrawn at any time by the Governor.

(3) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.

Power of Governor to promulgate ordinances at any time with respect to certain subjects.

89. (1) If at any time the Governor of a Province is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion, or to exercise his individual judgment, he may promulgate such ordinances as in his opinion the circumstances of the case require.

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(*a*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature;

(*b*) may be withdrawn at any time by the Governor; and

(*c*) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature, it shall be void:

Provided that for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, an ordinance promulgated under this section shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him.

(5) The functions of the Governor under this section shall be exercised by him in his discretion but he shall not exercise any of his powers thereunder except with the concurrence of the Governor-General in his discretion:

NOTES.

order to fulfil them, it may be necessary for him to proceed by Ordinance. Therefore, it would be quite wrong to put the responsibility upon him and not to confer the Ordinance-making power. The Committee having passed Clause 52 and the other Clauses giving the Governor special responsibilities, that must be unanswerable." (*Par. Deb. Vol.* 299, *Col.* 1542.)

Under the Government of India Act, 1919, S. 72 the power of promulgating Ordinances was vested only in Governor-General and Provincial Governors had no such power. If any such ordinance was needed for any particular Province, it had to be passed by the Governor-General.

Sec. 39: "Assume to himself all or any of the Powers."—"In the event of a breakdown of the constitutional machinery, the Governor is not bound to take over the whole Government of the Province and administer it himself on his own undivided responsibility. The intention is to provide also for the possibility of a partial breakdown and to enable the Governor to take over part only of the machinery of Government, leaving the remainder to function according to the ordinary law. Thus the Governor might, if the breakdown were in the legislative machinery of the Province alone, still carry on the Government with the aid of his Ministers, if they were willing to support him; we are speaking of course of such a case as the refusal of the Legislature to function at all, and not merely of lesser conflicts or disputes between it and the Governor." (J.P.C. Report para. 109).

Provided that, if it appears to the Governor that it is impracticable to obtain in time the concurrence of the Governor-General, he may promulgate an ordinance without the concurrence of the Governor-General, but in that case the Governor-General in his discretion may direct the Governor to withdraw the ordinance and the ordinance shall be withdrawn accordingly.

* * * *

Power of Governor in certain circumstances to enact Acts.

90. (1) If at any time it appears to the Governor that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to the Chamber or Chambers of the Legislature explain the circumstances which in his opinion render legislation essential and either—

(*a*) enact forthwith as a Governor's Act a Bill containing such provisions as he considers necessary; or

(*b*) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor takes such action as is mentioned in paragraph (*b*) of the preceding sub-section, he may, at any time after the expiration of one month, enact, as a Governor's Act, the Bill proposed by him to the Chamber or Chambers either in the form of the draft communicated to them, or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by the Chamber or either of the Chambers with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Provincial Legislature assented to by the Governor and, if and so far as it makes any provision which would not be valid if enacted in an Act of that Legislature, shall be void:

Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, a Governor's Act shall be deemed to be an Act reserved for the consideration of the Governor-General and assented to by him.

(4) Every Governor's Act shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor under this section shall be exercised by him in his discretion, but he shall not exercise any of his powers thereunder except with the concurrence of the Governor-General in his discretion.

CHAPTER VI.

PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY.

Power of Governor to issue Proclamations.

93. (1) If at any time the Governor of a Province is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(*a*) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion;

(*b*) assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority;

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Provincial body or authority:

Provided that nothing in this sub-section shall authorize the Governor to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend, either in whole or in part, the operation of any provision of this Act relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation under this section—

(*a*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament;

(*b*) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months:

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this sub-section it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years.

(4) If the Governor, by a Proclamation under this section, assumes to himself any power of the Provincial Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Provincial Acts, Provincial laws, or Acts or laws of a Provincial Legislature shall be construed as including a reference to such a law.

(5) The functions of the Governor under this section shall be exercised by him in his discretion and no Proclamation shall be made by a Governor under this section without the concurrence of the Governor-General in his discretion.

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PART V.

Legislative Powers.

CHAPTER I.

DISTRIBUTION OF POWERS.

Extent of Federal and Provincial laws.

99. (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

NOTES.

Sec. 99: SCOPE.—This section defines the territorial ambit of the powers conferred on the Federal and the Provincial legislatures as also the classes of persons over whom they have legislative competence. The succeeding sections of this Chapter together with the legislative lists in Schedule VII, delimit their competence with reference to the subject-matter of the legislation.

Secs. 99, 100.—Act of Indian Legislature excluding right of resort to Civil Court—If *ultra vires.*—An Act excluding the subjects right of resort to the Civil Courts is not *ultra vires* of the Indian Legislature. S. 32 of the Government of India Act (1915) does not affect the validity of an Act which creates an obligation and provides an exclusive code for its determination. 67 I.A. 222=I.L.R. (1940) Mad. 599=52 L.W. 1=44 C.W.N. 709=1940 P.C. 105=(1940) 2 M.L.J. 140 (P.C.). *Powers of Provincial Legislature —Legislation taking away jurisdiction of Courts.*—The Provincial Legislatures are statutorily sovereign within the limits of the powers assigned to them. The jurisdiction of the Courts is within the province of the Provincial Legislature. It follows therefore that the Provincial Legislature can take away the right of the Courts to try any dispute which the Legislature considers it inexpedient to be decided by Courts at all. 195 I.C. 17 =43 P.L.R. 198=1941 Lah. 182 (F.B.). *Power to affect prerogative rights of His Majesty—Decree or order of Privy Council—If affected by Madras Agriculturists' Relief Act.*—It is a well-established principle that within the limits of subject and area assign-

(2) Without prejudice to the generality of the powers conferred, by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

(*a*) to British subjects and servants of the Crown in any part of India; or

(*b*) to British subjects who are domiciled in any part of India wherever they may be; or

(*c*) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(*d*) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(*e*) in the case of a law for the regulation or discipline of any naval military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be.

Subject-matter of Federal and Provincial laws.

100. (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

NOTES.

ed to a legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself. It is clearly competent for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. The legislative authority conferred by Ss. 99 and 100 of the Government of India Act of 1935 is subject only to "the provisions of this Act" and there is no provision in the Act which excepts generally the prerogative of the Crown. It is therefore within the competence of the legislatures of India to make laws derogating from the prerogative rights of the Crown except of course in so far as such prerogagatives may be comprised in matters specifically excepted. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law, such as Madras Act IV of 1938. 54 L.W. 107=1941 M.W.N. 741=1941 Mad. 817=(1941) 2 M.L.J. 125=I.L.R. (1942) Mad. 60.

Per *Gwyer, C.J. and Varadachariar, J.*—It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule has been evolved whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect to matter in this list or in that. This rule of interpretation is equally applicable to the Indian Constitution Act, and may be accepted as a guide for the interpretation of the Government of India Act. 53 L.W. 109=45 C.W.N. (F.R.) 1=1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1. The provisions of the Madras Agriculturists' Relief Act are not invalid even though they may affect the rights of parties under the Negotiable Instruments Act. 54 L.W. 577=(1941) 2 M.L.J. 808. ***East India Company Act*** *(1773), S. 36—**Power to legislate—If confined to Calcutta.***—S. 36 empowered the Governor-General in Council to legislate not only for the settlement at Fort William but also for other factories and places subordinate or to be subordinate thereto.' 20 Pat. 573=22 Pat.L.T. 863=1941 Pat. 306 (S.B.).

Secs. 100 and 107: SCOPE AND EFFECT OF.—Though in one aspect and for one purpose a subject may be within the powers of the Federal Parliament, in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. The Madras Agriculturists' Relief Act is one which relates to "*agriculture*" a subject reserved for the Provincial Legislature, item 20 of List II of Schedule VII of the Government India Act. The Act relates to money-lending to agriculturists, and "*money-lending*" also is a subject reserved for Provincial Legislature, item 27 of List II of Sch. VII. The only effect of the Act, so far as Negotiable Instruments are concerned is to reduce liability where the maker or endorser is an agriculturist. The Act being in substance within the powers of the Madras Legislature, the fact that in particular cases it may operate to reduce liability on contracts evidenced

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

NOTES.

by negotiable instruments cannot affect its validity. The Madras Agriculturists' Relief Act is therefore *intra vires* the powers of the Provincial Legislature, and not *ultra vires* on the ground that its provisions are repugnant to the provisions of the Negotiable Instruments Act, the Usurious Loans Act and the Hindu Law as to debts. I.L.R. (1939) Mad. 151=2 F. L. J. 39=49 L. W. 257=1939 Mad. 361=(1931 1 M. L.J. 272 (F.B.). If a tax is covered by the Federal List (List I of of Sch. VII, and not covered by the Provincial List (List II of the said Schedule), then the Provincial Legislature cannot impose such tax and it would be invalid. If a tax is covered by the Provincial List and not covered by the Federal List, then the validity of tax cannot be questioned. But if a tax falls within both the Lists, then such a tax will be *ultra vires* the Provincial Legislature by reason of the non-obstante clause in S. 100 (1) of the Act. But it is a fundamental assumption that the legislative power of the centre and the Provinces could not have been intended to be in conflict with one another, and the Court must therefore read them together and interpret or modify the language in which one is expressed by the language of the other and arrive at a reasonable and practical construction of the language of the section so as to reconcile the respective powers they contain and give effect to all of them. It is only if such a reconciliation should prove impossible and only then will the non-obstante clause in S. 100 (1) operate and the Federal power prevail, for the clause ought to be regarded as a last resort. 49 L.W. 36=1939 F.C. 1=(1939) M.L.J. Supp. 1. *See also* 19 Pat. 974=21 Pat.L.T. 740=1940 Pat. 99; 20 Pat. 831=1941 Pat. 561. S. 4 (1) (*a*) of the *Madras Prohibition Act* is completely *ultra vires* so far as the possession of ganja or any other dangerous drug is concerned. The Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, in view of S. 107 of the Government of India Act. I.L.R. (1941) Mad. 687=54 L.W. 17=1941 Mad. 533=(1941) 2 M. L.J. 41 (F.B.). Under Cl. 31 of the Provincial Legislative List in the seventh schedule the Provincial Legislature had full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors, while Cl. 19 of the Federal List gave the Central Legislature power to legislate with regard to import and export across frontiers. S. 4 (1) (*a*) of the Prohibition Act prohibited *inter alia* the possession of intoxicating liquors. Since in the present case, which was merely concerned with the possession of arrack produced in the Madras Presidency there was no question of any import or export, the conviction was lawful as the Provincial Legislature had power to prohibit the possession of arrack. I.L.R. (1941) Mad. 701=53 L.W. 615=1941 Mad. 621=(1941) 1 M.L.J. 715. *Obiter.*—*A right to legislate as to possession of intoxicating liquors* must necessarily involve a right to prohibit possession. The Provincial Legislature has power so to limit possession, provided that in so doing it does not encroach upon the legislative powers of the Central Governments. The Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea frontier of Bombay, under item 19 of List I of the 7th Schedule. The power of the Provincial Government to legislate as to possession is thus a qualified, and not an absolute power; it is subject to the rights of the Central Government. I.L.R. (1940) Bom. 777=42 Bom.L.R. 791=1940 Bom. 307 (F.B.). S. 3 of the *C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act of* 1938 and all the provisions thereof levying "a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales" is not *ultra vires* the Legislature of the Central Provinces and Berar. It falls under Item 48 of List II in Sch. VII of the Act as "a tax on the sale of goods" and is not covered by Item 45 in List I of Sch. VII as a "duty of excise". 180 I.C. 161=43 C.W.N. (F.C.R.) 1=1939 F.C. 1=1939 M.L.J. (Supp.) 1. Part VI of the *Bombay Finance Act of* 1932, *as amended in* 1939, is not *ultra vires* the Provincial Government, and the *Urban Im-*

101. Nothing in this Act shall be construed as empowering the Federal

NOTES.

movable Property Tax imposed by that Act is a valid tax. It is a tax on lands and buildings, imposed on the owners *qua* owners, and assessed by a somewhat arbitrary but not inequitable standard, which is not dependent either on the income of the assessees or on the capital value of the prope.ties. It is not a tax upon income. The tax falls within item 42 of the Provincial List. I. L. R. (1940) Bom. 58=42 Bom.L.R. 10=1940 Bom. 65 (F.B.). The Madras General Sales Tax Act is not *ultra vires* in so far as it purports to levy a tax on first sales, that is, sales by the manufacturer or producer. Under the Government of India Act, the Federal Legislature has an exclusive power (List I, entry No. 45) to impose duties of excise, and the Provincial Legislature an exclusive power (List II, entry No. 48) to impose taxes on the sale of goods, and this power extends to sales of every kind including first sales. The expression "duty of excise" is wide enough to include a tax on sales, but where power is expressly given to another authority to levy a tax on sales, "duty of excise" must be given a more restricted meaning than it might otherwise bear. A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufacturer or producer, but it is levied upon him *qua* seller and not *qua* manufacturer or producer. If a taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise he may have to pay two taxes, but the two taxes are economically separate and distinct imposts. It is natural when considering the ambit of an express power in relation to an unspecified residuary power to give a broad interpretation to the former at the expense of the latter but where, as in the Government of India Act, there are two complementary powers each expressed in precise and definite terms there can be no reason for giving a broader interpretation to one power rather than to the other. The American and Australian decisions should not therefore be blindly adopted in India. 5 Fed.L.J. 61..A.I.R. 1942 (F.C.) 33=46 C.W.N. (F.B.) 38. [I.L.R. (1941) M. 874=1941 Mad. 913=(1941) 2 M.L.J. 607 Reversed.] The *Bihar Money-Lenders Act of* 1939 is not an enactment relating to the conduct of bank- The *Bihar Money-Lenders Act of* 1939 is not an enactment relating to the conduct of banking business by a corporation, contemplated by Item 38 of List I of Schedule VII. It is enactment relating to money-lending falling under Item 21 of List II of that Schedule. Money-lending is only a part of the business of a bank and therefore it cannot be said that in enacting the Bihar Money-Lenders Act the Legislature trespassed upon item 38 of List I of Schedule VII, to the Government of India Act. S. 13 of the Bihar Money-Lenders Act does not legislate directly or indirectly with regard to the conduct of banking business and is not inapplicable to cases where the creditor is a bank. The mere fact that a decree under execution might in the ordinary course be obtained by a Bank cannot make the section an enactment relating to the conduct of banking business. 20 Pat. 831=22 Pat.L.T. 522=1941 Pat. 562. *See also* 19 Pat. 974=21 Pat.L.T. 740=1941 Pat. 99. S. 23-A (*b*) of the Bihar Tenancy Act, as amended in 1938 deals with a provincial subject and cannot be held to be *ultra vires* or inoperative by reason of any actual or supposed repugnancy to an All-India Act, *viz.*, S. 37 of the Contract Act. 199 I.C. 182=1942 P.W.N. 66=23 P.L.T. 143. *Powers of local legislature to make laws—Limits—Old Act.*—It is wrong to think that sub-S. (3) of S. 80-A of the Government of India Act (1919), means that if the local legislature of a province has obtained the previous sanction of the Governor-General, it can make laws of the kind mentioned in cls. (*a*) to (*i*) of the sub-section so as to affect rights and properties not only within the boundaries of the province, but also outside those boundaries. The effect of sub-S. (3) is that without the previous sanction of the Governor-General, or at any rate his subsequent assent as mentioned in the proviso to the sub-section, the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction, or the subsequent assent, of the Governor-General in Council only makes such laws valid and effective within the territories of the province. I.L.R. (1938) All. 781=1938 A.L.J. 872=1938 All. 564. Order under S. 36, Madras District Municipalities Act—Power of Governor to issue—Governor and Provincial Government—Differentiation. *See* 1939 Mad. 940=(1939) 2 M.L.J. 801=50 L.W. 538. The U.P. Regularization of Remissions Act (1938) is not *ultra vires.* I.L.R. (1940 All. 455=1940 A.L.J. 274=1940 All. 272, S. 100—S. 100 and Art. 31, List II of the seventh Schedule, Government of India Act give Provincial Legislatures power to legislate with respect to intoxicating liquors, that is to say, with respect to the production, manufacture, possession, etc., of such liquors. The power is not confined to merely the regulation or restriction of such manufacture, production or possession, etc. It is impossible to say that prohibiting possession of certain forms of intoxicating liquor in specified areas is anything more than legislation with respect to possession or transport of such intoxicating liquor in such areas. 197 I.C. 618=21 Pat. 178=1942 P. 351.

Secs. 101.—The provisions of S. 100 relate to the exercise of legislative powers in and for British India. In the case of the Indian States, however, dealt with by this section the powers of the Federal legislature

Extent of power to legislate for States.

Legislature to make laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitation contained therein.

Power of Federal Legislature to legislate if an emergency is proclaimed.

102. (1) Notwithstanding anything in the preceding sections of this chapter, Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a "Proclamation of Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List:

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void.

(3) A Proclamation of Emergency—

(*a*) may be revoked by a subsequent Proclamation;

(*b*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and

(*c*) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

103. If it appears to the Legislatures of two or more Provinces to be desir-

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do not extend to all the matters comprised in the list, but only to such of them as are specified by the Ruler in the Instrument of Accession "as matters with respect to which the Federal legislature may make laws for his State and subject to the limitation if any to which that power may be made subject" S. 6 (2). Explaining the basis of the section, *Sir Samuel Hoare* said: "The whole essence of federation is that the units surrender definite powers, but beyond that field the Federal legislature has no power over the units at all. That is exactly the position. The Federal legislature has power over the units to the extent of the federal field; and in the case of Indian Princes to the extent that they have surrendered their powers in the Instrument of Accession. That is altogether in keeping with the letter and spirit of every federal legislature in the world. It would be contrary to every theory of federation if the Federal Government had more extended powers". (*Parl. Deb.*, Vol. 299, Col. 1932).

Sec. 103.—The section is necessitated by the fact that under S. 99, the legislative powers of a province are confined to the limits of that province, and that if a body having jurisdiction within more than one province, *e.g.*, like a Joint Public Service Commission for 2 or more provinces, was desired to be set up, there would be no power in the provinces to do so. With the disappearance of a central legislature with power to invade the provincial field at all points, there had necessarily to be devised some machinery for co-ordination of policy between the provinces in matters of common concern to them. As the Statutory Committee pointed out, there is urgent need for the establishment of institutions for research in the fields of Forestry, Agriculture, health, problems, all subjects in the Provincial list. This recommendation was endorsed by the Joint Parliamentary Committee and accordingly provision has been

Power of Federal Legislature to legislate for two or more Provinces by consent.

able that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

Residual powers of legislation.

104. (1) The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under the section the Governor-General shall act in his discretion.

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107. (1) If any provision of a Provincial law is repugnant to any provi-

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made for the creation of Interprovincial councils by Order in Council. This section would have to be utilised for providing the necessary legislation investing these councils with functions and powers. The presence of this section obviates the limitation set out in the judgment of Lord Atkinson of *City of Montreal* v. *Montreal Street Railway, Co.*, (1912) A.C. 333, where it is pointed out that inconvenience of provincial administration in a matter concerning more than one province does not clothe the Dominion Parliament with legislative power in that field.

Sec. 104: RESIDUARY POWER.—Explaining the principle adopted in framing the legislative lists and in enacting the machinery devised by this section in regard to the location of the residuary power *Sir S. Hoare* said: "We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant powers in the Centre, and the Moslems who wish to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field. the Hindus demanding that the residuary field should remain with the Centre and the Muslims equally strongly demanding that the residuary field should remain with the Provinces.

The feeling was very deep and very bitter on this issue. We tried year after year not only in the Joint Select Committee but also in the various Round Table Conferences to bridge the difference, but the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the concurrent List, each as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field. I believe that we have succeeded in that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Hon. Friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of Government in the three other fields. I agree with my Hon. Friend that it means complications. I believe that it also means the possibility of increased litigation."

The decision of the Governor-General that a subject is not covered by the enumerated matters in the three lists would not seem to be final, and the question could be challenged in the Courts. But having regard to the importance of the subject, it is not expected that he would decide such matters without obtaining the advisory opinion of the Federal Court under S. 213. But his decision allocating the subject—if in fact it is a residue—to the Provincial or Federal Legislature is not open to question in the Courts. The section states that the Governor-General might assign the subject 'either to the Federal or the Provincial Legislature' which seems to raise a doubt as to whether he can assign such a residuary subject to the concurrent list. It is however submitted that he can assign it to any of the three lists.

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U. P. REGULARISATION OF REMISSIONS ACT falls without residual powers defined in S. 104 of this Act. I.L.R. (1940) All. 455=1940 A.L.J. 274=1940 All. 272 (F.B.).

Sec. 107.—*See also* Notes under S. 100, *supra*.] *Applicability and scope of section.* —Per *Iqbal Ahmad*, J.—S. 107 affects the

Inconsistency between Federal laws and Provincial, or State laws.

sion of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

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relations between the Federal legislature and the Provincial legislature where the laws passed by the two legislatures are among the subjects in the concurrent legislative list and are repugnant to each other. It has no application to repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and concurrent lists on the other. I.L.R. (1940) All. 455=3 Fed.L.J. (H.C.) 83=1940 A.L.J. 274=1940 All. 272 (F.B.). S. 107 relates only to the concurrent list and has no application to subjects reserved exclusively to List I. The section, moreover, deals with repugnancy but not *ultra vires*. No assent of the Governor-General can validate a law which is void apart from any question of repugnancy and which it was never within the competence of the Provincial legislature to enact, a law which is therefore void *ab initio*. S. 107 (2) provides means for overcoming a repugnancy; it provides no means of validating a law which is completely *ultra vires*—*ultra vires ab initio*, and which therefore has no intrinsic force in it which can be validated. 19 Pat. 974=21 Pat.L.T. 740=1940 P.W.N. 719=1941 Pat. 99. *Repugnancy —Test.*—If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law. 69 C.L.J. 573=43 C.W.N. 913=1939 Cal. 628. *See also* 19 Pat.L.T. 760; 1938 P.W.N. 913 (F. B.); 71 C. L. J. 369. "Repugnant" means "inconsistent with" or "contrary to". Such contrariety may be in quality, in matter or in respect of the form prescribed. *Foster's case,* (11 Coke Rep. 56 B.). According to Higgins, J., repugnance must involve either directly or ultimately a contradictory proposition, probably contradictory duties or contradictory rights. (*A.-G. for Queensland* v. *A.-G. for Commonwealth,* 20 Com.L.R. 148 at p. 178). In other words there must be a direct collision between the provisions in the two enactments before they can be pronounced to be repugnant to each other. He further elucidated his proposition in these words in his dissenting judgment in *Clyde Engineering Co.* v. *Coburn,* (37 Com.L.R. 466). "Etymologically things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or provision in the one law conflicts directly with the command or power or provision in the other. Where two legislatures operate over the same territory and come into collision, it is necessary that one should prevail, but the necessity is confined to actual collision as when one legislature says "do" and the other says "don't". *Repugnancy of provincial law to existing Indian law—Principles of construction.* Per *Sulaiman, J.*—When the question is whether a provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. If the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter. A law which is *ultra vires* in part only may thereby become *ultra vires* in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939) is not void as repugnant to existing Indian law. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 68=20 Pat.L.T. 473=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. S. 15 of Bihar Act IX of 1938 is not void under S. 107 of the Government of India Act of 1935, as being repugnant to S. 38, C.P. Code an existing Indian law. 1939 P.W.N. 530=20 Pat. L.T. 492=18 Pat. 694=1939 Pat. 570. The expression "*Federal law*" in S. 107 (1) of the Government of India Act would not

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

CHAPTER II.

RESTRICTIONS ON LEGISLATIVE POWERS.

Sanction of Governor-General or Governor required for certain legislative proposals.

108. (1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which—

(*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; or

(*b*) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor; or

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include a previously existing Indian law on a subject falling in List I. 192 I.C. 225=73 C.L.J. 1=53 L.W. 109=45 C.W.N. (F.R.) 1=1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1. If the subject-matter of a Provincial enactment falls within the Provincial legislative list, the mere fact that it may also be affected by certain provisions in the concurrent legislative list would not attract the provisions of S. 107 of the Act regarding repugnancy. 43 P.L.R. 226=1941 Lah. 177 (F.B.).

Sec. 108.—Under the Government of India Act, 1915, which consolidated earlier enactments on the point, the previous consent of the Governor-General was requisite to the introduction of legislation affecting religion, religious usages and rites. This restriction has been omitted here on the ground that legislation of this type should be introduced on the full and unfettered responsibility of Indian Ministers, and on the ground that in a matter of that sort it was undesirable that their responsibility should be shared by the Governor or Governor-General. *See* J.P.C. Report, para. 141.

The term "British India" in S. 108 (2) (*a*) means the whole of British India and does not refer to a part of British India. Therefore, Bengal Regulation, I of 1793, cannot be said to be an Act of Parliament extending to the whole of British India inasmuch as it applies only to Bengal, Bihar, Orissa and other settled estates in some of the provinces. 20 Pat. 573=22 P. L. T. 863=1941 Pat. 306 (S.B.). In the ordinary meaning of the expression an "*Act of Parliament*" is an Act passed by the House of Commons, the House of Lords and assented to by the King. Regulation I of 1793 was an enactment of the Governor-General in Council in India and was never before Parliament in England. This Regulation together with the other Permanent Settlement Regulations were enacted pursuant to the provisions and directions contained in S. 39, Pitt's India Act of 1784. Regulation I of 1793 purports to be an enactment of the Governor-General in Council and was enacted by the Marquis of Cornwallis by virtue of the powers of legislation given to or assumed by the Governor-General in Council, and that being so it cannot be said that the Permanent Settlement Regulation, I of 1793, is in any sense an Act of Parliament. Consequently, the *Bihar Agricultural Income-tax Act* cannot be said to be invalid by reason of S. 108 (2) (*a*) on the ground that it is repugnant to the provisions of Regulation I of 1793. 20 Pat. 573=22 P.L.T. 863=1941 Pat. 306 (S.B.).

(*c*) affects matters as respects which the Governor-General is, by or under this Act, required to act in his discretion; or

(*d*) repeals, amends or affects any Act relating to any police force; or

(*e*) affects the procedure for criminal proceedings in which European British subjects are concerned; or

(*f*) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein; or

(*g*) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.

(2) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which—

(*a*) repeals, amends, or is repugnant to any provisions of any Act of Parliament extending to British India; or

(*b*) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General; or

(*c*) affects matters as respects which the Governor-General is by or under this Act, required to act in his discretion; or

(*d*) affects the procedure for criminal proceedings in which European British subjects are concerned;

and unless the Governor of the Province in his discretion thinks fit to give his previous sanction, there shall not be introduced or moved any Bill or amendment which—

(i) repeals, amends or is repugnant to any Governor's Act, or any ordinance promulgated in his discretion by the Governor; or

(ii) repeals, amends or affects any Act relating to any police force.

(3) Nothing in this section affects the operation of any other provision in this Act which requires the previous sanction of the Governor-General or of a Governor to the introduction of any Bill or the moving of any amendment.

Requirements as to sanctions and recommendations to be regarded as matters of procedure only.

109. (1) Where under any provision of this Act the previous sanction or recommendation of the Governor-General or of a Governor is required to the introduction or passing of a Bill or the moving of an amendment, the giving of the sanction or recommendation shall not be construed as precluding him from exercising subsequently in regard to the Bill in question any powers conferred upon him by this Act with respect to the withholding of assent to, or the reservation of, Bills.

(2) No Act of the Federal Legislature or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given—

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Sec. 108 (2) (*b*)—*"Governor-General's Act"—Bengal Permanent Settlement Regulation.*—The expression "Governor-General's Acts or Ordinances enacted or promulgated templated in S. 44, that is, to Acts enacted by the Governor-General after the Government of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. Consequently, S. 108 (2) (*b*) can in no way render the Bihar Agricultural Income-tax Act invalid because it is repugnant to Regulation I of 1793. 20 Pat. 573=22 P.L.T. 863=1934 Pat. 306 (S.B.). S. 108 (2) (*b*) merely limits the power of Provincial legislatures to repeal or amend Governor-General's Acts or Ordinances enacted or promulgated under Ss. 42 to 44 of the Act. A Governor-General's Act or Ordinance is a very special form of legislation and cannot possibly include an Act of a Provincial legislative authority, which in the past required the assent of the Governor-General for its validity. 197 I.C. 618=21 P. 178=1942 P. 351.

Sec. 109 (2): ASSENT OF GOVERNOR—OBJECTION AS TO ABSENCE OF PREVIOUS SANCTION UNDER S. 299 (3).—If an Act has received the assent of the Governor, its validity cannot be thereafter questioned on the (*a*) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty;

(*b*) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General, or by His Majesty.

Savings.

110. Nothing in this Act shall be taken—

(*a*) to affect the power of Parliament to legislate for British India, or any part thereof; or

(*b*) to empower the Federal Legislature, or any Provincial Legislature—

(i) to make any law affecting the Sovereign or the Royal Family, or the Succession to the Crown, or the sovereignty, or dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of Prize or Prize Courts; or

(ii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment; or

(iii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal from any Court.

PART VII.

CHAPTER III.

PROPERTY CONTRACTS, LIABILITIES AND SUITS.

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Power to acquire property and to make contracts, etc.

175. (1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on

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ground that previous sanction to its introduction as required by sub-S. (3) of S. 299 of the Government of India Act was not obtained. I.L.R. (1940) All. 455=1940 A.L.J. 274=1940 All. 272 (F.B.).

Sec. 175.—The powers formerly vested in the Secretary of State in Council under S. 30 (of the Government of India Act, 1915) to enter into contracts relating to or otherwise deal with property vested in the Crown, and which were exercised by the authorities in India by virtue of a delegation from him, (see *Kasturi Reddi* v. *Secretary of State*, 26 M. 268) are now directly devolved on the Federal and Provincial Governments in respect of the property vested in such. The provisions are merely a reproduction of S. 30, and there is no difference except, (1) The source of the authority is traced to the Governments in India and (2) the form in which contracts, etc., would hereafter run.

GOVERNMENT CONTRACTS.—Though it may be very desirable to have a formal deed with regard to all the agreements made by Government, it cannot be held as a matter of law, that an agreement evidenced by tenders and acceptance of tenders or an agreement evidenced by correspondence or other documents of informal nature though fully established by evidence, must fail and be said to offend the terms of S. 30 of the Government of India Act, 1918. It is a sufficient compliance with the terms of S. 30 if the agreement is expressed in writing, and this writing may comprise a series of letters or a series of informal documents. 1941 A.L.J. 570=4 F.L.J. (H.C.) 361=1941 All. 377. The provisions of the Act, 1915, are mandatory and must be strictly complied with in order to constitute a valid contract which can be enforced against the Secretary of State. The contract must, under the law and the rules in force, be by a deed executed on behalf of the Secretary of State and in his name by the proper authority. 39 Bom.L.R. 807=1937 Bom. 449. There is no justification for holding that a contract in order that it may comply with S. 30 of the Government of India Act, 1915, must be by deed, *i.e.*, under seal. There is no such provision in S. 30; the section behalf of His Majesty for those purposes respectively, and to the making of contracts:

Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be.

(2) All property acquired for the purposes of the Federation or of a Province or of the exercise of the functions of the Crown in its relations with Indian States, as the case may be, shall vest in His Majesty for those purposes.

(3) Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

(4) Neither the Governor-General, nor the Governor of a Province, nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

Suits and proceedings.

176. (1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature

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does not require a formal document in the nature of an indenture or deed. The contract under S. 30 must, in order to be binding, be made on behalf and in the name of the Secretary of State for India in Council by the local Government and executed by the proper officer authorised by the Governor-General in Council. A contract in the form of letters, complying with the provisions of S. 30 and signed by the proper officer, would be a contract complying with the terms of S. 30. But it must be plain that the correspondence is carried on on behalf of and in the name of the Secretary of State, and that the contract as finally concluded by correspondence is executed by a person authorised by resolution in that behalf. Where the correspondence does not show that, but only amounts to the fact that the Collector is prepared to recommend to Government to sanction a proposal, which if sanctioned would be made on behalf of and in the name of the Secretary of State in Council, there is no binding agreement under S. 30 which can be specifically enforced. 40 Bom.L.R. 19=174 I.C. 316=1938 Bom. 168. Under S. 30 (2) of the Government of India Act, 1919, contracts of mining leases have to be executed by the person and in the manner prescribed by the Government of India, and in order to be valid, a mining lease has to be executed by the Collector under the rules prescribed by the Governor-General in Council; until a formal lease has been executed there can be no enforceable contract against the Secretary of State for India in Council. 48 L. W. 194=1938 Mad. 749=(1938) 2 M.L.J. 141.

Sec. 176.—The Federation and the Provinces are endowed with juristic personality, with a right to sue and be sued. It must however be noted that the creation of these separate entities is only for the purpose of legal proceedings; neither the imparting of a juristic personality, nor the Crown holding property "in right of the Province" and "in right of the Federation" affords any scope for the doctrine of the multiple personality of the Crown. The Crown is one and indivisible throughout the Empire, and in the words of Dr. Keith, "there is no essential deviation from this unity in the fact that the Crown appears in various aspects and that in these aspects there may be collision of interest and of rights". A Province may sue another Province, or a Province, the Federation and "to this extent there is distinction of aspects within the Crown." The King in each part of his dominions has a distinct personality for certain purposes, but the unity of personality can be given effect to whenever the aspect of personality is unimportant. (Cf. *Williams* v. *Howarth,* 1905 A.C. 551).

CROWN BOUND BY LEGISLATION.—The Crown in right of the Federation is bound by a valid Provincial enactment assented to by the Governor as representing His Majesenacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

(2) Rules of Court may provide that, where the Federation, the Federal Railway Authority, or a province sue or are sued in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Authority or Province, as may be specified in the rules.

Legal proceedings as to certain matters.

179. (1) Any proceedings which, if this Act had not been passed, might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date, be brought

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ty. If the Crown is bound at all it is bound in all its aspects, and the question whether the Crown is bound is one of construction not of law.

SUITS.—Suits between Provinces and between the Province and the Federation, are only a method of ascertaining the true meaning of the Constitution and does not affect the indivisibility of the Crown. This section reproduces with one material alteration the provisions of S. 32 of the Government of India Act, 1915, which conferred "the same right of suit against the Secretary of State as existed against the East India Company, if the Government of India Act, 1858, had not been passed". This provision was construed as affirmatively conferring a right of suit in all cases where the East India Company if it existed could have been sued and negatively as precluding an action in all cases where such a suit did not lie against the Company.

SUIT AGAINST SECRETARY OF STATE—MAINTAINABILITY—TEST.—Per *Braund, J.*—So far as suits against the Secretary of State in Council are concerned, in India, it is a complete fallacy to attempt to consider them from the point of view of the English Common law which does not recognize actions against the Crown on the principle either that "the Crown can do no wrong" or that the King cannot be sued in his own Court. The principle applicable in India is wholly different; for, not only has the Crown submitted itself by statute (through its character as the successor of the East India Company) to certain 'remedies,' but it has by S. 65, Government of India Act, 1858, constituted a corporate defendant in the form of the Secretary of State in Council as its representative for the purpose of being sued in respect of those remedies. In the result, therefore, the East India Company, and, through the Company, the Secretary of State in Council, is, by virtue of S. 65, Government of India Act, 1858, and of S. 32 of the Act of 1919, in a wholly different position from the Crown as it stands under the English Common law. It is the 'character' of the suit, and not whether it would have succeeded, that is the test. If it is of that 'character' that it would have lain against the East India Company, then by statute it lies against the Secretary of State for India in Council. 1937 Rang.L.R. 35=1937 Rang. 89 (S. B.). The Secretary of State is not liable for acts of the Courts or the consequences of those acts. A person has, therefore, no cause of action against the Secretary of State for wrongful seizure and sale of his property by a Magistrate for payment of a fine inflicted on another person. 167 I.C. 309=1936 A.W.R. 1277=1937 All. 158. Secretary of State not liable for tort of servant employed in government hospital. 49 L.W. 679=(1939) 1 M.L.J. 784.

Sec. 179.—This section is an application to the existing contracts of the Secretary of State in Council, of the familiar principle in the Law of Contracts, that the remedy of a party against the original promisor is not prejudiced or lost by reason of an assignment by the latter to which the other is not a consenting party. The option is therefore given to persons claiming by virtue of contracts, etc., prior to the commencement of Part III to sue either the Secretary of State the original contracting party—or the Federation or the Province according as the authority to whom the contract would relate under the provisions of this Act. In a suit instituted against the Secretary of State, the description of the defendant as "Government Punjab Province through Deputy Commissioner" does not in any manner affect the institution of the suit. Under the present Government of India Act all that is necessary to be mentioned is the "Province". The addition of the words "through Deputy Commissioner" does not cause any prejudice to the defendant. 192 I.C. 729=42 P.L.R. 550=1940 Lah. 451. Where in a suit against the Secretary of State, the latter is wrongly described as "Secretary of State for India in Council" this is a mere misdescription which can be amended at any time by omitting the words "for India in Council". 1939 Lah. 583. No doubt under S. 179 (1) of the Government of India Act, an appeal should be lodged against the Secretary of State and not against the Secretary of State for India in Council. But against the Federation or a Province, according to the subject matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct.

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned.

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said sub-section (1).

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be.

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages, costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of sub-section (1) of the last preceding section.

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

PART IX.

THE JUDICATURE.

CHAPTER I.

THE FEDERAL COURT.

200. (1) There shall be a Federal Court consisting of a Chief Justice of

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the mere addition of the words "for India in Council" does not justify the dismissal of the appeal, as at the worst it could only be construed as a misdescription of the respondent. 41 P.L.R. 134=1939 Lah. 298. An appeal is merely a continuation of the proceedings within the meaning of sub-S. (2) of S. 179. Hence, if the original suit was pending at the commencement of Act of 1935, the Province cannot be impleaded as a respondent in appeal and the only respondent is therefore the Secretary of State within the meaning of sub-S. (2) of S. 179. 40 P.L.R. 927=178 I.C. 390=1938 Lah. 585.

Establishment and constitution of Federal Court.

India and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sing Manual and shall hold office until he attains the age of sixty-five years:

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor-General resign his office:

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(*a*) has been for at least five years a judge of a High Court in British India or in a Federated State;

(*b*) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(*c*) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession:

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (*b*) and (*c*) of this sub-section to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.

NOTES.

Sec. 200: SECTION EXPLAINED.—The establishment of a Federal Court is an essential element in a Federal Constitution. "It is at once the interpreter and guardian of the Constitution and a tribunal for the determination of disputes between the constituent units of the Federation". (As to the jurisdiction of the Federal Court and the High Courts under the new Act, see articles in the Madras Law Journal, Vol. 69, December, 1935; Calcutta Weekly Notes, December, 1935, and January, 1936, Parts; Contemporary Law Review, November, 1935.)

EXTRACTS FROM THE DEBATES IN PARLIAMENT (SOLICITOR-GENERAL Par. Deb. Vol. 300, No. 70, 134-135).—"It would be impossible to overstate the importance of the Federal Court in the development of the constitution. But when we are considering appointments to a Court, the first and chief thing is not perhaps so much the minimum qualifications as the method of appointment. That is why it is proposed that the members of the Federal Court, including the Chief Justice, shall be appointed by His Majesty, which of course means on the advice of the Secretary of State and the Ministry in this country, who will be held responsible to this House for any advice they give. That in our view is really the important thing. Whatever qualifications you put in, unless the appointing authority takes the trouble to appoint the best men, then no minimum qualifications will avail at all. At the same time, we are impressed by what has been said as to the fact that this Federal Court will be dealing, almost exclusively with what may be called pure points of law, of great difficulty. * *"

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

Salaries, etc., of judges.

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Temporary appointment of acting Chief Justice.

202. If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other Judges of the Court as the Governor-General may in his discretion appoint for the purpose. [*See also* 3 and 4 Geo. 6, Ch. 5, Sec. 5, *infra.*]

Seal of Federal Court.

203. The Federal Court shall be a Court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint.

Original jurisdiction of Federal Court.

204. (1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to—

(*a*) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concern some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that

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NOTES.

Sec. 201.—As to salaries of Judges, *see* Order in Council.

Sec. 204.—The section refers to a dispute involving "any question (whether of law or fact) on which the existence or extent of a legal right depends".

EXTRACTS FROM THE PARLIAMENTARY DEBATES (SPEECH OF THE SOLICITOR-GENERAL).—"In drafting this clause we have followed the recommendation of the Joint Select Committee. We have passed clauses which specifically deal with the matter of suits being brought against the Provinces or the Federation. But there are many cases to-day in India—and there will continue to be such cases when this becomes law—in which private individuals have rights against and can sue the Federation. It would be most oppressive and inconvenient if any litigant who had a claim against the Federation—and it might be quite a small claim—had to go up from the far end of India to the central place where

State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(*b*) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

NOTES.

the Federal Court will sit to prosecute his claim. It would be regarded as the greatest possible injustice in India, and indeed I think it would have manifold great inconveniences. It would seem quite unnecessary in what I may call ordinary cases. But, you may get cases where there is some question as to whether legislation is or is not *ultra vires*. We believe that the right and best procedure in that case is the procedure under the Bill. Let it go first to the local Court. Let it be sifted and dealt with there; and let it go from there to the Federal Court, which is after all, the final Court of appeal in some cases. * * * * As regards constitutional questions, the case "will be dealt with in the ordinary way, first by the local Court and if there is any doubt about it, and it seems a proper case for appeal, it will be taken on appeal to the Federal Court, which will have the advantage of having in this difficult matter the judgment of the first Court before it. For these reasons, we believe that the scheme of the Bill, under which original and exclusive jurisdiction is confined to disputes between units of the new constitution, is better than the scheme proposed by my Hon. and learned Friend." (Parl. Deb., Vol. 300, Part 70, 1st April, 1935, cols. 140-142.)

Per *Sulaiman, J.*—The term legal right' used in S. 204 obviously means right recognised by law and capable of being enforced by the power of a State, but not necessarily in a Court of law. It is a right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty, even though no action may actually lie. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the Governor-General in Council or the Secretary of State, would not be sufficient in itself for holding that the former could not possibly possess any 'legal rights' at all against the Central Government, even in respect of rights conferred upon them by the provisions of the Act or the rules made thereunder. If a 'legal right' existed under the old Act, S. 204 of the new Act would not be inapplicable merely because the right related to an earlier period. 50 L.W. 209 =2 Fed.L.J. 123=1939 F.C. 58=(1939) 2 M.L.J. (Supp.) 1. The United Provinces instituted in the Federal Court a suit against the Central Government represented by the Governor-General in Council for a declaration that S. 106 (*c*) of the Cantonments Act (II of 1924) was *ultra vires* the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924. *Held,* that the dispute with regard to the validity of S. 106 (*c*) of the Cantonments Act involved a question on which the existence of a legal right depended, within the meaning of S. 204 (1) of the Government of India Act 1935, notwithstanding the fact that before the Act of 1935, the provinces could not have sued the Central Government in any Court of law, and the Federal Court had therefore jurisdiction to entertain the suit. (1939) 2 M.L.J. (Supp.) 1.

Sec. 205: "SUBSTANTIAL QUESTION OF LAW".—[*See* notes under Civil Procedure Code, S. 110, *supra*.] S. 205 deals with the appellate jurisdiction of the Federal Court in appeals from High Courts in British India. It is to be observed that an appeal will lie from any judgment, decree or final order of a High Court "if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder". [Cl. (1).] Appeals to the Privy Council are provided for by the Code of Civil Procedure, Ss. 109-112.

EXTRACTS FROM PARLIAMENTARY DEBATES (THE SOLICITOR-GENERAL).—"This Clause deals with the appellate jurisdiction of the Federal Court and provides that if in a case in the High Court it appears that a substantial question of law involving an interpretation either of this Act or any Order-in-Council made under it arises, there shall be a right of appeal to the Federal Court if the High Court certifies that such a question of law arises. The second part of the Clause says that a person can appeal on that ground once he has got his certificate. There may be other grounds in the case, and, if they are proper grounds for appeal, leave may be given."* * The main purpose of the Clause is to ensure that appeals which involve questions of the interpretation of the Constitution shall go to a higher Court. Nothing in the Clause affects the right of appeal to the Privy Council in cases outside the clause. If cases fall within the clause, which involve matters of interpretation of the constitution, parties will have to go to the Federal Court. There is a further

Appellate jurisdiction of Federal Court in appeals from High Courts in British India.

205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed

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right of appeal from the Federal Court to the Privy Council in a later clause (Parl. Deb., 1st April, 1935, Vol. 300, part 70, p. 147.)

Sec. 205 (1): CONSTRUCTION—"JUDGMENT, DECREE OR FINAL ORDER"—MEANING—FEDERAL COURT—JURISDICTION IN CRIMINAL MATTERS.—*Gwyer, C.J.*—The Federal Court has jurisdiction in civil as well as in criminal matters. The words "judgment, decree or final order" ought to receive no narrow interpretation. 1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23. *Sulaiman, J.*—It may be assumed that the words "judgment or final order" in S. 205 (1) of the Government of India Act apply to criminal cases as well, but an order of the High Court directing the re-hearing of a criminal appeal by the Sessions Court is not "judgment" within the meaning of the section. (1939) 2 M.L.J. (Supp.) 23. *Varadachariar, J.*—S. 205 of the Government of India Act, is not in terms limited to civil cases, and the word "judgment" is comprehensive enough to include a judgment pronounced in a criminal case. I.L.R. (1940) Lah. 400=50 L.W. 95=43 C.W.N. (F.C.R.) 50=2 Fed. L.J. 153=1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23. *See also* 20 Pat. L.T. 473=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.

CERTIFICATE WHEN CAN BE GIVEN.—According to S. 205 (1) a certificate can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1915, or any order in council made thereunder is involved. 1940 A.W.R. (C.C.) 250=1940 O.W.N. 494=1940 Oudh 382=15 Luck. 740. Where the High Court refuses to interfere under S. 115, C.P. Code and S. 224 of the Government of India Act, with the order of a trial Court, refusing to decide the question of jurisdiction, as a preliminary issue it is not a fit case to be certified under the Government of India Act as no question of interpretation of S. 224, was involved. It is not the function of the High Court under S. 224 to interfere with judicial orders of the Subordinate Courts. 1938 A.L.J. 911=1938 A.W.R. (H.C.) 624=1938 All. 639.

Sec. 205 (2): CONSTRUCTION—RIGHT OF APPEAL UNDER.—The wording of sub-S. (2) of S. 205, must be taken to indicate that the legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act. I.L.R. (1941) Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.).

"INVOLVES A SUBSTANTIAL QUESTION OF LAW, ETC."—MEANING OF.—It cannot be said that a case *involves a substantial question of law* as to the interpretation of the Act under when the actual decision does not determine any such question, but in certain events, such a question might arise in the Federal Court. The mere possibility of some such question of law arising in a remote contingency cannot be enough to justify the granting of a certificate. When a man has been acquitted by two Courts in criminal case, the High Court, before giving leave to appeal against his acquittal to a third Court, must find a clear indication in the statute that it is its duty to give such leave. I.L.R. (1941) Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.). An order by a single Judge of the High Court dismissing a Civil Revision Petition is a final order, and when the Judge has passed a final judgment and certified that a substantial question of law as to the interpretation of the Government of India Act is involved under S. 205 (1) of the Act, an appeal to the Federal Court is competent and must be admitted. 52 L.W. 240=1940 M.W.N. 849=1940 Mad. 890=(1940) 2 M.L.J. 170. An order made by the High Court under S. 433, Cr.P. Code, merely answering a question raised by a presidency magistrate in a reference under S. 432, Cr.P. Code, and expressing opinion on a point of law, is not a final order within the meaning of S. 205 of the Government of India Act, against which a right of appeal to the Federal Court can be claimed. I.L.R. (1941) Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.); I.L.R. (1939) 2 Cal. 411=69 C.L.J.. 599=43 C.W.N. 950=1939 Cal. 529 (S.B.). The notification or order of the Foreign Political Department of the Government of India, No. 34-1, B, dated 14-1-1937, cannot be regarded as an order made under the Government of India Act 1935. The construction of the said order, cannot be said to be a substantial point of law as to the interpretation of the Act or of any order in Council without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

NOTES.

made under the Act, within the meaning of S. 205 (1) of the Act, so as to justify the grant of a certificate by the High Court, though the case, as such, might involve a difficult and substantial point of law in general. 1939 P.W.N. 858=21 Pat.L.T. 252=1940 Pat. 109. Per *Sulaiman, J.*—The word 'judgment' does not include every order. Similarly, decree must involve a determination of the rights of the parties. The order of the High Court dismissing the appeal from the lower Court's order refusing to fix the valuation or to specify a portion of the mortgaged property in the proclamation of sale is neither a judgment, decree nor a final order within the meaning of S. 205 (1) of the Act, No appeal therefore lies to the Federal Court. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74 =(1939) 2 M.L.J. (Supp.) 45.

JURISDICTION OF FEDERAL COURT—CERTIFICATE OF HIGH COURT—IF CONITION PERCEDENT.—The certificate of the High Court that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is a condition precedent to the exercise of jurisdiction by the Federal Court, although if the certificate has once been given, the case is at large and the applicant is not necessarily restricted in arguing his appeal to what may be called the constitutional issue. But until the certificate has been granted, the Federal Court cannot entertain the case at all. 1938 O.W.N. 1251=1938 F.C. 1.

CERTIFICATION—DUTY OF HIGH COURT—NATURE OF.—It is a well settled general rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." It is sufficient if the plain object of the directory provision is carried out. The duty imposed by S. 205 on the High Court to consider in every case decided by it and to certify or withhold certification that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council passed under it is only directory as distinguished from being absolute or mandatory and arises only in a case where there is reasonable ground for thinking that the question of law as to interpretation mentioned in S. 205 may be involved. I.L.R. (1940) Lah. 685=67 I.A. 464=(1941) 1 M.L.J. 130=52 L.W. 926=1940 P.C. 230 (P.C.).

EFFECT OF THE ABSENCE OF CERTIFICATE.—S. 205, imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order the giving or withholding of the certificate. On such determination, the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate should be recorded, not only for the information of the parties, but also for the certification of the Judicial Committee of the Privy Council and the Federal Court as to their jurisdiction to entertain an appeal. 67 I.A. 64=I.L.R. (1940) 1 Cal. 286=1940 A.L.J. 60=51 L.W. 93=44 C.W.N. 317=42 Bom.L.R. 315=1940 P.C. 16=(1940) 1 M.L.J. 64 (P.C.). When the question is one of a discretion of the High Court, the Federal Court will not in appeal interfere with the way in which the discretion was exercised or not exercise, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law; and if there is no legal objection to the way in which discretion has or has not been exercised by the High Court, the Federal Court would not in appeal substitute its own discretion to that of the High Court. 3 F.L.J. 46=44 C.W.N. (F.R.) 21=72 C.L.J. 165=1940 F.C. 20=(1940) 1 M.L.J. (Supp.) 14. No appeal lies to the Federal Court in the absence of the certificate prescribed in S. 205 of the Government of India Act, and the refusal of a High Court to grant a certificate cannot be questioned by the Federal Court, nor can the reasons which prompted the refusal be investigated by it. Even when the refusal of the certificate is alleged to be perverse and malicious and inspired by wicked or improper motives and assuming that the High Court has, by refusing to grant a certificate, deliberately deprived the Federal Court of a jurisdiction which Parliament has entrusted to it, and is therefore guilty of a contempt of the Federal Court, the Federal Court has no jurisdiction to interfere. The jurisdiction of the Federal Court is limited by statute and cannot be extended by a High Court acting even perversely or maliciously in withholding the certificate. The Court cannot do indirectly what it cannot do directly. The Federal Court cannot assent to the proposition that proceedings by way of contempt can ever be the appropriate remedy against a High Court even if it has acted perversely or maliciously. 55 L.W. 3=4 F.L.J. 33=(1942) 1 M.L.J. 74 (F.C.). A certificate under S. 205, is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for the Federal Court to enquire into the reasons for the refusal, against which no appeal lies to that Court. 185 I.C. 801=71 C.L.J. 108=44 C.W.N. (F.R.) 17=3 Fed.L.J. (P.I.) 12=1940 F.C. 4. Where the High Court has refused to grant a certificate under S. 205 (1) the Federal Court has no

Power of Federal Legislature to enlarge appellate jurisdiction.

206. (1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act, an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

NOTES.

inherent jurisdiction to grant special leave to appeal. The Federal Court being a statutory Court, its jurisdiction must be collected from the terms of the statute which created it and there is nothing in the statute which gives the Court power to entertain an application for special leave to appeal. 49 L.W. 570=20 Pat.L.T. 263=1939 P. W.N. 203=2 Fed.L.J. 121=1939 F.C. 42. Though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes, there is no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts. The concluding words of S. 205 (1) which impose a duty on every High Court to consider in each case whether or not a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder is involved, "and of its own motion to give or to withhold a certificate accordingly" may reasonably be construed as giving the High Court the last word in the matter, so far as this Section is concerned; and as there is no statutory powers of revision or superintendence possessed by the Federal Court like those possessed by the High Court under S. 224, Government of India Act or S. 115, C.P. Code, the Federal Court cannot entertain in exercise of its inherent power, an application for revision of an order of a High Court refusing to grant a certificate under S. 205 (1). 1938 O.W.N. 1251=1938 F.C. 1. A litigant who, apart from S. 205, would have a right of appeal to the Privy Council, is not deprived of that right by the refusal of the High Court to grant a certificate. S. 205 (2) only applies where a certificate is given and has no application to a case where it has been refused. 1938 O.W.N. 1251=1938 F.C. 1. The object of S. 205 is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word "direct" is used because S. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council; S. 205 does not provide for a case where no certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law specified in S. 205 could by any reasonable possibility arise. There is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The failure of the High Court to certify or withhold certification may be "blamable" but third parties have nothing to do with that. Where in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. 67 I.A. 464=52 L.W. 926=(1941) 1 M.L.J. 130=1940 P.C. 230 (P.C.).

CASE INVOLVING VALIDITY OF CERTAIN ACT—ACT SUBSEQUENTLY REPEALED AND RE-ENACTED—CERTIFICATE DOES NOT BECOME INFRUCTUOUS—JURISDICTION OF FEDERAL COURT TO HEAR OTHER GROUND EXISTING. 72 C.L.J. 174=1940 F.C. 7=1939) 1 M.L.J. 23. *Held,* (*i*) that the certificate did not become void and inoperative owing to the fact that, after the granting of the certificate, the Act of 1938, had been repealed and replaced by a new Act, and the appellant was, therefore, entitled to maintain the appeal; (*ii*) that, in the circumstances, the appellant could not be tied down to the grounds mentioned in his application to the High Court for admitting the appeal; in any event, the Federal Court had ample power to grant leave for taking such a ground under S. 205 (2) of the Constitution Act; (*iii*) that the appellant was entitled to the benefit of the Act of 1939 even thogh it was passed only after the decision of the High Court. 71 C.L.J. 557=44 C.W.N. (F.R.) 1=3 F.L.J. 27=1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1 The High Court has no power either under S. 152, C.P. Code, or in the exercise of inherent powers, to vacate or alter a certificate which was correct at the time when it was made or given because of the happening of some subsequent event. 52 L.W. 127=44 C.W.N. (F.R.) 18=72 C.L.J. 174=3 F.L.J. 58=1940 F.C. 7=(1940) 1 M.L.J. (Supp.) 23.

Sec. 206: ENLARGEMENT OF APPELLATE JURISDICTION.—By S. 206 of the Act power is given to the Federal Legislature, where the sanction of the Governor-General for the introduction of the measure has been obtained, to provide by Act that, in such (*a*) the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum, not less than fifteen thousand rupees, as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*b*) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding sub-section, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

NOTES.

Civil cases as may be specified therein, an appeal shall lie to the Federal Court from a judgment, decree, or final order of a High Court in British India without any certificate. No appeal, however, is to lie under any such Act unless—(*a*) the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or (*b*) the Federal Court gives special leave to appeal. If the Federal Legislature thus enlarges the appellate jurisdiction of the Federal Court consequential provision may also be made for the abolition in whole or in part of direct appellate jurisdiction of the Federal Court to the Privy Council, either with or without special leave. The provision for the enlargement of the appellate jurisdiction of the Federal Court takes the place of the proposal contained in the White Paper for the establishment of a separate Supreme Court to hear appeals from the Provincial High Courts. The Joint Select Committee were not for the adoption of this proposal. They said: "A Supreme Court of this kind, would be independent of, and, in no sense, subordinate to the Federal Court; but it would be impossible to avoid a certain overlapping of jurisdiction, owing to the difficulty of determining in particular cases whether or not a constitutional issue was raised by a case under appeal. This might involve the two Courts in undignified and very undesirable disputes". In the event of the appellate jurisdiction of the Federal Court being enlarged, the Joint Select Committee assumed that the Court would sit in two Chambers, the first dealing with federal cases and the second with appeals from the High Courts. S. 214 accordingly enacts that, if the Federal Legislature makes provision for enlarging the appellate jurisdiction of the Court, the rules shall provide for "the constitution of a special division of the Court for the purpose of deciding all cases which would have been within the jurisdiction of the Court even if its jurisdiction had not been so enlarged". (S. 214, *infra.*)

EXTRACTS FROM THE PARLIAMENTARY DEBATES (THE SOLICITOR-GENERAL).—"The right of appeal from one Court to another is not a privilege which the rich always particularly value. The amounts, which are only rough and ready, are a measure of the importance of the case. The figures are arbitrary, but the idea of an amount as a criterion for the right of appeal already exists in respect of appeals in India, and we think that these figures are the proper figures to put in the Clause".* * If a case involves a large sum of money it is obviously a case of importance to litigants. It is also true to say that cases which involve only small sums of money are much better settled in one Court without two or more rights of appeal. That is in the interest of all. It is better to have justice promptly administered in one Court rather than to be dragged from one Court to another. I do not think anybody need be shocked at the fact that a sum of money is in issue as a convenient, rough-and-ready test. If there is any case involving special circumstances, it would be one in which the Courts in the exercise of their discretion would allow an appeal under paragraph (*b*). With regard to sub-S. (2), the Federal Legislature can give a right of appeal in certain classes of cases from the High Court to the Federal Court. Obviously, if you do that, you cannot have a double right of appeal. One party cannot be going to the Federal Court and also to the Privy Council in the same class of case. The right of appeal to the Privy Council is safe guarded to this extent, that "an appeal may be brought to His Majesty in Council from a decision of the Federal Court by leave of the Federal Court or of His Majesty in Council." (S. 208). At present in certain classes of cases there is an appeal as of right from the High

Appellate jurisdiction of Federal Court in appeals from High Courts in Federated States.

207. (1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature.

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

Appeals to His Majesty in Council.

208. An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

(*a*) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature, without leave; and

(*b*) in any other case, by leave of the Federal Court or of His Majesty in Council.

NOTES.

Court. That appeal would be to the Federal Court, and the further appeal from the Federal Court to the Privy Council would be by leave either of the Federal Court itself or of the Privy Council. (Parl. Deb., 1st April, 1935, Vol. 300, Part 70, pp. 149-151).

Sec. 207.—Under this section an appeal will lie to the Federal Court from a High Court in a Federated State by way of special case to be stated for the opinion of the Federal Court on the ground that a question of law has been wrongly decided. Such question must be one which—

(*i*) concerns the interpretation of the Act or of an Order in Council made thereunder; or

(*ii*) concerns the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of that State; or

(*iii*) arises under an agreement made under Part VI of the Act [Part VI deals with administrative relations between Federation, Provinces and States] in relation to the Administration in that State of a law of the Federal Legislature.

Sec. 208.—S. 110 preserves the prerogative right of the Crown to grant special leave to appeal from any Court. But the Select Committee said: "We may perhaps point out, that the jurisdiction of the Privy Council in relation to the States will be based upon the voluntary act of the Rulers themselves, *i.e.*, their instrument of accession". "Their Lordships do not generally advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominions, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character". See also *Clerque* v. *Murray,* (1903) A.C. 521; 47 B. 724 (P.C.).

Sec. 208 (b): LEAVE TO APPEAL TO PRIVY COUNCIL — GRANTING OF — PRINCIPLE.—The Federal Court will not be disposed to grant leave to appeal to the Privy Council, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved. Leave to appeal was refused in a case where the decision of the Court dealt only with the scaling down of decrees obtained before the Madras Agricultural Relief Act came into force, on the ground that the number of such decrees must necessarily be small and that there could be no addition to their number. 73 C.L.J. 429=54 L.W. 61=45 C.W.N. (F. R.) 96=4 F. L. J. 16=1941 F.C. 69=(1941) 2 M.L.J. 33. When dealing with an application for leave to appeal to the Privy Council, the Federal Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined. The Federal Court held that it was unable to hold that there was room for such serious doubt on the point as to whether S. 292 of the Constitution Act deprived the Legislatures in India of the power to legislate with retrospective effect as to justify it in holding that that was a substantial question on which

Form of judgment on appeal.

209. (1) The Federal Court shall, where it allows an appeal, remit the case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against, and the Court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the Court from which the appeal was brought and that Court shall give effect to the order.

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

Enforcement of decrees and orders of Federal Court and orders as to discovery, etc.

210. (1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court.

(2) The Federal Court shall, as respects British India and the Federated States, have power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of Court, which any High Court in British India has power to make as respects the territory within its jurisdiction, and any such orders, and any orders of the Federal Court as to the costs of and incidental to any proceedings therein, shall be enforceable by all Courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest Court exercising civil or criminal jurisdiction, as the case may be, in that part.

(3) Nothing in this section—

NOTES.

leave to appeal to Privy Council was to be granted. The Court further held that it could not be said that any decision to be obtained from their Lordships of the Privy Council if this appeal was to be permitted to go to them, was likely to have a material bearing upon future litigation. 73 C.L.J. 431=45 C.W.N. (F. R.) 90=1941 F.C. 70. Unless special circumstances are shown which would justify the grant of leave to appeal to the Privy Council, the Federal Court will not ordinarily grant such leave. 1939 O.L.R. 416=2 Fed.L.J. 206 =1939 M.W.N. 616. *See also* 71 C.L.J. 390.

Sec. 209: REMISSION OF CASE TO HIGH COURT—POWERS OF FEDERAL COURT.—The Federal Court in the exercise of its appellate jurisdiction can remit under Ss. 205 and 209 (1) a case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognizes the state of the law which comes into force while the appeal to Federal Court is pending, without discussing the law as it existed at the time when the High Court had seisin of the case. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.

Secs. 210 and 212.—Where the Federal Court allows an appeal it is to remit the case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against. The Court from which the appeal was brought is to give effect to the decision of the Federal Court. Under S. 210 all authorities, civil and judicial, throughout the Federation are to act in aid of the Federal Court. [Cl. (1).] S. 212 provides that the law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on all Courts in British India. It is also to be binding in any Federated State so far as respects the application and interpretation of this Act or any other Order in Council thereunder or any other matter with respect to which the Federal Legislature has power to make laws in relation to the State.

Sec. 210 (2): SCOPE AND EFFECT OF—JURISDICTION OF FEDERAL COURT IN CONTEMPT.—S. 210 (2) confers powers, not jurisdiction; and unless in any given case the Court has jurisdiction, it has no powers to exercise. The Federal Court as Court of record has all the powers belonging to such a Court including the power to punish (*a*) shall apply to any such order with respect to costs as is mentioned in sub-section (2) of the last preceding section; or

(*b*) shall, as regards a Federated State, apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court.

Letters of request to Federated States.

211. Where in any case the Federal Court require a special case to be stated or re-stated by, or remit a case to, or order a stay of execution in a case from, a High Court in a Federated State, or require the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

Law declared by Federal Court and Privy Council to be binding on all Courts.

212. The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in British India, and, so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State.

Power of Governor-General to consult Federal Court.

213. (1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that Court for consideration, and the Court may, after such hearing as they think fit, report to the Governor-General thereon.

NOTES.

for contempt of itself; and S. 210 (2) does no more than give it the same machinery for making that power effective as the High Courts themselves possess. 4 F.L.J. 33=55 L.W. 3=1942 M.W.N. 48=(1942) 1 M.L.J. 74 (F.C.).

Sec. 212: SECTION EXPLAINED.—"What this section says first is "that the law declared by the Federal Court and by any judgment of the Privy Council shall so far as applicable be recognised as binding on and shall be followed by all Courts in British India." That is an obvious and necessary provision, because these are superior Courts and their decisions must be followed and recognised by lower Courts. So far as the Indian States are concerned it provides that any decision of the Federal Court and the Privy Council, "so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State,"—In those cases the decision shall be recognised as binding and followed by the Courts of the Federated State. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 209, Speech of the Solicitor-General.)

Sec. 213: SECTION EXPLAINED.—"This section deals simply with the power of the Governor-General to refer any question of law, on which he thinks it desirable to obtain the opinion of the Federal Court, to that Court for a decision. There is an analogus power in a well-known section of the Privy Council Act." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Cols. 213-214, Speech of the Attorney-General. *See* S. 4 of the Judicial Committee Act, 1833.) In certain circumstances "may" and "shall" are inter-changeable expressions. "May" in this position means "shall" having regard to the consideration that you cannot compel a Court to answer a question, although, no doubt, they will regard it as their duty to answer it having regard to the powers that are conferred on them. (*Ibid.*) This advisory jurisdiction of the Federal Court is analogous to that possessed by the Privy Council under S. 4 of the Judicial Committee Act, 1833, which provides that His Majesty may refer to the Committee for their opinion any matters whatsoever as His Majesty may think fit, and that the Committee shall thereupon hear and consider the same, and shall advice His Majesty thereon. Procedure under the Judicial Committee Act, 1833, differs from that under S. 213 of this Act in one respect—dissenting judgments are not delivered in the Privy Council. In allowing expression of dissent the Federal Court follows the practice of the International Court at the Hague. As to the practice and desirability of Courts giving opinions in advance of actual litigation between parties *see* "Judicial Precedents or

(2) No report shall be made under this section save in accordance with an opinion delivered in open Court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

Rules of Court, etc.

214. (1) The Federal Court may, from time to time, with the approval of the Governor-General in his discretion, make rules of Court for regulating generally the practice and procedure of the Court, including rules as to the persons practising before the Court, as to the time within which appeals to the Court are to be entered, as to the costs of and incidental to any proceedings in the Court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay.

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose, so however that no case shall be decided by less than three judges:

Provided that, if the Federal Legislature make such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Court, the rules shall provide for the constitution of a special division of the Court for the purpose of deciding all cases which would have been within the jurisdiction of the Court even if its jurisdiction had not been so enlarged.

(3) Subject to the provisions of any rules of Court, the Chief Justice of India shall determine what judges are to constitute any division of the Court and what judges are to sit for any purpose.

(4) No judgment shall be delivered by the Federal Court save in open Court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.

(5) All proceedings in the Federal Court shall be in the English language.

Ancillary powers of Federal Court.

215. The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Act.

NOTES.

a Study in Case-law" published by the M. L. J. Office, Chapter XVI, pp. 71-75.

Sec. 213: REFERENCE UNDER—ONUS—CASE, ANSWER AND REJOINDER—PROCEDURE.—Where a special reference under S. 213 relates to an Act of a Provincial Legislature and the Advocate-General of India challenges its validity on behalf of the Governor-General of India, the onus is on him in the first instance to state the facts and arguments and authorities showing that the Act or any provisions thereof is or are *ultra vires* of the Provincial Legislature concerned. It would then be for the Advocate-General of that Province to file his case stating any further facts which may be considered necessary and meeting the arguments of the Advocate-General of India and citing the authorities upon which he proposes to rely at the hearing. The position would be reversed if a Province were challenging the validity of an Act of the Central Legislature. The question whether there should be any rejoinder by the party challenging the validity of the Act must be considered after the opposite party has filed his case. 1938 P. W.N. 609=1 Fed. L. J. R. 1.

Sec. 215: SECTION EXPLAINED.—"This is a clause put in purely out of precaution, in case it should turn out that, in some very important and vital matter, some supplemental power is necessary for the purpose of enabling the Court more effectively to exercise its jurisdiction. Where you are dealing with such important matters as this, it is thought wise to put in an enabling clause to enable the Legislature, should the need arise, to fill up the gap. The Committee will see that the powers under the Clause are definitely limited and restricted. The powers are to be such as may appear necessary to enable the Court to exercise the jurisdiction conferred upon it by or under

Expenses of Federal Court.

216. (1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the revenues of the Federation, and any fees or other moneys taken by the Court shall form part of those revenues.

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

Construction of references to High Courts in States.

217. References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any Court which His Majesty may, after communication with the Ruler of the State, declare to be a High Court for the purposes of that provision.

Savings.

218. Nothing in this chapter shall be construed as conferring, or empowering the Federal Legislature to confer, any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a Court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave.

CHAPTER II.

THE HIGH COURTS IN BRITISH INDIA.

Meaning of "High Court."

219. (1) The following Courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore, and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North-West Frontier Province and in Sind, any other Court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable Court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act:

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any Court or Courts mentioned in this sub-section, then as from the establishment of the new Court, this section shall have effect as if the new Court were mentioned therein in lieu of the Court or Courts so replaced.

(2) The provisions of this chapter shall apply to every High Court in British India. [*See* Amendment by 3 and 4, Geo. 6, Ch. 5, S. 6, *infra.*]

NOTES.

this Act. Necessarily there is no specific
point in mind or the Clause would have
been made specific. The Legislature will
have the power, should it be required, to
confer upon the Court the powers neces-
sary to enable it to perform the functions
placed upon it under the Act." (Parl.
Deb., Vol. 300, No. 71, 2nd April, 1935, p.
236. Speech of the Solicitor-General.)

Sec. 217.—"Under this clause it will be
for the Crown to say what Courts should
be determined to be High Courts for the
purposes of this part of the Act. Such
decisions will be by the Crown after com-
munication with the Ruler of a State, but the
decision will rest with the Crown. (Parl.
Deb., Vol. 300, No. 71, 2nd April, 1935,
p. 243).

Sec. 218.—This clause is only included with a view to making good the intention of the Government to maintain the right of appeal from the Court at Aden to the High Court at Bombay. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 243.)

Sec. 219.—Prior to the passing of the new Act, the High Court at Calcutta was mainly under the jurisdiction of the Central Government. The other High Courts were under the jurisdiction of the Local Governments. The Joint Select Committee reported in favour of bringing the Calcutta High Court into the same relationship with the Bengal Government as that obtaining between all other High Courts and their res-

Constitution of High Courts.

220. (1) Every High Court shall be a Court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint:

Provided that the judges so appointed, together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter, shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that Court.

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years:

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor resign his office;

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of a High Court unless he—

(*a*) is a barrister of England or Northern Ireland, of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

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NOTES.

pective Provincial Governments; and the new Act makes provision accordingly.

PROVISO.—The Proviso is intended "to meet the possibility of what is now the Judicial Commissioner's Court in the Central Provinces and Berar being, as may well happen, converted into a High Court before this Bill becomes an Act. At present it is referred to as what is now, namely, the Judicial Commissioner's Court in the Central Provinces and Berar. It may well be that before the Bill becomes an Act it will have been turned into a High Court, and the amendment merely makes provision in case this happens before that date." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 244.)

[*N.B.*—Now the High Court of Nagpur has been constituted by Letters Patent—*See* Nagpur Letters Patent, *infra.*]

Sec. 220.—The former statutory requirement that not less than one-third of the Judges of every High Court must have been called to the English, Scottish or Irish Bar, and that not less than one-third must be members of the Indian Civil Service, is abrogated. "We are informed", said the Joint Select Committee in their Report, "that the rigidity of this rule has sometimes caused difficulty in the selection of Judges." They also said, that the Civil Service Judges are an important and valuable element in the judiciary, and that their presence adds greatly to the strength of the High Courts. Before the Act the Civil Service Judges were not eligible for permanent appointment as Chief Justice of a High Court. His Majesty's freedom of choice is no longer fettered in this respect, under the present Act. The Joint Select Committee said, "We need hardly add that our acceptance of the proposal to abrogate the statutory proportion so far as barristers are concerned implies no doubt as to the necessity of continuing, in the interests of the maintenance of British legal traditions, to recruit a reasonable proportion of barristers or advocates from the United Kingdom as Judges of the High Courts." In India there is not the distinction in the lower ranks between the Executive and the subordinate judiciary, and it is quite inevitable whether you federalise the High Courts or keep them provincial as they are now, that the subordinate judiciary will have to be provincial. I suggest that there is every objection against taking the higher ranks of the judicature and making them federal while maintaining the lower ranks under provincial administration. All sorts of administrative difficulties will at once occur, and, apart from those, it seems to me that there will be a grave danger of the Provinces regarding the High Court as isolated and insulated from the Province itself, as something imposed by the Federation from outside, with the result that there will much more likelihood of friction between the Local Government on the one hand and the High Court on the other, and within the Province, between the subordinate judiciary, which is to remain part of the administration, and the federalised High Court. The Joint Select Committee therefore recommended that these Courts should remain part of the Provincial Administration, accompanied by the safeguards that they are to be Crown appoint-

(*b*) is a member of the Indian Civil Service of at least ten years standing, who has for at least three years served as, or exercised the powers of, a district judge; or

(*c*) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a Small Cause Court; or

(*d*) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession:

Provided that a person shall not, unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

Salaries, etc., of judges.

221. The judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment.

Temporary and additional judges.

222. (1) If the office of chief justice of a High Court becomes vacant, or if any such chief justice is by reason of absence, or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the Court as the Governor-General may in his discretion think fit to appoint for the purpose.

NOTES.

ments and that the expenses are to be non-votable charges on provincial budgets." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Cols. 249-254.)

Sec. 220 (4).—The oath prescribed by S. 220 (4) is only necessary before entering upon the office as a Judge. Where a person appointed as an additional Judge of the High Court has continued as such without a break after taking the oath prescribed under Cl. 3 of the Letters Patent, and he is made a permanent Judge of the High Court by a Royal warrant signed and issued before the commencement of the Act—the appointment to take effect after the Act in continuation of his appointment as additional Judge,—it cannot be said that he *enters upon his office* as a Judge afresh necessitating a fresh oath which is required only for a person who enters upon his office for the first time. The fact that the additional Judge did not take the oath afresh on being made a permanent Judge would not invalidate his appointment or make the High Court otherwise than validly constituted. 1937 A.L.J. 840=I.L.R. 1937 A. 880=1937 A. 588 (F.B.).

Sec. 222.—Cl. 1 of S. 222 of the Government of India Act expressly recognises and provides for the contingency of the Office of Chief Justice of a High Court remaining vacant for some time. Cl. 2 of the Letters Patent (Patna) only determines the constitution of that High Court by declaring that it shall consist of a Chief Justice and a certain number of other Judges. In the case of a vacancy caused by death some time must necessarily elapse before a

(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to act temporarily as a chief justice, or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that Court, and the persons so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties.

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the judges of the Court, should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify.

Jurisdiction of existing High Courts.

223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate legislature enacted by virtue of powers conferred on that legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts, shall be the same as immediately before the commencement of Part III of this Act.

NOTES.

new appointment is made. It would be preposterous to hold that during the interval between the death and new appointment there is no properly constituted High Court. The vacancy in the Office implies that the office exists which is distinct from the case of an abolition of the office. Where the Chief Justice of the High Court dies during the vacation of the High Court, the Office of Chief Justice does not die with him. It still continues, though it remains vacant till filled up. The constitution of the Court remains unbroken and unchanged. So far as the jurisdiction of a vacation Bench of the High Court to hear and decide cases is concerned, that cannot be questioned, because the Vacation Bench is not required to do any of the duties of the Chief Justice. The only effect of the vacancy in the office of Chief Justice, is that, so long as the vacancy continues, there would be no one to perform his duties until the Governor-General appoints some one of the other Judges to do the same under S. 222 (1) of the Government of India Act. The death of the Chief Justice and the consequent vacancy in his office does not affect the jurisdiction of the Vacation Bench in the least or render it incompetent to pass orders in any case within its jurisdiction as provided by the law and the Rules of the High Court. 17 Pat. 574=19 Pat.L.T. 675=1938 P.W.N. 683=1938 Pat. 550.

Sec. 223: EXTRACTS FROM PARLIAMENTARY DEBATES (ATTORNEY-GENERAL).—"The scheme of the Act provides that the Provincial Legislatures shall have competence to legislate in respect of the jurisdiction of the High Court in any matters in connection with which they may pass legislation. It will be seen at once how important it is that if the Provincial Legislature is to have power to legislate upon any particular matter, it shall also have the power to legislate in respect of the necessary jurisdiction of the High Court as being connected with that matter. My Noble Friend has suggested some ways in which legislation might be passed by the Provincial Legislature derogating from the jurisdiction of the High Court. I am informed that, judging from present day and past experience, the tendency has been and would be in the future in exactly the opposite direction. The inclinations of the Legislatures has been to increase the jurisdiction of the High Court and not to diminish it or derogate from it. The reason that I would mention as the one which makes it impossible to accept the amendment of my honourable and learned Friend is that his amendment makes it impossible for the Provincial Legislature to derogate from the jurisdiction of the High Court. That would really mean that the Federal Legislature would have to come in and legislate in respect of jurisdiction to deal with that which had been made the subject of legislation in the Provincial Legislature, and you would get an inextricable tangle between the two, or you might easily get such a tangle. In spite of what I have

Administrative functions of High Courts.

224. (1) Every High Court shall have superintendence over all Courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

(*a*) call for returns;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts;

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts; and

(*d*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of Courts:

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

NOTES.

said as to the probable tendencies being in the direction of increasing the jurisdiction of the High Court, rather than diminishing it, provision has been made in the Instrument of Instructions by which any legislation derogating from the powers of the High Court so as to endanger the position which the Court is by such Act designed to fill, is to be sent by the Governor for the consideration of the Governor-General. That would give the most ample safeguards against the possibilities suggested by my noble Friend. I hope that my honourable Friends will feel that the safeguard which will be inserted in the instrument of Instruction will prevent them from feeling any fears as to the jurisdiction of the High Court being tampered with by the Provincial Legislature." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 294.)

Secs. 223 and 224.—The High Court has no jurisdiction under the Government of India Act, 1935, to interfere with an order passed by a Deputy Collector in execution proceedings under the Bengal Rent Act. I.L.R. (1941) 2 Cal. 366=4 F.L.J. (H.C.) 405.

Sec. 224.—This section reproduces the terms of S. 107 of the old Act with two variations, one of which alone is of substance:

(1) The provision as to transfer of cases to itself under cl. (*b*) has been omitted for the reason stated by the Attorney-General:—"The Codes of Criminal and Civil Procedure already provide for this power in connection with the ordinary jurisdiction of the Courts, that is to say, the power to direct the transfer of a suit or appeal from one Court to another of equal or superior jurisdiction. It seems most undesirable to take one of the powers conferred upon the Courts by the Code, and introduce it into a section which deals only with administrative matters." (Parl. Deb., Vol. 302, Col. 994.) The proviso which prescribes the previous approval of the Governor to the validity of the rule made by the High Court under this section, makes a departure from the previous law in the case of the High Court of Calcutta for which the previous approval of the Governor-General in Council was formerly perscribed; thus rendering all the High Courts uniform in respect of this matter.

Cl. (2).—This deprives the High Courts of the revisional powers which they have been exercising over Courts subject to their appellate jurisdiction ever since the constitution of the High Courts in 1861, originally under S. 15 of the High Courts Act of 1861 and later under S. 107 of the Government of India Act, 1915. The revisional powers of the High Courts would therefore hereafter be confined to those cases where the Indian enactments confer such a power. The term "inferior Court" is not defined by the Act, and in the context it can presumably mean "*Courts* inferior to the High Court which are subject to the appellate jurisdiction of the High Court" within the opening words of this section. It is submitted that the sub-section does not affect the powers of the High Court to issue writs of *certiorari* and prohibition in respect of the proceedings and determination of tribunals which are not "inferior Courts", *e.g.*, in those cases where jurisdiction is conferred on *persona designata* to determine judicially the rights of parties; or in cases of quasi-judicial tribunals. (*See also* Notes under S. 220, *supra*. Parl. Deb. and Joint Par. Com. Report.)

APPLICABILITY.—Although S. 224 contains in effect a reproduction of the terms of S. 107 of the previous Government of India Act, it also contains a proviso which makes it clear that S. 224 has no application of itself to legal proceedings at all. I.L.R. (1938) 1 Cal. 256=1938 Cal. 23.

POWER OF SUPERINTENDENCE—SCOPE AND EXTENT OF.—The power of superintendence

Transfer of certain cases to High Court for trial.

225. (1) If, on an application made in accordance with the provisions of this section, a High Court is satisfied that a case pending in an inferior Court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power.

(2) An application for the purposes of this section shall not be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province.

NOTES.

of Magisterial Courts conferred on the Chief Court of Sind by law includes necessarily the power to guide, advise and encourage Magistrates in the faithful discharge of their judicial duties. I.L.R. (1941) Kar. 3=1940 Sind 239 (F.B.).

Sec. 224 (1) and (2): CONSTRUCTION AND SCOPE—POWERS OF HIGH COURT EXISTING BEFORE ACT—IF TAKEN AWAY OR AFFECTED.—Sub-S. (2) of S. 224 of the Government of India Act cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact S. 223 preserves those powers. All that S. 224 (2) means is that the High Courts cannot so interpret sub-S. (1) of that section as to usurp the powers which they did not possess before. S. 224 deals with the administrative functions of the High Court and it does not affect the powers conferred upon the High Courts by the Letters Patent and the Charter Act, powers co-extensive with those of the Court of the King's Bench in England, including the power to issue writs of *certiorari* in respect of proceedings of Subordinate Courts, tribunals or officers acting judicially. 41 Bom. L. R. 984=1939 Bom. 471. The word "judgment" as used in S. 224 of the Government of India Act is used in the English sense and embraces an order in the same way as the word 'judgments' used in the Letters Patent include not only judgments as understood by the C. P. Code, in India, but also all final orders. 1940 N.L. J. 93.

REVISION—INHERENT POWERS OF HIGH COURT.—Outside the statutory provisions, *e.g.*, S. 224, Government of India Act and S. 115, C. P. Code, no High Court has any inherent powers of revision over the Subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself. 1938 O.W.N. 1251 =A.I.R. 1938 F.C. 1. *See also* 47 L.W. 578 (Revision of order under S. 36, Legal Practitioners' Act). S. 224 (2) limits the High Court's powers to question judgments of inferior Courts to those given under the ordinary law. Hence High Court cannot entertain a revision from an interlocutory order which is not a decided case. 40 P. L.R. 775=1938 Lah. 442.

POWER OF NAGPUR HIGH COURT TO ISSUE WRIT OF CERTIORARI.—The High Courts in India other than the chartered High Courts have not the power to issue the prerogative writ of *certiorari* either under the Letters Patent or the Government of India Act. S. 224 (2) of the Government of India Act denies the Nagpur High Court jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. This would preclude that Court from issuing a writ of *certiorari* in respect of the acts of any public authority even though they are judicial as opposed to merely administrative acts. I.L.R. (1941) Nag. 397=1941 Nag. 282. An order passed by a Village Headman under S. 10 of Regulation XI of 1916 is not subject to appeal or revision. S. 224 (2) of the Government of India Act of 1935 excludes the High Court's jurisdiction in such cases. 1940 Mad. 183 =50 L.W. 799=1939 M.W.N. 1223. The superintendence given to the High Court under S. 224 (1) cannot be construed as giving to the High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. Neither S. 224 nor S. 439, Cr. P. Code, will enable the High Court to expunge passages or remarks made by the trial Court against a witness in a judgment of acquittal at the instance of the witness concerned when the judgment is not under appeal or revision. 194 I.C. 248=1941 P.W. N. 534=1941 Pat. 544. The combined effect of Ss. 224 (1) (*d*) and 231 (2) is that so far as the Punjab is concerned, rules framed and tables settled by the Lahore High Court come into force on the date when they are approved by the Governor of the Punjab, but in Delhi they receive their validity on the date on which they are approved by the Governor-General. 1941 Lah. 450.

Secs. 225-227.—Under S. 225 if, on application, a High Court is satisfied that a case pending in an inferior Court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of invalidity of any Federal or Provincial Act, it is to exercise that power. [S. 225, Cl. (1)]. An application for this purpose is not to be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the

Jurisdiction in revenue matters.

226. (1) Until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial

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NOTES.

Advocate-General for the Federation or the Advocate-General for the Province. The purpose of this section was to minimise the inconvenience caused by the possibility of an Act being challenged as *ultra vires*. Until otherwise provided by Act of the appropriate Legislature no High Court will have any original jurisdiction in any matter concerning the revenue or concerning any Act ordered or done in its collection. [S. 226. cl. (1).] As in the case of the Federal Court, all proceedings in every High Court will be in the English language (S. 227).

Sec. 226.—(*Cf.* S. 106, Old Government of India Act. 1915). *See* 50 M. 449 =53 M. L. J. 335; 45 M. L. J. 592 (P. C.). The question whether the Urban Immovable Property Tax imposed by the Bombay Finance Act of 1932. as amended in 1939. Part VI; can be raised by the municipal authorities in the manner provided is a matter concerning the revenue, and therefore the jurisdiction of the High Court to determine the question is barred by S. 226. I.L.R. (1940) Bom. 58=3 F.L. J. (H.C.) 25=42 Bom.L.R. 10=1940 Bom. 65 (F.B.).Under S. 226 (1) the High Court has no original jurisdiction to entertain a suit challenging the legality of an order for confiscation of smuggled goods passed under the Sea Customs Act as the seizure and confiscation of the goods is an act ordered or done in the collection of revenue. No irregularity of procedure and no error in the conclusions arrived at can *per se* exclude the application of this section, when there is no allegation that the Officer of Customs directed the confiscation of the goods *mala fide*, or in the exercise of powers conferred on him by Sea Customs Act in circumstances to which he knew the provisions of the Act were not applicable. 3 Fed.L.J. (H.C.) 50=I.L.R. (1939) 1 Cal. 257=43 C.W.N. 445=1939 Cal. 763. *See also* I. L. R. (1939) 2 Cal. 541=1940 Cal. 174. The adjudication of the penalty under the Sea Customs Act is an adjudication of a matter concerning the revenue and its collection is an act ordered in the collection of revenue according to the usage and practice of the country or the law for the time being in force within the meaning of S. 226 (1). The High Court has therefore no jurisdiction to entertain a suit to recover back the penalty. 42 Bom. L. R. 532=1940 Bom. 29 "Concerning the revenue, etc"—Application to High Court to direct Income-tax Officer to forbear from assessing applicant—competency. *See* 42 Bom.L.R. 414. Even assuming that it is correct to say that the motive of *Government in instituting and maintaining the Court of Wards* was to safeguard estates from mismanagement and consequent inability to pay revenue, that is no justification for saying that an order of the Court of Wards declaring a female, a disqualified proprietor is a matter '*concerning revenue or an act done in collection thereof*' within the meaning of S, 226 (1) of the Government of India Act. I.L.R. (1938) 1 Cal. 476=42 C.W.N. 230=1938 Cal. 385. The expression "the revenue" in S. 106 (2) of the Government of India Act does apply to the stamp duty payable under the Indian Stamp Act and such stamp duty does fall within the terms of the section. Where the contention is that the stamp authorities are not entitled to charge any particular stamp duty, it must be a "Matter concerning the revenue" within the meaning of S. 106 (2), and any act ordered to be done in the collection of the revenue would likewise be a matter concerning the revenue. An act done by the revenue authorities for the purpose of collecting the revenue which they consider to be properly leviable in accordance with law is an act done in accordance with law and can never give rise to any cause of action against the officers of the Secretary of State. The High Court has no jurisdiction to entertain a suit in such a matter by reason of the bar imposed by S. 106 (2), and the public have no remedy against what may turn out to be a wrong and arbitrary decision of the stamp authorities with regard to the payment of duty chargeable in respect of any particular document, save and except the somewhat doubtful remedy provided by S. 56 of the Stamp Act. I.L.R. (1939) Bom. 320 =2 Fed.L.J. (P. II) 60=41 Bom.L.R. 297 =1939 Bom. 215. The jurisdiction, powers and authority of the High Court as conferred by S. 106 of the Government of India Act, 1915-1919 can be affected either by His Majesty by further Letters Patent or by the Indian Legislature. The Provincial Legislature even with previous sanction of the Governor-General cannot by reason of S. 80-A (4) of the Act affect, curtail or extend the jurisdiction and powers of the High Court, and if it passes such a piece of legislation, it would be *ultra vires*. I.L.R. (1939) 2 Cal.

legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion.

Proceedings of High Courts to be in English.

227. All proceedings in every High Court shall be in the English language.

Expenses of High Courts.

228 (1) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court and the salaries and allowances of the judges of the Court shall be charged upon the revenues of the Province, and any fees or other moneys taken by the Court shall form part of those revenues.

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the legislature.

Power of His Majesty to constitute or reconstitute High Court by letters patent.

229. (1) His Majesty, if the Chamber or Chambers of the legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty, may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof, or, where there are two High Courts in that Province, amalgamate those Courts.

(2) Where any Court is reconstituted, or two Courts are amalgamated, as aforesaid, the letters patent shall provide for the continuance in their respective offices of the existing judges, officers and servants of the Court or Courts, and for the carrying on before the reconstituted Court or the new Court of all pending matters, and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation.

Extra-provincial jurisdiction of High Courts.

230. (1) His Majesty in Council may, if satisfied that an agreement in that behalf has been made between the Governments concerned, extend the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has relation to any other area in relation to which it exercises jurisdiction.

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province.

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed—

(*a*) as empowering the legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction; or

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93=43 C.W.N. 613=1939 Cal. 435 (S.B.).

Sec. 228.—*See* Joint Parl. Com. Rep., para. 335.

Sec. 230.—"This clause reduces substantially S. 109 of the existing Act. It provides that where the High Court exercises jurisdiction in relation to an area outside the Province in which it has its principal seat, then the Bill shall not be interpreted as empowering the legislature of that Province to increase or restrict the jurisdiction of the Court or prevent the legislature from having power to make laws for that area. The legislature having power to make laws for the area can pass laws in regard to the jurisdiction of the Court. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 297. Speech of the Attorney-General.).

(*b*) as preventing the legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the Court in relation to that area as it would be competent to pass if the principal seat of the Court were in that area.

Saving and definitions.

231. (1) Any judge appointed before the commencement of Part III of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this Part of this Act, but shall not by virtue of this Act, be required to relinquish his office at any earlier age than he would have been required so to do, if this Act had not been passed.

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province, references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as referenees to the Governor and the revenues of the Province in which the Court has its principal seat, and the reference to the approval by the Governor of rules, forms and tables for subordinate Courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate Court is situate, or, if it is situate in an * * * area not forming part of a Province, by the Governor-General.

PART X.

CHAPTER II.

CIVIL SERVICES.

General Provisions.

Tenure of office of persons employed in civil capacities in India.

240. (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

NOTES.

Sec. 240: TENURE OF OFFICE OF CIVIL SERVANTS.—This section reproduces in substance the provisions of S. 96-B of the Government of India Act, 1919. The slight variations in the language of the opening words of this section compared with the old section serve to emphasise that the tenure of all civil services is at pleasure, if ever it was open to doubt. The use of the words "subject to the provisions of this Act and the rules made thereunder" before specifying the tenure gave rise to the argument in *Venkata Rao* v. *Secretary of State,* (1937) 1 M.L.J. 529=64 I.A. 55, that the Statute gave servants of the Crown a right enforceable by action to hold office in accordance with the rules and that they could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. Their Lordships of the Judicial Committee negatived this contention observing: "S. 96-B in express terms states that office is held at pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance". (See *Venkata Rao* v. *Secretary of State,* (1937) 1 M.L.J. 529 (535)=64 I.A. 55). The omission of those words from the section makes it clear that the tenure is an unqualified one at pleasure. The exceptions provided for in the opening words relate to the office of Judges of the High Courts and the Federal Court, and of the Auditor-General of India and the Auditor-General of Home Accounts whose tenure of office is during good behaviour and who are removable only on the ground of misbehaviour or infirmity of mind or body if the Judicial Committee of the Privy Council on reference being made to them by His Majesty report that the official ought in any such ground to be removed. It is a fundamental principle, based on public policy, that the Crown should have the unfettered discretion to remove a public servant at pleasure, and even a contract to engage him for a fixed term, if there be no statute law authorising it, would not be available to him, such a contract being void as against public policy. This power to dismiss at

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will can only be controlled by a statute but cannot be abridged or controlled by rules or regulations of service, even if those rules or regulations are framed under powers given by a statute. Consequently, the dismissal or discharge of a civil servant in violation of the Fundamental Rules would not entitle him to an appeal to the Civil Court but would leave him to appeal only to the administrative authorities. 42 C.W.N. 1186 =68 C.L.J. 320=1938 Cal. 759. *See also* 46 L.W. 242=1937 Mad. 777. A servant of the Crown in India holds his appointment at the pleasure of the Crown and is liable to dismissal at the will and pleasure of the Crown, notwithstanding a contract to the contrary, unless the Crown has deprived itself of its prerogative in some way expressly recognised by law, nor can an action for wrongful dismissal be entertained even though a special contract be proved. A refusal to employ a person to whom employment has been offered does not stand on a different footing, because the power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. 39 Bom. L. R. 807=1937 Bom. 449. The words 'subject to the rules' appearing in S. 96-B, of Government of India Act, are not superfluous and ineffective. The section contains a statutory and solemn assurance that the tenure of office held by servants of the Crown though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. Redress therefore in such cases is not obtainable from the Courts by action. It is so even where there has been serious and complete failure to adhere to important and fundamental rules, as for instance in the case of a person who has been dismissed from service without any investigation into the charge. The remedy of the person aggrieved does not lie by a suit in Court but by way of appeal of official kind. 64 I.A. 55=I. L. R. (1937) Mad. 532=1937 P. C. 31=(1937) 1 M. L. J. 529 (P. C.). *See also* 1937 Rang. L. R. 35=1937 Rang. 89 (S. B.); 165 I. C. 834=1936 O.W.N. 1140=1937 Oudh 209. Although by virtue of S. 96-B, a statutory right is created between the Crown and the servant, it is not to be implied that any provisions in Statute 23 of 1871, repugnant to the terms of the Statute creating such right are repealed or rendered inapplicable to such a case. Statute of 1919 does not confer right of action to enforce the rules made thereunder. I. L. R. (1937) Mad. 517=64 I. A. 40 =41 C. W. N. 545=1937 P. C. 27= (1937) 1 M.L.J. 515 (P.C.). In a case in which after Government officials, duly competent and duly authorised in that behalf, have arrived honestly at one decision, their successors in office after the decision has been acted upon and is in effective operation, cannot purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. Where a Sub-Inspector of Police was granted an invalid pension by a competent authority and thus duly ceased to be in service, and the officer succeeding the authority, which had granted the pension, reconsidered the matter and ordered his removal from the service. *Held,* that the servant had suffered a wrong and therefore had every right to complain of the stoppage of pension as a breach of rules relating to pensions. 64 I.A. 40=I.L.R. (1937) Mad. 517=1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.). R. 55 of the Civil Services (Classification, Control and Appeal) Rules, which provides for the case of a departmental inquiry into charges against a Government servant who is subject to the rule, contains a safeguard to the effect that none of the graver penalties—dismissal, removal or reduction—which the authority concerned is empowered to inflict can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. But the rule does not state that the authority concerned shall itself hold the inquiry. The authority is competent under the rule to depute some subordinate officer to hold the inquiry. The purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which is to be departmentally investigated. And so long as the conditions of the rule are followed, there is nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the authority itself which imposes the punishment but by some subordinate officer deputed by that authority for the purpose. 1937 M.W.N. 821=46 L.W. 531=1937 Mad. 735=(1937) 2 M.L.J. 189. *See also* 1937 Oudh 209. The stipulation or proviso as to dismissal in S. 96-B is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. This statutory safeguard should be observed with the utmost care and a deprivation of pension based upon a dismissal purporting to be made by an official, who is prohibited by statute from making it, rests upon an illegal and improper foundation. 64 I. A. 40=I.L.R. (1937) Mad. 517=39 Bom.L. R. 688=41 C.W.N. 545=45 L.W. 139= 1937 P.C. 27=(1937) 1 M.L.J. 515 (P. C.). Where a civil servant was placed on suspension till a criminal case against him was finally decided and on his conviction by the Magistrate was dismissed from service but on his acquittal in appeal, the order of dismissal was cancelled and he was discharged from service, a month's pay being given in lieu of notice, the said payment does not

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply—

(*a*) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(*b*) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

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amount to reinstatement and he cannot, therefore, under R. 54, Part III of the Fundamental Rules, claim full pay for the whole period of suspension. 42 C.W.N. 1186=68 C.L.J. 320=1938 Cal. 759. *See also* 4 F.L.J. (H.C.) 400. A servant of the Crown who is dismissed from service has no cause of action against the Crown, although the dismissal is by an authority subordinate to the one who appointed him and is, therefore, made in contravention of the very terms of the Government of India Act. A mere declaration by the Civil Court that the dismissal is illegal and that the servant is fit to be reinstated to his post will not serve any useful purpose. Because he was illegally dismissed, it does not necessarily follow that he was a good officer or that he might not have been legally dismissed and justifiably dismissed on proper grounds and after a proper enquiry. 44 C.W.N. 79=71 C.L.J. 95. But *see* (1942) 1 M.L.J. 77. It cannot be said that since S. 240 of the Act of 1935 had re-enacted with amendments S. 96-B of the earlier Act (on which the appellant's cause of action was based) the Act of 1935 must *pro tanto* be regarded as retrospective, so that a Court which had founded its judgment on the provisions of S. 96-B must in law be deemed to have been interpreting the provisions of S. 240 of the Act of 1935. 1938 O.W.N. 1251=1938 F.C. 1.

Secs. 240 (2) and 243: DISMISSAL OF SUB-INSPECTOR OF POLICE BY AUTHORITY SUBORDINATE TO THAT WHICH APPOINTED HIM—SUIT TO DECLARE DISMISSAL VOID.—A Sub-Inspector of Police appointed by I. G. of Police was dismissed by the Deputy I. G. of Police. After an unsuccessful appeal against such dismissal to the I. G. and the Provincial Government the dismissed officer filed a suit to declare his dismissal void on the ground among others that his dismissal by authority subordinate to that which appointed him was opposed to S. 240 (2) of the Government of India Act. On a preliminary issue it was held that the plaintiff had no remedy by civil action and it was upheld by the appellate Court. On appeal to the Federal Court, it was *held* that sub-S. (2) of S. 240 contained a statutory prohibition to the effect that no office-holder shall be dismissed from service by any authority subordinate to that by which he was appointed, and that the section had been enacted in unqualified terms and the protection thus afforded could not be qualified or taken away by statutory rules. *Held, further,* that the plaintiff was entitled to invoke the aid. S. 240 (2) and that S. 243 had not the effect of depriving him of the benefit of sub-S. (2) of S. 240. It was also held that the dismissal by the I. G. of the appeal against the order of dismissal by the Deputy I. G. was not equivalent to a dismissal from office by the I. G. Under the circumstances their Lordships thought it best to say, that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void and inoperative and that the Courts below were not justified in dismissing the suit as wholly unsustainable. (1942) 1 M.L.J. 77. But *see* 44 C.W.N. 79=71 C.L.J. 895, *supra.*

Judges of the Federal Court and High Courts.

253. (1) The provisions of this chapter shall not apply to the judges of the Federal Court or of any High Court:

Provided that—

(*a*) for the purposes of this section a member of any of the civil services of the Crown in India who is acting temporarily as a judge of a High Court shall not be deemed to be a judge of that Court:

(*b*) nothing in this section shall be construed as preventing the Orders in Council relating to the salaries, leave and pensions of judges of the Federal Court, or of any High Court, from applying to such of those judges as were, before they were appointed judges, members of a civil service of the Crown in India, such of the rules relating to that service as may appear to His Majesty to be properly applicable in relation to them:

(*c*) nothing in this section shall be construed as excluding the office of judge of the Federal Court or of a High Court from the operation of the provisions of this chapter with respect to the eligibility for civil office of persons who are not British subjects.

(2) Any pension which under the rules in force immediately before the commencement of Part III of this Act was payable to or in respect of any person who, having been a judge of a High Court within the meaning of this Act or of the High Court at Rangoon, retired before the commencement of the said Part III, shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, continue to be payable in accordance with those rules and shall be charged on the revenues of the Federation.

(3) Any liability of the Federation or of any Province to or in respect of any person who is, at the commencement of Part III of this Act, a judge of a High Court within the meaning of this Act, or to or in respect of any such person as is mentioned in sub-section (2) of this section, being a liability to pay a pension granted to or in respect of any such person or any other liability of such a nature as to have been enforceable in legal proceedings against the Secretary of State in Council if this Act had not been passed, shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, be deemed, for the purposes of the provisions of Part VII of this Act relating to legal proceedings, to be a liability arising under a statute passed before the commencement of Part III of this Act.

District judges, etc.

254. (1) Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section, the expression "district judge" includes additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, sessions judge, additional sessions judge, and assistant sessions judge.

Subordinate civil judicial service.

255. (1) The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province, make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of district judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

Subordinate criminal magistracy.

256. No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the district magistrate which he is of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be.

Special Provisions as to Political Department.

Officers of political department.

257. (1) Subject to the provisions of this section, the provisions of this Part of this Act shall not apply in relation to persons wholly or mainly employed in connection with the exercise of the functions of the Crown in its relations with Indian States.

(2) Notwithstanding anything in the preceding sub-section, all persons so employed immediately before the commencement of Part III of this Act shall hold their offices or posts subject to the like conditions of service as to remuneration, pensions or otherwise as theretofore or not less favourable conditions, and in relation to those persons anything which might, but for the passing of this Act, have been done by or in relation to the Secretary of State in Council shall be done by or in relation to the Secretary of State, acting with the concurrence of his advisers.

(3) Nothing in this section shall be construed as affecting the application to such persons of the rule of law that, except as otherwise provided by statute, every person employed under the Crown holds office during His Majesty's pleasure.

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CHAPTER V.

GENERAL.

270. (1) No proceedings civil or criminal shall be instituted against any

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Sec. 27: INDEMNITY FOR THE PAST. —This section carries out the recommendations of the Joint Parliamentary Committee in Para. 283 of their Report. They statel: "The White Paper poposes that there shall be a full indemnity against civil and criminal proceedings in respect of all acts before the commencement of the Constitution Act done in good faith and done or purported to be done in the execution of duty. In view of

Indemnity for past acts.

person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion.

NOTES.

threats which have been made in certain quarters, especially against the Police, we think that it is justifiable to give this measure of protection to men who have done no more than their duty in very difficult and trying circumstances." Explaining the section, it was stated in Parliament: "The section deals with past acts. It does not take the exact form of an indemnity, but it is an indemnity of a kind. As far as the future is concerned, obviously it would not be right to give what would appear to be in any sense an indemnity in advance. There are no doubt special circumstances which make it desirable to have something in the nature of an indemnity. In regard to the future, as I have indicated, obviously it would be very undesirable, and indeed wrong, to appear to be casting a cloak in advance irrespective of the type of charge that might be made." *(Par. Deb., Vol.,* that might be made. *(Par. Deb. Vol. Col.* 877.) In regard to the future the protection is afforded by the next section, S. 271.

Secs. 270 and 271: PROTECTION AFFORDED TO PUBLIC SERVANT—NATURRE AND EXTENT OF.—S. 270 (1) applies but only to criminal proceedings, but also to the institution of civil proceedings. In the institution of criminal proceedings, the protection of public interests is the main concern, and it may well be left to the Local Government to determine the question of the expediency of a prosecution from that point of view. But when a citizen seeks a civil remedy against a public servant, the Legislature must be presumed to have been very cautious in depriving the aggrieved citizens of redress in a Court of law, and any restrictions on such a remedy imposed in the interest of the public servant should not be lightly extended so as to unduly restrict the remedy of the citizen. 50 L.W. 95=43 C.W.N. (F.C.R.) 50=2 Fed.L.J. 153=1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23. S. 270 is very wide in its terms and prohibits the initiation of proceedings in respect of the acts described therein against all servants of the Crown, employed in connexion with the affairs of the province, whether they are "gazetted officers" or not. 184 I.C. 680=1939 Lah. 479. It is quite obvious from a perusal of the various sections of Part X of the Government of India Act that crown services include the subordinate as well as the superior civil services and there is no warrant for holding that the chapter in general and S. 270 in particular apply only to the case of the superior civil services. A member of the Bombay Subordinate Medical service is a servant of the crown and doing duty as such within the meaning of S. 270, and therefore the consent of the Governor is necessary for his prosecution in respect of an act done by him in the execution of his duty as a servant of the crown. I.L.R. 1938 Bom. 770=40 Bom.L.R. 825 =1938 Bom. 419. The word "duty" in S. 270 is not necessarily confined to a legal duty. Civil servants who are Medical Officers are obviously bound to obey the rule in the Medical Code, made for the guidance of such officers and it is their duty to obey them. I.L.R. 1938 Bom. 770=40 Bom.L.R. 825 =1938 Bom. 419. When the acts of the official trustee complained of are done during the course of administration of the trust as an ordinary trustee under S. 7 (1) *(a)* of the Official Trustees Act, his acts cannot be said to be done 'in the execution of his duty as a servant of the Crown' and hence the *consent of the Governor is not necessary in respect of a suit against such a trustee* for breaches in respect of a private trust. 1940 Rang.L.R. 273=1940 Rang. 207.

"PURPORTING TO BE DONE"—MEANING OF—TEST TO FIND OUT.—The words "purporting to be done" in S. 270 (1), must be given their full meaning. Clearly, used in their context, they mean something more than "done". There must be something in the nature of the act complained of that attaches it to the official capacity of the person doing it. I.L.R. (1941) Kar. 328=4 F.L.J. (H.C.) 383=1941 Sind 204. Per *Rowland, J.* *(Obiter)*.—If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have. The applicability of the statute [S. 270 (1)] depends on what the act purports to be and is not affected by any allegations that the apparent state of things is not the real one. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character, and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less where the same malice is attributed

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this Part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall, in so far as they are not recoverable from the persons instituting the proceedings, be charged, in the case of persons employed in connection with the functions of the Governor-General in Council or the affairs of Burma, on the revenues of the Federation, and in the case of persons employed in connection with the affairs of a Province, on the revenues of that Province.

(3) For the purposes of this section—

the expression "the relevant date" means, in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part III of this Act and, in relation to acts done by persons employed about the affairs of the Federation, the date of the establishment of the Federation;

references to persons employed in connection with the functions of the Governor-General in Council include references to persons employed in connection with the affairs of any Chief Commissioner's Province;

a person shall be deemed to have been employed about the affairs of a Province if he was employed about the affairs of the Province as constituted at the date when the act complained of occurred or is alleged to have occurred.

NOTES.

to him jointly with others. The taking of cognizance of an offence on complaint, by a sub-divisional officer, whether done in good or bad faith, is clearly an official act of that officer, purporting to be done in the execution of his duty as a Magistrate. It is an act which he cannot do in any other capacity and one without which there can be no institution of a criminal proceeding and it can form no foundation for a suit against him. 20 Pat. 417=(1941) P.W.N. 225=1941 Pat. 385.

Charge under Ss. 409 and 477-A, I.P. Code, against public servant—Consent of Governor.—The consent of the Governor would be *prima facie* necessary in respect of the latter charge. The question whether or not the particular act complained of is one "purporting to be done in execution of his duty" as a public servant is substantially one of fact, to be determined with reference to the act complained of and to the attendant circumstances. 1939 P.W.N. 429=50 L.W. 95=43 C.W.N. (F.C.R. 50=I.L.R. (1940) Lah 400=(1939) 2 M.L.J. (Supp.) 23. *See also* 1941 Sind 204. Charge of cheating against Deputy Inspector of Schools—Inducing District Educational Council by false information to admit school to aid—Prosecution—Sanction of Governor is necessary. 191 I.C. 51=1940 M.W.N. 534=1940 Mad. 813. Postman misappropriating amount of money by forging thumb impression of payee and returning form to Post Office—Charge under Ss. 409, 467 and 471, I.P. Code—Sanction of Governor-General is necessary. 1941 M. 38=52 L.W. 516=1940 M.W.N. 1116=(1940) 2 M.L.J. 564. Where the charges against certain servants of the Crown not only stated that the alleged criminal acts were done by them while they were engaged in the execution of their duties as such servants but they also showed that their official capacity was involved in the acts complained of as amounting to a crime. *Held,* that the consent prescribed in S. 270 was required for initiating proceedings against them. 184 I.C. 680=1939 Lah. 479. Under the rules framed by the Governor of the Punjab it is not necessary that orders passed by the Governor must be signed by a particular secretary. Hence a signature by the Home Secretary on a consent under S. 270 is in order and the transmission of the consent by him is valid. 184 I.C. 680 =1939 Lah. 479. Where the consent is stated to have been granted by the Governor of a Province and there is no indication that in doing so the Governor was acting with his Ministers, it must be presumed that he granted it "in his discretion." 184 I.C. 680 =1939 Lah. 479. Under S. 270, the consent of Governor is a condition precedent to the institution of the proceedings, and the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings have been instituted, but must be determined with reference to the nature of the allegations made against the public servant in the suit or criminal proceeding. 43 C.W.N. (F.C.R.) 50=2 Fed.L.J. 153 =1939 F.C. 43=I.L.R. (1940) Lah. 400 =(1939) 2 M.L.J. (Supp.) 23. The

Protection of public servants against prosecution and suit.

271. (1) No Bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by section one hundred and ninety-seven of the Indian Code of Criminal Procedure, or by sections eighty to eighty-two of the Indian Code of Civil Procedure, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(2) The powers conferred upon a Local Government by the said section one hundred and ninety-seven with respect to the sanctioning of prosecutions and the determination of the Court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only—

(*a*) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment; and

(*b*) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgment:

Provided that nothing in this sub-section shall be construed as restricting the power of the Federal or a Provincial Legislature to amend the said section by a Bill or amendment introduced or moved with such previous sanction as is mentioned in sub-section (1) of this section.

NOTES.

provisions of sub-S. (1) S. 270 are mandatory, and admit of no reservation or exception. They contain a positive prohibition against the institution of civil and criminal proceedings against the persons described in the section in respect of the acts mentioned, without such consent. In other words, the Government's consent is an essential prerequisite to the competency of the Court to entertain the proceedings. It is the very foundation of the Court's jurisdiction, and its absence renders the entire proceedings void *ab initio*. Such an illegality cannot be cured under S. 537, Cr.P. Code, even when no prejudice has been shown to have been caused. Where therefore the initiation of proceedings is illegal for want of consent, but those proceedings are transferred to another Court which begins with the case afresh, subsequent production of consent even though it is before the commencement of the trial *de novo*, cannot validate what was invalid at its inception. 184 I.C. 680=1939 Lah. 479=I.L.R. (1940) Lah. 102=**42 P.L.R. 51.**

ACTS OF A PUBLIC SERVANT DONE AFTER APRIL, 1937.—As part III of the Government of India Act came into force only in April, 1937, the act referred to in S. 270 (1) of the Government of India Act, is an act done prior to April, 1937. Hence S. 270 (1) can have no application to the acts of a public servant after April, 1937. 1940 O.W.N. 494=1940 Oudh 382=15 Luck. 740. [*See also* Notes under S. 271, *infra*.]

Sub-S. (1).—This applies to cases where in respect of acts done prior to the "relevant date"—no proceedings had been started in Court against the official. The consent of the Governor or the Governor-General as the case may be 'acting in his discretion' is constituted a condition precedent to the institution of the proceedings.

Sub-S. (2).—This deals with cases which had been already instituted and are pending in Court on the "relevant date". The Court is directed to dismiss the proceedings unless it is satisfied that the acts complained of were not done in good faith. The Joint Parliamentary Committee recommended that the certificate by the Governor or Governor-General as the case may be that the act was done in good faith, should be conclusive and binding on the Court; this has not been accepted and the matter has been left to the Courts to decide.

Sec. 271: PROTECTION OF PUBLIC SERVANTS.—Speaking on this section the *Solicitor-General* said:—"In order to re-assure these officials, Indians just as much as British, who are anxious that there shall be no doubt that there is proper protection against vexatious and unjustifiable criminal proceedings, we propose to give the Governor or the Governor-General the last word. But it is most undesirable and entirely against the best interests of the services of India, or officials in any country where British ideas prevail, that you should give, or tend to give, the impression that they are hedged off and free to do as they like, and that no one can get at them. On the other hand, it is equally necessary, particularly in a country like India, that where there is a danger of their being harassed by vexatious or maliciously-motived proceedings, they should be given fair and proper protection. After all, it not only causes mental anxiety, and so on, to a Magistrate; but is bad for the administration of law and justice if a Magistrate, because some person thinks he has a griev-

(3) Where a civil suit is instituted against a public officer, within the meaning of that expression as used in the Indian Code of Civil Procedure, in respect of any act purporting to be done by him in his official capacity, the whole or any part of the costs incurred by him and of any damages or costs ordered to be paid by him shall, if the Governor-General exercising his individual judgment so directs in the case of a person employed in connection with the affairs of the Federation, or if the Governor exercising his individual judgment so directs in the case of a person employed in connection with the affairs of a Province, be defrayed out of and charged on the revenues of the Federation or of the Province, as the case may be.

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CHAPTER XII.

MISCELLANEOUS AND GENERAL.

Provisions as to certain legal matters.

Existing law of India to continue in force.

292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

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ance, should be put into the dock and have to justify his action. "At present there is nothing to prevent a person issuing a writ, or whatever may be the proper technical term in India, against an official for damages for some civil wrong which he alleges has been committed. I do not think it would be right as a permanent part of the Constitution, as it were, to impose a barrier, even though it be a discretionary barrier, between a member of the public and the official whom he is saying has invaded his private rights. After all, civil actions would extend to such cases as motor accidents; and they would extend no doubt to unjustified assaults. I suppose it might be possible to conceive a libel in which words might have been written or uttered in the course of carrying out official duties." "It is a great principle, and we do not wish to invade it, that if an ordinary member of the public has a wrong committed against him, be it by an official or a non-official person, he has the right to issue his writ and claim his redress in the Courts. We think it would be undesirable to put up, or even to attempt to put up, as a permanent part of this Constitution, a barrier in cases where officials are concerned. But it seems to us that what really affects an official who has a civil claim made against him is the question of costs and the question of any damages that he may have to pay." (*Par. Deb.*, *Vol.* 300, *Cols.* 879 *et seq.*)

PROTECTION OF CROWN SERVANTS.—S. 124 of the Government of Burma Act purports to be a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the commencement of the Act. The protection given by this section is in addition to the existing protection given by S. 197 of the Cr.P. Code, 1938 Rang.L.R. 116=1938 Rang. 189. There is nothing in the Government of India Act of 1935, which imposes a legal *obligation upon the Governor of a Province to consult his minister before sanctioning under S.* 196, *Cr.P. Code*, a prosecution for an offence under S. 124-A, I.P. Code. There is no provision in the Act, which requires the Governor to consult his Ministers before performing executive acts. The instrument of instructions implies that he should consult his ministers, but he is not legally required to do so. In the case of a sanction for prosecution under S. 196, Cr.P. Code, the Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his action can be called in question in a Court of law. 48 L.W. 170=1938 Mad. 758=(1938) 2 M. L.J. 416. If any question arises whether any matter (*a*) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (*b*) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment then the decision of the Governor in his discretion is final. 193 I.C. 91=1941 Rang. 5.

Sec. 292.—In theory all Colonial Legislatures are subordinate law-making bodies and legislation under the powers conferred on them are comparable with the articles and bye-laws of Corporations and statutory bodies, which is the ratio for the application of the doctrine of *ultra vires* to their legislative enactments. The rule of construction applicable to bye-laws is that when a statute is repealed it must be considered as if it had never existed, and that all bye-laws and rules made under a repealed statute cease to operate with the repeal of

Adaptation of existing Indian laws, etc.

293. His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall,

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NOTES.

the main enactment unless there is any saving provision in the repealing enactment. As was observed by Lord Reading, C.J., in *Watson* v. *Winch,* (1916) 1 K.B. 688 at 690:—"Does the repeal of an Act which enables a corporation to make by-laws have the effect of repealing by-laws already made under the power while it existed, or whether the bye-laws remain in force notwithstanding the repeal of the statute under which they were made?" Citing the passage from *Surtees* v. *Ellison,* [9 B. & C. 750 (752)], "It has long been established that when an Act of Parliament is repealed it must be considered (except as to transactions passed and closed) as if it had never existed." His Lordship proceeded, "To that passage it is only necessary to make one qualification in that since that case Lord Brougham's Act, and the Interpretation Act, 1889, have been passed. It would follow that any bye-law made under a repealed statute ceases to have any validity unless the repealing Act, contains some provision preserving the validity of the bye-law notwithstanding the repeal." In the words of Sankey, J., "When a statute is repealed any by-law made thereunder ceases to be operative unless there is saving clause in the new statute preserving the old by-law". Hence the necessity for this saving clause. The section merely continues the existing law. It does not validate any law and such invalidity as existed is still open to attack.

SCOPE AND EFFECT.—S. 292 of the Government of India Act is more than a mere preserving section. It enjoins that all the law in force in British India immediately before the commencement of Part III shall continue to remain in force until altered or repealed or amended. This provision amounts to a direction that the alteration, repeal or amendment of any law in force at the time of the commencement of Part III cannot be with a retrospective effect. I.L.R. (1940) All. 455=1940 All. 272 (F.B.). There is nothing in S. 292 to suggest that there was any intention to curtail the power of the Indian legislature or other competent authority to decide in what manner a new law should operate as against the existing rights. All that S. 292 provides is that the existing law shall remain in force until it is repealed and not that the rights which have accrued under that law shall continue to be exercised even after the date of the repeal. S. 292 can obviously have no application to a case where pending appeal the question of the applicability of S. 84-A of the new Bihar Tenancy Act arises after the old law has been changed and the new section has come into operation. If the Legislature can make new laws and unmake old laws, it can also create new rights as well as take away rights already accrued. 1941 P.W.N. 216=22 Pat.L.T. 356=1941 Pat. 413.

SCOPE OF SECTION—IF PROHIBITS RETROSPECTIVE LEGISLATION.—Per *Gwyer, C.J.*—The purpose of S. 292 was to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorised its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances. Within their own sphere the powers of the Indian legislatures are as large and ample as those of Parliament itself; and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. There is nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor is there any explanation why Parliament should have desired to do so. (1941) 1 M.L.J. (Supp.) 65. Per *Sulaiman, J.*—Although the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the language of the section is more emphatic than would have been ordinarily necessary. There is nothing in S. 292 which debars Central or a Provincial Legislature which has altered, repealed or amended previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed. (1941) 1 M.L.J. (Supp.) 65. Per *Varadachariar, J.*—A provision like S. 292 is usually inserted in similar Acts to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. That being the reason, it is not necessary or proper to lay undue stress on the word 'until' used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in other constitution Acts. There is no justification for drawing a distinction between the statement that the previous law shall continue in force *subject* to repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislature the power of retrospective legislation with reference to pre-existing law seems to rest on mere speculation and is not a fair inference from the language used in the section. 45 C.W.N. (F. R.) 27=1941 F.C. 16=(1941) 1 M.L.J. (Supp.) 65.

Sec. 293.—The amendments made by the Adaptation Order cannot be challenged as until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces:

Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in British India the force of law.

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Provisions as to death sentences.

295. (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province:

Provided that nothing in this sub-section affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a Court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

* * * *

Prohibition of certain restrictions on internal trade.

297. (1) No Provincial Legislature or Government shall—

NOTES.

ultra vires, as they derive their authority from Parliament but the Acts as amended or adapted, may be altered by the legislature which under Part V is competent to legislate in regard to the subject-matter of the Law. The 'competent legislature or competent authority' is not determined by the Orders in Council, but must be sought on the proper interpretation of Part V, read with Sch. VII of the Act.

SCOPE AND EFFECT.—All that S. 293 enacts is a power given to His Majesty in Council to adapt Acts already in force to bring them into accord with the provisions of the Government of India Act and what is contemplated is formal consequential amendment arising in the Act due to the passing of the Government of India Act. S. 293 does not mean that if His Majesty has made any Act the subject of an adaptation order, then that Act *ipso facto* becomes valid even though its provisions conflict with the provisions of the Government of India Act. 43 P.L.R. 198=1941 Lah. 182 (F.B.).

Sec. 295: POWER OF PARDON.—This section deals in general with the power of pardon. Under S. 401, Criminal Procedure Code, the authorities heretofore vested with such powers were the Local Governments and the Governor-General in Council and they had concurrent powers in all cases. Besides this statutory power, S. 401 saved the right of His Majesty to exercise the prerogative of pardon and to delegate that power to the Governor-General in Council. It was thought to be inconsistent with Provincial autonomy to vest a power in the Federal executive at the centre to interfere with convictions of Courts over whom the control, vested in the Provincial Government and Legislature, was complete. An exception has, however, been made in the case of sentences of death, and the Governor-General in his discretion has been authorised to exercise the powers formerly vested in the Governor-General in Council under S. 401 in respect of such sentences. Subject to this exception, the powers of the Governor-General in Council under S. 401 are taken away.

Sec. 297: FREEDOM OF INTER-PROVINCIAL TRADE.—The purpose and scope of the provisions of this section were thus explained in Parliament: "It would indeed be a serious situation if we were to allow to develop within India in future serious restrictions on trade and so upset many of the arrangements that have been made in other directions. This is a subject which has demanded considerable care and attention on the part of the Government, and the Government have finally drafted this clause for the purpose of achieving as far as possible, free trade within India. The object of (*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description;

(*b*) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the

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NOTES.

paragraph (*a*) is to stop a Provincial Legislature, by its power to legislate on items in the Provincial Legislative list, from checking the distribution of trade in India. Therefore the clause draws particular attention to the items in the Provincial Legislative list which might empower the Province so to legislate as to check the free circulation of trade. These items are in particular No. 26 (now 27)—Trade and commerce within the Province; markets and fairs; and so forth. I take these two as typical examples of the attempt which the proposed clause makes to prevent a Provincial legislature legislating in such a way as to stop the free circulation of trade. "It leaves it possible still for the Provinces to take measures, for instance, under items 30 and 40 of the Provincial legislative list to deal with such a question as duties of Excise on liquor. Item 40 of the Provincial legislative list gives powers to impose duties of Excise. These duties of Excise are vital to the welfare of the Provinces. I believe that in the Province of Madras from three to four crores of revenue accrue by this power of putting duties of Excise on liquor and so forth; and in a Province like the United Provinces two crores accrue to the Provincial revenues from this source. It is not thought that by allowing this power to the Provinces it will lead to any contravention of the principle of free trade. In the same way, we must allow the Provincial Governments to legislate on such questions as health, the movement of diseased cattle and so forth, and if our Clause were drawn in a different way with reference to the items on the legislative list this would be impossible. It is to achieve the object of free trade, and not unduly to restrict the Provinces with regard to Excise or health questions that we have drawn our clause in this manner." (*Parl. Deb.*, *Vol.*300, *Col.* 1406).

Sulaiman, J.—An intention to discriminate is not essential to invalidate a legislation under S. 297 (1) and (2), but it is sufficient if the provisions of the enactment result in discrimination. (1939) 1 M.L.J. (Supp.) 1. *Quaere.*—Whether the word "locality" in S. 297 (1) (*b*) should not be confined to localities in India, having regard to the marginal note to the section, and whether the section deals with products of foreign countries. *Jayakar, J.*, *Quaere.*—Whether S. 297 (1) (*b*) does not posit a power to levy a tax on two sets of goods. 43 C.W.N. (F.C.R.) 1=49 L.W. 36=1939 F.C. 1=(1939) 1 M.L.J. (Supp.) 1. The law which is open to objection under S. 297 (1) of the Constitution Act is a law made by Provincial Legislature substantially by virtue of the entry relating to trade and commerce or by virtue of the entry relating to production, supply and distribution of commodities. And if a law is made substantially by virtue of the entry relating to agriculture or of entry relating to development of industry it is not open to objection under this section. Further the law contemplated by this section is a law which prohibits or restricts entry into or export from the province of goods directly and a law which does not deal directly and in substance with prohibition or restriction of export or import of goods but which deals with other needs of the province and provides for them, though incidentally, the effect of the provision is that in some measure export or import is restricted, such a law is not within the meaning of the section. It follows from the above that the prohibition or restriction contemplated by the section is a prohibition or restriction on the act of export or import and so long as the goods remain the property of the province and are a stock of the province and before they have become the subject of interprovince or foreign trade the province has every right to expropriate goods or to put any restriction upon them which it considers necessary for the needs of the province. All measures of price control, collective marketing and expropriation of goods do not *per se* and as a matter of course interfere with free trade clauses in a constitution, and the interference contemplated by the constitution is a direct interference and not an indirect interference. 200 I.C. 526=1942 A. 156=1942 A. L. J. 112. Section 297 does not deal with intoxicating liquors or narcotic drugs. It merely limits the power of the Provincial Legislature to legislate with respect to trade and commerce within the province which is one of the items in Art. 27, List II Seventh Schedule of the Act and with respect to the production, supply and distribution of commodities which is one of the matters included in Art. 29, List II, Seventh Schedule of the Act. All that S. 297 (1) means is that though a Provincial Legislature has power

Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

Persons not to be subjected to disability by reason of race, religion, etc.

298. (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2). Nothing in this section shall affect the operation of any law which—

(*a*) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(*b*) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities.

Compulsory acquisition of land, etc.

299. (1) No person shall be deprived of his property in British India save by authority of law.

NOTES.

to legislate with respect to trade and commerce within the province and with respect to production, supply and distribution of commodities, it has no power to legislate or take any executive action prohibiting or restricting the entry into, or export from, the province of goods of any class or description. It is to be observed that intoxicating liquors and narcotic drugs appear in a different article and are not included in the general terms "trade or commerce" or "production, supply and distribution of commodities." 197 I.C. 618=21 P. 178=1942 P. 351.

DECLARATION OF FUNDAMENTAL RIGHTS.—*Sir S. Hoare* thus explained the origin of this section:—"The Indian delegates were anxious to have some declaration of fundamental rights. The request that they pressed upon the Joint Select Committee and the various Round Table Conferences was that somewhere or other the effective words in Queen Victoria's Proclamation should be repeated. These are the words substantially from Queen Victoria's Proclamation. They have become consecrated by long usage in the minds of Indians and the wise course is to retain the words." *Parl. Deb.*, *Vol.* 300, *Cols.* 1048-1649.)

Sec. 298 (2) (a): "AGRICULTURAL LAND" —MEANING OF.—Per *Dalip Singh, J.*—The words "agricultural land" in S. 298 (2) (*a*) must, in the absence of any indication to the contrary in the Act, be taken in their natural meaning. Agricultural land is obviously land which is either actually used for purposes of agriculture or for purposes subservient to agriculture, that is, it may include buildings necessary to carry out the process of agriculture but by no stretch of language can it be held to include pastural land or other rights in land which are included in the definition of land in the Punjab Alienation of Land Act. 43 P.L.R. 198=1941 Lah. 182 (F.B.).

Sec. 299: COMPULSORY ACQUISITION OF LAND.—The Joint Parliamentary Committee thus expressed themselves: "We think that some general provision should be inserted in the Constitution Act, safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind. the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

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Protection of Governor-General, Governor or Secretary of State.

306. (1) No proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any Court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any Court in India against any person who has been the Governor-General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof:

NOTES.

some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation". (J.P.C., Rep. *Para.* 369). *Cf.* Para. XIII (*c*) of the Instrument of Instructions to the Governor-General and Para. XVII (*c*) of the Instructions to the Governor of Madras. Although the Governor's previous sanction under S. 299 (3) was not obtained before enacting the Bihar Agricultural Income-tax Act, the Governor having assented to the bill, having regard to the provisions of S. 109 (2) (*a*), the Bihar Act cannot be said to be invalid by reason of S. 299 (3). 20 Pat. 573=22 P.L.T. 863=1941 Pat. 306 (S.B.).

Sec. 306.—This is an enlargement of the protection formerly afforded to the Governor and Governor-General by S. 110 of the Government of India Act, 1919. They were under that Act not subject to the Original Jurisdiction of the High Court in respect of acts ordered or done in their public capacity; they were however liable to the High Court's original criminal jurisdiction for treason or felony. They were subject to Courts in the mofussil. The present section is all comprehensive and protects the Governor-General, the Governor and the Secretary of State from all "process" whatsoever—including even a summons to appear as witness. It extends to all Courts in India—Civil and Criminal and applies not merely to their public acts but even to acts in a private capacity; *e.g.*, even a suit for recovery of a debt will not lie. Cf. *Hill* v. *Bigge*, (1841) 3 Moo. P. C. 465, where a suit was held to lie for a debt against the Colonial Governor of Trinidad. There is however power reserved to His Majesty in Council to relax the provisions of this section and permit proceedings to be taken. The liability of these officials to be proceeded against in England, for their personal acts, so far these proceedings could be

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act.

(2) The provisions of the preceding sub-section shall apply in relation to His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States as they apply in relation to the Governor-General.

CHAPTER XIII.

TRANSITIONAL PROVISIONS.

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Legislature.

316. The powers conferred by the provisions of this Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature, and accordingly references in those provisions to the Federal Legislature and Federal Laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature, and references in those provisions to Federal taxes shall be construed as references to taxes imposed by laws of the Indian Legislature:

Provided that nothing in this section shall empower the Indian Legislature to impose limits on the power of the Governor-General in Council to borrow money.

NOTES.

initiated in the English Courts is not affected. Moreover, though Chapter XI of the Government of India Act is repealed, these officials could be punished for criminal action in India, by the Court of King's Bench under the Governor's Act 1699 as amended by later Acts. The exemption from jurisdiction formerly afforded by S. 110 extended to Executive Councillor's and ministers—but the protection in their case has not been re-enacted by this Act. It was on the ground of this personal exemption that it was held that no *certiorari* could be brought against the Act of the Ministry. (*Venkataratnam* v. *Secretary of State for India*, 53 Mad. 979=60 M.L.J. 25). Order of Provincial Government under S. 36, Madras District Municipalities Act, and issued in name of Governor under S. 59, Government of India Act, revising prior order—Application for writ of *certiorari* is not maintainable. 50 L.W. 538=1939 Mad. 940=I.L.R. (1940) Mad. 204=(1939) 2 M. L.J. 801. Where the Hindu Religious Endowments Board has abused its powers in notifying a temple under Chapter VI-A of the Madras Hindu Religious Endowments Act, the High Court has power to quash the Board's orders on which the notification is based, and if the basis of the notification is illegal, the notification is illegal. Even if the notification in such circumstances remained a lawful notification, the Court would still be in a position to take effective action. The provisions of S. 306, read with S. 109 of the Government of India Act, 1935, do not make the notification under the Madras Hindu Religious Endowments Act an act of the Governor which cannot be challenged in Courts. Where on the facts it is found that the Board's action in notifying a temple was arbitrary and an abuse of its powers, the order of the Committee of the Board and that of the full Board on appeal under S. 65-A of the Madras Hindu Religious Endowments Act should be quashed. I.L.R. (1941) Mad. 807=1941 Mad. 878=(1941) 2 M. L. J. 175.

Sec. 316.—Speaking of this section *Sir Samuel Hoare* said: "The word 'Powers' means the powers in the Federal and Provincial lists; simply the Legislative powers conferred by the two lists. The setting up of provincial autonomy would in itself considerably restrict the field of the activity of the Central Legislature. The Central Legislature at the present time can legislate over the whole field of Indian government. In the transitional period it will not be able to legislate over the very wide field of Provincial legislation.

"In the concurrent list again the legislative field of the Centre is being considerably restricted. At the present time it has full power over the whole field. In future it will not have power over the provincial list. The Central Legislature so far from having greater powers than it has now will have smaller powers in the transitional period.

"There can be no question of the executive at the Centre becoming responsible to the Central Legislature during the transitional period. The executive at the Centre during the transitional period will remain the Governor-General in Council, just as it is now, and there can be no question whatever that during the transitional period, a Government will be set up at the Centre responsible to the Central legislature." (*Parl. Deb.*, *Vol.* 300, *Col.* 1119).

Continuance of certain provisions of Government of India Act.

317. (1) The provisions of the Government of India Act set out, with amendments consequential on the provisions of this Act, in the Ninth Schedule to this Act (being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian Legislature and provisions supplemental to those provisions) shall, subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act:

Provided that nothing in the said provisions shall affect the provisions of the last but one preceding section.

(2) In the said provisions, the expression "this Act" means the said provisions.

(3) The substitution in the said provisions of references to the Secretary of State for references to the Secretary of State in Council shall not render invalid anything done thereunder by the Secretary of State in Council before the commencement of Part III of this Act.

Provisions as to Federal Court and certain other Federal authorities.

318. (1) Notwithstanding that the Federation has not yet been established, the Federal Court and the Federal Public Service Commission and the Federal Railway Authority shall come into existence and be known by those names, and shall perform in relation to British India the like functions as they are by or under this Act, to perform in relation to the Federation when established.

(2) Nothing in this section affects any power of His Majesty in Council to fix a date later than the commencement of Part III of this Act for the coming into operation, either generally or for particular purposes, of any of the provisions of this Act relating to the Federal Court, the Federal Public Service Commission or the Federal Railway Authority.

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SEVENTH SCHEDULE.

[Ss. 100 & 104.]

LEGISLATIVE LISTS.

LIST I.

Federal Legislative List.

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

NOTES.

Sec. 317.—As till now no federal legislation has yet been brought into force as part of the Law of India, under the provision of S. 317 and Sch. 9 of the Government of India Act, 1935, the law in regard to the Indian Legislature contained in the Government of India Act, 1919, has all along continued to be the law of British India. It appears that the provisions made in S. 317 and Sch. 9 is intended to continue the validity of the functions of the Indian Legislature. So the Hindu Women's Right to Property Act is a validly passed Act. 1939 A.L.J. 875=I.L.R. (1939) All. 912=1939 All. 706. *See also* 1941 Sind 114.

Sch. VII: LISTS AND ITEMS THEREIN—CONSTRUCTION—RULES AS TO.—Per *Gwyer, C. J.*—The subjects dealt with in the three Legislative Lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the provincial list in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad general import. None of the items in the list is to be read in a narrow or restricted sense and each general word should be held to extend to all ancillary or subsidiary matters which can

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organisations.

15. Ancient and historical monuments; archæological sites and remains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom; pilgrimages to places beyond India.

18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways; the regulations of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

NOTES.

fairly and reasonably be said to be comprehended in it. Per *Sulaiman, J.*—The lists even if taken together may not prove to be exhaustive. It is quite possible to conceive of cases which are not comprised in any of the lists. But they are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them at all. 45 C. W. N. (F.R.) 27=72 C.L.J. 550=1941 A.L.J. 170=53 L.W. 397=1941 F.C. 16=(1941) 1 M.L.J. (Supp.) 65. *See also* 1940 All. 272 (F.B.); 53 L.W. 109=73 C.L.J. 1=1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1. Per *Iqbal Ahmad, J.*—The U.P. Regularisation of Remissions Act is not with respect to the jurisdiction and powers of Courts within the meaning of entry 2 of the Provincial list. It is also outside the scope of the legislative powers defined in entry 21 of the Provincial list. It is outside the scope of the three Legislative lists and therefore falls within the residual powers of legislation defined in S. 104 of the Government of India Act. Per *Bajpai, J.*—The U. P. Regularisation of Remissions Act comes within entry No. 2 read with No. 21 of the List II of Sch. VII of the Government of India Act. Per *Ismail, J.*—The U. P. Regularisation of Remissions Act falls within entry 2 and entry 21 of List II and not within entry 4 and entry 15 of List III. I.L.R. (1940) All. 455=1940 A.L.J. 274 208=1940 All. 272 (F.B.).

Sch. VII, List I, Cl. 19 and List II, Cl. 31.—Scope—Madras Prohibition Act, S. 4 (1) (*a*) not *ultra vires*—Possession of arrack in contravention of S. 4 (1) (*a*)—Conviction is legality. *See* (1941) 1 M.L.J. 715.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of ærodromes.

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms, firearms, ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oilfields.

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations, other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of member of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

NOTES.

List I, No. 31.—*See* (1941) 1 M.L.J. 715.

List I, No. 34. 'FEDERAL LAW'—MEANING—COMPETENCY OF LOCAL LEGISLATURE TO REPEAL SUGARCANE ACT (1934) OF THE CENTRAL LEGISLATURE.—'Federal law' as used in entry No. 34 of List I of Sch. VII of the Constitution Act, is either a law made by the Federal Legislature after it has come into existence or a law made by the Indian Legislature during the transitional period, that is, between the enactment of the Constitution Act and till Federal Legislature comes into existence, but other existing Indian Laws which were enacted before the Constitution Act could not fall within the meaning of the 'Federal law' as used in the Constitution Act. As sugarcane as an agriculture and sugar manufacture as an industry are entirely provincial subjects the Provincial Legislature is competent to repeal the Sugarcane Act (1934) and to make its own laws about sugarcane and sugar as also about sugar factories. 200 I.C. 536=1942 A. 526=1942 A.L.J. 112.

List I, Item 45 and List II, Item 48.—*See* 1942 F.C. 33=5 F.L.J. 61=46 C.W.N. (F.R.) 38. "EXCISE"—"TAXES ON THE SALE OF GOODS"—INTERPRETATION OF.—The term "excise" may have a wider meaning so as to include all duties levied on the consumption of excisable commodity at any stage from production to sale, but having regard (*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalisation.

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

[54-A. *See* 3 and 4 Geo. 6, Ch. 5, S. 2, *infra.*]

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

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to the context in which the expression is used and the scheme of the Government of India Act, and to avoid conflict with Item 48 in List II of Schedule VII, the expression "Duties of excise" as used in Item 45 of List I of Schedule VII must be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production and that it extends no further. A clear distinction exists between the first sale and the last sale as the latter is not intimately connected with the manufacturer or producer while the former is. If "excise" should be given the wider meaning, then the only taxes that would not amount to excise duty and would be left over for the Provinces to impose under Item 48 in List II would be license fees and certain turn over taxes, which will be merely illusory and that could not have been the intention of Parliament in using the words "taxes on the sale of goods" in Item 48 in List II of Sch. VII to the Act. 2 F.L.J. 6=43 C.W.N. (F.C.R.) 1=49 L.W. 36=1939 F.C. 1=1939 M.L.J. (Supp.) 1. The true distinction between an excise duty, sale tax and a cess on entry of goods as used in the Constitution Act does not consist in the fact that the tax is on goods or that the tax is payable by manufacturer or producer but it consists in the fact whether the tax is on the act of production or on the act of sale or on the act of introducing goods in a particular area. Two conclusions follow from this that a tax on consumption of goods or a tax on purchase of goods whatever else it may be, cannot be an excise duty. And a tax on raw produce required by the manufacturer for his manufacture may be an excise duty or may be a general tax or may be a special tax, and the fact whether it is one or the other will depend upon the true nature of the tax in the light of surrounding circumstances of each case. The expression "excise duty" in entry No. 45 of List I, in Sch. VII, Constitution Act, is used in a restricted sense so as to allow provinces to exercise powers under sale tax and cesses on goods without making those taxes excise duties in the British sense of the word. A.I.R. 1942 A. 156=1942 A.L.J. 112. Fees and cesses are two forms of special taxation which a Provincial Legislature provided it is given authority to do so is entitled to resort to in order to recoup itself for any special expenditure which it has incurred for the benefit of a special class of persons against that special class. And the Provincial Legislature may recover the whole of this expenditure either by levying a fee which may be partly recurring and partly non-recurring and recurring portion may be based on monthly payment measured on the consumption of goods by the payer of fee or by levying a cess or partly by levying a fee and partly by levying a cess at its option. The imposition of a cess under Cl. (2) of S. 29 of the U. P. Sugar Factories Control Act is in the first instance a cess within the meaning of Entry No. 49 of List II and not a duty of excise within the meaning of Entry No. 45 of List I and if there be any difficulty in regarding it as a cess it can also be treated as a fee under Entry No. 54 of List II and Entry No. 36 of List III. The U. P. Sugar Factories Act, Cl. (2) of S. 29 and R. 21-A of U. P. Sugar Factories Control Rules are all *intra vires* the Provincial Legislature. 1942 A.L.J. 112=200 I.C. 526 1942 A. 156.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

LIST II.

PROVINCIAL LEGISLATIVE LIST.

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subject to such detention.

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature and persons detained therein; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education. [*See* 3 and 4 Geo. 6, Ch. 5, S. 7 *infra*.]

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

NOTES.

List II, Entry No. 21.—The term "devolution" in Entry No. 21 of List II includes the operation of the principle of survivorship. 73 C.L.J. 415=54 L.W. 22=45 C.W.N. (F.R.) 81=4 F.L.J. 1=1941 F.C. 72=(1941) 2 M.L.J. 12.

List II, Acts 27 and 29.—*See* 197 I.C. 618.

27. Trade and commerce within the Province; markets and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments. [*See* now amendment by 3 and 4 Geo. 6, Ch. 5, S. 2 (3).]*

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

[48-A and 48-B. Inserted, *See* 3 and 4 Geo. 6, Ch. 5, S. 3.]*

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

NOTES.

List II, Entries 27 and 29.—*See* 197 I.C. 618.

List II, Entry 31.—*See* 197 I.C. 618.

List II, Entry 48.—*See* (1939) 1 M.L.J. (Supp.) 1.

List II, No. 49: 'LOCAL AREA—MEANING.—The words 'local area' as used in Entry No. 49 of List II have no technical meaning and they are merely used in the dictionary sense of the word and hence it should mean any limited area or any area peculiar to a place, and as such factory area might well be regarded as a local area. 1942 A.W.R. (H.C.) 46=1942 O.A. (Supp.) 94=1942 A.L.W. 81=1942 A.L.J. 112.

Sch. VII, List I, No. 45, List II, Nos. 49 and 54 and List III, No. 36.—U. P. Sugar Factories Control Act (1938), S. 29 (2) and U. P. Sugar Factories Control Rules, R. 21-A—Forms of special taxation to which Provincial Legislature can resort—Imposition of cess under S. 29 (2) of U. P. Sugar Factories Act, nature of—Act and R. 21-A of U. P. Sugar Factories Control Rules not *ultra vires* the Provincial Legislature. *See* 1942 A.L.J. 112.

* *See* page 2804.

LIST III.

CONCURRENT LEGISLATIVE LIST.

PART I.

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II.

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

NOTES.

List III, Entry No. 4.—"Civil Procedure" in the Concurrent Legislative List in Sch. VII to the Government of India Act must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters in the second entry in the Provincial Legislative List. 69 C.L.J. 573=2 F.L.J. 112 =43 C.W.N. 913=1939 Cal. 628.

List III, Entry No. 7: 'SUCCESSION'—IF INCLUDES PRINCIPLE OF SURVIVORSHIP.—The word "succession" in Entry No. 7 of List III includes the principle of survivorship. 73 C.L.J. 415=54 L.W. 22=45 C.W.N. (F.R.) 81=4 F.L.J. 1=1941 F.C. 72=(1941) 2 M.L.J. 12.

33. The sanctioning of cinematograph films for exhibition.
34. Persons subjected to preventive detention under Federal authority.
35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.
36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

THE GOVERNMENT OF INDIA (AMENDMENT) ACT, 1939.

2 and 3 Geo. 6, Chapter 66.

[1*st September,* 1939.

An Act to amend the Government of India Act, 1935.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendments as to Proclamations of Emergency. 26 and 27 Geo. 5. c. 2.

1. (1) After section one hundred and twenty-six of the Government of India Act, 1935, there shall be inserted the following section:—

"126-A. Where a Proclamation of Emergency is in operation whereby the Governor-General has declared that the security of India is threatened by war—

(*a*) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised, and any directions so given shall for the purposes of the last preceding section be deemed to be directions given thereunder;

(*b*) any power of the Federal Legislature to make laws for a Province with respect to any matter shall include power to make laws as respects a Province conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Federation or officers and authorities of the Federation as respects that matter, notwithstanding that it is one with respect to which the Provincial Legislature also has power to make laws:

Provided that no Bill or amendment which, as respects a province, confers powers or imposes duties, or authorises the conferring of powers or the imposition of duties, upon the Federation or upon officers or authorities of the Federation in relation to such a matter as aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency".

(2) The following consequential amendment shall, for the avoidance of doubt, be made in sub-sections (2) and (3) of section one hundred and twenty-four of the said Act, that is to say, after the word "duties" there shall be inserted the words "or authorise the conferring of powers and the imposition of duties".

(3) At the end of section one hundred and two of the said Act, there shall, for the avoidance of doubt, be inserted the following sub-section—

"(5) A Proclamation of Emergency declaring that the security of India is threatened by war or by internal disburbance may be made before the actual occurrence of war or of any such disturbance if the Governor-General in his discretion is satisfied that there is imminent danger thereof".

Short title and commencement.

2. (1) This Act may be cited as THE GOVERNMENT OF INDIA ACT (AMENDMENT) ACT, 1939.

(2) This Act shall be deemed to have come into operation on the commencement of Part III of the Government of India Act, 1935.

NOTES.

List III, Item 36.—*See* 1942 A. L. J.

INDIA AND BURMA (MISCELLANEOUS AMENDMENTS) ACT, 1940.

(3 and 4 Geo. 6, Chapter 5.)

(*Extracts.*)

2. (2) After paragraph 54 of the Federal Legislative List there shall be inserted the following paragraph:—

"54-A. The matters specified in the proviso to sub-section (2) of section one-hundred and forty-two-A of this Act, as matters with respect to which provision may be made by laws of the Federal Legislature."

(3) For paragraph 46 of the Provincial Legislative List there shall be substituted the following paragraph:—

"46. Taxes on professions, trades, callings and employments, subject, however, to the provisions of section one hundred and forty-two-A of this Act."

3. (1) In paragraph 2 of the Federal Legislative List after the words "Local Self-Government in cantonment areas (not being cantonment areas of Indian State troops)" there shall be inserted the words "the constitution and powers within such areas of cantonment authorities".

(2) After paragraph 48 of the Provincial Legislative List there shall be inserted the following paragraphs:—

"48-A. Taxes on vehicles suitable for use on roads, whether mechanically propelled or not, including tramcars.

48-B. Taxes on the consumption or sale of electricity, subject, however, to the provisions of section one hundred and fifty-four-A of this Act."

(3) After section one hundred and fifty-four of the Act, there shall be inserted the following section:—

Exemptions from taxes on electricity.

"154-A. Save in so far as any Federal law may otherwise provide, no Provincial law or law of a Federated State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(*a*) consumed by the Federal Government, or sold to the Federal Government for consumption by that Government; or

(*b*) consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that Railway, or sold to that Authority or any such railway company for consumption in the construction, maintenance or operation of a Federal Railway;

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government, or to the Federal Railway Authority or any such railway company as aforesaid for consumption in the construction, maintenance or operation of a Federal Railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity."

Amendments of Ss. 88, 89 and 90.

4. (1) At the end of sub-section (3) of section eighty-eight of the principal Act, there shall be inserted the following proviso:—

"Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List, an ordinance promulgated under this section in pursuance of instructions from the Governor-General, acting in his discretion, shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him."

(2) For the proviso to sub-section (1) of the said section eighty-eight there shall be substituted the following proviso:—

"Provided that the Governor—

(*a*) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if—

(i) a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; or

(ii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty; and

(*b*) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance if—

(i) a Bill containing the same provisions would under this act have required the Governor-General's previous sanction for the introduction thereof into the Legislature; or

(ii) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General; or

(iii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty."

(3) In the proviso to sub-section (4) of section eighty-nine, and the proviso to sub-section (3) of section ninety, of the principal Act, after the words "repugnant to an Act of the Federal Legislature" there shall be inserted the words "or an existing Indian Law with "respect to a matter enumerated in the Concurrent "Legislative List."

5. At the end of section two hundred and two of the principal Act there shall be inserted the following sub-section:—

Power to appoint acting puisnse judges of the Federal Court.

"(2) If the office of any other judge of the Federal Court becomes vacant, or if any such judge is appointed to act temporarily as Chief Justice of India or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a judge of a High Court who is duly qualified for appointment as a judge of the Federal Court to act temporarily as a judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of the Federal Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties."

Amendment of S. 219 (1).

6. For the proviso to sub-section (1) of section two hundred and nineteen of the principal Act (which enumerates the Courts in British India which are to be deemed to be High Courts for the purpose of that Act) there shall be substituted the following proviso:—

"Provided that, if provision has been made, whether before or after the commencement of Part III of this Act—

(*a*) by His Majesty by Letters Patent for the establishment of a High Court to replace any Court or Courts mentioned in this sub-section; or (*b*) by the appropriate Legislature in India for the establishment of a Chief Court to replace the Judicial Commissioner's Court in the North-West Frontier Province, or the Judicial Commissioner's Court in Sind,

then, as from the establishment of the new Court, this section shall have effect as if the new Court were mentioned therein in lieu of the Court or Courts so replaced."

Amendment of Legislative Lists with respect to Universities.

7. (1) For paragraph 17 of the Provincial Legislative List there shall be substituted the following paragraph:—

"17. Education, including Universities other than those specified in paragraph 13 of List 1."

(2) The Federal Legislature shall not by virtue of paragraph 33 of the Federal Legislative List (which relates to corporations and, in particular, to corporations, whether trading or not, with objects not confined to one unit), and the Provincial Legislature shall not by virtue of paragraph 33 of the Provincial Legislative List (which relates to other corporations) have power to make any law with respect to universities, and accordingly—

(*a*) at the end of the first of those paragraphs, there shall be added the words "but not including Universities"; and

(*b*) in the second of those paragraphs, for the words "other than corporations specified in List I" there shall be substituted the words "not being corporations specified in List I or Universities".

(3) This section shall come into operation on the first day of April nineteen hundred and forty.

THE GOVERNMENT SAVINGS BANKS ACT (V OF 1873).

PREFATORY NOTE.—"Savings Banks are institutions for the purpose of receiving small deposits of money and investing them for the benefit of the depositors at compound interest. They are generally managed by benevolent persons, who seek no remuneration for their services. In India these banks are managed by the State. They originated in the latter part of the 18th century—a period marked by a great advance in the organization of provident habits in general. Such banks are now almost universally established throughout the civilized world.

Year.	No.	Short title.	Amendments.
1873	V	The Government Savings Banks Act, 1873.	Repealed in part, XII of 1873; XVI of 1874; XII of 1891. Amended, XIII of 1916; XVII of 1917; XVI of 1923.

CONTENTS.

PREAMBLE.

Preliminary.

SECTIONS.
1. Short title.
Local extent.
2. [*Repealed.*]
3. Interpretation clause.

Deposits belonging to the Estates of deceased Persons.

4. Payment on death of depositor.
5. Payment to be a discharge.
Saving of right of executor.
Saving of right of creditor.
6. Security for due administration.
7. Power to administer oath.

SECTIONS.
Penalty for false statements.
8. Deposit when excluded in computing Court-fees.
9. Act not to apply to deposits belonging to estates of European soldiers or deserters.

Deposits belonging to Minors.

10. Payment of deposits to minor or guardian.
11. Legalisation of life payments heretofore made.

Deposits belonging to Lunatics.

12. Payment of deposits belonging to lunatics.

SECTION.

Deposits made by married women.

13. Payment of married women's deposits.

SECTION.

Rules.

14. Rules regulating certificates under S. 8, and payments under S. 10, 12 or 13.

THE GOVERNMENT SAVINGS BANKS ACT (V OF 1873).

[28th *January*, 1873.

An Act to amend the Law relating to Government Savings Banks.

Preamble.

WHEREAS it is expedient to amend the law relating to the payment of deposits in Government Savings Banks; It is hereby enacted as follows:—

Preliminary.

Short title.

1. This Act may be called THE GOVERNMENT SAVINGS BANKS ACT, 1873.

Local extent.

2. It extends to the whole of British India.

[*Commencement.*] *Rep. by the Repealing Act,* 1874 (*XVI of* 1874.)

2. [*Repeal of Act XXVI of* 1855] *Rep. by the Repealing Act,* 1873 (*XII of* 1873).

Interpretation clause.

3. In this Act—

"depositor" means a person by whom, or on whose behalf, money has been heretofore, or shall be hereafter, deposited in a Government Savings Bank; and "deposit" means money so deposited:

[1]["Secretary" means, in the case of a Post Office Savings Bank, the Post Master-General appointed for the area in which the Savings Bank is situate:]

[2]["minor" means a person who is not deemed to have attained his majority under the Indian Majority Act, 1875.]

Deposits belonging to the Estates of deceased Persons.

Payment on death of depositor.

[3][4. If a depositor dies and probate of his will or letters of administration of his estate or a certificate granted under the Succession Certificate Act, 1889, is not within three months of the death of the depositor produced to the Secretary of the Government Savings Bank in which the deposit is, then—

(*a*) if the deposit does not exceed three thousand rupees, the Secretary may pay the same to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, or

(*b*) if the deposit does not exceed one hundred rupees, any officer employed in the management of a Government Savings Bank, who is empowered in this behalf by a general or special order of the Central Government may, subject to any general or special orders of the Secretary in this behalf, pay the deposit to any person appearing to him to be entitled to receive it or to administer the estate.]

Payment to be a discharge.

5. Such payment shall be a full discharge from all further liability in respect of the money so paid:

Saving of right of executor.

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

LEG. REF.

[1] Substituted by Act XVI of 1923 for the original definition, *viz.*, "Secretary" includes every person empowered to manage a Government Savings Bank.

[2] Substituted by Act XIII of 1916 for the original definition, *viz.*, "minor" means a person who has not completed the age of eighteen year.

[3] S. 4 was substituted by Act XVI of 1923, S. 3.

Saving of right of creditor.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act or [1][* * *] [2]Act No. XXVI of 1855 to any person, and remaining in his hands unadministered, in the same manner and to the same extent as if the latter had obtained letters of administration of the estate of the deceased.

Security for due administration.

6. The Secretary of any such Bank [3][or any officer empowered under section 4] may take such security as he thinks necessary from any person to whom he pays any money under section 4 for the due administration of the money so paid,

and he may assign the said security to any person interested in such administration.

Power to administer oath.

7. For the purpose of ascertaining the right of the person claiming to be entitled as aforesaid, the Secretary of any such Bank [3][or any officer empowered under section 4] may take evidence on oath or affirmation according to the law for the time being relating to oaths and affirmations.

Penalty for false statements.

Any person who, upon such oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of an offence under section 193 of the Indian Penal Code.

Deposit when excluded in computing court-fees.

8. **Where the amount** of the deposit belonging to the estate of a deceased depositor does not exceed [4][three thousand rupees], such amount shall be excluded in computing the fee chargeable, under the Court-Fees Act, 1870, on the probate, or letters of administration, or certificate (if any), granted in respect of his property:

Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorised to grant the same a certificate of the amount of the deposit in any Government Savings Bank belonging to the estate of the deceased. Such certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

Act not to apply to deposits belonging to estates of European soldiers or deserters.

9. Nothing hereinbefore contained applies to money belonging to the estate of any European Officer, non-commissioned officer or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

Deposits belonging to Minors.

Payment of deposits to minor or guardian.

10. Any deposit made by, or on behalf of, any minor may be paid to him personally if he made the deposit, or to his guardian for his use if the deposit was made by any person other than the minor, together with the interest accrued thereon.

The receipt of any minor or guardian for money paid to him under this section shall be a sufficient discharge therefor.

LEG. REF.

[1] The words "the said" repealed by Act XII of 1891.

[2] Act XXVI of 1855 repealed by S. 2 of this Act.

[3] The words "or any officer empowered under S. 4" inserted by Act XVI of 1923, S. 4.

[4] The words "three thousand rupees" were substituted for the words "one thousand rupees" by Act XVII of 1917.

Legalization of like payments heretofore made.

11. All payments of deposits heretofore made to minors or their guardians by any Secretary of a Government Savings Bank shall be deemed to have been made in accordance with law.

Deposits belonging to Lunatics.

Payment of deposits belonging to lunatics.

12. If any depositor becomes insane or otherwise incapable of managing his affairs,

and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be,

such Secretary may, from time to time, make payments out of the deposit to any proper person,

and the receipt of such person, for money paid under this section, shall be a sufficient discharge therefor.

Where a committee or manager of the depositor's estate has been duly appointed, nothing in this section authorizes payments to any person other than such committee or manager.

Deposits made by Married Women.

Payment of married women's deposits.

13. Any deposit made by or on behalf of a married woman, or by or on behalf of a woman who afterwards marries, may be paid to her, whether or not the Indian Succession Act, 1865, section 4, applies to her marriage; and her receipt for money paid to her under this section shall be a sufficient discharge therefor.

Rules.

Rules regulating certificates under section 8, and payments under section 10, 12 or 13.

14. All certificates under section 8, and all payments under section 10, section 12 or section 13, shall be respectively granted and made by the Secretary of the Bank, subject to such rules consistent with this Act as the Central Government may, from time to time, prescribe.

THE GOVERNMENT SEAL ACT (III OF 1862).[1]

Short title given, Act XIV of 1897.

Declared in force throughout British India except as regards the Scheduled Districts Act (XV of 1874), S. 3.

[28*th February*, 1862.

An Act to amend the law relating to the use of a Government Seal.

Preamble.

WHEREAS it is expedient to adapt the law relating to the use of a Government seal to the present form of the Government in India; It is enacted as follows:—

Seal to be used instead of seal of East India Company.

Whenever it is required by any Regulation of a Local Government or by [2][any Act of the Central Legislature] that the seal of the East India Company shall be affixed on behalf or by the authority of the Government to any

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LEG. REF.

[1] Short title: "The Government Seal Act, 1862". *See* the Indian Short Titles Act, 1897 (XIV of 1897). For Statement of Objects and Reasons of the Bill which became Act III of 1862, *see* Calcutta Gazette, 1862, p. 466. For proceedings in Council relating to the Bill, *see ibid.*, Supplement, pp. 28 and 71.

[2] Substituted for "any Act of the Governor-General of India in Council" by A.O., 1937.

instrument or document, it shall be lawful, if the seal is to be affixed on behalf or by the authority of a Provincial Government to affix in lieu of the seal of the East India Company a seal bearing the designation of such Provincial Government or, if the seal is to be affixed on behalf or by the authority of the [1][Central Government] a seal bearing [2][the inscription "Government of India" or "Government of the Federation of India"] and such instrument or document so sealed shall to all intents and purposes be as valid and effectual as if the seal so used had been that of the East India Company.[3]

THE GOVERNMENT SECURITIES ACT (X OF 1920).

See SECURITIES ACT (X OF 1920).

THE GOVERNMENT TRADING TAXATION ACT (III OF 1926).

PREFATORY NOTE.—One of the resolutions of the Imperial Economic Conference, 1923, was to the effect that the several Parliaments of Great Britain, the Dominions and India should be invited to enact at the earliest opportunity a declaration that the general and particular provisions of its Acts or Ordinances imposing taxation shall be deemed to apply to any commercial or industrial enterprise carried on by or on behalf of any other such Governments in the same manner in all respects as if it were carried on by or on behalf of a subject of the British Crown. This resolution has been accepted by the Government of India and the present Act has been enacted in order to give effect to it. The Act follows, with suitable modifications, the wording of S. 25 of the British Finance Act, 1925 (15 and 16 Geo. V, Chap. 36).

[*24th February*, 1926.

An Act to determine the liability of certain Governments to taxation in British India in respect of trading operations.

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926.

LEG. REF.

[1] Substituted for "Government of India" by A.O., 1937.

[2] Substituted for "the inscription 'Government of India' by A.O., 1937.

[3] "Legislation on this subject was originally suggested in order to meet a difficulty respecting the seal to be used under Act XIX of 1838 (*for the registration of coasting vessels in the Bombay Presidency*). S. 8 of that Act requires that certificates of registry 'shall be sealed with the seal of the East India Company,' and the Government of Bombay were advised by their law officers that no other seal could properly be used for such certificates until some Act should be passed 'prescribing the seal to be used in lieu of the seal of the East India Company'."

NOTES.

Sec. 1.—The Government Trading Taxation Act falls within the legislative powers conferred by S. 65 of the Government of India Act, and is therefore *intra vires* the Government of India. I.L.R. (1941) Bom. 391=43 Bom.L.R. 84=1941 Bom. 93; 1930 A.L.J. 579=1930 A. 389. The Government Trading Taxation Act applies wherever a Government specified in the Act, *i.e.*, a Dominion Government, including the Government of a Native Indian State, carries on a business anywhere. There is no justification for holding that the Act is confined to business carried on in British India. The title, preamble and the operative part of S. 2 of the Act make it perfectly clear that it applies to every case in which a Dominion Government is carrying on a business, and when that happens, the Dominion Government is liable to Indian income-tax as though it were a company. I.L.R. (1941) Bom. 391=1941 Bom. 93. Applicability to Tehari State Government Trading Taxation Act of 1926, is applicable to the Tehari State. 1930 A.L.J. 579=1930 A. 389.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Liability of certain Governments to taxation in respect of trading operations.

2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(*a*) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable;

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions.

NOTES.

Sec. 2.—The effect of the Act is to add to the definition of "company" in S. 2 (6) of the Indian Income-tax Act, so as to include a Dominion Government deemed to be a company under Act III of 1926 and where a Dominion Government is carrying on a business anywhere, it is liable to British Indian Income-tax Act in respect of the income, profits and gains of that business which accrue or arise or are received in British India, as if it were a company working under like circumstances under the Income-tax Act. I.L.R. (1941) Bom. 391 =43 Bom.L.R. 84=1941 Bom. 93. Where the sale of forest produce grown in a Native State was arranged in British India and the money was received in British India and what was done in the State itself was merely the acceptance of the offer of the purchaser, *held,* that the transactions of sale amounted to "Trading in British India" within the meaning of S. 2. 1930 A.L.J. 579=1930 A. 389. Where a Native State sold timber grown in its territory in two places in British India and the income so derived was sought to be assessed to income-tax, *held,* that the income was not in the nature of capital and that it was assessable to income-tax. 1930 A.L.J. 579 =1930 A. 389. Though the Government Trading Taxation Act came into force only in April, 1926, the Government of a Native State carrying on business in British India is liable to assessment in respect of transactions which took place in the previous year. 1930 A. 389. The income from the investments made by a Native State Bank of a part of its surplus funds in the Government of India Securities must be held to be profits from the business of the bank received in British India and as such taxable under the Indian Income-tax Act by reason of the Government Trading Taxation Act. A property situate in British India, taken over by such a Native State Bank from a debtor who is a subject of that State, in part satisfaction of a loan advanced to him is not property occupied in British India for purposes of the business, but the income derived from such property is income arising in connection with such business and in that sense falls to be taxed under the Indian Income-tax Act. Profits made by such a bank on the sale of its investments in Government of India Securities, being the surplus realised by it over the cost price of such investments, which are not appropriated as accretions to capital but treated as profits, are assessable to income-tax under the Income-tax Act. I.L.R. (1941) Bom. 391=43 Bom.L.R. 84=1941 Bom. 93.

THE GUARDIANS AND WARDS ACT (VIII OF 1890).[1]

Year.	No.	Short title	Amendments.
1890	VIII	The Guardians and Wards Act, 1890.	Repealed in part. XIII of 1898, s. 18; VI of 1900. s. 48; V of 1908; I of 1938. Repealed in part and amended, IV of 1926; Amended, XVII of 1929.

CONTENTS.

CHAPTER I.

PRELIMINARY.

SECTIONS.

1. Title, extent and commencement.
2. [*Repealed.*]
3. Saving of jurisdiction of Courts of Wards, and Chartered High Courts.
4. Definitions.

4-A. Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers.

CHAPTER II.

APPOINTMENT AND DECLARATION OF GUARDIANS.

5. Power of parents to appoint in case of European British subjects.
6. Saving of power to appoint in other cases.
7. Power of the Court to make order as to guardianship.
8. Persons entitled to apply for order.
9. Court having jurisdiction to entertain application.
10. Form of application.
11. Procedure on admission of application.
12. Power to make interlocutory order for production of minor and interim protection of person and property.
13. Hearing of evidence before making of order.
14. Simultaneous proceedings in different Courts.
15. Appointment or declaration of several guardians.
16. Appointment or declaration of guardian for property beyond jurisdiction of the Court.
17. Matters to be considered by the Court in appointing guardian.
18. Appointment or declaration of Collector in virtue of office.
19. Guardian not to be appointed by the Court in certain cases.

CHAPTER III.

DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.

General.

20. Fiduciary relation of guardian to ward.
21. Capacity of minors to act as guardians.
22. Remuneration of guardian.
23. Control of Collector as guardian.

Guardian of the person.

24. Duties of guardian of the person.
25. Title of guardian to custody of ward.
26. Removal of ward from jurisdiction.

SECTIONS.

Guardian of property.

27. Duties of guardian of property.
28. Powers of testamentary guardian.
29. Limitation of powers of guardian of property appointed or declared by the Court.
30. Voidability of transfers made in contravention of S. 28 or S. 29.
31. Practice with respect to permitting transfers under S. 29.
32. Variation of powers of guardian of property appointed or declared by the Court.
33. Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.
34. Obligations on guardian of property appointed or declared by the Court.

34-A. Power to award remuneration for auditing accounts.

35. Suit against guardian where administration bond was taken.
36. Suit against guardian where administration bond was not taken.
37. General liability of guardian as trustee.

Termination of Guardianship.

38. Right of survivorship among joint guardians.
39. Removal of guardian.
40. Discharge of guardian.
41. Cessation of authority of guardian.
42. Appointment of successor to guardian dead, discharged or removed.

CHAPTER IV.

SUPPLEMENTAL PROVISIONS.

43. Orders for regulating conduct or proceedings of guardians, and enforcement of those orders.
44. Penalty for removal of ward from jurisdiction.
45. Penalty for contumacy.
46. Reports by Collectors and Subordinate Courts.
47. Orders appealable.
48. Finality of other orders.
49. Costs.
50. Power of High Court to make rules.
51. Applicability of Act to guardians already appointed by Court.
52. [*Repealed.*]
53. [*Repealed.*]

THE SCHEDULE.—[*Repealed.*]

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1886, Pt. V, p. 77; for Report of Select Committee, *see ibid.*, 1890, Pt. V, p. 77 and for Debates in Council, *see ibid.* 1886, Supplement, pp. 419 and 666; *ibid.*, 1890, Pt. VI, pp. 33 and 45. For Civil Rules of Practice made by the High Court, Madras,

[21*st March*, 1890.

An Act to consolidate and amend the law relating to Guardian and Ward.

WHEREAS it is expedient to consolidate and amend the law relating to guardian and ward; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called THE GUARDIANS AND WARDS ACT, 1890.

(2) It extends to the whole of British India, inclusive of [1][* * *] British Baluchistan; and

(3) It shall come into force on the first day of July, 1890.

LEG. REF.

[1] The words "Upper Burma and" were repealed by the Burma Laws Act (XIII of 1898), S. 18 and Sch. V.

NOTES.

under the Code of Civil Procedure and certain other Acts, for observance by the subordinate Civil Courts of the Presidency except the Madras Small Cause Courts, *see* Fort St. George Gazette, 1905, Supplement, p. 1.

Sec. 1: GENERAL.—Difference between the old Act (Act XL of 1858) and the present Act. 19 C. 301. Act is exhaustive. 30 M. 807=24 I.C. 290 (P.C.). The provisions of the Code will apply to proceedings under this Act unless the contrary is expressly declared therein. 7 P.R. 1898. Nature of proceedings under the Act. *See* 107 I.C. 606. Proceedings under the Act cannot be attacked for lack of formality and precision of procedure which the C. P. Code exacts from a Court in India in suit properly so called. 44 A. 587=1922 A. 338. The exercise of parental jurisdiction in guardianship matters by a District Judge cannot be guided by hard and fast rules, and if the order passed is on the whole a reasonable one, it will not be interfered with on appeal. 44 A. 587. A guardian cannot be appointed to the property of the minor member of an undivided Hindu family possessed of no separate property. A guardian of the person of such a minor may be appointed. 19 B. 309 (F.B.). *See also* 54 B. 75; 43 P.R. 1909=1 I.C. 745; 25 A. 407; 30 B. 152. As to necessity for sanction of Court for marriage of minor, *see* 23 S.L.R. 75. Admission by guardian or by collector as representing the Court of Wards will not necessarily bind the minor. 14 P. 70.

POWERS OF HIGH COURT.—The High Court has the power to appoint a guardian for an infant or his estate, irrespective of the Act. 16 B. 634. *See also* 1913 M.W.N. 906=21 I.C. 545; 54 B. 75. The powers and the jurisdiction of the Court, vested in it cannot be ousted by any agreement of the parties. 4 Bom.L.R. 963. Jurisdiction of the District Court in regard to minors is confined only to the powers expressly conferred on it by the Guardians and Wards Act. 40 B. 600=18 Bom.L.R. 582. Guardian—Appointment of—Infant residing out of the Ordinary Original Civil Jurisdiction of the High Court—Powers of the High Court. *See* 57 C. 533. The powers conferred upon the District Court are totally dissimilar to its powers as a Court of Ordinary Civil Jurisdiction and so an order purporting to be made under the Act which is not warranted by its provisions cannot be considered as a decree in a suit. 36 M. 39=13 I.C. 251=22 M.L.J. 193. There is nothing in the Act to prevent the Court from making a declaration that a person appointed by will is the guardian of a minor. 3 M.L.J. 182. When a matter of guardianship is before the Court under the Act, it is incumbent on the Court to hear such evidence as the parties desire to put before it. Where it does not do so, the High Court can interfere in revision. 34 C.W.N. 763=1931 C. 59.

NATURE OF JURISDICTION.—In dealing with the custody of illegitimate children, the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of these rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. 5 Bur.L.T. 164=17 I.C. 926. This equitable rule should be adopted in the case of parties in this country, neither the father nor the mother has any absolute right to the custody of their illegitimate child. 17 I.C. 926. The District Court should not assume direct responsibility under the Act for the marriage of minors for whom a personal guardian has been appointed. 98 P.R. 1914=27 I.C. 381 (22 B. 509, Foll.). There is no provision in the Act authorizing the Court to compel a person in possession of a minor's property to hand it over to the person appointed guardian. 13 I.C. 386. The scheme of the Act is to entrust the District Court, with the duty of looking after the welfare of the minor's person and property and for this purpose, gives it power to appoint a guardian. The guardian is really the hand of the District Court and is to act under its advice (control and constant supervision). The enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for decisions upon or enforcing any such claims though so far as the guardian is concerned, the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. 36 M. 39=22 M.L.J. 193=13 I.C. 251. Agency tract—*Ex parte* order of agent appointing guardian of infant—Appeal lies to High Court. 18 M. 227. A mandatory

2. [*Repeal.*] *Rep. by the Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

Saving of jurisdiction of Courts of Wards and Chartered High Courts.

3. This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [1][any competent legislature, authority or person in British India], and nothing in this Act shall be construed to affect, or in any way derogate from, the jurisdiction or authority of any Court of Wards, or to take away any power possessed by [1][any High Court established in British India by Letters Patent].

Definitions.

4. In this Act, unless there is something repugnant in the subject or context,—

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority:

(2) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property.

LEG. REF.

[1] Substituted by A.O., 1937.

NOTES.

order directing the defendant to take possession of the persons of infants and bring them back to India, should not be made, as, if the minor resisted the defendant, it would expose him to a proceeding under a writ of *babeas corpus*. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Unauthorized alienation by a certificate guardian in excess of the powers is void. 18 C. 259 (doubted in 24 C. 265=1 C.W.N. 453). *See* Notes under sec. 31, *infra*. Orders apparently under this Act made without jurisdiction—Proceedings not had *bona fide*, orders in—Consent obtained by judicial pressure—Judge, no arbitrator, *see* 16 C.W.N. 444. Courts have a discretion to appoint a person other than the one who on the ground of relationship may have a prior claim. 5 M.L.T. 208=4 I.C. 1117. Effect of Act on inherent jurisdiction of Court. 19 C.W.N. 84. In enquiry under the Act, interest of minor to be the predominant consideration in making the order—Protracted enquiry unnecessary. 249 P.L.R. 1914.

HABEAS CORPUS.—A Mahomedan wife, divorced by her husband, who seeks to recover custody of a child of about 4 years, as its lawful guardian under the Mahomedan Law, from her husband, should seek her remedy not under sec. 491, Cr. P. Code, but under the Guardians and Wards Act, which is a special Act dealing with a special subject, *i.e.*, the subject of minors. When the remedy under the Guardians and Wards Act is open, the High Court will not exercise its discretionary power under sec. 491, Cr. P. Code, which is only a general power in the nature of a *hapeas corpus*. 1934 A.L.J. 946=1935 A. 55.

WHO CAN APPLY, AND FOR WHAT PURPOSE.—Any friend of the minor can invoke the protection of the Court in case of a minor being ill-treated, but a stranger must satisfy the Court that welfare of the minor would be better secured by removing the father from the lawful custody. 64 I.C. 576=23 Bom.L.R. 1225. Thus in castes not permitting widow-remarriage where infant girls are married, a stranger cannot successfully deprive the father of the custody of the infant daughter who is about to be given in marriage. 23 Bom.L.R. 1225. There is no machinery under the Act to work out the right of the mother under Muhammadan Law, to visit her child in the custody of the father as guardian. 59 I.C. 562=13 Bur.L.T. 86. The provisions of the Act should not be put in force in order to enable a husband to get possession of the person of his wife. 67 I.C. 882=3 P.L.J. 293. *See also* Notes under sec. 25, *infra*. It is well settled that the manager of a joint Hindu family is regarded as guardian of the interest in the coparcenary property of all the minor members of the family and therefore no certificated guardian can be appointed for such minors. 1936 O.W.N. 354=1936 Oudh 270.

Sec. 3.—Appellate Court, power of, to make *ad interim* order appointing guardian. 3 C.L.J. 29 (28 C. 734, R.) Foll. in 38 C. 927=3 C.L.J. 67. A minor cannot sue through a next friend for possession of the property from the defendant, which the latter claims to hold as *de jure* guardian. The proper remedy is to apply for appointment of guardian of property under this Act. 21 Nag.L.R. 75=1925 N. 328. *See also* 112 I.C. 873; 57 C. 533.

Sec. 4 (2).—The word "guardian" is used in a very wide sense and does not necessarily mean a guardian duly appointed or declared by Court. Any person who has the care of the person of the minor is a guardian of the person and any person who has the care of the property of the minor is a guardian of the property within the meaning of the Act. 54 A. 128=1932 A.L.J. 21=1932 A. 215. The word "guardian" as defined in S. 4 (2) is a very wide term and must include a father, who is admitted on all hands and in every system of law to be the natural guardian of his children; and the word 'care' in the definition includes the constructive custody of the father though the child is residing with another person. Where the plaintiff, a Mahomedan, sent his minor daughter along with his wife to his mother-in-law and after the death of the wife there, the daughter continued to live with the maternal grandmother for nine years, still, the father is the guardian of the minor as she is in his constructive custody. 1935 O.W.N. 1096=1935

(3) "ward" means a minor for whose person or property, or both, there is a guardian :

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction :

[1][(5) "the Court" means—

(*a*) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian ; or

(*b*) where a guardian has been appointed or declared in pursuance of any such application—

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian ; or

(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides ; or

(*c*) in respect of any proceeding transferred under S. 4-A, the Court of the officer to whom such proceeding has been transferred] :

(6) "Collector" means the chief officer in charge of the revenue administration of a district, and includes any officer whom the Provincial Government, by notification in the Official Gazette, may, by name or in virtue of his office, appoint[2] to be a Collector in any local area, or with respect to any class of persons, for all or any of the purposes of this Act :

(7) "European British subject" means an European British subject as defined in the Code of Criminal Procedure, 1882, and includes any Christian of European descent ; and

(8) "prescribed" means prescribed by rules made by the High Court under this Act.

[3][4-A. (1) The High Court may, by general or special order, empower

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LEG. REF.

[1] Substituted by Act IV of 1926, S. 3.

[2] For appointments of Collectors under this sub-section in—

(1) the Presidency of Bombay, *see* the Bom. R. & O., Vol. I.

(2) the United Provinces of Agra and Oudh, *see* U. P. List of Local R. & O., Vol. I.

The powers of the Local Government under this sub-section have been delegated to the Commissioner in Sind. *Vide* Notification No. 3453, dated 17th May, 1899, Bom. Govt. Gazette, 1899, Pt. I, p. 686.

[3] Inserted by Act IV of 1926, S. 2.

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Oudh 492 (F.B.). A *de facto* guardian is a guardian within S. 4 (2) and is removed from guardianship under S. 7 (2) by the Court's order appointing guardian. 51 I.C. 236=36 M.L.J. 189. A *de facto* guardian is a 'guardian' within the meaning of S. 4 (2) and on his removal or discharge the Court has power under S. 41 (3) to require him to deliver any property in his possession or control belonging the ward. 1938 N.L.J. 202=1938 Nag. 399. Person holding the property of the minor's share by virtue of a certain alleged will must be deemed to have been a person having the care of the minor's property and therefore within S. 4 (2). 1934 L. 323.

Sec. 4 (2) and (3): "GUARDIAN"—MEANING.—From the definitions of "guardian" and "ward" as given in S. 4, it appears that the word "guardian" is of general import and includes natural and testamentary guardians appointed by Court. 27 A.L.J. 1248=1929 A. 879=52 A. 110, and even *de facto* guardians. *See also* 36 Bom.L.R. 668=1934 B. 311; 1938 Nag. 399. A charitable society is not a 'person' within the meaning of S. 4 (2) and it cannot be appointed guardian of the property of a minor. 1930 C. 397=58 C. 15.

Sec. 4 (3).—'Ward' as defined in S. 4 (3) is wide enough to include every minor who has a guardian, even though the guardian may not be appointed under the Act. 1935 O.W.N. 1096 =1935 Oudh 492 (F.B.).

Sec. 4 (5).—Minors who had left before the institution of the suit for England and were living there, were not "ordinarily resident" in the district and hence were beyond the jurisdiction of the District Court. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Under the Act a suit *inter partes* is not the form of procedure prescribed for proceedings in a District Court. 38 M. 807 (P.C.).

Sec. 4 (5) (b) (ii)—"For the time being ordinarily resides"—Interpretation. *See* 40 P.L.R. 64.

Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers.

any officer exercising original civil jurisdiction subordinate to a District Court, or authorise the Judge of any District Court to empower any such officer subordinate to him, to dispose of any proceedings under this Act transferred to such officer under the provisions of this section.

(2) The Judge of a District Court may, by order in writing, transfer at any stage any proceeding under this Act pending in his Court for disposal to any officer subordinate to him empowered under sub-section (1).

(3) The Judge of a District Court may at any stage transfer to his own Court or to any officer subordinate to him empowered under sub-section (1) any proceeding under this Act pending in the Court of any other such officer.

(4) When any proceedings are transferred under this section in any case in which a guardian has been appointed or declared, the Judge of the District Court may, by order in writing, declare that the Court of the Judge or officer to whom they are transferred shall, for all or any of the purposes of this Act, be deemed to be the Court which appointed or declared the guardian.]

CHAPTER II.

APPOINTMENT AND DECLARATION OF GUARDIANS.

Power of Parents to appoint in case of European British subjects.

5. (1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing,—

(*a*) by the father of the minor, or

(*b*) if the father is dead or incapable of acting, by the mother.

(2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly.

Saving of power to appoint in other cases.

6. In the case of a minor who is not an European British subject, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject.

Power of the Court to make order as to guardianship.

7. (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

NOTES.

Sec. 7 : APPOINTMENT OF GUARDIAN.—Under the Act, it is open to a Court to appoint a guardian of the properties of a minor even though the minor is not entitled to present possession of these properties. 70 I.C. 360=14 L.W. 706. Such appointment will not interfere, with the right of the persons to possession of the properties as executor or trustee or otherwise. 70 I.C. 360. Where owing to disputes between rival claimants, there is likelihood of the property being lost, a guardian should immediately be appointed. 96 I.C. 283. Appointment of person who has not applied as guardian not proper. 107 I.C. 397. An order appointing a husband as guardian of his minor wife cannot be passed in disregard of the Civil Court's decree that he cannot have the custody of her person until she attained majority. 2 Lah.L.J. 509. The provisions of the Act should not be enforced to enable a husband to get possession of his wife which he has failed to do by execution of the decree obtained by him for restitution of conjugal rights. 57 I.C. 882 (2). Once the powr of the Court is invoked, it is its duty as soon as any dispute about the guardianship of the minor's property or any allegation of detriment to the minor's interest resulting from such dispute is properly brought to its notice to set right the matters in the interests of the minor and appoint a properp peron as his guardian. 64 I.C. 433. The conception of a *dual guardianship* is by itself not repugnant to law and there may be cases where there are more than one guardian. The guardianship of a father or a mother does not cease while the minor child is in the possession of anotherperson who has been lawfully entrusted with the care and custody of such minor by the father or mother. There is nothing in law to prevent the father or the mother of a minor, who may be his or her lawful guardian for the time being, from entrusting lawfully the care and custody of such minor to more than one person at a time. 15 Pat. 817=18 Pat.L.T. 535=1937 Pat. 263.

CONSIDERATIONS FOR THE COURT IN APPOINTING GUARDIANS.—The law does not make it inceumbent upon the Court to grant every appli.

(*a*) appointing a guardian of his person or property, or both, or

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cation for guardianship. The welfare of the minor is the sole criterion in deciding whether a guardian should be appointed or not. 42 I.C. 191=90 P.L.R. 1917; 19 I.C. 783=118 P.L.R. 1913; 28 I.C. 507. *See also* 33 I.C. 77=19 M.L.T. 294 (Personal law of the minor should also be considered). A person can apply for the appointment of another guardian under S. 7, though an order of removal under S. 39 is not obtained. 104 I.C. 562=1927 Oudh 516. *See also* 41 P.L.R. 12; 1940 All. 315. Where the dispute is as to the validity of the marriage of the minor and the matter is not free from difficulty, the Court should refer them to a regular suit. 1927 Oudh 516. An order of appointment of a guardian to a minor can only be made on the sole ground of welfare of the minor; the Court cannot go against the will of the minor especially when he is old enough to form an intelligent opinion. 11 I.C. 478=196 P.W.R. 1911. It is clear that before making an order on an application under sec. 7 the Court ought to insist on evidence showing that the order is in the best interest of the ward or child. It is not competent for the Court to make an order in advance, but the Court is bound to consider whether the applicant is the proper person to have the custody of the child. I.L.R. (1941) Bom. 488=43 Bom.L.R. 615=1941 Bom. 344. The appointment of a guardian of a minor cannot be settled by an agreement between the contesting applicants for guardianship. The Court has to consider the welfare of the minors on evidence before it and not to pass judgment in accordance with the terms of a compromise. It is the duty of the Court to consider whether or not the compromise is in the interests of the minor. 1940 L. 9=41 P.L.R. 678. *See also* 41 Bom.L.R. 625=1939 Bom. 367. Where it appeared that the appointment of the elder sister of the minor as his guardian would promote his welfare and the minor who was aged 14 was also in favour of such an appointment. *Held*, that the sister should be appointed guardian of the person of the minor in preference to a philanthropic body such as the Society for the protection of children in India. 58 C. 15=1930 C. 397. *See also* 35 C.W.N. 158=1931 C. 563. It is not proper for a Court to appoint a guardian of a person of a minor who is at least over 17 years old, as he comes of age very soon. The order of appointment would simply deprive him of his right to manage his own affairs for three years more. It is not for the Courts to moralize on the advantage of keeping a youth under tutelage for a longer period than the law ordinarily contemplates. 182 I.C. 992=1939 Lah. 221. *See also* 27 M.L.J. 30=41 I.A. 314=38 M. 807 (P.C.). A Court should not entertain an application for a guardian to be appointed for a minor where the previous arrangements are quite satisfactory. 101 I.C. 259. Where there is nothing established against a father except that he and his wife are on bad terms and living apart, he is entitled to the custody of his child. 18 L.W. 173=1924 M. 45. As to the nature of the father's right, *see* 83 I.C. 308=1925 L. 250. *See also* 10 Mys.L.J. 156 (following 46 A. 706). Immorality of father is not by itself a disqualification. 10 Mys.L.J. 156; nor change of religion. 41 I.C. 571. The fact that he at one time agreed to allow the child to remain with the mother is immaterial as it is a revocable agreement. 1925 L. 250. So also leaving child even with a mere friend. 96 I.C. 617=1926 A. 687. A mother should be left undisturbed as regards the guardianship of her minor girl, where there is no property to be administered by the Court and a statutory guardian is unnecessary. 84 P.R. 1915=31 I.C. 237. The re-marriage of a mother is not a sufficient reason to deprive her of the custody of her children. The question in cases of guardianship always is whether it is for the welfare of the minor to appoint a guardian. 28 I.C. 507=36 P.W.R. 1915. When the mother of a minor is managing the affairs of her son properly, no guardian need be appointed. 60 P.W.R. 1913=19 I.C. 783. A mother is in the absence of the father, the proper guardian for the person and property of a minor, until the contrary is proved. 19 I.C. 428. As to right of a step-mother for guardianship, *see* 134 I.C. 596=1931 O. 326. Where no charge of waste or mismanagement had been proved, the mere desire of the relatives of the minor is not a sufficient reason for depriving the widowed mother of her recognized claim to be the guardian of her minor child's property. 68 I.C. 474. The appointment of the minor's paternal aunt as guardian is proper, when it is proved that the mother is living in open adultery and has borne children of such connection. 23 I.C. 938. An uncle should not be preferred specially when he is separate and was not on good terms with the minor's father during his lifetime. 19 I.C. 428. The fact that one seeks the assistance of her relatives in the management of the property is not objectionable. 19 I.C. 428. The Guardians and Wards Act contemplates only the appointment of an *individual as guardian*. The appointment of a *Society or its Secretary* as such as guardian is invalid. The Secretary may however be appointed in his individual capacity. 35 C.W.N. 158=1931 C. 563. *See also* 58 C. 15=1930 C. 397. It is against intention of the Act that any *one residing ont of British India* should be appointed guardian of the person of a minor, as the Court cannot exercise its proper control over such a guardian. (22 M.L.J. 68, Foll.) 54 M. 758=1931 M. 478=60 M.L.J. 615. *See also* 1940 Pesh. 14; 18 Lah. 426=1937 Lah. 797.

INTERFERENCE WITH LEGAL RIGHTS OF GUARDIANSHIP.—A Court can both in equity and under the Act interfere with the legal rights of guardianship of the parents. 41 I.C. 571=11 S.L.R. 17. The welfare of the children should primarily be considered. The Court should ascertain what would be for the welfare of the minors, whether any of them was sufficiently advanced to make an intelligent preference, what means were at the disposal of such parents to provide for them in future, and whether the father would under altered circumstances be able to provide a fit home for his (*b*) declaring a person to be such a guardian, the Court may make an order accordingly.

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children. 41 I.C. 571. If the father is not able to provide a fit home, he should be held to be not fit to be the guardian. The provisions of the Act are in no way limited by the English paactice. *English decisions* cannot be considered to have any authority in India when dealing with a conflict between Hinduism and Islam. *Change of religion* by itself does not necessarily render a father unfit to be the guardian of his minor children. 41 I.C. 571. Whether the general rule that a child should follow the religion of the father could apply without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared. 41 I.C. 571.

EFFECT OF ORDER.—An order appointing a guardian is final (subject to any other order passed in appeal) even if it was made under a misapprehension of the case. 52 I.C. 831=73 P.R. 1919. Appointment of guardian of person and property of a minor under the Act means removal of natural guardian. 50 I.C. 580; 42 I.C. 505=6 L.W. 760. When a guardian is appointed by Court for minor's property no other person, not even the *de facto* guardian, can legally bind the minor's estate. 37 M. 38=21 M.L.J. 1077=12 I.C. 568.

ANCESTRAL PROPERTY.—No guardian can be appointed in respect of a Hindu minor's undivided ancestral property. 46 I.C. 815 [25 A. 407 (P.C.), Foll.]. *See also* 140 I.C. 198=1932 C. 730. But *see also* 59 C. 570=138 I.C. 739=1932 C. 502 and cases cited therein (High Court can appoint such guardian under powers conferred by Letters Patent). *See also* 1933 M. W.N. 1293; 36 C.W.N. 769=1932 Cal. 730 (Guardian can be appointed only when the minor who is a member of joint Hindu family governed by Mitakshara law is shown to have separate property of his own).

TRUST PROPERTY.—No guardian in respect of trust properties can be appointed under S. 7; nor can sanction be granted under S. 29 to sell the properties. Such a sale is invalid. 23 M. L.J. 267=42 I.C. 273. A right to a portion of the income of the trust properties does not vest the properties in the beneficiary so as to attract the provisions of Ss. 7 and 29 of the Act. 23 M.L.J. 267.

SECURITY.—A conditional order "that upon petitioner furnishing security he is appointed guardian of minor's property" is *ultra vires* and bad *ab initio*. 49 M. 809=1927 M. 36=51 M. L.J. 726 (F.B.) (30 M.L.J. 508, Foll.; 40 M. 775=37 I.C. 892, Overruled). But *see* 1930 L. 497, *contra*. The practice of issuing suspensory orders of guardianship deprecated. 49 M. 809. The Act does not require two orders, *viz.*, interim order of approval and a "final order" of appointment of the guardian of property nor does it postpone the appointment till security is furnished. 30 M.L.J. 508=34 I.C. 432. But *see* 1930 L. 497 (F.B.) *contra.* [*See also* Notes under S. 10, *infra.*] An order appointing a person guardian of the property of a minor, conditional on his furnishing security, is not void *ab initio*. S. 7 of the Act, which empowers the Court to make an order appointing a guardian of the person or property of the minor is comprehensive in its terms and does not lay down, expressly or by necessary implication, that the Court cannot impose a condition of this kind, in cases where it thinks fit to do so. S. 31 (*a*) is not exhaustive as to the powers of the Court to demand security. It obviously confers on the Court powers which are additional and not exclusive. It deals with the obligations of a guardian of property, who has already been appointed as such, and empowers the Court to require him to furnish security if and when, subsequent to his appointment, it becomes necessary to do so. It does not in any manner control or qualify S. 7 under which the Court has full power to make the appointment on such terms and subject to such conditions as it, in its discretion, considers conducive to the welfare of the minor. 1930 L. 497 (F.B.). A guardian to the property of a minor was appointed on condition of furnishing security in 1902. The guardian furnished security in 1909. *Held*, that the appointment of the guardian took effect from 1909. 1930 L. 497 (F.B.). In case of a conditional order of appointment of a guardian, the minor's natural guardian's acts done in good faith prior to the furnishing of security by the guardian appointed are valid. 40 M. 775=37 I.C. 892. An order of appointment of a guardian of property of an infant on condition that he furnishes security is an order under S. 7 (1) and not under S. 34 and is appealable under S. 47 (4). 24 I.C. 202. *See also* 49 M. 809.

PRACTICE AND PROCEDURE.—The proceedings under S. 7 are summary. 65 I.C. 888=15 S. L.R. 175. Section contemplates only a summary inquiry followed by an order for the welfare of the minor. 40 B. 513=35 I.C. 57. When a minor is to attain majority shortly ;the Courts cannot prolong the age of minority by appointing a guardian under S. 7. 38 M. 807. =27 M.L.J. 30=41 I.A. 314 (P.C.). *See also* 1939 Lah. 221=41 P.L.R. 542. Ss. 7 and 8 do not necessarily require that when proceedings have been instituted on a proper application, application should be taken from the person whom the Court appoints, though certainly in practice it is more usual to take one. 73 I.C. 256. But *see also* 117 I.C. 901 ; 1933 L. 220 ; 38 C. 226 ; 1931 L. 212. A Court dealing with an application under the Act should not dispose of the matter in the absence of the applicat by making an order in favour of his opponent as though the absent person were a defaulter in a civil suit. 19 A.L.J. 489=63 I.C. 567. In determining whether a person is a minor the Court should take an independent view of its own and not adopt a finding in some civil suit that that person is a minor. 19 A.L. J. 489=63 I.C. 567. In an application for the appointment of a guardian for the property of a minor, it must be shown that the minor as some property, as without that there is no foundation for the application. An enquiry for such purpose is, no doubt, not meant to be a

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

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lengthy and elaborate one, but there must be some basis for finding that there is some property at all. 1940 Lah. 9=41 P.L.R. 678. When an application is made on the footing and with the claim that the minor is entitled to separate property, the Court should appoint a proper person as guardian of his property leaving it to the guardian to institute suits for the recovery of the property claimed. 40 B. 513=35 I.C. 16=18 Bom.L.R. 343.

MALA FIDE APPLICATION.—Where no guardian for the person or property of a minor was necessary, and a master instigated his servant who was the grandfather of the minor to make an application for appointing himself as the guardian, so that the minor may be married to his son, it was held that it was not a *bona fide* judicial proceeding and orders made thereon were wholly without jurisdiction. 15 C.L.J. 142 =16 C.W.N. 444.

TESTAMENTARY GUARDIAN—CL. (3).—Under Hindu Law, a man cannot appoint a testamentary guardian for his minor nephew. 12 I.C. 452=220 P.W.R. 1911. It is only where there is a written will appointing a guardian that a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court. 16 L.W. 415=1922 M. 70 (1). *See also* 40 M. 672=34 I.C. 766=30 M.L.J. 504. In an application for the appointment of a guardian of a minor, the Court has jurisdiction and is bound to consider the fact that there is a will although no probate had been granted in respect of the same. 42 C. 953=28 I.C. 972==19 C.W.N. 513. Where there is a testamentary guardian for a minor an order appointing another person to be his guardian shall not be made unless the Court has ordered under S. 39 or S. 41, the removal of the testamentary guardian. 29 Bom.L.R. 1577. *See also* 100 I.C. 738=28 P.L.R. 127. If the validity of the will is in question, it is discretionary with the Court to defer decision of guardianship until the question of probate has been determined. 29 Bom.L.R. 1577. (17 B. 560; 16 M. 380; 29 B. 832, Ref.). European British subject—Whether mother can be preferred to testamentary guardian. 31 C.W.N. 394=101 I.C. 609=1927 C. 389. An application by a person, who has been appointed guardian of a minor under a will, to be appointed as a guardian, can be entertained, even though he has not obtained probate of the will. It is not incumbent on him to take out probate as a condition precedent to his obtaining a certificate of guardianship. 1936 A.L.J. 331=1936 A. 368.

APPOINTMENT OF GUARDIAN—DISCRETION—INTERFERENCE IN APPEAL.—Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal. (71 I.C. 824 and 21 M.L.J. 1, Rel. on.) 14 Lah. 804=1933 L. 881.

APPOINTMENT OF GUARDIAN—RESIDING OUT OF JURISDICTION.—There is nothing in the Guardians and Wards Act which debars a Court from appointing a guardian who is not residing within the jurisdiction of the Court to which an application is made. Under S. 7 a Court will appoint a guardian whenever it is satisfied, that it is for the welface of the minor that an order should be made. S. 39, Cl. (*h*) does not imply that a person applying for appointment must be residing within the jurisdiction of the Court to which the application is made. What Cl. (*h*) means is that in certain cases, ceasing to live within the jurisdiction of the Court which made the order of appointment may be ground for the removal of the guardian from his office and no more. The only duty cast on the Court under the Act is to appoint the best person to act as guardian regardless of his place of residence. 1933 A.L.J. 1333=1933 A. 780=56 A. 20.

INTERLOCUTORY ORDER—REFUSAL OF APPLICATION TO BE APPOINTED GUARDIAN—APPEAL.—An interlocutory order passed at an intermediate stage of the proceedings refusing the application of a party to be appointed guardian of a minor's property, as being unfit, the proceedings being kept pending, is not a final order within the purview of S. 7 (1) or S. 47 (*a*), so as to be appealable. 38 C.W.N. 1083. *See also* 1934 L. 323.

Secs. 7 and 8: THIRD PARTY—APPLICATION FOR APPOINTMENT OF GUARDIAN—MINOR'S RIGHT TO FUND DISPUTED—PROCEDURE.—Where a person with whom a certain fund was deposited on behalf of a minor filed an application to Court under S. 7 to appoint a guardian for the minor in respect of the said fund and the Court decided in the face of opposition that the minor's natural father should be appointed guardian with direction for deposit of the amount in a Bank, the interest alone being payable to the guardian. *Held*, that original petition would be deemed to be under S. 8 (*b*) of the Act and the Court had power to appoint a guardian in spite of the denial of the minor's right to the fund, and that the Court could order the investment of the amount in dispute but that it acted wrongly in directing payment of interest to the guardian, while the minor's title to the fund was in dispute. 1934 M. 496=66 M.L.J. 310.

Secs. 7 and 12.—A Hindu father has the absolute right of appointing by will the guardian of his minor child, and the will so far as the appointment of the guardian is concerned

Persons entitled to apply for order.

8. An order shall not be made under the last foregoing section except on the application of—

(*a*) the person desirous of being, or claiming to be, the guardian of the minor, or

(*b*) any relative or friend of the minor, or

(*c*) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or

(*d*) the Collector having authority with respect to the class to which the minor belongs.

Court having jurisdiction to entertain application.

9. (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

NOTES.

speaks from the date of the testator's death. And when there is a testamentary guardian, the Court has no power to appoint another person as the guardian or to give another person the custody of the minor child, unless it be temporary custody under S. 12 of the Guardians and Wards Act, until the testamentary guardian is removed from his office. In such a case the fact that the will remains unprobated and that there is a contest as to its validity may be a ground for the Court passing an order for the temporary custody of the minor child, but the Court cannot say that it will refuse to take notice of the will and pass an order for the custody of the minor in favour of a person other than the testamentary guardian I.L.R. (1938) Mad. 757=47 L.W. 470=(1938) 1 M.L.J. 422.

Secs. 7 and 17.—In a contest, regarding guardianship of the person of a minor girl, aged about three years, between her mother (having custody) who has remarried and the minor's paternal grandfather the primary question for decision is whether it is necessary for the welfare of the minor for the guardian of the person to be appointed at all. The person, who has her interests most at heart is the mother, and, in view of the age of the minor, it would not be for her welfare to be taken away from her mother and handed over to her paternal grandfather. The mere fact that the mother had agreed to hand over the child to her paternal grandfather on being allowed to remarry makes no difference as the welfare of the minor is the overriding consideration. 160 I.C. 1013=1936 Pesh. 63.

Secs. 7 and 19.—An application by a Hindu father for an order appointing him guardian of the person of his minor son does not lie, because S. 19 prohibits the Court making such appointment. Moreover, an order under S. 7 is not necessary. A Hindu father is the lawful guardian of his minor children, and a declaration by a Court cannot increase his powers in that respect. 13 R. 590. *See also* 1937 Bom. 98.

Secs. 7 and 39.—A Court which has jurisdiction under the Guardians and Wards Act can remove a guardian as well as appoint him. Where in the first instance an *ex parte* order of appointment is made, it can, when the matter comes up for final orders, be set aside by the same Court. 189 I.C. 823=1940 All. 315.

Sec. 8.—A Court has no power to make an order appointing a guardian of minors except on a substantial application. 38 C. 226=15 C.W.N. 676=10 I.C. 334. *See also* 131 I.C. 296=1931 L. 212; 1933 L. 220; 73 I.C. 256. The mere fact that the mother of a minor is a pardanashin lady is no obstacle to her being appointed guardian of the minor son. 38 C. 226. An application by a cousin of two minor girls for his appointment as their guardian was objected to by another who alleged that the girls were his illegitimate children by the wife of another man. *Held*, that the objector had no legal or moral right to claim to be the guardian of the minors and that the cousin should be appointed guardian. (29 A. 210, Dist.) 10 O. W.N. 635=1933 O. 312. A first cousin, once removed, of a minor comes within the terms of S. 8 (*b*) and is, therefore, entitled to make an application for the appointment of a guardian. I.L.R. (1939) 2 Cal. 440=185 I.C. 880. The jurisdiction of the District Court is limited by S. 9 to infants ordinarily resident within the district and minors who have left India months prior to the proceedings are not ordinarily resident in the district. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Failure to serve notice under S. 11, if fatal. 18 C.W.N. 160=16 I.C. 900. The appointment of Official Receiver as guardian of the minor's property without any application by him is contrary to the provisions of S. 8 of the Act and therefore invalid. 117 I.C. 901. But *see also* 73 I.C. 256; 1933 L. 220. Where the name of a third party was suggested by the counsel for the objector and consented to by the counsel for the petitioner and the Court accordingly appointed him as a guardian, the fact that there was no proper application under S. 10 by the third party to be appointed as guardian does not invalidate the appointment. (1928 L. 458, Dist.) 34 P.L.R. 17=1933 L. 220. *See also* 149 I.C. 708=1934 A. 849.

Secs. 8 and 25.—Illegitimate minor girl aged seven years—Mother living with another paramour—Girl in possession of putative father—Appointment of guardian—Duty of Court—Considerations. 1936 S. 63=163 I.C. 192.

Sec. 9.—According to the Act, the applicant for guardianship of minor must be residing within the jurisdiction of the Court to which the application is made. 36 A. 280=24 I.C. 59. It is not necessary that the applicant for guardianship of the person of a minor should reside

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

Form of application.

10. (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint, and stating, so far as can be ascertained,—

NOTES.

in the district in which the application is made. (36 A. 280, Diss. From). 18 Lah. 426=39 P.L.R. 640=1937 Lah. 797. Residence is a matter of fact, not of presumption. 34 Bom.L.R. 1293 =1932 B. 592. The fact that a minor is found actually residing at a place at the time the application under the Act is made does not determine the jurisdiction. It must be proved where the minor ordinarily resides, as required by S. 9 (1). The mere fact that the minors were taken to a place when the mother went to visit that place would not make that place the place of ordinary residence of the minors. I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. A mother of minor children, who was living in Ferozepore District filed an application in that district for guardianship of her children. The minors were with the father who was living in Rohtak district. The father obtained their custody as a result of a compromise with the mother in a criminal case. The elder child was born in Rohtak district and the younger in Ferozepore. *Held*, that in the circumstances the minors must be taken to ordinarily reside in Rohtak district and that, therefore, the Ferozepore Court had no jurisdiction to hear the application. 40 P.L.R. 708. Where a girl-wife for the most part resided with her parents in one district and only occasionally with her husband who was a resident of another district, it is the Court in the former district that has jurisdiction to entertain an application for appointment of a guardian for the girl. 34 Bom.L.R. 1293=1932 B. 592. A mofussil Court other than the District Court has no jurisdiction to entertain proceedings by a father for the custody of his minor child. A suit will not lie for the purpose in the Civil Court. 42 M. 647=37 M.L.J. 93=53 I.C. 399 (F.B.). A District Court, the jurisdiction of which is, as defined under the Guardians and Wards Act, has no inherent powers as are not expressly conferred upon it by the Act. 121 I.C. 168=1930 S. 43. A suit by a father for custody of his child is maintainable especially as no remedy exists under the Guardians and Wards Act. 44 I.C. 753=10 Bur.L.T. 186. *See also* 29 I.C. 768=8 Bur.L.T. 128; 157 I.C. 941. But *see* 38 M. 807 (P.C.); 42 M. 647=37 M.L.J. 93.

Secs. 9 (1) and 25.—In order to give the Court jurisdiction for purposes of appointment of guardian under S. 9 (1) and for purposes of passing order under S. 25, the minor must be ordinarily resident within the local limits of the Court's jurisdiction. 39 Bom.L.R. 103=1937 B. 158=I.L.R. (1937) Bom. 348.

Sec. 9 (3).—The words "ordinarily resides" mean more than a temporary residence even though the period of such temporary residence may be considerable. 53 P.L.R. 1902. *See also* 38 M. 807=24 I.C. 290 (P.C.); 1932 B. 592=34 Bom L.R. 1293. In determining the jurisdiction of the Court the question of domicile is relevant for fixing the ordinary residence of the minor. 34 B. 121=4 I.C. 262. *See also* 8 Bur. L.T. 73=29 I.C. 890.

Sec. 10.—Where the name of a third party was suggested by the counsel for the objector and consented to by the counsel for the petitioner and the Court accordingly appointed him as a guardian, the fact that there was no proper application under S. 10 by the third party to be appointed as guardian does not invalidate the appointment. 34 P.L.R. 17=1933 L. 220. A suit *inter partes* is not the form of procedure prescribed by S. 10 for proceedings touching the guardianship of infants. *See* 38 M. 807 (P.C.). Illness of a child in the custody of the adoptive father is no reason to make over the child to the natural father. 1923 L. 376. Application stating age and date of birth of minor is no evidence to prove age of minor. 4 I.C. 744. As to a conditional order of appointment of guardian and the effect of such order, *see* 1930 M. 19 and cases referred to therein. On this section, *see also* 15 C.W.N. 457=7 I.C. 702; 49 M. 809; 1930 L. 497 and other cases cited under S. 7, *supra*; 6 I.C. 645=74 P.L.R. 1910; 2 A.L.J. 81; 26 A. 594; 1905 A.W.N. 104.

JURISDICTION AND PROCEDURE.—Though a Judge is not authorised by law to appoint a guardian in the absence of an application for such appointment, once an application is filed under S. 10 of the Act, the jurisdiction of the Judge comes into play, and it is open to him as a result of the enquiry, to appoint a person other than the applicant as guardian, provided such person has intimated his willingness to act as guardian. No doubt it would be more in conformity with law that such willingness is communicated to the Court in the form of an application in accordance with S. 10. But the absence of such application by the appointee is no bar to the jurisdiction of the Court to appoint him. 1934 A.L.J. 652=1934 A. 849. *See also* 144 I.C. 173=1933 L. 220.

Secs. 10, 11 and 17 ; SCOPE—APPOINTMENT (*a*) the name, sex, religion, date of birth and ordinary residence of the minor ;

(*b*) where the minor is a female, whether she is married, and, if so, the name and age of her husband ;

(*c*) the nature, situation and approximate value of the property, if any, of the minor ;

(*d*) the name and residence of the person having the custody or possession of the person or property of the minor ;

(*e*) what near relations the minor has, and where they reside ;

(*f*) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment ;

(*g*) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court and with what result ;

(*h*) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both ;

(*i*) where the application is to appoint a guardian, the qualifications of the proposed guardian ;

(*j*) where the application is to declare a person to be guardian, the grounds on which that person claims ;

(*k*) the causes which have led to the making of the application ; and

(*l*) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

Procedure on admission of application.

11. (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—

(*a*) to be served in the manner directed in the Code of Civil Procedure on—

(i) the parents of the minor if they are residing in British India,

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

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NOTES.

OF NON-APPLICANT—JURISDICTION.—The absence of an application by the person appointed as guardian is not a ground which invalidates his appointment. Once an application is made in accordance with the provisions of S. 10 of the Act for the appointment of a guardian for a minor, and notices sent to the interested persons under S. 11 and such persons avail themselves of the opportunity and appear in Court and adduce evidence in the enquiry the Court can appoint as guardian any person which it thinks best in accordance with S. 17 of the Act. In the absence of a definite provision in the Act that the Court has no jurisdiction to appoint a person who has not applied under S. 10, the objection on that ground is at best a technical one and cannot be given effect to. 1934 A.L.J. 652=1934 A. 849.

Sec. 11 : OBJECT AND SCOPE OF.—The object of S. 11 is to give an opportunity to all the persons interested in the minor of being heard before an order appointing a guardian is passed. 1934 A.L.J. 652=1934 A. 849.

APPEAL.—A person who is not made a party in an application under S. 10 but to whom notice ought to have been given under S. 11 (*a*) as a person interested in the result of the application, cannot under S. 47 (*a*) file an appeal from the order passed on the application. 27 I.C. 121=18 O.C. 65.

EVIDENCE.—In an application for appointment of guardian, Court should give applicant an

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and

(*b*) to be posted on some conspicuous part of the court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The Provincial Government may, by general or special order,[1] require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

Power to make interlocutory order for production of minor and interim protection of person and property.

12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

LEG. REF.

[1] For instance of such order, *see* Ben. Stat. R. & O., Vol. II; U. P. List of Local R. & O., Vol. I.

NOTES.

opportunity to let in evidence regarding his allegations. 1926 L. 716=107 I.C. 606.

SECOND APPLICATION.—Where a person's application to be appointed as guardian of a minor is rejected and there is no appeal from that order a subsequent application for the same purpose by the same person is not competent. 1923 N. 36.

Sec. 12.—S. 12 by reason of the wording used as well as by reason of its location in the Statute only applies during the pendency of guardianship proceedings. After guardian is appointed, Ss. 24 and 25 do apply. 119 I.C. 423=1929 L. 487. Under S. 12 (1) the Court has the power to pass interim orders for the protection of the person or property of a minor. Thus it can pass an order by way of injunction for the protection of a female minor against an unsuitable marriage. Such an order should issue under O. 39, R. 2 (1) read with S. 141, C.P. Code, and disobedience of the same is punishable under sub-R. (3) of O. 39, R. 2. 28 N.L.R. 332. Where during the pendency of an application for being appointed guardian of the person and property of a minor, the petitioner applied for the appointment of a receiver to sell certain articles belonging to the minor and to apply the sale proceeds towards the payment of debts due from the minor's estate and the Court ordered the same, *held*, that the order appointing a receiver was not *ultra vires* of S. 12 of the Act. 34 C.W.N. 192=1930 C. 384. The recognised principle is that a father is not only the natural guardian but has an inalienable right to the custody of his minor son unless there are overwhelming circumstances to the contrary. 49 A. 332=101 I.C. 529=1927 A. 458. Court's power to put minor in possession of guardians. 37 A. 515=29 I.C. 416. *See* S. 25, *infra*. High Court has power to make interlocutory orders issuing injunction to stop the marriage of minors, for the protection of their persons and property. 86 I.C. 226; 88 I. C. 576=1925 L. 375. District Judge has no power to direct any party to proceedings to deposit in Court any sum due to minor—Jurisdiction. 24 I.C. 518=12 A.L.J. 789. *See also* 11 I.C. 554. On an application under S. 12, the Court has power to direct payment of the minor's money into Court or to appoint a receiver of his property. 36 B. 20=11 I.C. 654=13 Bom.L.R. 487. *See also* 116 I.C. 642=1929 N. 119; 1924 A. 682; 90 I.C. 611=1925 L. 489. Order so appointing receiver is one under C. P. Code, O. 40, R. 1 and not under this section. 36 B. 20. Minor claiming as adopted son—Widow denying adoption, in possession of property—No jurisdiction in Court to order widow to file inventory of deceased's property and to furnish security. *See* 3 S.L.R. 52=2 I.C. 369. An order of a Court rejecting an application by a guardian for the custody of a minor, on the ground that the proper course was to bring a civil suit, is not appealable, but can be revised. 13 P.R. 1897. The custody of the Munsif under an order of the Court for the temporary custody and protection of minor's property is the custody of the Court, and is not contrary to S. 12 (3). 10 P.R. 1898. From the date of order appointing guardian of the minor, the latter becomes a ward of the Court, and the Court could and should take action and assist the guardian. 37 A. 515=29 I.C. 416. The person appointed to take temporary possession of the property of the minor under S. 12 is the person who should be held responsible for making enquiries and deciding whether *prima facie* the property concerned belongs to the minor or to some other person laying claim thereto. 1941 A.M.L.J. 53.

PRACTICE AND PROCEDURE.—*See* 137 I.C. 425.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

(*a*) the Court to place a famale minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(*b*) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

Hearing of evidence before making of order.

13. On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

Simultaneous proceedings in different Courts.

14. (1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being appraised of the proceedings in the other Court or Courts, stay the proceedings before itself.

(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

[1][(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to, and be guided by such orders as they may receive from, their respective Provincial Governments.]

LEG. REF.

Substituted by A.O., 1937.

NOTES.

Secs. 12 and 25: APPLICABILITY—APPLICATION BY APPOINTED GUARDIAN FOR CUSTODY OF MINOR.—The Court can entertain an application by a guardian appointed by it for the custody of the minor under the provisions of Ss. 12 and 25. So long as the custody of a minor is not actually made over to the guardian appointed by Court, the proceeding for the appointment of the guardian does not terminate and the applicability of S. 12 is not barred. There is another way of looking at the matter. A minor who is not delivered to the guardian, after he has been appointed by a competent Court, can be treated as having left or been removed from the custody of the guardian under S. 25 (1) of the Act. I.L.R. (1938) L. 318=1938 Lah. 313. The Court has jurisdiction to entertain an application by a guardian appointed by it for the custody of the minor although the minor has been removed out of its jurisdiction. To place a restricted meaning on the words "for the time being ordinarily resides" in S. 4 (5) (*b*) (*ii*) so as to interpret them to mean where the minor actually is at the time of the application would be tantamount to rendering nugatory all the provisions of the Act and to making the law helpless against the machinations of recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. I.L.R. (1938) Lah. 318=1938 Lah. 313.

Secs. 12 and 43 and C. P. Code, O. 39; DISTINCTION IN THE POWERS EXERCISABLE UNDER.—There is a difference between a Court issuing an injunction under O. 39, C. P. Code and a Court exercising similar powers under the Guardians and Wards Act in the interests of the minor. Ss. 12 and 43 of the latter Act enable the Court to pass orders *suo motu* unlike O. 39, R. 2, C. P. Code and it can *suo motu* deal with disobedience of its orders. 189 I.C. 813=1940 N.L.J. 157=1940 Nag. 203.

Sec. 13.—The procedure under S. 13 is not intended to be summary. 44 I.C. 976=134 P. W.R. 1917; 105 I.C. 616. *See also* 83 I.C. 320 =1925 N. 233; 89 I.C. 865; 26 P. L.R. 164; 1926 L. 117. An order made without proper inquiry is bad and ought to be set aside. 15 I.C. 195=71 P.W.R. 1912. *See also* 63 P.L. R. 1917=44 I.C. 976. On this section, *see also* 23 B. 698; 15 I.C. 195; 27 I.C. 121: 4 I.C. 603; 17 B. 560. Ss. 13 and 17 are wide enough to cover an enquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual. 27 I.C. 121=18 O.C. 66. *See also* 105 I.C. 616. Whether preliminary enquiry as to whether the minor is possessed of property is not necessary before action is taken under the section, *see* 99 I.C. 222=1927 O. 68.

Sec. 14 (2): RESIDENCE OF MINOR NOT DETERMINABLE—JURISDICTION OF.—Where the minors ordinarily resided cannot be found out as both parties claim that the minors resided with them, the matter should be heard by the Court where it is alleged the minors have property. 1934 L. 208.

Appointment or declaration of several guardians.

15. (1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

(2) On the death of a father, being an European British subject, who has by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.

(3) On the death of a mother being an European British subject, who during the incapacity of the father of her minor child has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian appointed by the mother, as it thinks fit.

(4) Separate guardians may be appointed or declared of the person and of the property of a minor.

(5) If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

16. If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared and give effect to the order.

Matters to be considered by the Court in appointing guardian.

17. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

NOTES.

Sec. 15.—A Hindu mother who remarries loses her natural right to be a preferential guardian of the person of her minor children. She can however be appointed guardian by the Court. 48 I.C. 75. There is nothing in the Hindu Law which prevents the Court from appointing more persons than one as guardian of the person of a minor. 48 I.C. 75. *See also* 1927 C. 389=101 I.C. 609. The Court, when it appoints a person as the guardian of a minor's person, should put the person appointed as guardian in a position to support the minor. 1930 A. 255 (2). Where property is not large and the Court has appointed separate guardians of persons of the minors, and the appointment of as many guardians of property as that of persons would lead to waste, property may be left in the hands of one of such guardians. 1930 A. 255 (2).

Sec. 15 (2).—Among European British subjects whether mother can be preferred to testamentary guardian, *see* 31 C.W.N. 394=101 I.C. 609=1927 C. 389. As to appointment of joint guardians, *see ibid.*; 48 I.C. 75.

Sec. 16.—Where a person had been appointed under the Act as guardian of the property and person of a minor, he becomes the guardian of the property of the minor, in whichever district or districts the property may be situated. The effect of the appointment is that he becomes the certificated guardian for all purposes until he is discharged and cannot lay aside his status as such and pose as a natural guardian. 2 A.L.J. 460. The section is directory, and does not in any way affect or prejudice the status of a certificated guardian when appointed generally over the property of a minor. 2 A.L.J. 460. Under sec. 3 a minor, of whose person or property a guardian has been appointed by any Court of justice, shall be deemed to have attained his majority when he has completed his age of 21 years and not before. Such a minor can be major in one district and a minor in another. 2 A.L.J. 460. Decree for the specific performance of a contract of sale made by a guardian of minor's property should not be decreed except on proof of certain benefit to minor. 45 I.C. 192.

Sec. 17 [*See also* Notes under sec. 7]:—SCOPE OF SECTION.—The words of sec. 19 so far from being subject to the provisions of sec. 17 expressly override them. 19 N.L.R. 45=1923 N. 199 (38 M. 807, Foll). *See also* 47 I.C. 817=12 S.L.R. 14; 32 Bom.L.R. 386=1930 B. 239=54 B. 560; 54 A. 128=137 I.C. 219=1932 A. 215; 1942 O.W.N. (B.R.) 22.

JURISDICTION.—When an application is made for the appointment of a guardian for a minor and notices are issued to all persons interested in the minor, all the interested parties have an opportunity of putting their case before the Court, and actually appear before the Court and adduce all the evidence that they have, the Court has jurisdiction under sec. 17 to appoint such person as it thinks should be appointed.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

NOTES.

The fact that the person so appointed has not himself filed an application under sec. 10 of the Act does not deprive the Court of its jurisdiction to appoint him. 149 I.C. 708=1934 A.L.J. 652=1934 A. 849. *See also* 1934 L. 208.

CONSIDERATIONS FOR THE COURT—PERSONS ENTITLED TO BE GUARDIANS.—The welfare of the minor is the paramount consideration in an application for the appointment of a guardian for the person of a minor though the rights of guardianship under the minor's personal law must also be considered, but the qualification or otherwise of the proposed guardian is only secondary to that of the minor's welfare. 22 M.L.J. 68=13 I.C. 16. *See also* 13 I.C. 453=22 M.L.J. 247; 4 P. 109=1925 P. 444; 13 C.L.J. 735. When a minor girl is living and has been living with her mother's sister, ever since her mother's death when she was an infant and now when she is of marriageable age, it is not in the interests of the minor that her custody should be given to her father. 170 I.C. 592=1937 Lah. 481. Under the Act a Court in appointing a guardian or declaring a guardian of the minor is guided first by the provisions of sec. 17 of the Act and secondly by what appears to be the welfare of the minor consistently with the law to which the minor is subject. By placing the provisions of the section above the law to which the minor is subject, the Act makes it open to the Court to consider other matters as well as the personal law even if they are opposed to that law. Thus, the Court may consider the opinion of the minor, whatever it may be, if he be old enough to form an intelligent preference: and in considering what is for the welfare of the minor the Court must have regard to his age, sex and religion and any existing or previous relations of the proposed guardian with the minor or his property. 7 O.W.N. 950=1930 O. 471. *See also* 1936 Pesh. 207; 162 I.C. 632=1936 R. 63. Matters to be considered by the Court in appointing a guardian under this section, *viz.*, the legal right to be appointed a guardian, the preference of the minors, and the existing previous relationship are very minor considerations as compared with the main question, what order would be for the welfare of the minor. 9 Bom.L.R. 923=32 B. 50. The interest, well-being and happiness of the minor ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. 9 Bom.L.R. 923=32 B. 50. *See also* 13 O.C. 140=6 I.C. 1001; 192 P.L.R. 1913=19 I.C. 609; 33 A. 222=8 I.C. 785; 26 I.C. 300; 1936 Pesh. 207. Consistently with the welfare of the minor the Court should also have regard to the wishes of the deceased parents of the minor and also to the minor's wishes when he is of years of discretion. 25 I.C. 112=18 C.W.N. 1198 (32 B. 50; 29 A. 210, Foll.) The Guardians and Wards Act does not permit the Court to subordinate the law to which the minor is subject to the considerations of what will be for the minor's welfare. 1938 A.L.J. 982=1939 All. 15=I.L.R. (1938) All. 963. Personal law of the minor can be disregarded if the minor's welfare leaves no alternative. 28 O.C. 172=85 I.C. 624=1925 O. 623. Selection of guardian cannot be referred to arbitration. 112 I.C. 451. A boy aged 14 years and a girl aged 16 years, are old enough to form an intelligent preference; such preference is strongly entitled to consideration under sec. 17 (3). 12 N.L.R. 35=32 I.C. 977. As to consulting the wish of the minor, *see also* 134 I.C. 596=1931 O. 326. Being litigious is in itself no disqualification for guardianship. 87 I.C. 903=1925 O. 398. The circumstances that the mother of the minor girl has been forced to leave the house of the person claiming guardianship, that there has been litigation between them, that the person claiming guardianship is the legal heir of the minor girl and that the minor girl wishes to remain with the person who helped her mother and for whom she has life-long affection, make it desirable that girl should remain in the custody of the person with whom she has so long stayed. 1929 A. 857. Sec. 19 precludes from appointing any one other than the father of the minor as guardian of the minor unless the minor's father is found to be unfit to be guardian of the minor's person. 19 N.L.R. 45=1923 N. 199. But *see also* 83 I.C. 308=1925 L. 250; 1925 O. 282; 87 I.C. 1024=1925 O. 421; 86 I.C. 957=1925 M. 1085. The *sister of the minor* applied to be appointed guardian of his person and property. The minor who was aged 14 opposed this and it appeared that, after her appointment, the minor attempted to commit suicide. It did not, however, appear that his conduct was due to ill-treatment by the sister. There being no other relatives the Court revoked the order of appointment and directed the Society for Protection of Children in India to visit the boy at his sister's house. The Society, however, was not appointed guardians. *Held*, (1) that it was necessary to have a guardian appointed for the person of the minor; (2) that under the circumstances of the case the sister was the only proper person to be appainted guardian, the Society being authorised at the same time to visit the boy and look after his interests in consultation with the guardian. 58 C. 15=1930 C. 397. The District Court is justified in superseding a guardian who does not furnish security within the fixed time. 192 P.L.R. 1913=19 I.C. 609. Discretion under the section is very wide—No interference by High Court. 13 O.C. 103=11 I.C. 340. If it thinks it would be injurious to the minor to give effect to the father's wishes it can interfere even in his lifetime. 22 M.L.J. 247=13 I.C. 453. Father marrying a second wife—Not valid ground of disqualification. 28 M.L.J. 442=29

NOTES.

I.C. 4. On the death of Hindu adoptive father, whether natural father or remote adoptive relations should be preferred, *see* 4 P. 109=1925 P. 444. *See also* 15 C.W.N. 558; 7 I.C. 234. Simple illiteracy is no disqualification for the appointment of a mother as guardian of her sons. 33 I.C. 918=20 C.W.N. 663. The fact that the mother of a Muhammadan minor is divorced is no ground to refuse guardianship if she is of good character. 89 I.C. 865. Under the Mahomedan Law, a mother is disqualified from guardianship of her minor daughter where she re-marries a man who is not related to the minor within prohibited degrees. S. 17 does not interfere with this rule and in such a case the paternal grandfather of the minor can be appointed guardian of the person and property of the minor. 138 I.C. 148=1932 L. 493. Shia minor girl married to Sunni—Girl repudiating marriage on attaining majority—Husband, whether a fit person to be appointed guardian. *See* 95 I.C. 271; 1926 O. 521. The mere fact of unchastity is not enough to deprive a mother of her rights of guardianship. 74 I.C. 53=1923 N. 305. Re-marriage of a minor's mother is no disqualification. 40 I.C. 107=32 P.W.R. 1917. *See also* 26 P. L.R. 251. Right of guardianship —Competition between outcasted mother and paternal grandfather in caste—Hindu Law. *See* 2 A.L.J. 663=28 A. 233; U.B.R. (1892-1896), Vol. II, 418. The mere fact that an applicant is a pardanashin lady is no ground for rejecting her claim to be appointed guardian of the property of a minor. 1922 N. 232; 15 C.W.N. 676. Paternal uncle, *see* 43 I.C. 849; Paternal aunt, *see* 67 P.L.R. 1914. Step-mother, *see* 134 I.C. 596=1931 O. 326; 18 C.W.N. 163=16 I.C. 900=17 C.L.J. 405. Husband who failed to get restitution is not a good guardian. 67 I.C. 882=3 Lah.L.J. 293. That the first wife was not properly treated, is not a ground for presuming that the children will not be properly looked after. 39 M. 473=28 M.L.J. 442. The legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other. 39 M. 473. *See also* 86 I.C. 957=1925 M. 1085. Where the applicant was a distant relation of the husband of a childless widow who was living happily with her father, *held*, that the father of the minor widow was her proper guardian. 7 A.L.J. 1149=8 I.C. 785. (16 C. 584; R.) The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death. 44 M.L.J. 62=1923 M. 359. The desirability of having a very near relation like the elder sister appointed guardian of the property of a minor should not be overlooked, where no adverse interest is for the present apparent or is made out by evidence before the Court. In such a case the furnishing of security to the satisfaction of the Court would be ample protection of the minor's interest. 58 C. 15=1930 C. 397. Muhammadan Law—Guardianship for marriage. 38 I.C. 787=25 C.L.J. 551. Where a male child has been born and brought up in the faith of his father, he should not be handed over to his mother who has left that faith and has thereby stepped outside the family in which she was married, with the certainty that the boy will be induced to leave the religion of his father for the new religion of the mother. Where a minor aged 6 years, who has been brought up in the Shiah religion of his father till the latter died was claimed by the mother, who had since become converted to Christianity, as her ward. *Held*, that in spite of the personal law, the Court could refuse the application of the mother for the custody of the child and place him under the protection of his paternal gtandfather. 7 O.W.N. 950=1930 Oudh 471. A female relation of a Mahomedan minor who has under the Mahomedan Law a preferential right to the custody of the minor, can be appointed guardian of the person of the minor under S. 17 if the welfare of the minor would be better served thereby, although she has married a person who is not related to the minor in the prohibited degrees. Under the section, the welfare of the minor is the primary consideration and even a stranger may be appointed a guardian in preference to a relation if the Court considers that the welfare of the minor demands it. The section, no doubt, also, enjoins that the Court should, wherever possible, make an appointment which is inconsistent with the personal law to which the minor is subject; and that when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. I.L.R. (1941) 1 Cal. 419=45 C.W.N. 515.

COMPETITION BETWEEN HUSBAND AND FATHER OF MINOR WIFE.—The language of the section obviously implies that when any of the three contingencies mentioned in the sub-clauses exist, there is no authority in the Court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the Court conferred upon it by S. 17 to appoint or declare a guardian is ousted where the case is covered by S. 19. The section means not only that in the presence of the husband or the father no one else should be given preference, when either of them is fit to be appointed the guardian, but on its language it even ousts the jurisdiction of the Court altogether and prevents it from appointing even the husband or the father as the guardian when both of them are not unfit to be the guardian. The legislature did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor. 54 A. 128=137 I.C. 219=1932 A. 215. Immorality is not decisive to show that he is not fit to be guardian. 10 Mys.L.J. 156, following 46 A. 706.

RELIGION OF MINOR.—A child in India must, under ordinary circumstances, be presumed to have his father's religion and his corresponding civil and social status, and it is therefore ordinarily the duty of a guardian to train his infant ward in such religion. 32 I.C. 897=46 P.W.R. 1916 [11 W.R. 77 (P.C.), foll.] Effect of change of religion on right of guardianship, *see* 167 P.L.R. 1901; 60 P.R. 1901. *See also* 13 O.C. 140=6 I.C. 1001. The father of an infant is *prima facie* entitled to say in what religion his infant child should be

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

Appointment or declaration of Collector in virtue of office.

18. Where a Collector is appointed or declared by the Court in virtue of his office to be guardian of the person or property, or both, of a minor, the order appointing or declaring him shall be deemed to authorize and require the person for the time being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.

Guardian not to be appointed by the Court in certain cases.

19. Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence

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NOTES.

brought up, but, at the same time in a proper case (*e.g.*, when the father has abdicated his right) there is undoubted jurisdiction in the Court to disregard those wishes. 25 C. 881 = 2 C.W.N. 379. *See also* 22 M.L.J. 247 = 11 M.L.T. 53. The scope of the enactment is merely to remove legislative prohibition, to confer expressly a certain jurisdiction and to define exactly the position of those, who avail themselves of or are brought under, the Act, leaving persons to whom any existing rules of law apply, unaffected. 4 C. 929 = 4 C.L.R. 247 (F.B.). The Act contains no provisions enabling the Court to act of its own motion. (*Ibid.*)

MAHOMEDAN FATHER — APPOINTMENT AS GUARDIAN—DIFFERENCE IN RELIGION.—An application for being appointed as guardian of his child by a Mahomedan father should be decided in the discretion of the Court after due consideration of the matters set out in S. 17. The child being a child of a Mahomedan marriage, the Mahomedan Law on the subject should receive due consideration at the hand of the Court, but the Mahomedan law need not necessarily govern the application. Where a Mahomedan divorces his Buddhist wife with a three months' old female child who is brought up in her mother's religion for nine years afterwards, the mother having married a Buddhist, it is in the interests of the child that the mother should remain the guardian. The facts that the father is comparatively more well to do and able to maintain and educate the child and had given maintenance to the child who had never seen him do not override the consideration of the minor's interests. 145 I.C. 843 = 1933 R. 201.

MUHAMMADAN MOTHER.—Where the mother of the minors, who were Mahomedans and of the age of 11, 9 and 8, was not of good character and had married a Hindu Jat, *held*, it is in the interest of the minors to be brought up in the religion of their Mahomedan father and that the children were not so young that they cannot be separated from the mother. 149 I.C. 973 (1) = 1934 L. 287. Where the mother of two Mahomedan girls, five and a half and two and a half years of age, did not appear to be of good character and had married a Hindu. *Held*, the mother was not a proper person to have custody of the minors, but the girl of two and a half years was too young to be separated from her mother. 151 I.C. 322 (1) = 1934 L. 291.

GUARDIAN OF INFANT IN AN UNDIVIDED HINDU FAMILY.—The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 of the Letters Patent (and apart from the Guardians and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family. 59 C. 570 = 138 I.C. 739 = 1932 C. 502.

Secs. 17 and 25: CHILD OF TENDER YEARS—RIGHT TO CUSTODY—CONSIDERATION FOR COURT.—In proceedings for custody of a minor child under the Act the paramount consideration is the interest of the child rather than the rights of the parents. In the case of a child of tender years, the natural mother of the child is the proper person to have the custody of the child, though the father is the natural guardian of her child. It is impossible to find an adequate substitute for the mother for the custody of a child of tender years, and in the absence of any evidence to show that she is not a proper person to have the custody of the child, she must be given custody of the child in preference to the father. I.L.R. (1941) Bom. 455 = 43 Bom.L.R. 79 = 1941 Bom. 103. If a *girl willingly and with understanding embraces the Mahomedan religion*, the fact that she was under 18 years of age would not invalidate the conversion and make her subsequent marriage void, if all the necessary formalities at the conversion and the subsequent nikah had been faithfully observed, because a minor girl above 15 years, *i.e.*, the age of minority under the Mahomedan Law, can be validly converted to the Mahomedan religion if in addition to a mere repetition of the words of faith she has understood their meaning. The Court is not concerned to inquire into the motive or sincerity of religious belief or observance. 186 I.C. 183 = 1939 Sind 311.

Sec. 19.—[*See also* notes under S. 7 and S. 17, *supra.*] S. 19 recognizes the natural righ of a Court of Wards, or to appoint and declare a guardian of the person—

(*a*) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(*b*) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

CHAPTER III.

DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.

General.

Fiduciary relation of guardian to ward.

20. (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

NOTES.

of the father and is controlled by S. 17 according to which the paramount consideration is the welfare of the minor. 47 I.C. 817=12 S.L.R. 14. But *see* 23 L.W. 213=1925 M. 1085, which lays down that the prohibition contained in this section applies also to a husband or father. S. 19 does not make a father the guardian of the person of a minor girl, when he is not already the natural guardian under the personal law applicable to the minor. The Act is not intended to interfere with the personal law of minors. 1935 L. 25. *See also* 13 R. 590. S. 19 is no bar to an application by the father under S. 25. 1940 A.L.J. 238=I.L.R. (1940) All. 269=1940 All. 329. *See also* 24 Bom.L.R. 779=1922 B. 405. Father being a natural guardian, he cannot be appointed or declared guardian under this section. *See* 83 I.C. 308=1925 L. 250; 1925 O. 282; 87 I.C. 1024=1925 O. 421; 86 I.C. 957=1925 M. 1085. But *see also* 86 I.C. 640=21 L.W. 244=1925 M. 398=48 M.L.J. 179. During the natural guardian's life, a Court cannot appoint another guardian unless in its opinion, the natural guardian is unfit. 38 M. 807=41 I.A. 314=27 M.L.J. 30=18 C.W.N. 1089 (P.C.). *See also* 2 L.W. 531=29 I.C. 740; 5 U.B.R. (1892-1896) Vol. II, 413 (415); 32 S.L.R. 215. "Father" in S. 19 (*b*) means father of a child born in wedlock. 36 I.C. 646 =8 L.B.R. 415. A Hindu father's conversion does not operate to deprive him of the guardianship of his children by reason of Act XXI of 1850. 47 I.C. 817=12 S.L.R. 14. The mere fact that the father has changed his religion does not amount to unfitness within the meaning of S. 19. Where the father is alive and able to provide for the welfare of his children, no guardian can be appointed. 138 I.C. 685=1932 L. 385. Guardianship of illegitimate child —Adoption by Mahomedan. *See* U.B.R. 1892-1896, Vol. II, 415. Court, if can delegate duty of enquiry as to fitness, *see* 21 O.C. 194=48 I.C. 60. Minor girl—Husband not a proper guardian before puberty. 43 I.C. 849. *See also* 7 S.L.R. 199=24 I.C. 944. Where the application is to appoint a guardian of the person of a minor who is a married female and it has been found that the husband is not unfit to be her guardian, an order declaring the husband guardian under S. 19 (*a*) of the Act is not competent. The proper course for the husband would be to apply for custody of his minor wife under S. 25 of the Act. (24 Bom.L.R. 779 and 41 I.A. 314, Ref. to.) 32 Bom.L.R. 386=1930 B. 239. Appointment of a person as *manager of an infant's properties* does not create the relationship of guardian and ward. 35 C.W.N. 850=53 C.L.J. 589.

Secs. 19 and 25—As long as the father of the minor is alive and is not proved to be unfit to be guardian of the minor, the Court cannot make an order appointing him or anybody else as guardian. But it can order the person who has custody of the minor to hand the minor to the custody of the father. The proper procedure for the father is to apply under S. 25 and not to ask for declaration under S. 19. 158 I.C. 911 =1935 A.L.J. 1016=1935 A. 838. *See also* 13 R. 590; 1940 All. 329. S. 19 bars an application by the maternal grandmother of Mahomedan minor girls against their father for the appointment of a fit and proper person as their guardian and for custody of the minor girls unless the father is shown to be unfit. Though the maternal grandmother under the Mahomedan Law is entitled to the custody of minor girls who have not attained puberty, failing their mother, in preference to the father, the latter is their legal guardian, and S. 25 cannot apply so as to entitle the maternal grandmother to the custody of the minor girls in the absence of proof that the minors had ever been in the custody of the grandmother and had left or been removed from such custody. There can be no question in such a case of the Court arriving at the conclusion that "it will be for the welfare of the wards to return to the custody" of the grandmother. 54 L.W. 395=1941 Mad. 944=(1941) 2 M.L.J. 548.

Sec. 20.—Guardian dealing with ward's money—Investment—Duty to account for profits—Breach of trust. 54 I.C. 926=157 P.R. 1919.

Secs. 20 and 27: APPLICABILITY.—All guardians whether appointed by will, instrument, or Court, are governed by Ss. 20 and 27 of the Act. 1940 O.W.N. 995=1940 R.D. 468.

(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

Capacity of minors to act as guardians.

21. A minor is incompetent to act as guardian of any minor except his own wife or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.

Remuneration of guardian.

22. (1) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.

(2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Provincial Government, by general[1] or special order, directs.

Control of Collector as guardian.

23. A Collector appointed or declared by the Court to be guardian of the person or property, or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the Provincial Government, or of such authority as that Government, by notification[2] in the Official Gazette, appoints in this behalf.

Guardian of the Person.

Duties of guardian of the person.

24. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

LEG. REF.

[1] For instance of such order, *see* Beng. Stat. R. and O., Vol. II.

[2] For notifications appointing authorities to whose control Collectors appointed under the Act shall be subject, in—

(1) Bengal, *see* Beng. Stat. R. & O., Vol. II ; (2) Bombay, *see* Bom. R. & O. Vol. I ; (3) U. P. of Agra and Oudh, *see* U. P. and Oudh List of Local R. & O., Vol. I; (4) Punjab, *see* Notification No. 632, dated 28th June, 1901, in *Punjab Gazette*, 1901, Pt. I, p. 756.

NOTES.

Sec. 21.—A minor step-mother is competent to act as guardian of the person of her infant step-son. 18 C.W.N. 160=16 I.C. 900=17 C.L.J. 405. (5 Bom.L.R. 542; 3 B. 2, Rel.)

Sec. 22.—*See* 24 B. 95=1 Bom.L.R. 547; 1925 O. 260.

Sec. 23.—*See* 3 C.L.J. 165.

CASE-LAW.—Power of Collector appointed as guardian to sell minor's property. *See* 96 I.C. 17=28 Bom.L.R. 628.

Sec. 24: RELIGION.—The father of an infant is *prima facie* entitled to say in what religion his child should be brought up. 22 M.L.J. 247; 25 C. 881. But where the Court thinks it would be injurious to the child's interest, it will interfere. 22 M.L.J. 247. Where the parents are not of the same religion, the mother after the death of the father should bring up the child in its father's religion. 22 M.L.J. 247. *See also* 41 I.C. 571. The Court may restrain a marriage if it is unsuitable even though the guardian has given his consent. 10 I.C. 136. *See also* 98 P.R. 1914=27 I.C. 381. A ward of Court cannot marry without the consent of the Court. 42 C. 351. *See also* 32 B. 52; 57 I.C. 651; 39 M. 473. On this section, *see also* 8 C.W.N. 37; 36 M. 39=13 I.C. 251=22 M.L.J. 193; (1911) 2 M.W.N. 519. As to what are material considerations in sanctioning an application for the marriage of a minor girl, *see* 1933 A.L.J. 1188=1933 A. 480. District Judge is competent to sanction the marriage of a minor girl under the guardianship of one appointed by the Court with a particular bridegroom. 52 I.C. 998. Where the Court sanctioned the marriage of a minor boy aged 12 to a girl aged 10 and the grounds alleged were that the boy who was himself very rich was likely to get a very rich father-in-law, that the boy was grown up and desired his marriage and it was also said that because the Sarada Act which would take effect soon was likely to postpone the marriage for a long time, it was better to have the marriage celebrated, so that the boy might avoid the temptations of a dissolute life. *Held*, that the welfare of the minor was the only test in such a case and that the grounds set out would not be a justification for sanctioning the marriage of such a young boy. *Held, also*, that it was not the province of the Judge to set at naught the principle underlying the Sarda Act or to teach others to flout it. 1930 M.W.N. 57.

Title of guardian to custody of ward.

25. (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.[1]

LEG. REF.

[1] *See* now Act V o 1898.

NOTES.

REVISION.—Order not warranted by Act—Revision lies. *See* 36 M. 39. *See also* 34 P.L. R. 333.

Sec. 25.—[*See* Notes under Secs. 17 and 19, *supra*.] The only remedy of a guardian seeking the restoration of the custody of his minor ward is by way of an application under S. 25 of this Act. A separate suit is not maintainable for the purpose. 9 R. 569. *See also* 68 M.L.J. 662. *Quaere*, whether S. 25 was intended to apply to the case of a person who has not been declared or appointed a guardian under the provisions of the Act. 132 I.C. 636 =35 C.W.N. 158=1931 C. 563. An application under S. 25 must be made to the Court where the minor ordinarily resides. 118 I.C. 415 (1)=1929 R. 129 (1). The refusal by a person to deliver back the child to its natural guardian when asked to do so by the latter amounts in effect to a removal from his custody and he can, therefore, apply under S. 25 of the Act. 1929 M. 81. *See also* 54 A. 128=1932 A. L.J. 21=1932 A. 215; 158 I.C. 581=1935 O. W.N. 1096=1935 O. 492 (F.B.). (Application by Muhammadan father for custody of his minor girl.) Where it appeared that the father had been tried of serious charges in relation to his treatment of his children and though he had been acquitted of criminal prosecution, his conduct was otherwise reprehensible. *Held*, that he was disentitled from claiming custody of the minor children who were residing in a convent. 132 I.C. 636=35 C.W.N. 158=1931 C. 563. *See also* 1935 A. 838. Matters to be considered in passing order under the section. *See* 107 I.C. 759. The father has a right to custody of a minor child. 47 A. 706; 18 L. W. 173=1924 M. 45. But as to conflict of rulings, 1925 O. 282; 1925 O. 257; 83 I.C. 308=1925 L. 250; 86 I.C. 957=1925 M. 1085; 86 I.C. 640=1925 M. 398. The decision of the question whether it would be for the welfare of the child to return to the custody of its guardian depends entirely on the circumstances of each case. When the guardian of the person of a ward applies for the custody of the ward, he is only asking the Court to help him to discharge the duty cast on him by law with reference to his ward and it is for those, who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made. This onus is especially heavy when the guardian is the father of the child. 1929 M. 81. Before the Court can pass an order for the arrest and delivery of a minor girl to her husband, the guardian, the Court has first to be satisfied that it is for the welfare of the ward to return to her guardian. The Court cannot assume that it is for her welfare to so return, and if the order is passed without the Court deciding that question, the order will be set aside. 43 L.W. 650=1936 M. 556=71 M.L.J. 396. There is no legal prohibition against the appointment of a person as a guardian who is not residing within the jurisdiction of the Court or the making of an order under S. 25 in favour of such a person, though naturally the Courts would as an ordinary rule be reluctant to make such an order. 39 Bom.L.R. 103=1937 B. 158=I.L.R. (1937) Bom. 348.

FATHER—RIGHTS OF.—The father has an inalienable right to the custody of his children and he cannot be deprived of it except for strong reasons. 41 P.L.R. 841=1939 Lah. 359. The father, as the natural guardian, has the legal right to the custody of his child and the Court will not interfere with his right except when the safety or the welfare of the child requires such interference. The Court will be perfectly justified in imposing limits upon the father's right of custody, if the exercise of such rights will materially interfere with the health and happiness of the minor. 74 C.L.J. 196. An *immoral father* has not the same right to the custody of his children as a moral man. (1924 A. 622, not appr.) 1929 M. 81. *See also* 120 I.C. 747. Although according to Hindu Law a father is the natural guardian of his children during their minority and has, therefore, a paramount right to the custody of his children, yet each case must depend upon its own circumstances and the right of the father is liable to be defeated where it is shown that it is better in the interests of the minor and for its welfare that it should remain where it is. If a minor girl has for many years from a tender age lived with grandparents or other near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance and bear both upon the question of the interests and welfare of the minor and on the *bona fides* of the petition by the father for the custody of his minor girl. 41 L.W. 190=1935 M.W.N. 412= 1935 M. 195. A Hindu father is the natural guardian of his children during their minority, and has *prima facie* a paramount right to their custody, and must be given such custody unless he is unfit or there are other circumstances. But the welfare of the minor child is a very

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

NOTES.

important matter for consideration and the interests and welfare of the minor are sometimes even paramount to the rights of the father. A minor girl about one year old was, on her mother's death, taken to live with her maternal uncles with the consent of her father who took a second wife and had by her four children. She remained with her uncles ever since until she was 13 years of age and was fondly brought up and well-cared for by her uncles and grandmother. The father did not show the slightest interest in her welfare till then, but suddenly applied for her custody under S. 25 of the Act. The minor girl showed her preference clearly in favour of remaining with her uncles, and it also appeared that the petition made by the father was not *bona fide* but out of spite and grudge against the maternal uncles. *Held*, that the *minor girl of* 13 *years was capable of forming a good opinion on the matter* and that the interests and welfare of the minor demanded that she should remain where she was and the father's petition should be refused. 41 L.W. 400=1935 M. 363=68 M.L.J. 213. *See also* 50 L.W. 520=1939 Mad. 611=(1939) 2 M.L.J. 515. The father is the natural guardian of his minor child and has a right to claim custody of the child, but such right can be defeated if the Court thinks it better in the minor's interests to leave him in another's custody. In determining the minor's welfare, the question whether the application for custody is *bona fide* or not should be considered. If it is not *bona fide*, that is a reason for not disturbing the existing custody. The Court may in that connection take into account the failure on the part of the father to take steps over a long period to get custody of the minor. Another consideration is whether he is a fit person for the minor to be returned to. The *fact that the father ill-treated the minor's mother and was about to marry a second wife* will also count against him, especially when his application is belated, made after the lapse of a long time. 158 I.C. 99=1935 M. 568. *See also* 1939 Mad. 611=(1939) 2 M.L.J. 515. A minor, provided he or she is old enough to understand the nature of his or her acts, though under 18 years of age, is able in spite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. But in this, as in all other matters under the Guardians and Wards Act, the Court in deciding who shall have the custody of the minor will consider first the welfare and interest of the minor and in so doing the Court can set aside her own preferences in her own interest and for her good. Further, a father does not lose the right of custody of his minor child if he becomes converted to another religion or if his child becomes so converted. 1939 Sind 311; 39 Bom.L.R. 103=1937 B. 158 ; 41 L.W. 789=68 M.L.J. 662. Where a District Judge appointed the father guardian of the property of a ward and directed the respondent to restore the child to her father, remarking that no order as regards the guardianship of her person was necessary. *Held*, that the conditional order of appointment as guardian of the property is of no effect. The District Judge was not correct in saying that no order as regards the guardianship of the person was "necessary". 1930 M. 19. On this section, *see also* 27 I.C. 257 ; 13 A.L.J. 742 ; 29 I.C. 768 ; 28 I.C. 597 =17 Bom.L.R. 332. Though, according to the *Muhammadan Law*, the mother is the guardian of her minor son below 7 years of age, and so an application by the father for the custody of a child aged less than 7 at the time of the application would be incompetent, nevertheless, if during the course of the proceedings, the infant has attained 7 years of age, it is open to the father to continue the application. The only remedy of a father for the custody of his minor son is by an application under S. 25. The words "removed from his custody" should receive a liberal construction as including removal from constructive custody. A refusal to deliver a minor to his natural guardian when asked to do so by the latter amounts in effect to removal from his custody. 124 I.C. 381 ; 25 A.L.J. 585 (rights of Mahomedan father and mother over minor child). Natural father of a child consented to the mother retaining the child during its infancy. The mother separated from the father before birth of the child and lived with another man as his wife. On her death the natural father applied for the custody of the child. The natural father was a man of good character. *Held*, that he was entitled to apply for and obtain the custody in preference to the other man with whom the mother lived as wife after separation from the natural father and that the child must be deemed to have been in his custody at the time of its birth. (39 M. 608 ; 49 A. 332, Ref.; 40 B. 600, Diss. from.) 12 R. 161=149 I.C. 1045=1934 R. 49 (1). Petitioner who lived with his wife and minor child in the house of his father-in-law for nearly two years and thereafter lived apart called upon the wife to come with the child and live with him but the latter refused. The petitioner having applied under S. 25 of the Act for custody of his minor child, *held*, that the father as the natural guardian of his minor child was entitled to apply under S. 25, that the minor must be deemed to be in the constructive custody of the petitioner and that the refusal of the wife to go and live with him with the child was in law a removal of the child from the custody of the petitioner. *Held*, *further*, that an application under S. 25, and not a suit was the proper remedy of the petitioner. 151 I.C. 1037=36 Bom.L.R. 668=1934 B. 311. The word 'custody' in S. 25 includes both actual and constructive custody. 39 M. 608=30 M.L.J. 21 ; 25 A.L.J. 585 ; 58 B. 724=36 Bom.L.R. 668=1934 B. 311. Even where the minor has never been in the custody of the guardian, in order to make the Act workable, a fiction must be imported into S. 25, whereby it is deemed that the child has been constructively in the guardian's custody and has left it. 1930 M. 19. About mother's right to custody, *see* 56 I.C. 242 =24 C.W.N. 711 ; 31 C.L.J. 365=57 I.C. 13.

NOTES.

See also 1931 A.L.J. 333 (minor alleged to be member of joint Hindu family). But where she by her conduct precludes herself from demanding the custody, *see* 1 M.L.J. 347; 23 C. 290. Where immoral conduct is proved against her she is not entitled to custody. 14 M.I.A. 309. *See also* 1929 M. 81. A Court is not justified in refusing relief to the guardian under S. 25 of the Act on the ground that the guardian is too weak to keep the minor. 1927 L. 266. It is the duty of the Court to protect the weak against the high handed acts of the strong and this duty had to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. 100 I.C. 807=1927 L. 266. In order to take action under S. 25, it is immaterial whether the minor left the guardian's custody of his own accord or was forcibly removed by the respondent. 100 I.C. 807=1927 L. 266. Father leading an immoral life—Children living with maternal uncle—Power delegated by the father whether can be revoked. 103 I.C. 361=1927 N. 314. For the purposes of S. 25, it is not really necessary that the applicant should be a lawful guardian under the personal law. The application can be made by any person having the care of the person of the minor. The *father of an illegitimate son* who had the care of his person has, therefore, a *locus standi* to maintain a petition under the section. The petition must be decided on equitable considerations, the sole criterion for decision being the welfare of the minor. 15 L. 630=35 P.L.R. 677=1934 L. 1003. *See also* I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. Under Hindu Law the father of a minor girl ceases to be the guardian of her person as soon as she is married. 1935 L. 25. On the death of her husband, this right does not revive in favour of the father, but devolves upon the husband's relations. Where therefore at the time of the application under S. 25 by the father the girl was in custody of her natural guardian, the mother-in-law, it cannot possibly be said that she had been removed from lawful custody, and the order for the delivery of the minor to her father under S. 25 is illegal. 1935 L. 25. *Ex parte* order directing production of minor—Application to cancel the order dismissed—Order of dismissal not appealable—Proper remedy of the party is to apply to set aside *ex parte* order. 92 I.C. 36=1926 N. 351. A husband is, by Hindu Law, a natural guardian of his minor wife and entitled to custody and comes within the definition in S. 14 of the Act as being "a person having the care of the person of a minor" and, therefore, is entitled to apply under S. 25 for the custody of his wife. 121 I.C. 175=1930 Sind 135. *See also* 33 Bom.L.R. 386. Where a husband obtains a decree for restitution of conjugal rights against this minor wife, his only remedy would be to get an attachment against the property of his wife, if she has any. It would be altogether wrong to permit the husband to achieve his object by making an application under the provisions of sec. 25 to take custody of his minor wife against whom the decree was passed. (1936 A.L.J. 211=1936 A. 267=161 I.C. 816, Reversed.) 164 I.C. 915=1936 A. 657.

"CUSTODY"—"GUARDIAN."—The meaning of the word "custody" is not confined to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody. 54 A. 128=1932 A.L.J. 21=1932 A. 215. "Custody" in sec. 25 includes the actual as well as the constructive custody of the minor, and the section is not limited to the powers of enforcing the guardian's right to the extreme case of an actual leaving or removal. A ward in the actual custody of another person with the permission of the guardian is deemed to be in the constructive custody of the guardian, and the refusal of the person in actual custody to hand over the minor to the guardian amounts to a removal of the minor from the constructive custody of the guardian within the meaning of sec. 25 of the Act. 151 I.C. 1037=36 Bom.L.R. 668=1934 B. 311. *See also* 74 C.L.J. 196; 39 M. 608=30 M.L.J. 21; 25 A.L.J. 585; 161 I.C. 816=1936 A.L.J. 211=1936 A. 267. Any person who has the care of the person of the minor is a 'guardian' of the person; so if a female relation is under the Muhammadan Law entitled to the custody of the minor and not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having the care of the person of the minor. 54 A. 128=137 I.C. 219=1932 A. 215. A father can make an application under sec. 25 for the custody of his minor son although the minor was never in his custody and lived all along with his maternal grandparents. The word "custody" as used in that section refers not only to actual but also to constructive or legal custody. When the father of a child is alive and has not abandoned his right, the maternal grandfather or for the matter of that any other relation who has actual custody of the boy must be deemed to have that custody with the knowledge and consent of the father. Legally it is the father who has the custody of the child in such circumstances, and the child can be deemed within the meaning of the section, to be removed from such legal custody, when the person in whose actual possession he is, repudiates to the guardian's knowledge the right of the latter to the actual or legal custody of the minor. 74 C.L.J. 196. Sec. 25 does not apply if the ward has never been in the custody of the guardian. Custody means actual custody and not constructive custody. When the father of a minor has never had actual custody of the child, there is no jurisdiction in the Court to direct the custody of the minor child to be handed over to the father in proceedings under the Act. I.L.R. (1941) Bom. 488=43 Bom.L.R. 615=1941 Bom. 344.

GUARDIAN—MEANING OF.—"Guardian" in the Guardians and Wards Act means a person having the care of the person of a minor or of his property or both and is used in a wide sense. It does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural or even a *de facto* guardian. 151 I.C. 1037=36 Bom.L.R. 668=1934 B. 311. *See* sec. 4, *supra.*

Removal of ward from jurisdiction.

26. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.

Guardian of Property.

Duties of guardian of property.

27. A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

OTES.

NATIVE CHRISTIAN MINOR.—Failing the father and mother and their appointees, no other person is entitled as of right to the custody of an Indian Christian minor or to the guardianship of his or her property. 132 I.C. 120=1931 M. 529=60 M.L.J. 695.

RIGHT OF SUIT.—A guardian appointed under the Act is only entitled to apply under the Act for the custody of the minor and cannot bring a separate suit. 39 M. 608=33 M.L.J. 21; 42 M. 647 (F.B.); 38 M. 807 (P. C.). *See also* 9 R. 569 following [26 A. 594; 38 M. 807 (P.C.); 42 M. 647].

PRACTICE.—Orders as to the custody of a child under the Act are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court for *modification or alteration of such order* whenever necessity arises. I.L.R. (1941) Bom. 455=43 Bom.L.R. 79=1941 Bom. 103.

JURISDICTION.—Application by mother for custody of minor daughter—Minor removed from Court's jurisdiction—Application cannot be granted. 177 I.C. 427=1938 Lah. 84; 40 P.L.R. 64=I.L.R. 1938 L. 318=1938 L. 313.

Secs. 25 and 19.—Where a father applies for the custody of his illegitimate children by a prostitute, and it is found that the mother was continuing to lead a life of prostitution, it is in the interests of the minors that they should not be allowed to remain in the custody of the mother and that the father should be given their custody. S. 19 is not a bar to such an order being made. I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. *See also* 15 Lah. 630=1934 Lah. 1003.

Sec. 26.—*See* 19 I.C. 655=11 A.L.J. 209; A.W.N. (1899) 204; 8 M.H.C.R. 94.

Sec. 27: APPLICABILITY.—S. 27 applies to guardians recognized by the law whether or not they have been appointed guardians under the Guardians and Wards Act. It does not and was not intended to confer any power upon a person who without any lawful authority in that behalf has usurped the position of a guardian, or has taken upon himself the care of the property of a minor. 12 R. 656=1934 R. 335. A guardian appointed under the Act cannot ratify the unauthorized acts or a former guardian. 54 I.C. 311. It is unwise on the part of the guardian to admit that his wards were liable for a ebt when the debt could not be legally recovered owing to the lapse of time. 56 I.C. 328=23 O.C. 27. Where a guardian acting in the interests of the minor enters into a compromise of a doubtful right, it is binding on the minor. 14 M.L.J. 442. A guardian has a discretion under sec. 27 to allow a remission of rent on failure of rain or other source of irrigation. 28 I.C. 5=8 S.L.R. 222. On this section, *see also* 83 I.C. 24=1924 A. 622. Where the income from a business inherited by a minor is the principal source of his maintenance, money borrowed by his guardian for the efficient conduct of that business is money borrowed for the benefit of the minor's estate. 44 C.W.N. 1048=1940 Cal. 532. The mere fact that the guardian has filed abstract statement of assets and liabilities does not release him from liability to account unless he gets a discharge from such liability from the Court. 15 C.L.J. 57=7 I.C. 214 (34 C. 211, Rel.). A *promissory note* executed by the certificated guardian for goods supplied to the shop owned by the minor does not impose a personal liability on the minor and the creditor is not entitled to recover the amount from the minor or his estate. 34 Bom.L.R. 1001=1932 B. 480. Although a guardian can under certain circumstances sell or charge his ward's estate or property, he cannot bind him personally by a simple contract debt nor can he bind his estate except by a document purporting to bind it. This principle applies even to a case where the promissory note was executed by the guardian (appointed by the Court) after obtaining sanction from Court and the amount was utilised for the benefit of the minor, [11 B. 551 (P.C.) and 20 B. 61, Foll.] 34 Bom. L.R. 996=1932 B. 460. Though a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the property of the minor, a guardian cannot impose an unconditional personal liability on the minor by executing a promissory note on his behalf because any qualification of the promise contained in a promissory note such as that it is only to be enforced against a minor, if necessity binding on the minor be shown, is wholly foreign to the idea of a negotiable instrument. 65 M.L.J. 350=56 M. 879. Where the *guardian of a minor executed a mortgage* which was found to be invalid and unenforceable as

Powers of testamentary guardian.

28. Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

Limitation of powers of guardian of property appointed or declared by the Court.

29. Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court,—

NOTES.

such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor, if the liability was one binding on the minor under Hindu Law. 54 M. 163=1931 M. 410=60 M.L.J. 56 [39 M.L.J. 29 (F.B.), Foll.]. A *decree* can be passed *against a minor's estate* on a contract entered into by his guardian in a case in which the estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor was subject. (42 M. 185, Foll.) 139 I.C. 383=1932 M. 696.

EXECUTION APPLICATION.—A guardian cannot make an application for execution of a decree on behalf of a minor who has attained majority without a proper power of attorney. If, however, the minor ratifies the act, the application is valid. 32 P.L.R. 290=1931 L. 600 (1929 L. 478, Appl.). Liability of guardian for his *failure to invest his ward's money for interest*—Liability not outside the Act. 33 B. 419=11 Bom.L.R. 512=3 I.C. 172. Where the omission of the guardian to invest the minor's property in trust securities as directed by S. 20 of the Trusts Act and to file proper accounts was the main cause of the loss caused to the minors though the action of others also partly caused the loss, *held*, that the guardian and his surety were liable for the whole loss sustained by the minors. 136 I.C. 517=1932 S. 181. Negligence of guardian—Order passed by Revenue Court—Right of minor to avoid. *See* 138 I.C. 465=1932 A.L.J. 437=1932 A. 293 (F.B.).

PURCHASE OF LAND FOR MINOR.—A guardian of a minor, although he occupies a position which is fiduciary in character, cannot be held to be debarred from acquiring immovable property on behalf of his ward, provided in doing so he acts as a prudent man who is acting carefully with his own money. Though a guardian in possession of minor's property may fall under S. 94 of the Trusts Act, he cannot be held in every case to come within S. 95 of the Trusts Act as the words "so far as may be" in that section make it subject to S. 27 of the Guardians and Wards Act. 49 L.W. 644=1939 Mad. 645 =(1939) 1 M.L.J. 745.

Secs. 27, 29 and 30.—Under S. 27 of the Act, a guardian may, subject to the provisions of the Act, do all acts which are reasonable and proper for the realisation, protection or benefit of the property of the minor. Other sections in the Act place restrictions on the guardian's power to alienate or charge the immovable property of the minor. It follows that the restrictions contained in S. 29 and the provisions of S. 30 do not apply to a mere borrowing of money by a guardian. A *loan contracted without the sanction of the Court* by a guardian appointed under the Act will be binding upon the minor if the lender had made proper enquiries and had satisfied himself as to the legal necessity for the loan, whether or not the money was actually applied for the benefit of the minor. The fact that the true necessity was not mentioned in the recitals in the bond is of little importance, as such recitals are merely a piece of evidence as to the nature of the alleged necessity and are not conclusive on the point. 72 C.L.J. 542=44 C.W.N. 1048=1940 Cal. 532. *See also* 31 P.L.R. (J. & K.) 125.

Sec. 28.—*See* 11 O.C. 29. Guardian appointed by Court cannot avoid the duties imposed by the Act, by purporting to act as natural guardian. 87 I.C. 238=1925 O. 633. *See also* 62 I.C. 616=23 C.W.N. 634; 61 P.R. 1918=47 I.C. 353. Testamentary guardian, powers of. *See* 9 L.L.J. 488=1928 Lah. 90.

Secs. 28 and 29.—A sale by a certificated guardian in contravention of Ss. 28 and 29 is voidable and not void. 8 P. 226=117 I.C. 161 =1929 P. 202. Where a compromise has been entered into on behalf of a minor and sanction for that compromise has been duly granted under O. 32, R. 7, C. P. Code, the permission of the Court under S. 29 of the Act is not necessary. 122 I.C. 103=1930 L. 250. Joint Hindu family—Application by father to be appointed guardian of property—Proper procedure in such cases. 112 I.C. 873.

Sec. 29.—S. 29 refers to the powers of guardians appointed and declared by the Court whether they are permanent or temporary guardians. An order of Court directing the sale of property by a temporary guardian is, therefore, not *ultra vires*. 40 P.L.R. 153 (1)=1938 Lah. 308. In a case where the property of a minor has been conveyed by the guardian without permission of the District Judge, the minor in a suit brought against him, cannot avoid the transfer without restoring the benefit which he has received. I.L.R. (1938) All. 614=1938 A.L.J. 521=1938 All. 369. S. 29 is imperative, and absence of permission for a particular alienation renders it void. Where a permission is applied for a particular mortgage of (*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or

(*b*) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

NOTES.

the ward's property for a specified amount on certain terms and granted by the Court, and circumstances change subsequently and part of the money is not required, the guardian is bound to obtain a new permission from the District Judge for a mortgage under the changed circumstances. If the guardian executes a mortgage for an amount less than that specified in the original sanction application, or on different terms without fresh permission, the mortgage so executed is invalid and unenforceable against the minor, because the former permission cannot cover the mortgage which is different from the contemplated one and executed under different circumstances. The provisions of S. 29 cannot be said to be complied with. 1937 A.L.J. 1351 =1938 All. 109. A deed of family arrangement entered into by a certificated guardian in which no distinct title is conferred on any body and all that is done is a relinquishment of claim by some person in respect of property assigned to another and a recognition of the antecedent right of that other person to the property does not amount to a transfer falling within S. 29 requiring sanction of the Court. I.L.R. (1938) All. 125=1938 A.L.J. 23=1938 All. 170. Where a guardian granted a five years' lease of certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed a fresh auction, *held*, that the first lease granted was within the competency of the minor and that the Court's order cancelling the same was made without jurisdiction. 132 I.C. 203=1930 L. 1017. When a certified manager creates an occupancy tenancy, whether deliberately or inadvertently, by giving a lease without the previous permission of the Court the landlord is not bound by it. It is not in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. 177 I.C. 931=1938 Nag. 314.

Secs. 29 and 30.—S. 29 does not apply to transfers of property made on behalf of minors by their guardians *ad litem* and no sanction of the Court is necessary. 44 I.C. 564=61 P.W. R. 1918. S. 29 (*b*) has no application when the contract for the benefit of the minor is entered into not by the guardian but by the Court. 1935 L. 863. As regards raising of loans on the security of property of the minor, *see* A.W.N. (1908) 75=5 A.L.J. 260=30 A. 188; 1933 M.W.N. 791. As to effect of sanction of Court, *see* 50 M. 217=25 L.W. 25=1927 M. 233. Surrender of an ex-proprietary holding is not a transfer within the meaning of S. 29, consequently previous permission of the District Judge was not necessary in such a case. 101 I.C. 804=1927 A. 546. The karta of a joint Hindu family who is appointed guardian of minor member of the family under the Act comes under the control of the Court and cannot mortgage the minor's share as karta. 62 I. C. 616=23 C.W.N. 634. *See* 87 I.C. 238=1925 O. 633. Sale of minor's property by guardian without permission of the Court is voidable, though the sale was for the minor's benefit and was a perfectly honest transaction. 13 I. C. 594. *See also* 1933 M.W.N. 791; 6 A.L.J. 491=31 A. 378; 25 A. 59. Sale of ward's property — Power of Court to stop sale injurious to ward. 109 P.R. 1915=29 I.C. 804. A mortgage executed by a guardian appointed under the Act without the permission of the Court is not absolutely void. It is only voidable. 16 C.W.N. 716=14 I.C. 515. *See also* 1938 Mad. 822=(1938) 2 M.L.J. 428; 17 Pat. 460=19 Pat.L.T. 594=1938 Pat. 337. To avoid the mortgage it is not necessary for the minor to bring an action to set aside the transaction. 16 C.W.N. 716=14 I.C. 515. A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation. 17 Pat. 460=19 Pat.L.T. 594=1938 Pat. 337. As to power of guardian to alienate ward's property among Parsis, *see* 43 Bom.L.R. 981. This section only enables the Judge to give permission to the guardian to sell such portion of the properties as may be necessary, on an application properly framed by the guardians for that purpose. It confers no power whatever on the Judge to deal with the minor's property on his own motion in any way. 12 C.L.J. 322=7 I.C. 46. Courts should be slow to hold that when a Court has granted sanction to create a mortgage that sanction does not protect a subsequent lender of money who lends on the faith of that sanction and who is in no way a party to any slackness or fraud in obtaining that sanction. Where the transaction is not the same as the sanctioned transactions, it is not covered by the sanction and one is thrown back to the position of a mortgage by a guardian without the sanction of Court (*i.e.*) it could be avoided and when the minors or principal avoid such transaction they can be held liable to restore what they have gained as a consequence of it. 1941 N.L.J. 447. Contract by guardian to sell—Liability of ward. 40 I.C. 490=22 C.W.N. 477. Mortgage in excess of

Voidability of transfers made in contravention of section 28 or section 29.

30. A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

NOTES.

sanction voidable. 19 I.C. 624. *See* 22 M. 289; 11 I.C. 764; 8 A.L.J. 754; 1941 N.L.J. 447. Permission to mortgage minor's property—Guardian has no power to confer power of sale on mortgagee. 10 I.C. 872. Sale without permission of Court is voidable. 13 I.C. 594. Alienation by guardian by way of *sale or mortgage*—Distinction between. 50 M. 217=1927 M. 233. *See also* 51 M.L.J. 869. Contract for sale with permission of Court by certificated guardian is a valid contract and so a suit for damages for its breach lies. 35 A. 499=11 A L.J. 783. *See also* 19 I.C. 624. A transfer, 15 years after the sanction granted by the District Judge cannot be held to be in pursuance of the sanction. 35 A. 150=11 A.L.J. 107. Under S. 30 disposal of immovable property by a guardian in contravention of Ss. 28 and 29 is voidable and could be set aside in a proper proceeding. 49 C. 911=28 C.W.N. 57=1922 C. 150. The scope of an enquiry under S. 29 is entirely distinct from the scope of an enquiry under O. 21, R. 83, C. P. Code. 49 C. 911. O. 21, R. 83, C. P. Code, does not render unnecessary the fulfilment of the requirements of S. 29 in a case which falls within the scope of both these provisions of the law. 49 C. 911. Lease by Court guardian for seven years—Sanction of Court not obtained—Lease in accordance with compromise sanctioned by Court—Validity. 68 I. C. 997=35 C.L.J. 206. Power of Collector appointed as guardian to sell minor's property. *See* 96 I.C. 17=28 Bom.L.R. 628.

APPEAL.—Orders under Ss. 29 and 30 are not appealable. 87 I.C. 251=1923 A. 14.

PRACTICE AND PROCEDURE.—Absence of recital of necessity for alienation in order sanctioning alienation—Effect of. *See* 50 M. 217=51 M. L.J. 869=1927 M. 233. Sale by guardian on behalf of minor—Condition subsequent not complied with—Effect of. 25 A.L.J. 725=50 A. 63=1927 A. 631. As to the necessity of restoring the benefit taken in case of avoidance of transaction entered into by guardian, *see* 25 A. L.J. 1017=50 A. 218; 34 C.W.N. 948; 51 A. 1027.

Ss. 29 and 31: SCOPE—SANCTION FOR LOAN—SUBSEQUENT CANCELLATION—LENDER ADVANCING LOAN DURING CONTINUANCE OF SANCTION—IF AFFECTED.—Where the Court passes an order authorising the guardian of a minor to raise a loan on the security of minor's estate, the lender is entitled to trust that order and rely on it and is not bound to inquire as to the expediency or necessity of the loan. The subsequent cancellation of the order of sanction after the money has been advanced cannot make any difference in the rights of the lender. 16 Pat.L.T. 135=14 P. 410=1935 P. 225.

Ss. 29, 33 and 34: COURT AUTHORISING GUARDIAN TO RAISE SIMPLE LOAN—DUTY OF LENDER TO ENQUIRE AS TO NECESSITY.—If an order of Court authorises the guardian of a minor to raise a loan on the security of the minor's estate, the lender is entitled to trust to that order and is not bound to enquire as to the expediency or necessity of the loan for the benefit of the minor's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but, apart from any charge of that kind he is entitled to rest upon the order. There is no reason why the same principle should not apply when the guardian instead of raising a loan on the security of the minor's property obtains money on a simple bond after obtaining the sanction of the Court for a simple loan. [11 C. 379 (P.C.), Appl.] 160 I.C. 64=1936 A.L.J. 155=1936 A. 172. *See also* 17 L. 688=1936 L. 946.

Sec. 30: MEANING OF WORDS.—It is clear that the 'guardian' contemplated by S. 30 of the Guardians and Wards Act, is not only a certificated guardian who is the natural guardian of the ward, but also a certificated guardian who is not the natural guardian. I.L.R. (1938) All. 614=1938 A.L.J. 521=1938 All. 369. The words "any other person affected thereby" in S. 30 do not include a creditor whom a transfer of property might injuriously affect. 75 P.R. 1914=22 I.C. 829. Whether the words of S. 30 contemplate the avoiding of a transaction by a person other than the minor. *See* 1938 M.W.N. 802=1938 Mad. 822=(1938) 2 M.L.J. 428. A permission obtained by a certified guardian by a fraudulent misrepresentation is a nullity but a transfer made in pursuance thereof is only voidable. 1931 A.L.J. 997. Transfer of minor's interest in decree—Judgment-debtor cannot impugn. 41 I.C. 269=27 C.L.J. 110. On this section, *see also* 54 C. 687.

APPEAL.—An order under S. 30 is not appealable. 44 A. 458=1923 A. 54 (1)=87 I.C. 251.

LIMITATION.—When an assignment by the guardian of a minor of a mortgage to which the minor is entitled is repudiated by the minor, the minor himself filing a suit for recovery of the mortgage money, the assignee has no right to file a suit on the mortgage as assignee and to ask the Court to recognise his transfer. It is not correct to say that the minor cannot repudiate a transfer by his guardian except by filing a suit under Art. 44 of the Limitation Act, S. 30 of the Guardians and Wards Act makes the transfer voidable and it is unnecessary to inquire whether it was beneficial to the minor or not. 1938 M.W.N. 802=1938 Mad. 822=(1938) 2 M.L.J. 428. Where a person has been appointed under the Act to be the guardian of the property of certain Mahomedan minors, an alienation by him of the minor's properties without obtaining the Court's permission, would be only voidable and not void. It would operate as a valid transfer unless set aside at the instance of the minors concerned. Art. 44 of the Limitation Act gives the minors three

Practice with respect to permitting transfers under section 29.

31. (1) Permission to the guardian to do any of the acts mentioned in S. 29 shall not be granted by the Court except in case of necessity or for an evident advantage to the ward.

NOTES.

years from the date of their attaining majority to set aside the alienation. Where a transfer is made by a *de facto* guardian, the position may be different. I.L.R. (1941) Mad. 775=53 L. W. 650=1941 Mad. 481=(1941) 1 M.L.J. 800 (F.B.). Where a guardian sells immovable property belonging to the minor without the sanction of the Court and subsequently executes a second sale with the permission of the District Judge, the latter transferee can sue for possession without expressly suing to have the prior sale set aside. To such a suit Art. 120 and not Art. 91 of the Limitation Act will apply. 34 C.W.N. 948. Where the minor sues after attaining majority to set aside the transfer by his guardian, the suit is governed by Art. 44 and not Art. 144, Limitation Act. 1931 A.L.J. 997=1932 A. 108=53 A. 738.

Secs. 30 and 31.—Where a guardian of a minor appointed under the Act obtains the sanction of the Court authorising him to execute a mortgage of the minor's property and to borrow a certain amount for the purpose of paying off a mortgage decree against the estate, and executes a mortgage for the amount authorised by Court, and no fraud or underhand dealing is alleged, the person who lends money to the guardian and takes a mortgage from the guardian is entitled to rely upon the sanction itself for the validity of the transaction. The lender is not bound to go behind the order of the Court sanctioning the mortgage, is entitled to rely upon it, and if he acts *bona fide*, he is not bound to see to the application of the money or any part of it. The circumstance that the guardian does not subsequently apply the money in its entirety for the purpose for which he borrows it is irrelevant. If the guardian applies the bulk of the money borrowed for the purpose sanctioned by the Court, but applies a small part of it for a different purpose which is not sanctioned, it would still be open to the creditor who has advanced the money to establish that there was legal necessity for that amount also. When he has paid the whole amount of the consideration on the faith of the sanction, and the amount advanced does not exceed the amount sanctioned by the Court, he is entitled to claim the whole amount advanced by him as a mortgagee. 40 Bom.L.R. 180=1938 Bom. 234.

Sec. 31.—[*See also* under S. 29]. S. 31 does not make the holding of any enquiry by Court essential. The fact that the guardian mentioned one debt in the application for permission for sale but the sale-deed purports to have been executed to pay off totally different debts, and the fact that the sale was actually made for a higher sum than that proposed do not show that the interests of the minor were prejudiced in any manner by the sale. 172 I.C. 637=1938 O.W.N. 104=1938 Oudh 65. Under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The High Court has also jurisdiction to sanction an alienation by the father of a minor or the manager of a joint family where the Court is satisfied that the transaction is for the benefit of the minor. The father or manager has no doubt power under the Hindu Law to sell or mortgage for legal necessity or for the benefit of the estate; but that is no ground for depriving the father or manager in a Hindu joint family of his right to come to the High Court and apply to appoint him the guardian of the property of a minor member and for empowering him as such to sell or mortgage the family estate including the minor's undivided share, and if the requisite facts are proved, the Court ought in a proper cause to make an order sanctioning the alienation. 167 I.C. 947=38 Bom. L.R. 1286=I.L.R. (1937) Bom. 432=1937 B. 98. *See also* 13 R. 590.

SANCTION—GRANT OF—FACTS TO BE CONSIDERED.—All that the District Judge has to consider in an application by the certificated guardian for sale of the minor's property is whether such a sale is necessary or is for the evident advantage of the ward. While granting permission the District Judge should mention that the transaction may take place at a certain figure; the certificated guardian, however, should not be directed to sell to a certain party; the sanction under S. 31 is therefore complete authority to the certificated guardian to sell to any person he likes who is willing to comply with the terms upon which permission to sell is accorded by the District Judge. 8 P. 226=117 I.C. 161=1929 P. 202. *See also* 17 L. 688=1936 L. 946. Subsequent cancellation of the order of sanction does not affect the validity of a transaction made primarily. 14 P. 410=16 Pat.L.T. 135. Sanction of Court, effect of—If conclusive as to necessity for alienation. *See* =15 Pat.L.T. 787=1935 P. 74. Where a Judge in a case in which an enquiry is necessary allows through his remissness a transaction to take place to the detriment of the minor the sanction which he has given is not a bar to a reopening of the transaction. But absence of enquiry would not vitiate a transaction if the Judge has been able to conclude a good bargain. 115 I.C. 273=1929 O. 354. *See also* 17 L. 688=1936 L. 946. A sale of the property of a minor by a guardian appointed by the Court, with the sanction of the Court, has to be upheld, and the alienee can rely upon, and is protected by, the order of consent, unless it is shown that the order of sanction was obtained by fraud or underhand dealing and that the alienee was a party thereto. It is not necessary for the alienee to prove that the transaction was in the interests of the minor. 165 I.C. 530=38 Bom.L.R. 796=1936 B. 389. A certificated guardian can enter into a contract with

(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission ; and it shall be recorded, dated and signed by the Judge of the Court with his own hand, or when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him.

NOTES.

an intending purchaser, but such a contract is subject to sanction being accorded to the proposed transaction and when the sanction has been accorded, the contract becomes a completed contract by virtue of that sanction. After the sanction is actually accorded, it is not necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser. 8 P. 226=117 I.C. 161=1929 P. 202. Under S. 31 (2) of the Act the Court sanctioning a sale by a guardian of a minor should in the order granting sanction recite the necessity for the sale or the advantage to be derived from it ; but the omission to do this is only an irregularity, and cannot invalidate the order or render the sale voidable. 165 I.C. 530 =38 Bom.L.R. 796=1936 B. 389. A contract entered into by a certificated guardian without authority is not void but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. 27 A.L.J. 1140=1929 A. 890.

ACKNOWLEDGMENT.—A *de facto* guardian has no power to acknowledge debt so as to bind a minor. 1933 M.W.N. 365.

ACQUIESCENE.—A minor is not bound by any acquiescence on the part of his guardian though it may be a piece of evidence against him (the minor). 37 C.W.N. 237=1933 P.C. 20=64 M.L.J. 1 (P.C.).

DE FACTO GUARDIAN—ALIENATION BY—(i) *Hindu minor.* (*Held*, by the Full Bench, Beaumont, C.J., dissenting).—The *de facto* guardian of a Hindu minor can validly sell the property of the minor to a third person for legal necessity. (*Hanoomanpersaud's* case, Rel. on; 49 B. 576, Overruled.) 34 Bom.L.R. 1483 (F.B.). (ii) *Indian Christian minor.*—An alienation by a *de facto* guardian of an Indian Christian minor is void. 152 I.C. 120=1931 M. 529=60 M.L. J. 695. (iii) *Burmese Buddhist* de facto *guardian.* —A *de facto* guardian of a Burmese Buddhist cannot bind the ward's estate. Unless a guardian is appointed by the Court and gets permission from the Court to dispose of the property of the ward, it cannot part with or encumber in any way the property of the ward. 1933 R. 83. *See also* 134 I.C. 214= 1931 R. 178.

ALIENATION BY GUARDIAN—INVALID SANCTION OF COURT—CLAIM FOR DAMAGES.—Apart from any personal covenant personally binding on him, a guardian selling the property of his minor ward is not personally liable for damages to the vendee if the latter is deprived of the whole or part of the property in consequence of the permission of the District Judge conferring authority on the guardian to transfer being found to be invalid. 151 I.C. 120=1934 A.L. J. 350=1934 A. 645.

ARBITRATION — REFERENCE TO.—Where a Burmese mother referred a dispute to arbitration on behalf of herself and her minor sons but it appeared that she was never appointed guardian, *held*, that the reference and the award were invalid and not binding on the minors. [15 R. 186 (P.C.), Rel. on.] 142 I.C. 189. A guardian has no power to make a reference to arbitration on behalf of a minor. 130 I.C. 810 =1931 P. 92 (19 C. 334, Ref.; 39 C. 232, Dist.) (But *see also* 131 I.C. 738=1932 L. 728 where it has been held that a reference to arbitration made by a properly constituted guardian in good faith and for the benefit of the minor would be binding on him). *See also* 1931 A. 307.

Sec. 31 (2): GENERAL.—S. 31 (2) is mandatory and not merely directory. 23 O. C. 72=56 I.C. 328. *See also* 27 Bom.L.R. 483=87 I.C. 712=1925 B. 320; 98 I.C. 500; 103 I.C. 698=1927 L. 665. A sale by the certificated guardian of a minor without the sanction of the Judge is not void *in toto* but is only voidable. If the minors have been benefited by the sale, they cannot avoid the sale without restoring the benefit to the purchasers. 98 I.C. 500. *See also* 1926 O. 88; 142 I.C. 152= 1933 M. 352 (sale by mother upheld where major portion of the price was applied for purposes binding on the minor); 95 I.C. 421; 95 I. C. 680=1926 O. 169. In considering validity of a transaction entered into on minor's behalf, the tests to be applied are (1) to see whether a man of ordinary prudence would have entered into such a transaction in respect of his own property, (2) and whether the circumstances were such that, had the guardian applied to the Court for sanction, the Court would have given the sanction. 1925 M. 215=47 M.L.J. 928. What amounts to sanction by Court, *see* 12 O. L.J. 453=89 I.C. 69. Permission to a guardian to do any of the acts mentioned in S. 29 shall be granted only in case of necessity or advantage to the ward. 38 C.L.J. 213=1924 C. 420. A District Judge giving an unconditional sanction to a sale of a minor's property by a guardian cannot after its execution and registration order a re-sale thereof. 46 I.C. 542. Non-observance of some rules prescribing particular forms of procedure does not make the order a nullity, but non-observance of rules creating jurisdiction renders the order null and void. 87 I.C. 238= 1925 O. 633. *See also* 25 A.L.J. 725=50 A. 63 =1927 A. 631. Sanction cannot cure inherent defects—Suit by minor to set aside the sale—Onus. 45 M. 429=42 M.L.J. 333=1922 M. 135. Permission to sell—Necessity not mentioned—Effect. 23 O.C. 72=56 I.C. 328; 8 P. 48. Judgment against minor is binding unless guardian is guilty of fraud. 87 I.C. 238=1925 O. 633.

BURDEN OF PROOF.—In ordinary cases, it is for the transferee to prove that a loan taken by a

(3) The Court may in its discretion attach to the permission the following among other conditions, namely :—

(*a*) that a sale shall not be completed without the sanction of the Court ;

(*b*) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs ;

(*c*) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs ;

(*d*) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.

(4) Before granting permission to a guardian to do an act mentioned in S. 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.

Variation of powers of guardian of property appointed or declared by the Court.

32. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with law to which the ward is subject.

NOTES.

guardian of the Hindu minors who constitute a joint family, was for the purpose of family necessity. But once the loan is taken with the sanction of the District Judge, the burden of proof would change, and if the minors come to avoid the transfer, then it will be for them to show that the transfer is not binding upon them. Where, however, the mortgagees, fully knowing the terms of the order of the District Judge under which the guardian has been permitted to take a loan, grant the loan without complying with the terms of such order, it is not open to them to claim any benefit which they would have been entitled to otherwise because of the sanction given to the guardian. In such circumstances, the mortgagees, in order to establish the fact that the mortgage-deed is binding on the minors, have to show that the loan was taken for family necessity. 152 I.C. 503=1935 A. 41.

APPEAL AND REVISION.—Order of District Judge fixing expenses of minor's marriage is not open to appeal or revision. 48 A. 300=92 I.C. 482=1926 A. 301.

Sec. 31 (4).—The words "any person" means any person interested in an application made on behalf of a minor not merely his friends or relatives. 35 M. 743=11 I.C. 946=21 M. L.J. 685.

Secs. 31, 33 and 43: LEASE WITHOUT PERMISSION—POWER TO CANCEL—POWER TO DEAL WITH MINOR'S PROPERTY.—The District Judge cannot exercise judicial authority in relation to third persons in proceedings under the Guardians and Wards Act. If the lease executed by the guardian is voidable, the same not having been executed with the permission of the District Judge, the latter has no power to cancel it in the sense that the lease becomes inoperative by force of that order. Any question as regards the validity of the lease is to be determined by a competent Court in a regular suit. There is no provision in the Guardians and Wards Act which empowers the District Judge to exercise disposing power over the minor's property under the management of a lawful guardian. It is the function of the guardian to deal with the property of the minor and to administer it. The guardian may obtain the advice of the District Judge under S. 33. The District Judge may also make an order under S. 43 regulating the conduct or proceeding of any guardian appointed or declared by the Court. But he cannot deal with the minor's property and do everything which the guardian might do. Besides cancelling an instrument executed by the latter, he has no power to declare that the cancellation of the lease already executed is to take effect from a certain date and that it shall be valid till that date arrives. 1934 A. 1043=1934 A.L.J. 1208.

Sec. 32.—A *minor's interest in a trust* can be protected and the benefits thereof secured to the minor, by the appointment of a guardian of the property of the minor in respect of such interest. 39 A. 288=37 I.C. 885. As to jurisdiction to dispossess third person in possession of the estate, *see* 47 A. 313=23 A.L.J. 28=1925 A. 277. An order of suspension of the guardian can be passed by the Judge under S. 32. 40 I.C. 397. On this section, *see also* 57 M. 712=66 M.L.J. 351; 64 C.L.J. 556, cited under S. 43, *infra*.

Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.

33. (1) A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.

(2) If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

(3) The guardian stating in good faith[1] the facts in the petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.

Obligations on guardian of property appointed or declared by the Court.

34. [2]Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,—

(*a*) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;

(*b*) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the Court directs, a statement of the immovable property belonging to the ward, of the money and other movable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward;

(*c*) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;

(*d*) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs; and

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LEG. REF.

[1] *See* S. 3 (20) of the General Clauses Act (X of 1897).

[2] For instances of notifications issued under this section, *see* Bom. R. & O., Vol. III.

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Sec. 33.—The directions of Court under S. 33 do not impose a liability on a minor where none existed. The effect of the sanction under sub-cl. (3) of S. 33 is that it raises a statutory presumption of a faithful performance by the guardian of a duty cast upon him and protects him as regards his own liability either under his bond or in general to the Court or as against the minor. The sanction does not, however, have the effect of making the minor personally bound by a contract by the guardian which does not purport to charge the minor's estate. 34 Bom.L.R. 996. *See also* 1934 A. 1043. Where a guardian granted a five years' lease of a certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed a fresh auction, *held,* that the first lease granted was within the competency of the minor and the Court's order cancelling the same was made without jurisdiction. 132 I.C. 203=1930 L. 101. A Mahomedan mother who had been appointed guardian of her minor child by Court referred a dispute, in which the minor was interested, to arbitration without having obtained the previous sanction of the District Judge. When the award was filed, in Court, permission was obtained from the Court that the award should be filed inasmuch as it was for the benefit of the minor, but there again the mother acted as guardian *ad litem.* The minor sued after attaining majority to avoid the decree passed by Court on the basis of the ward. *Held,* that the mother's reference to arbitration without the necessary sanction of Court rendered the award and decree voidable at the instance of the minor and the latter could sue to have same set aside within three years of attaining majority. 53 A. 428=1931 A.L.J. 170=1931 A. 307. On this section, *see also* 26 A.L.J. 290=1928 A. 259.

Sec. 34.—There is no provision of law which allows a Court to require the guardian to pay into Court a fixed sum at stated intervals without regard to the question whether this is in excess of the balance shown on the guardian's account or is within it. 1935 L. 931.

Cls. (c) and (d).—For scrutiny of guardian's accounts, regular suit is the proper remedy. 26 L.W. 44=100 I.C. 600. *See also* 1926 M. 478 =50 M.L.J. 273; 107 I.C. 152=7 P. 144.

Cl. (d): SCOPE OF SECTION.—94 I.C. 79= 1926 M. 825=50 M.L.J. 273. There is nothing (*e*) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.

[1][34-A. When accounts are exhibited by a guardian of the property of a

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LEG. REF.

[1] Inserted by Act XVII of 1929, S. 2.

NOTES.

in S. 34 to warrant the suggestion that the expression "balance due from him on those accounts" is necessarily intended to empower the Court to compel the guardian to pay into the Court, not the sum which he admits to be due at the foot of the account exhibited by him, but the sum which the Court finds on enquiry held by it to be due. 121 I.C. 168=1930 S. 43. *See also* 140 I.C. 590=34 P.L.R. 549=1933 L. 484; 1930 L. 420. S. 43 read with S. 34 impliedly provides for expenditure in connection with the auditing of the accounts relating to the property of the ward. 11 P.L.T. 349=1930 P. 384. The guardian of a minor gave on lease a plot of land belonging to a minor to his brother-in-law. The Court held that the lessee was a benamidar for the guardian and called on the latter to deposit the lease money in Court. *Held,* that the claim against the guardian could be sustained only on the basis of a contract or a *quasi*-contract and such a claim could be enforced by a regular suit and not by a summary remedy. 136 I.C. 2=1932 L. 272. If no accounts are furnished by the guardian, it does not preclude the Court from going into accounts and calling on the guardian to pay such balance as the Court may find to be due. The power of Court is not limited to directing the guardian to pay such balance as he may or may not show. (46 A. 458; 7 P. 144, Foll.) 141 I.C. 590. Where a petition against a guardian states that a certain amount is due from the guardian and the Court finds that the exact amount due is something different. *Held,* that the Court can record any definite finding as to exact amount due from guardian. 164 I.C. 282=17 P.L.T. 756=1936 P. 447.

Sec. 34 (e).—Although under the Hindu Law money borrowed for the purposes of the marriage of a member of a Hindu family must be regarded as borrowed for legal necessity, yet when a guardian has been appointed by the Court, the powers of such guardian with regard to incurring liabilities on behalf of the ward are limited. Such guardian is incompetent to borrow money for the purpose of the marriage of one of his wards and his sister dependant on them without the permission of the Court in view of S. 34 (*e*). 8 O.W.N. 1146=1931 O. 403. An order passed in respect of maintenance of a dependant of a minor is one passed under S. 34 and being of a temporary nature is not binding when the minor attains majority. 1935 Pesh. 174. All orders passed under the provision of S. 34 (*e*) are temporary orders, having no effect after the owners of the estate attain majority. Once the minor attains majority, the Court is *functus officio* and the late ward is empowered himself to cancel or vary the arrangements made by the temporary orders which were passed during his minority. (5 C.W.N. 207, Dist.) 161 I.C. 41=1936 Pesh. 34. An order issuing warrant against an ex-guardian for recovery of arrears of maintenance said to be due to the minor up to the date of his making over possession of the minor's estate to the new guardian is bad, when the ex-guardian has no property of the minor in his hand and has made it over to the new guardian and has submitted accounts. If on the accounts anything is found due from him to the minor, appropriate steps could be taken against him for the recovery of the said amount. 68 C.L.J. 68. There is no provision in the Guardians and Wards Act empowering the Court to issue a distress warrant on the minor to recover from him sum alleged to be due by him to the ex-guardian. 1937 Cal. 422. Consent order for payment of money by husband to wife or school authorities for maintenance and school expenses of minor children is valid but not executable as decree for money under C. P. Code, O. 21, R. 11. 41 Bom.L.R. 625=1939 Bom. 367.

Secs. 34 and 35 : SCOPE.—This section does not deprive the Court of its general power to impose conditions on guardians and so the appointment of a guardian conditional on his furnishing security is not *ultra vires.* 40 M. 775=37 I.C. 892. *See also* 49 M. 809=51 M.L.J. 726 (F.B.). [*See also* Notes under Ss. 7 and 10 *supra.*] Court can ask guardian to apply income for maintenance. 34 P.R. 1912=14 I.C. 789. An order under S. 34, Cl. (*e*) directing the guardian of a ward to pay a certain sum of money to another is not an order under S. 2 (14), C. P. Code, and is therefore not executable as a decree. 41 M. 241=41 I.C. 341 (36 M. 29, Foll.). Attachment of property of guardian is improper. 1923 L. 506 (1).

SECURITY.—Appointment of guardian does not become effective until security is furnished. 71 I.C. 572. The Court is the obligee under a bond executed by sureties under S. 34 (*a*) and can alone sue on the bond in the absence of an assignment in due form of law. 42 M. 302=36 M.L.J. 114=49 I.C. 587. Limitation is that prescribed by Art. 68 of the Limitation Act except where the bond charges immovable property. 42 M. 30. The District Court can supersede a guardian if he fails to furnish security within the fixed time. 19 I.C. 609=192 P.L.R. 1913. Order appointing a person guardian subject to his furnishing security within a time—Failure to furnish—Penalty. 51 I.C. 88=17 A.L.J. 377.

APPEAL.—Direction to guardian to deposit money due to minor—Not appealable. 37 I.C. 309. No appeal lies from an order fixing the amount to be applied for the maintenance, education and advancement of the ward and the persons depending on him. 27 I.C. 921=28 M.L.J. 96.

Sec. 34-A.—S. 34-A was inserted by Act XVII of 1929. The necessity for this section is stated as follows in the Statement of Objects

Power to award remuneration for auditing accounts.

ward in pursuance of a requisition made under clause (*c*) or section 34 of otherwise, the Court may appoint a person to audit the accounts, and may direct that remuneration for the work be paid out of the income of the property.]

Suit against guardian where administration-bond was taken.

35. Where a guardian appointed or declared by the Court has given a bond duly to account for what he may receive in respect of the property of his ward, the Court may, on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for the ward, in respect of any breach thereof.

NOTES.

and Reasons :—"The Guardians and Wards Act, 1890, contains no specific provision for the auditing of the accounts of minor's estates and the meeting of the cost of the audit out of the estates. The audit of such accounts tends to be left to the Judges of Subordinate Courts or District Courts or to ministerial officers, who have rarely the time or training to apply anything in the nature of a thorough test. With a view to checking the possibility of defalcation an adequate audit of these accounts is desirable. Accordingly the present Bill has been framed for the purpose of giving express power to the Court to award remuneration for auditing accounts out of the income of the property. Cl. (3) empowers the High Court to make rules as to the audit of the accounts, the class of persons who should be appointed to audit them and the scales of remuneration to be granted to the auditors.

Sec. 35.—The Court has got the power under S. 35 to assign a surety bond executed by the guardian in favour of the assignee of the interests of the minors who has attained majority. The exercise of jurisdiction to assign is undoubtedly discretionary. (The effect of the words "as trustee for the ward" in S. 35 considered.) 34 C.W.N. 953.

SECURITY BOND BY GUARDIAN—ASSIGNMENT.—Where a person appointed as guardian of a minor under the Act executes a security bond in favour of the Court undertaking to "duly account for all the movable property and for all the money which he shall receive on account of the movable and immovable properties of the minor," etc., and to be liable for a certain amount of money in default of the due performance of his duties as guardian, making his immovable properties security for the amount in addition to his personal liability, the bond is conditioned for the due performance of the duties of the executant as guardian. The obligation to pay comes into force the moment there is failure to account for the monies received by the guardian. If as the result of the engagement of the bond not being kept up and of the failure of the guardian to account for the monies, the Court assigns the bond under S. 35 what the assignee gets is not a mere right to sue but a right to enforce a liability under the bond which has accrued due, and when the liability is also secured by a charge or mortgage of immovable property, the charge or mortgage is also assigned along with the right to enforce the liability. The assignee under S. 35 is entitled to enforce the liability and the charge or mortgage therefor as if the bond has been executed in his favour. When a newly appointed guardian of the ward takes an assignment the assignment is in trust for the ward. When the assignee guardian assigns the bond to the ward on the latter becoming a major, that assignment is only in fulfilment of the duty the assignee is under to hand over all the property of the ward to the latter. Such an assignment is perfectly valid and entitles the ward to sue and to enforce its terms. 1938 M. W.N. 379=1938 Mad. 829. The proceeding for assignment will in no way operate to the prejudice of any defence the surety's represtatives may have in a suit brought on the bond. 34 C.W.N. 953=1930 C. 594. An order by the District Court fixing the liability of the surety is not called for and not necessary before the Court can assign the bond to the minor or any other guardian of his, appointed by the Court. There is no provision in the Act for the surety being a party to any proceedings in which accounts may be taken and no provision by which the surety can appeal against the order of the District Court fixing his liability. 135 I.C. 833=1932 A. 177. *A certificate of guardianship is not a public or official record* within the meaning of sec. 35 and is therefore not admissible in evidence. 53 A. 428=130 I.C. 201=1931 A. 307. What sec. 35 apparently contemplates is that an entry should have been made by an officer whose duty it is to make such an entry after having been satisfied as to its correctness. 53 A. 428=130 I.C. 201=1931 A. 307.

Secs. 35 and 36.—A *suit for accounts* by a ward against his late guardian or his representatives if it is proved that his property had gone into their hands is maintainable. 22 Bom.L.R. 633=44 B. 852. *See also* 18 I.C. 876=17 C.W.N. 695. Ward should not be compelled to file regular suit for satisfying Court that engagement has not been kept up. 1928 M. 545=54 M.L.J. 671. Sec. 35 is perfectly general and can apply to a case where the ward was a minor or to a case where the ward has ceased to be a minor. The section is intended to cover both the cases. There is nothing in sec. 35 making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond. (42 M. 302; 51 M.L.J. 241, Diss. from). 1928

Suit against guardian where administration-bond was not taken.

36. (1) Where a guardian appointed or declared by the Court has not given a bond as aforesaid, any person, with the leave of the Court, may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.

(2) The provisions of sub-section (1) shall, so far as they relate to a suit against a guardian, be subject to the provisions of S. 440 of the Code of Civil Procedure as amended by this Act.[1]

General liability of guardian as trustee.

37. Nothing in either of the two last foregoing sections shall be construed to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which, not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee.

Termination of Guardianship.

Right of survivorship among joint guardians.

38. On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

Removal of guardian.

39. The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :—

(*a*) for abuse of his trust ;

(*b*) for continued failure to perform the duties of his trust ;

(*c*) for incapacity to perform the duties of his trust ;

(*d*) for ill-treatment, or neglect to take proper care, of his ward ;

LEG. REF.

[1] *See* new Order XXXII, Rules 1 and 4 (2) in the First Schedule to the Code of Civil Procedure (Act V of 1908).

NOTES.

M. 545=54 M.L.J. 671. A suit brought against the guardian of the property of a minor under sec. 36 is maintainable though the leave of the Court is obtained subsequent to filing. 22 Bom. L.R. 787=44 B. 602.

APPEAL.—*See* 135 I.C. 833=1932 A.L.J. 47=1932 A. 177; 30 B. 164=7 Bom.L.R. 803.

Sec. 36: SCOPE—SUIT FOR RENDITION OF ACCOUNTS.—The principle underlying sec. 36 is one of universal application and can be applied even to a case where the guardian is not appointed by the Court. The minors are therefore entitled to maintain a suit for rendition of accounts against the legal representative of the guardian. The fact that the minors have entered into a compromise with one of the legal representatives cannot in any way deprive them of the right of bringing a suit for rendition of accounts against the others. 1934 L. 410.

Secs. 36 and 37.—A minor cau sue the legal representative of his deceased guardian for accounts where the guardian had died without rendering accounts, and sec. 41 (3) is no bar to it. 55 P.R. 1918=46 I.C. 457.

Sec. 39.—The provisions of the Act apply to guardians appointed by will and action can be taken in regard to them under Ss. 39, 41 and 45. 8 L. 306=103 I.C. 470=1927 L. 344.

SCOPE OF SECTION.—The Court cannot appoint a guardian of the person of a Hindu minor of a joint family. 57 I.C. 678=11 L.W. 596. It is open to a District Court to remove a guardian for continued failure to perform the duties of his trust, for incapacity to perform those duties and for contumacious disregard of any order of the Court. Failure to keep account of trust property is a failure to perform a very important duty of the trust and the illiteracy which is a bar to the performance of such duty can be looked upon as an incapacity under sec. 39 (*c*). If a man is illiterate, it is still his duty to furnish account by employing another person to keep accounts. 117 I.C. 782=1930 S. 14. If a guardian has been appointed of the persons and property of the minor sons by their father by means of a will, the Court has no jurisdiction to proceed with the appointment of another guardian until the guardian appointed by the will is removed from guardianship under the provisions of sec. 39 of the Guardians and Wards Act. 41 P.L.R. 12. As to power to remove even testamentary guardians, *see* 28 Punj.L.R. 127. Appointment of sister's husband as guardian of Mahomedanminor—E (*e*) for contumacious disregard of any provision of this Act or of any order of the Court ;

(*f*) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ;

(*g*) for having an interest adverse to the faithful performance of his duties ;

(*h*) for ceasing to reside within the local limits of the jurisdiction of the Court ;

(*i*) in the case of a guardian of the property, for bankruptcy or insolvency ;

(*j*) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject :

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

(*a*) for the cause mentioned in clause (*g*) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or

(*b*) for the cause mentioned in clause (*h*) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

NOTES.

personal law of the minor. *See* 85 I.C. 624=28 O.C. 172=1925 O. 623. The word "instrument" in sec. 39 must be confined to instruments *ejusdem generis* with a will, and does not cover a compromise decree. 42 I.C. 505=6 L.W. 760 (18 B. 375, Foll.). A will need not and could not be set aside when the testator had no legal power to appoint a guardian for the property. 40 M. 672=30 M.L.J. 504. Guardian not validly appointed if trespasser, if could be removed. 21 I.C. 848. Guardian may be removed, if there exists bitter relationship between him and his ward. 1925 L. 375; 8 L. L.J. 201. Wishes of minors in a position to exercise their discretion to be consulted. 1925 L. 375. Courts removing guardians must, first of all, be satisfied that there are present one or more of the reasons for the removal of guardians set out in sec. 39, and should expressly state what the reasons are which justify the order removing the guardian. The mere circumstance that the minor is sufficiently old to be able to express a preference for one person over another for his guardian is no reason for removal of a guardian. 165 I.C. 258=1936 M.W.N. 373=1936 M. 695. Failure by a guardian to comply with the terms of his appointment justifies his removal by the Court. 20 I.C. 10=164 P.L.R. 1913. *See also* 1926 O. 169=2 O.W.N. 796(F.B.). When the Court removes a person from guardianship, it is its duty to pass the necessary orders for the adequate protection of the minor's estate, especially when it is in a bad state of management. 34 C.W.N. 986. Where objections were taken to accounts filed by a guardian of a minor by his maternal uncle who presented a petition for the removal of the guardian and an inquiry of accounts was held. *Held,* that inquiry could be held at the instance of such person as sec. 39 permitted a Court to act in the matter of removal of a guardian on the application of any person interested. 164 I.C. 282=17 Pat.L.T. 756=1936 P. 447.

Sec. 39 (e).—Guardian disobeying order under sec. 34 (*e*)—Imposition of fine *ultra vires.* 34 P.R. 1912=14 I.C. 789; 2 O.W.N. 796 (F.B.);

Cl. (h).—An applicant for guardianship must reside within the jurisdiction of the Court to which he makes the application. 36 A. 280=24 I.C. 59. But *see also* 1925 N. 224=75 I.C. 595. This is an enabling clause. Person outside jurisdiction can also be appointed in a fit and proper case. 1940 Pesh. 14. But *see* 58 C. 15, *infra.* It is within the discretion of the Court to appoint a man who does not reside within the local limits of its jurisdiction as a guardian or not. There is no provision in the Act prohibiting the appointment of a person as a guardian who does not reside within the local limits of the jurisdiction of the Court. A plain reading of sec. 39 shows that the Court has been given the power to remove a guardian who has ceased to reside within its local limits. The word "may" has been used and not "shall". But the converse proposition is not true. 188 I.C. 555=1940 Pesh. 14. *See also* 75 I.C. 595=1925 Nag. 224. Under the Guardians and Wards Act, it is not essential that a person who applies for being appointed guardian of the property of a minor should be a resident of the district in which the property is situated. The power of the Court under S. 39 of the Act to remove a guardian who is not residing in the district within which the property is situated is discretionary and it cannot reasonably be inferred therefrom that the applicant must necessarily be a resident of the district in which the property is situated. 44 P.L.R. 202.

Obiter.—Sec. 39 seems to suggest that a Court should not appoint a person who is resident outside its jurisdiction as guardian. 58 C. 15=1930 C. 397. Person residing out of jurisdiction of Court may be appointed guardian. 1933 A.L.J. 1333=1933 A. 780.

Cl. (j).—A widow appointed as testamentary guardian does not become legally disqualified by re-marriage to continue to be guardian. 18 I.C. 133.

Notice.—Removal of guardian—Notice to show cause essential before removal. 27 I.C.

Discharge of guardian.

40. (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the Provincial Government approves of his applying to be discharged, the Court shall in any case discharge him.

Cessation of authority of guardian.

41. (1) The powers of a guardian of the person, cease—

(*a*) by his death, removal or discharge ;

(*b*) by the Court of Wards assuming superintendence of the person of the ward ;

(*c*) by the ward ceasing to be a minor ;

(*d*) in the case of a female ward, by her marriage to a husband who is not unfit to be a guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit ; or

(*e*) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

(2) The powers of a guardian of the property cease—

(*a*) by his death, removal or discharge ;

(*b*) by the Court of Wards assuming superintendence of the property of the ward ; or

(*c*) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

NOTES.

18=20 C.L.J. 298. Before removing a guardian, he should be given notice setting out for which of the causes mentioned in sec. 39 it is proposed to remove him. 116 I.C. 669 (1)= 1929 N. 176.

APPEAL.—There is no appeal from an order made by the District Judge refusing to remove a guardian. 14 I.C. 56=195 P.W.R. 1912 (19 C. 487; 23 C. 201; 20 B. 667; 20 A. 433, Foll.). Order removing guardian is appealable. 1925 O. 260.

Secs. 39 and 8.—A first cousin, once removed, of a minor comes within the terms of S. 8 (*b*) and is thereby entitled to make an application for the appointment of a guardian. The fact that he comes within the terms of S, 8 is quite enough to make him personally interested within the meaning of S. 39 and he is, therefore, entitled to file an application for the removal of a guardian. The fact that he is at enmity with the guardian is immaterial. I.L.R. (1939) 2 Cal. 440=185 I.C. 880=12 R.C. 420.

Secs. 39 and 43.—Relative scope—Testamentary guardian—Removal—Directions and conditions as to discharge of duties—Powers of Court. *See* 71 M.L.J. 417.

Sec. 40.—Application for removal of guardian dismissed—Subsequent application is barred. 20 A.L.J. 959=49 A. 196=1922 A. 540. *See also* 136 I.C. 3=1932 L. 306 cited under S. 41, Cl. (4).

Sec. 41 : SCOPE OF SECTION.—S. 41 is not confined to the case of guardian appointed by the Court. The word "guardian" in that section refers not merely to a guardian appointed or declared by the Court, but also to other guardians, including guardians appointed by instruments. Under S. 41 (*b*), the rights of a person who claims to be the legally constituted guardian of a minor come to an end when the Court of Wards assumes superintendence. 150 I. C. 706=1934 O. 392.

APPLICATION OF DISCHARGE ON GROUND OF MAJORITY—EFFECT OF ORDER.—In an application by the guardian for a discharge on the ground of majority, it is not necessary for the Court to declare the minor to have attained majority. The Court, when it accepts the fact that the minor has attained majority, does not make any order under the Act, which would be final and not liable to be contested by suit or otherwise. It is open to the minor to show that he had not attained the age of majority on that date in spite of the orders passed by the Judge. 149 I.C. 781=1934 A.L.J. 318=1934 A. 406 (F.B.).

Sec. 41 (3).—The words "in his possession or control" should be taken in the narrow sense of "in this sense of the guardian having a power of disposition over it and not in the actual possession." It does not mean that if the guardian has converted the Government Promissory Notes of his ward and disposed of the property or proceeds, no order can be made against him under S. 41. 152 I.C. 1073=38 C.W.N. 438=1934 C. 520. On an application for the discharge of guardian, the Court has

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

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power to direct an investigation into accounts filed in Court. *See* 92 I.C. 98=1926 M. 419. But *see* 50 M. 80. S. 41 does not authorise a Court to order accounts to be rendered after the termination of the guardianship. 49 I.C. 132=29 C.L.J. 44. *See also* 18 S.L.R. 85=1925 S. 269. As to construction of section, *see* 10 L. 127=30 P.L.R. 680. S. 41 has no application to guardians whose powers had ceased by reason of their wards having attained majority or otherwise before the passing of the Act. 17 B. 566. *See also* 149 I.C. 781=1934 A. 406 (F.B.). Under S. 41 (3) the guardian is liable to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. But the Court has no power to compel the guardian to pay any sum found due from the guardian after the enquiry. Per *Curiam.*—It cannot be said, if the deceased guardian's accounts are wrong, the Court can compel the representative of the guardian to pay into Court any sum found due after an investigation. 130 I.C. 779=1931 L. 68. Where the only object is to protect the minor's property the object can well be served by directing the discharged guardian to furnish solvent security for payment of any amount that may be found due on scrutiny of accounts. It is hard on a guardian, to be called upon to deposit a large amount in cash. 1938 N.L.J. 202=1938 Nag. 399. The guardian must without prejudice to his title or to anything he could establish by suit be compelled to give up possession on ceasing to be guardian. 14 I.C. 674 (1). Property in guardian's possession or control and also accounts whether correct or not are to be handed over. 1930 S. 43. Under S. 41 (3) the guardian is liable to deliver any property in his possession or control belonging to the ward or any account in his possession or control relating to any past or present property of the ward. But the Court has no power to compel the guardian to pay any sum found due from the guardian after the enquiry. Per *Curiam.*—It cannot be said, if the deceased guardian's accounts are wrong, the Court can compel the representative of the guardian to pay into Court any sum found due after an investigation. 31 P. L.R. 965=1931 L. 68. *See also* 10 L. 168. The Court has power to require a *de facto* guardian to deliver the infant's properties to the guardian appointed under the Act. 51 I.C. 236=36 M. L.J. 189. Under S. 41 (3), a Court cannot compel the guardian of a minor to pay to the minor any sum found due from the guardian after an enquiry into the accounts, and the only order which it could pass is for the payment of the balance on the accounts exhibited by the guardian. 161 I.C. 493=1936 A.W.R. 100=1936 A.L.J. 36=1936 A. 179. A ward cannot maintain a suit against the widow and minor sons of his deceased guardian. 9 I.C. 591=74 P.W.R. 1911 (22 A. 332, Foll.; 11 Bom.L.R. 190; 7 I.C. 214, Dist.). Meaning of 'property belonging to the ward' in S. 41 (3). 51 I.C. 529=1918 M.W.N. 440. "Any cause" includes death of the minor which terminates the guardianship. 51 I.C. 529. Deathof ward—Power to direct guardian to hand over properties to heir. 51 I.C. 529=1918 M.W.N. 440. *See also* 42 A. 1=52 I.C. 167; 92 I.C. 196=1922 S. 269. Death of ward—Succession disputed—Court should not order guardian to hand over properties to one of the claimants. *See* 22 L.W. 642=92 I.C. 570. If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under S. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. 100 I.C. 807=1927 L. 266.

Sec. 41, Cl. (3) **and** (4).—When the *quandom* guardian has complied with the directions of the Court under sub-S. (3), the Court has full discretion in the matter under sub-S. (4) to discharge him, if it thinks fit. In exercising such discretion the Judge is exercising a jurisdiction vested in him and as such it cannot be interfered with in revision. I.L.R. (1938) Mad. 667=1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.). Where the ward is not satisfied by the accounts rendered by the guardian, it is the duty of the Court to order an enquiry into the accounts. The Court cannot shirk its duty by suggesting a remedy by way of a separate suit in view of the provisions of S. 48. 191 I.C. 108=1940 Rang. 246.

Cl. (4).—A suit will lie against the guardian's son and a surety to render accounts in the absence of an order of discharge of the guardian. 67 I.C. 935=3 Lah.L.J. 364. Even after discharge of guardian his liability continues for mistakes discovered subsequently. 23 A.L.J. 428=88 I.C. 165=1925 A. 457. To bar a suit by a ward on attaining majority against a guardian for rendition of accounts, the order of discharge under S. 41 (4) must be in express terms. 25 P. R. 1918=41 I.C. 344 (34 C. 211; 15 C.L.J. 57 Foll.). The proper thing for a Court when the guardian applies for a discharge, is to issue a notice to the minor. If the minor has no objection, the discharge may be given. If, however, he has any objections, the Court may look into them in a summary manner, and if it is satisfied *prima facie* that there is some force in the objections, it will refuse to declare the guardian discharged from his liabilities under S. 41 (4), and direct the minor to obtain redress by means of a suit, and the discharge will be given on the basis of the decision of the regular suit. 161 I.C. 493=1936 A.L.J. 36=1936 A. 179. Where a guardian of property has been appointed, on the minor coming of age, the proper course for a Court is either to refuse a discharge if it appeared that there was sufficient reason to keep open the question of the guardian's liability or to exercise its power under S. 41 (4) and discharge him if it considered that he has acted properly throughout and that no reasonable claim could be brought against him. I.L.R. (1938) Mad. 667=1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.). An order discharging a guardian under S. 41 (4) must be regarded as discharging him from all his

Appointment of successor to guardian dead, discharged or removed.

42. When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

CHAPTER IV.

SUPPLEMENTAL PROVISIONS.

Orders for regulating conduct or proceedings of guardians, and enforcement of those orders.

43. (1) The Court may, on the application of any person interested or of it own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

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liabilities as guardian except in respect of any frauds committed by him which may subsequently be discovered. "Liability" referred to in the clause is not confined to liabilities to which the guardian is made subject by the Act but includes all the liabilities of the guardian under the general law to render an account of his management to the minor. When the guardian has rendered accounts and has been discharged by the Court under S. 41 (4), it is not open to the minor after becoming a major to sue the guardian praying that an account should be taken of the management. The suit, to be maintainable, should be framed as one for falsifying or surcharging the account already rendered by the guardian and not merely for taking an account. 44 L.W. 441=1936 M. 868=71 M.L.J. 658. When an application is made by the mother of a minor under S. 39 for removal of a guardian appointed under the Act and for appointing herself as guardian of the property of the minor, and the Court orders the guardian to be discharged on the ground that he had furnished proper accounts which were checked and found correct by the Court, the discharge must be deemed to have been granted under S. 41 (4) of the Act. 44 L.W. 441=1936 M. 868=71 M.L.J. 658. *See also* 8 Mys.L.J. 25. Order of discharge of guardian must be express—Guardian cannot set up title of third person. 2 Pat.L.T. 556=61 I.C. 807=6 Pat.L.J. 273. *See also* 1932 L. 306. Minor attaining majority—Discharge of guardian—Filing accounts in Court—Court has no power to inquire into correctness of accounts—Separate suit is remedy of minor. 50 M. 80=1926 M. 977=51 M.L.J. 241. On this section, *see also* 26 A.L.J. 290=1928 A. 259.

TERMINATION OF GUARDIANSHIP—SUBSEQUENT ORDER FOR RESTORATION OF PROPERTY—POWER OF COURT.—An order for delivery of specific properties, to wit. Government Promissory Notes can be made against the guardian on an application made even after the termination of the guardianship by reason of the ward having attained majority. (5 C.W.N. 207, Dist.) 152 I.C. 1073=38 C.W.N. 438=1934 C. 520.

PROPERTY OF WARD NOT TAKEN POSSESSION OF BY THE GUARDIAN—ORDER FOR RESTORATION.—Though it may be the duty of the guardian, as soon as he was appointed as such, to take possession of the ornaments of the ward from whomsoever they were with, and his failure to do so is a great dereliction of duty, where, however, it is proved he had never obtained possession of those ornaments, no order can be made under S. 41 directing him to restore such property. 152 I.C. 1073=38 C.W.N. 438=1934 C. 520.

INTEREST, RATE OF ON RESTORATION.—Where the guardian is ordered, to restore certain Government Promissory Notes belonging to the ward, he can only be charged with interest at 3½ per cent., the interest which the ward would have got if those notes had been duly handed over to her. 152 I.C. 1073=38 C.W.N. 438=1934 C. 520.

Secs. 41 and 43: GUARDIAN REQUIRED TO CONTINUE PERIODICAL PAYMENTS—APPEALABILITY OF ORDER.—Where a guardian has been required to continue the fixed periodical payments which the Court required him to make as a condition of being appointed guardian, and it is because he is unwilling to comply with this condition that he refuses to act as guardian, the requisition is not an order under S. 41, but one under S. 43 and as such is appealable. 1935 L. 931.

Secs. 41 (3) and 45.—The power of a Court under S. 41 (3) to direct a guardian on termination of his guardianship to deliver any property belonging to the ward extends to monies belonging to the minor. S. 45 is not inapplicable to a guardian after his removal. In view of the above, it cannot be contended that the accounts filed by a guardian prior to his removal should be deemed to have been passed by the Court. 19 Pat.L.T. 485=1938 P.W.N. 509=1938 Pat. 398.

Sec. 42: SCOPE.—This section comes into operation only where a guardian is properly removed. 27 I.C. 28=20 C.L.J. 298. Object of the section. *See* 4 I.C. 603. Court has power to appoint a person who has not made an application himself and whose name is not mentioned in an application under this section as guardian. (*Ibid.*) An order appointing a guardian under S. 42 is appealable under S. 47. 93 I.C. 776=7 S.L.R. 90. Where a guardian of the person and property of a minor has been appointed, the minor should be treated as a minor or infant and would not be able to enter into a contract or to transact any kind of business himself until the age of 21, and when a guardian so appointed has resigned, another guardian should be appointed to the person and property of the minor even though he has exceeded the age of 18 years. 162 I.C. 716=1936 L. 142.

Sec. 43.—A guardian disobeying an order of the District Court under the Act can be ordered to give security for his own appearance but cannot be compelled to cause the production of

(2) Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

(3) Except where it appears that the object of making an order under sub-section (1) or sub-section (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-section (1), to the guardian or, in a case under sub-section (2), to the guardian who has not made the application.

(4) In case of disobedience to an order made under sub-section (1) or sub-section (2) the order may be enforced in the same manner as an injunction granted under [1]section 492 or 493 of the Code of Civil Procedure, in a case under

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[1] *See* now O. XXXIX, Rr. 1 and 2 in the First Schedule to the Code of Civil Procedure (Act V of 1908).

NOTES.

another person. 18 I.C. 922=24 M.L.J 231. The exercise of powers by District Judges over the guardians appointed by them, should be kept within limits provided by law, and should not be wholly arbitrary, made before necessary enquiries are held in the manner provided by law. Orders which are arbitrary are liable to be set aside. 64 C.L.J. 556=1937 C. 424. S. 43 (4) limits the exercise of the powers to punish a disobedience of orders passed under cls. (1) and (2). 103 I.C. 493. In the case of a minor for whom a personal guardian has been appointed and who undertook not to marry the minor without the Court's permission, the marriage or connivance at marriage with the ward of the Court without the consent of the Court is contempt of Court liable to be severely punished. These powers of the District Judge are however limited to the actual guardian in respect of whom the order is made and cannot be exercised as against persons indirectly committing the breach by assisting the guardian in the act. (42 C. 351, Rel. on.) 31 Bom.L.R. 1120=122 I.C. 140=1929 B. 417. "Regulating the conduct or proceedings of a guardian" cannot be interpreted as an order holding that prior to the date of such order guardian had caused loss to the estate which he should make good. (1926 M. 478, Not appr.) 121 I.C. 168=1930 S. 43. S. 43 enables a Court to regulate by its order the conduct of persons either appointed or declared by the Court. A person who is appointed executor under a will and who disclaims that he is a guardian of the minor sons of the testator cannot be declared to be a guardian against his will by reason of S. 17 (5) of the Act. S. 43 is therefore inapplicable to him, and does not justify the Court to impose conditions on him in regard to his discharge of duties as guardian. *Obiter.*—Under S. 39 which is wider in its scope than S. 43, the Court may remove a guardian appointed or declared by the Court or a guardian appointed by a will. 44 L.W. 513=1936 M. 843=71 M.L.J. 417. One of the duties of a guardian of a minor girl is to provide a suitable bridegroom. Whatever he does in relation to that is either conduct or proceedings within the meaning of S. 43. Where a Court authorises the guardian to celebrate the marriage of the girl, his act is a regulation of conduct or proceeding on the part of the guardian. The appellate Court has therefore the right to hear appeal from such an order under the provisions of S. 47 (1) read with S. 43. 1930 A.L.J. 152=121 I.C. 690=1930 A. 66. It is not the function of the District Judge to act as a match-maker for the female ward, much less on the application of the guardian of the property of the ward to select a particular bridegroom and force him upon the minor against the wishes of the minor and her step-mother who is appointed guardian of the person of the minor. The natural guardian or the guardian appointed by Court for the person of the minor should apply to the Court for sanction in granting which the wishes of the minor where the minor is old enough to form an intelligent preference, cannot be ignored: 56 B. 71=130 I.C. 732 (2)=34 Bom.L.R. 83=1932 B. 156. Legislature has neither expressly nor impliedly given power to the Court to record a definite finding as to the exact amount due by the guardian as a result of an enquiry binding upon the guardian and to compel its payment; and if there is a definite finding by a Court as to the amount which the ex-guardian had to pay as the result of the enquiry, to that extent the finding is not warranted by the provisions of the Act and is without jurisdiction. 121 I.C. 168=1930 S. 43. S. 43 read with S. 34 impliedly provide for expenditure in connection with the auditing of the accounts relating to the property of the ward. 11 P.L.T. 349=1930 P. 384 (2). As to power of Court to make order in relation to third parties, *see* 1934 A. 1043=1943 A.L.J. 1208.

APPLICATION FOR INVESTMENT OF MINOR'S MONEY—APPEAL.—An application under S. 43 (1) of the Act can be made only by a person interested in the minor. Where a stranger filed an application under S. 43 of the Act praying that a loan might be ordered to be given out of the minor's funds on a first mortgage of immovable properties and notices were issued to the personal guardian, the outstandings' guardian, and the immovable properties guardian of the minor and though the several guardians opposed the petition the Court ordered the grant of the loan, *held*, that the order was one regulating the conduct or proceedings of the guardian appointed by the Court, as contemplated in S. 4, against which an appeal would lie to the High Court under S. 47 (1) of the Act. *Held, further* that the petitioner was not a person interested sub-section (1), as if the ward were the plaintiff and the guardian were the defendant or, in a case under sub-section (2), as if the guardian who made the application were the plaintiff and the other guardian were the defendant.

(5) Except in a case under sub-section (2), nothing in this section shall apply to a Collector who is, as such, a guardian.

Penalty for removal of ward from jurisdiction.

44. If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of S. 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.

Penalty for contumacy'

45. (1) In the folllwing cases, namely :—

(*a*) if a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under section 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under S. 25, sub-section (1), or

(*b*) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under clause (*b*) of S. 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (*c*) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (*d*) of that section, or

(*c*) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under S. 41, sub-section (3),

the person, guardian or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.

NOTES.

in the minor and consequently had no *locus standi* to make the application under S. 43 (1). 57 M. 712=1934 M. 207=66 M.L.J. 351. On this section, *see also* 15 C.L.J. 147; 13 I.C. 351; 10 M.L.J. 305; 6 I.C. 862; 16 B. 307. *See also* 1932 L. 272, cited under S. 34, *supra.*

Ss. 43 to 45 have no application to cases where interim orders in the form of injunctions restraining persons from causing injury to the persons or property of minors are issued by the Court. 28 N.L.R. 332.

Sec. 45.—The words "recusancy" in S. 45 means something more than mere disobedience of an order under Cl. (*d*) in S. 34. 49 I.C. 624 ; 17 A.L.J. 300. On this section, *see also* 16 M.L.J. 286; 1 I.C. 338=11 Bom.L.R. 190. Section applies also to a guardian who has been removed. 175 I.C. 173=19 Pat.L.T. 485=1938 Pat. 398. Under S. 45 it is not open to the Court to take disciplinary action against a late guardian for non-compliance with an order issued to him to pay into Court an amount which was not admittedly due from him, but was arrived at by the Court itself on the basis of a report made by the present guardian, together with the Court's own inquiry into the correctness of that report. 1937 O.W.N. 809=1937 Oudh. 463. *See also* 1938 Pat. 398. Failure to deposit moneys alleged to be misappropriated—Imposition of fine, if and when legal. 25 C.L.J, 149=36 I.C. 286=21 C.W.N. 688. *See also* 4 P. 264=1925 P. 477: 23 A.L.J. 736=88 I.C. 444=1925 A. 785; 7 Pat.L.T. 473. An *ex parte* order imposing a fine under S. 45 for not producing a minor in Court is bad, Courts should not take proceedings, especially of a punitive kind without giving the party concerned notice to show cause against such proceedings. 40 P.L.R. 532. Power of Court to direct a person other than guardian to produce the minor in Court. 1929 C. 27. S. 45 is intended to punish wilful disobedience by the guardian to an order issued to him by the Court which it is within his power to comply with if he is so minded. Cl. (*e*) places failure by the legal representative of a deceased guardian to deliver any property or account in his possession on the same footing as failure by the guardian himself to do the same. This clause therefore refers only to wilful non-compliance with what is within the competence of the person ordered, to do which he has contumaciously declined and nothing more 121 I.C 168=1930 S. 43. Where the Court

(2) If a person who has been released from detention on giving an undertaking under sub-section (1) fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and recommitted to the civil jail.

Reports by Collectors and Subordinate Courts.

46. (1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report on any matter arising in any proceeding under this Act and treat the report as evidence.

(2) For the purpose of preparing the report, the Collector or the Judge of the subordinate Court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.

Orders appealable.

47. An appeal shall lie to the High Court from an order made by a [1][* *] Court—

LEG. REF.

[1] The word "District" was omitted by Act IV of 1926, S. 4.

NOTES.

acting under S. 45, imposed penalty on the guardian for non-compliance of an order to produce the minor without giving him an opportunity to show cause against infliction of the penalty, *held*, the order imposing penalty was obviously untenable. 114 I.C. 333=1929 L. 630. The Court has no authority under S. 45 to demand payment from the guardian of any more than the balance shown due by the guardian's accounts as put in. Such order cannot also be made when no enquiry is made, even assuming that the guardian's accounts are false, as to what the income and the expenditure for each year actually is. 125 I.C. 328=1930 L. 558. An order by the Court directing a guardian to pay unrealised purchase-money from his vendee —Order to pay unrealised money in Court or pay a daily fine—Whether *ultra vires*. 33 I.C. 918=20 C.W.N. 663. Appeal against order of fine. *See* 23 A.L.J. 736=88 I.C. 344=1925 A. 785. As to security by Court of guardian's accounts, *see* 107 I.C. 152=7 P. 144.

Sec. 46.—It is only when the District Court calls upon the Collector to report under S. 46 that it is open to the Court to treat it as evidence. 25 Bom.L.R. 1232=1924 B. 157. On this section, *see also* 26 B. 716; 7 A.L.J. 321; 23 B. 698.

APPEAL—HIGH COURT—INHERENT POWER.—The High Court, apart from Cl. 15 of the Letters Patent, has inherent jurisdiction to hear an appeal in a matter affecting a Ward of Court. 32 Bom.L.R. 1301. *See also* 121 I.C. 690. No appeal lies from an order calling on the guardian to pay such balance as the Court may find to be due from him. 34 P.L.R. 549=1933 L. 484=141 I.C. 590. An order entitling ward to recover a sum of money from his guardian is not an order regulating the conduct or proceedings of a guardian or settling a matter in difference, etc., within the meaning of S. 47 (i) of the Guardians and Wards Act, and is, therefore, not open to appeal. 154 I.C. 17=11 O.W.N. 1625=1935 O. 180. Interlocutory order—Refusal of application to be appointed guardian—No appeal lies. *See* 38 C.W.N. 1083. It is doubtful if an order appointing a guardian is appealable at the instance of the guardian on the ground that the security demanded from him by that order is excessive; but in any case revision would lie. 34 P.L.R. 333.

Secs. 47 and 48: GENERAL.—Orders under the Act are final except where they are challenged in appeal or revision. *See* 85 I.C. 667=1925 C. 1160; 1925 O. 260.

CASES WHERE APPEAL LIES.—An appeal lies only against an order appointing a person, guardian of the property of a minor. 30 M.L.J. 508=34 I.C. 432. But an order approving the security furnished by him and ratifying the original appointment is not appealable. 30 M.L.J. 508. (27 I.C. 921, Foll.) Order sanctioning sale of minor's property is appealable. 1924 N. 269. Whether an order directing the marriage of a minor ward is appealable, *see* 56 B. 71=137 I.C. 732=34 Bom.L.R. 83=1932 B. 156. Third party—Application for investment of minor's money—Order made against wishes of guardian—Appeal lies. *See* 57 M. 712=148 I.C. 583=1934 M. 207=66 M.L.J. 351, cited under S. 43, *supra*.

CASES WHERE NO APPEAL LIES.—An order refusing to remove a guardian is final and no appeal lies against it. 18 A.L.J. 624=56 I.C. 208; 1924 M. 327. *See also* 78 I.C. 138 (Order fixing remuneration of guardian). *See also* 45 M. 873=45 M.L.J. 481. There a no appeal against an order of the District Judge refusing to order the person in possession of a minor's property to hand over the property to an appointed guardian and referring the guardian to a separate suit. 40 P.L.R. 1912=13 I.C. 326. An order returning an application for guardianship for presentation to the Court having territorial jurisdiction, is not appealable. 53 I.C. 563=107 P.R. 1919. An order of the District Judge sanctioning a marriage of minor girl while an application for appointing a guardian for her is pending is not appealable. 44 B. 690=57 I.C. 79. Order fixing expense of maintenance and education of minor is not appealable. 1925 N. 141. *See also* 1938 N.L.J. 195=I.L.R. (1940) Nag. 221=1938 Nag. 495. Application dismissed for non-appearance—Second application if lies—Order dismissing the (*a*) under section 7, appointing or declaring or refusing to appoint or declare a guardian ; or

(*b*) under section 9, sub-section (3), returning an application ; or

(*c*) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian ; or,

(*d*) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto ; or,

(*e*) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section ; or

(*f*) under section 32, defining, restricting or extending the powers of a guardian ; or

(*g*) under section 39, removing a guardian ; or

(*h*) under section 40, refusing to discharge a guardian ; or

(*i*) under section 43 regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order ; or,

(*j*) under section 44 or section 45, imposing a penalty.

Finality of other orders.

48. Save as provided by the last foregoing section and by section 622[1] of the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise.

49. The costs of any proceeding under this Act, including the costs of main-

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LEG. REF.

[1] *See* now S. 115 of the Code of Civil Procedure (Act V of 1908).

NOTES.

latter application—Appeal. 18 I.C. 985=17 C. W.N. 429. Third party in possession of minor's property—If he can be compelled to hand it over to the guardian—Order refusing to compel—Not appealable. 40 P.L.R. 1912=13 I.C. 326. No appeal is allowed against an order calling upon a guardian to pay into Court the balance due from him on settlement of his accounts. 55 I.C. 587.

REVISION.—Orders under S. 34 are open to examination by the High Court on the revision side. 55 I.C. 587. *See also* 78 I.C. 138. It is doubtful if an order appointing a guardian is appealable at the instance of the guardian on the ground that the security demanded from him by that order is excessive; but in any case revision would lie. 34 P.L.R. 333.

REVIEW.—An order for appointing a guardian of a minor under S. 7 is not open to review. 4 Lah.L.J. 274=1922 L. 395 (143 P. R. 1906, Foll.). *See also* 1924 N. 269 (Order sanctioning sale of minor's property).

RIGHT OF SUIT.—[*See also* notes under S. 47, *supra.*] There is nothing in the Guardians and Wards Act to prevent a Hindu husband from maintaining a suit in the Civil Court for a declaration that a minor was his lawfully wedded wife. There is nothing in the Act to suggest that the marriage of a minor girl under his custody by the mother of the girl without the approbation of the former is null and void. 133 I.C. 289=1931 A.L.J. 816. An order dismissing an application for guardianship cannot be contested by a regular suit. 33 I.C. 987=24 P.W.R. 1916. S. 48 does not cover the case of a requisition under S. 41 (3) and a separate suit will lie to contest the propriety of the requisition under S. 41 (3). 51 I.C. 236=36 M.L.J. 189. Order of District Judge fixing amount for marriage expenses is not open to revision. 92 I.C. 482=1926 A. 301. Whether a valid sanction under S. 31 by a Judge could be assailed in any legal proceedings, *see* 27 O.C. 284=1925 O. 237. Powers of guardian—Right to institute suit—Delegation of powers. *See* 128 I.C. 763=1930 A. 875.

Sec. 47 (i).—*See* 154 I.C. 17=1935 O. 180. The performance of the marriage of the ward is one of the proceedings of a guardian referred to in S. 43, and an order refusing to sanction the marriage of the ward upon the application of the personal guardian is appealable under S. 47 (1). 184 I.C. 840=41 Bom.L.R. 757=1939 Bom. 366.

Sec. 48.—It is not open to a plaintiff in order to enforce a debt contracted by a minor to show that a judgment which has the effect of making him a minor (*i.e.*, an order appointing a guardian for the minor and thereby extending the period of minority) was obtained by collusion. S. 48 bars any contest regarding the validity of the judgment appointing a guardian except by the procedure of appeal or revision. Since the judgment falls under S. 43 of the Evidence Act, there is no power to attack that judgment under S. 44 of the Evidence Act. 53 L.W. 352=1941 M.W.N. 237=1941 Mad. 569 =(1941) 1 M.L.J. 492. The Court has no authority to lay down a period of limitation different from that prescribed by the Limitation Act and has no power to compel the ward to institute a suit for accounts against the guardian within that period under the threat that failure to sue as aforesaid would result in the discharge of the guardian. 191 I.C. 108=1940 Rang. 246.

Sec. 49.—There is no law which entitles a person to start a litigation for the appointment of guardian of a minor and then later on call upon the minor to recoup him of the cost of litigation. S. 49 gives the Court ample powers to order who should bear the cost of the litigation. If he carries on the litigation honestly for

Costs.

taining a guardian or other person in the civil jail, shall, subject to any rules made by the High Court under this Act, be in the discretion of the Court in which the proceeding is had.

Power of High Court to make rules.

50. (1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules consistent with this Act—

(*a*) as to the matters respecting which, and the time at which, reports should be called for from Collectors and Subordinate Courts;

(*b*) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;

(*c*) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in sections 28 and 29;

(*d*) as to the circumstances in which such requisitions as are mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 34 should be made;

(*e*) as to the preservation of statements and accounts delivered and exhibited by guardians;

(*f*) as to the inspection of those statements and accounts by persons interested;

[2][(*ff*) as to the audit of accounts under section 34-A, the class of persons who should be appointed to audit accounts, and the scales of remuneration to be granted to them;]

(*g*) as to the custody of money, and securities for money, belonging to wards;

(*h*) as to the securities on which money belonging to wards may be invested;

(*i*) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the Court; and

(*j*) generally, for the guidance of the Courts in carrying out the purposes of this Act.

(2) Rules under clauses (*a*) and (*i*) of sub-section (1) shall not have effect until they have been approved by the Provincial Government, nor shall any rule under this section have effect until it has been published in the Official Gazette.

Applicability of Act to guardians already appointed by Court.

51. A guardian appointed by or holding a certificate of administration from a Civil Court under any enactment repealed by this Act shall, save as may be prescribed, be subject to the provisions of this Act and of the rules made under it, as if he had been appointed or declared by the Court under Chapter II.

52. [*Amendment of Indian Majority Act.* [*Repealed by Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

53. [*Amendment of Chapter XXXI of the Code of Civil Procedure.*] *Repealed by the Code of Civil Procedure* (*V of* 1908), *S.* 15 *and Sch. V.*

THE SCHEDULE.

[ENACTMENTS REPEALED. *Repealed by the Repealing* (*Act I of* 1938), *S.* 2 *and Sch.*

LEG. REF.

[1] For rules made by the Judicial Commissioner, Central Provinces, see *Central Provinces Gazette*, 1908, Part I, p. 765.

[2] Inserted by Act XVII of 1929. *See* notes under S. 34-A.

For rules made by the Chief Commissioner, North-West Frontier Province, see *Gazette of India*, 1906, Part II, p. 546.

NOTES.

the benefit of the minor concerned, it is open to him to ask the Court to allow him the costs from the minor's estate. When he does not do that, a suit by him for recovery of the amount of costs from the minor will in no circumstances be maintainable. 1936 P. 194=16 Pat.L.T. 649.

Sec. 50.—Rules and forms made by the High Court requiring the appointment of guardian to be postponed to the furnishing and approval of security, if *ultra vires*. 34 I.C. 432=30 M.L.J. 508.

THE HINDU DISPOSITION OF PROPERTY ACT (XV OF 1916).

FREFATORY NOTE.—*Statement of Objects and Reasons.*—The object of the present Bill is to enable Hindus and Mussalmans to dispose of property by transfer *inter vivos* and by will for the benefit of unborn persons within certain limits. According to the Hindu law as now administered in British India, a gift in favour of a person not in existence at the date of the gift is void; and so also a bequest in favour of a person not in existence at the time of the testator's death. The same is the rule of Mahomedan Law, except that, under the provisions of the Mussalmans Wakf Validating Act, 1913, it is competent to a Mahomedan to settle property for the benefit of unborn persons even in perpetuity, provided the ultimate disposition is for the benefit of charity.

2. Every lawyer familiar with the Indian Courts must have come across a large number of settlements and wills made by Hindus and Mahomedans for the benefit of their children and grandchildren. The paramount object of the settler in all these cases has been to provide not only for his children and grandchildren then in existence, but also for those to be born hereafter. Instead, however, of giving effect to the settler's intention, the law as now administered completely defeats it. Even where a donor has only one child in existence at the date of the gift, and the gift is made in express terms for the benefit of all his children including those to be born hereafter, the law excludes from the benefit of all gift all children born subsequently to the date of the gift, to the entire subversion of the donor's intention. Similarly, the intention of testators to benefit by their wills, their children and grandchildren not in existence at the death of the testators is also defeated. It is to remedy these evils, and to give effect to the settler's or testator's intention, that the present Bill is proposed. The sole object of the Bill is to enable the Court to carry out the settler's or testator's intention, which, under the present state of the law, they are precluded from doing. At the same time, it is recognised that this can only be done within the limits allowed by the rule against perpetuity, and these limits are prescribed in clauses 4 and 5. The effect of the Bill, if passed into law, will be to enable Hindus and Mahomedans to make dispositions of their property to the same extent, and subject to the same limitations as other communities in British India.

Notes on Clasues : Clause (4).—This clause is a reproduction of section 100 of Act X of 1865 and section 13 of Act IV of 1882.

Clause (5).—This clause is a reproduction of section 101 of Act X of 1865, and section 14 of Act IV of 1882. It refers to the rule against perpetuity.

Clause (6).—The effect of this clause is to supersede the decision in L.R. 11 I.A. 164, and other cases following it.

Clause (7).—This clause is a reproduction of section 103 of Act X of 1865 and section 15 of Act IV of 1882. It is also in conformity with the rule of construction laid down by the Privy Council in the Tagore Case.

Clause (8).—The enactments referred to in this clause are the Hindu Wills Act, 1870, the Transfer of Property Act, 1882, and the Indian Trusts Act, 1882.

Select Committee's Report.—The following report of the Select Committee on the Bill to enable Hindus and Mussalmans to make disposition of property by transfer *inter vivos* or by will for the benefit of unborn persons was presented to the Indian Legislative Council on the 19th September, 1916:—

1. We, the undersigned Members of the Select Committee to which the Bill to enable Hindus and Mussalmans to make dispositions of property by transfer *inter vivos* or by will for the benefit of unborn persons was referred, have considered the Bill and have now the honour to submit this our Report, with the Bill as recast by us annexed thereto.

2. In obedience to the instructions contained in the order of reference, we have so amended the Bill as to confine its operation to Hindus, save that, in the exercise of the discretion vested in us, we have inserted an enabling cause permitting the Governor-General in Council to extend its provisions to the Khoja community in the whole or any part of India where he is satisfied that the community in question desires the extension. Having regard to the existence of the Hindu Transfers and Bequests Act, 1914 (Madras Act I of 1914), we have limited the extent clause of the Bill so as to exclude the Province of Madras from its operation, but we have inserted a power allowing the Governor-General in Council to extend the Act to that province should this course at any time be considered necessary or desirable.

3. The most important clause in the Bill was clause (3), and this clause, now clause (2), we have recast so as to provide that no disposition of property by a Hindu, whether by a transfer *inter vvios* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition. We consider that the clause as drawn in this form avoids many of the difficulties which would arise if we had retained the positive form in which it appeared in the Bill as referred to us.

4. Clauses (4) and (5) of the Bill, as referred to us, endeavour to combine the provisions of the relevant sections of the Indian Succession Act, 1865, and the Transfer of Property Act, 1882. The language of the two Acts differs in slight respects, and we think it in every way desirable not to

attempt to combine their provisions in a composite clause, and we have preferred in section 3 of the Bill, as revised by us, to incorporate the sections of the Acts in question by reference. We are well aware that referential legislation of this kind is open to objection, but, in the circumstances, we feel that the practical advantages of reference to a well-known Code, and the incorporation of all the decisions under these provisions outweigh any such objection. In this connection, we have thought it well to include the provisions of section 20 of the Transfer of Property Act, 1882, as the wording of the Transfer of Property Act, differing in that respect from the Indian Succession Act, does not without this section, make it clear that the property is vested.

5. The only other change of substance is the omission of clause (6) of the Bill as referred to us. A perusal of the opinions recorded on the Bill leads us to the conclusion that there is no clear manifestation of opinion in favour of the retention of the English rule laid down by the clause in question, and we think, in the absence of any consensus of opinion in favour of the rule, that the clause should be omitted. The remaining alterations are mere alterations of form consequent upon the manner in which the Bill has been recast.

THE HINDU DISPOSITION OF PROPERTY ACT (XV OF 1916).

Year.	No.	Short title.	Amendment.
1916	XV	The Hindu Disposition of Property Act, 1916.	XXI of 1929.

[28*th September*, 1916.

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition: it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU DISPOSITION OF PROPERTY ACT, 1916.

(2) It extends, in the first instance, to the whole of British India, except the Province of Madras: Provided that the [1][Provincial Government] may, by notification in the Official Gazette, extend this Act to the province of Madras.

Dispositions for the benefit of persons not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in section 2 shall be the following, namely:—

(*a*) in respect of dispositions by transfer *inter vivos*, those contained in [2][*Chapter II*] of the Transfer of Property Act, 1882, and

(*b*) in respect of disposition by will, those contained in [2][sections 113, 114, 115 and 116 of the Indian Succession Act, 1925].

4. *Failure of prior disposition Repealed by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929), S. 12.*

LEG. REF.

[1] Substituted for the words "Governor-General in Council" by A.O. 1937.

[2] Substituted by Act XXI of 1929, S. 12.

Application of this Act to the Khoja community.

5. Where the [1][Provincial Government] is of opinion that the Khoja community in [2][the Province] or any part thereof desire that the provisions of this Act should be extended to such community, [3][it] may, by notification in the Official Gazette, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja", as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

THE HINDU GAINS OF LEARNING ACT (XXX OF 1930).

[25th July, 1930.

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.

WHEREAS it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning; It is hereby enacted as follows:—

Definitions.

1. (1) This Act may be called THE HINDU GAINS OF LEARNING ACT, 1930.

(2) It extends to the whole of British India.

Short title and extent.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "acquirer" means a member of a Hindu undivided family, who acquires gains of learning;

(*b*) "gains of learning" means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and

(*c*) "learning" means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

Gains of learning not to be held not to be separate property of acquirer merely for certain reasons.

3. Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(*a*) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof; or

(*b*) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

Savings.

4. This Act shall not be deemed in any way to affect—

(*a*) the terms or incidents of any transfer of property made or effected before the commencement of this Act,

(*b*) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act,

(*c*) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act, or

(*d*) any remedy or proceeding in respect of such right or liability; or to render invalid or in any way affect anything done before the commencement

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LEG. REF.

[1] Substituted forwords "Governor-General in Council" by A.O., 1937.

[2] Substituted for words "British India" by *ibid.*

[3] Substituted for word 'he' by *ibid.*

of this Act in any proceeding pending in a Court at such commencement; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT (XII OF 1928).

[20*th September*, 1928.

An Act to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

WHEREAS it is expedient to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928.

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas.

(3) It shall not apply to any person governed by the Dayabhaga School of Hindu law.

Persons not to be excluded from inheritance or rights in joint family property.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect.

Saving and exception.

3. Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929).

PFEFATORY NOTE.—The following extrac;s from the Statement of Objects and Reasons would show the necessity for the passing of this Act :—

1. This Bill is a revival of a similar Bill introduced by the late Mr. T. V. Seshagiri Aiyar and passed by the first Assembly on the 27th March, 1923. Its consideration in another place was moved on the 19th July, 1923, but postponed to the next session, when no further action being taken, the Bill was suffered to lapse.

2. The Bill is intended to remove a sex disqualification which under the archaic rules of Hindu Law excludes one's nearest female relations, *e.g.*, the sister, the son's daughter and the daughter's daughter from inheritance altogether,while it gives the sister's son a very low place among *bandhus*, who can only take in the absence of *gotraja sapindas* and *samanodaks*, that is to say, the owner's agnatic relations even up to the 14th and later degrees,which gives him a very poor chance of succession in many cases. This condition is somewhat ameliorated in the case of persons subject to the Mayukha law where usage has given female heirs a somewhat better position, though, in the case of persons subject to the Dayabagha School of law, certain *bandhus* are not considered inferior to the *gotrajas* : still even under that system the sister is not an heir, though the sister's son is expressly mentioned in the Dayabhaga as the heir, while the son's daughter and the daughter's daughter have no place at all. In fairness to Bengal the Bill should have been extended even to that Province but an objection was taken in the first Assembly to its extension to that Province and its provision was, therefore, restricted to the two Provinces of the Mitakshara country.

3. The Bill is intended to include the son's daughter, daughter's daughter, and the sister amongst heritable *bandhus* which they are not under the Hindu Law, and improves the position of the sister's son by placing him immediately after the grandfather but before the granduncle.

4. This does not exhaust a very large number of female relations, *e.g.*, the son's son's daughter, the brother's daughter, the sister's daughter, who still remain outside the pale of heritable

bandhus. But the Bill being merely a revival of the Bill already passed by the Assembly, it is not proposed to enlarge upon its provisions for the present, though the whole law of Hindu inheritance is unsatisfactory and does not follow the line of affinity and affection, placing as it does agnatic kinsmen, however remote above all cognatic relations however near.

5. The Bill will not make any serious inroad upon the law as understood in the Province subject to Mayukha, nor will it seriously affect the law as understood in the Province of Madras where female *bandhus* are allowed to rank but only after all the male *bandhus* are exhausted.

6. The previous Bill passed by this Assembly was limited only to the two provinces of Madras and United Provinces, but the reason for this limitation is not understood, nor was it clear to the Council of State who gave it as one of their reasons for postponing its consideration. The Act is thus intended to rectify a glaring injustice to one's nearest relations in matters of inheritance.—(*Fort St. George Gazette*, Part III, 10th April, 1928, p. 187).

THE HINDU LAW OF INHERITANCE (AMENDMENT ACT ACT (II OF 1929).

[21*st February*, 1929.

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.

NOTES.

PREAMBLE.—"HINDU MALE DYING INTESTATE"—MEANING OF.—The words "Hindu male dying intestate", in the preamble of the Act, simply mean the Hindu male who has died or may die hereafter and they cannot be construed as meaning only a Hindu male who will hereafter die intestate as excluding one who has already died. 16 P. 215=18 Pat.L.T. 8=1937 P. 117 (F.B.).

Sec. 1: ACT, IF RETROSPECTIVE—SCOPE AND EFFECT.—The provisions of Act II of 1929 regulate succession to the estate of a Hindu male, governed by the law of the Mitakshara, who had died before the Act came into force but whose estate had vested in a female holder who was alive on 21st February, 1929, which is the date of the enforcement of the Act. 39 P.L.R. 448=1937 Lah. 196 (2). *See also* I.L.R. (1937) Mad. 948=46 L.W. 37=1937 Mad.699=(1937) 2 M.L.J. 209 (F.B.); 18 Pat.L.T. 8=16 Pat. 215=1937 Pat. 117 (F.B.); 1937 O.W.N. 672=1937 Oudh 402. The Act merely alters the order of succession but does not alter the date on which the succession opens out. It is clear the question about the order of succession is material only when the succession opens out, and so if that event occurs after the Act has come into force, the order given in the Act should apply. 172 I.C. 858=1938 Nag. 97. Succession to the estate of a Hindu who leaves a widow surviving him is governed by the state of things which exists, not at his death, but at the death of his widow. In other words, for the purposes of succession a Hindu is deemed to have died not on the date on which he actually died, but on the date of the death of his widow. Where a Hindu dies intestate before the passing of the Act but his widow who takes the estate dies after the coming into force of the Act, the Act will govern the succession to that estate. To apply the Act when the widow dies after the Act is in no sense to make the Act retrospective. 40 Bom.L.R. 120. Stridhan of maiden dying after 1929—Succession—Preferential right among heirs of father—Determination—Reference to Act is permissible. I.L.R. (1939) Bom. 228=41 Bom.L.R. 287=1939 Bom. 194. The object of the Hindu Law of Inheritance (Amendment) Act is to allow a new class of persons "to succeed by inheritance" and the Act applies to all cases where succession opens after its coming into force. Where a Hindu owner dies before the coming into force of the Act and is succeeded by his grandmother who dies after the Act comes into force, the sister is entitled to succeed to his estate under the Act as succession opens when the grandmother dies, and not when the last male owner dies. 161 I.C. 353=1936 A.L.J. 64=1936 A. 154. If succession opens out after the coming into force of Act II of 1929, a sister can take advantage of the provisions of the Act even though the last male owner had died previously. A sister can, therefore, after the Act has come into force, maintain a suit for a declaration that an agreement entered into between the widows and the reversioners on the last male owner's death is not binding on her, even though the agreement was executed before the Act came into force. 163 I.C. 756=1936 A.L.J. 659=1936 A. 507 (F.B.). The Hindu Law of Inheritance (Amendment) Act applies even to cases where the last male Hindu owner had died prior to the coming of that Act into force, and after the passing of that Act, the sister passing has a reversionary right to his estate. Where, therefore, the last male owner died before the Act came into force and he was succeeded by his mother who remained in possession of the property till after the Act came into force and then executed a deed of gift in favour of her daughter, the deed of gift being by one limited owner in favour of another who is the next reversionary heir would have the effect of acceleration of the interest in her favour. 1937 O. 204=12 Luck. 324=1936 O.W.N. 712. Act II of 1929 is not retrospective and a sister is not an heir where the Hindu male throug hwhom she claims died before the passing of the Act. 146 I.C. 511 (1)=1933 L. 777. *See also* 153 I.C. 545=1935 A. 203; 1933 M.W.N. 1904;

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenery and not disposed of by will.

2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother:

Order of succession of certain heirs.

NOTES.

1935 L. 83. Act II of 1929 applies to the case of a person who dies before it came into force, if his widow, who inherits his estate, is alive at the time of its enforcement. (1932 L. 361 and 1934 P. 324, Foll.) 17 L. 356=1936 L. 124. Act does apply to cases in which a male governed by the law of Mitakshara has died before the date on which the Act came into force leaving a widow who was alive on such date. (1936 L. 124, Foll.) 163 I.C. 480 (1)=1936 L. 139. *See also* 1937 L. 196. Where a widow is in possession of her husband's estate as a limited owner, the question whether certain persons are heirs under Act II of 1929 depends on the date of the death of the widow and not on the date of the death of the last male-holder. In such cases the question is not whether Act II of 1929 is retrospective. 150 I.C. 1039=15 P. L.T. 707=1934 P. 324. But *see also* 1933 M. W.N. 1404 On the language of the Hindu Law of Inheritance (Amendment) Act as it stands, no question of its retrospective operation arises. The mere fact that the change of law introduced by the Act affects also the estates of persons who have died intestate before the Act does not, by itself, make the Act retrospective in its operation The critical date being the date when the succession opens, the Act would be retrospective only if it was applied to cases where the succession opened before the Act. That the Act may in certain cases apply to the estates of persons who died before the passing of the Act cannot prejudicially affect any rights which the reversioner possesses only in a representative capacity. It cannot therefore be said that the Act is retrospective. 16 P. 215=1937 P. 117 (F.B.). The effect of the Hindu Law of Inheritance (Amendment) Act of 1929 is simply to substitute a revised list of reversionary heirs to a Hindu male with certain additions and alterations in place of the list which was in force under the law as it stood before the Act. The Act, however, makes no reference to the date of death of the Hindu male and there is no reason why the operation of the Act should depend upon that date. The only date which is material is the date when the succession opens or when the question of succession to the estate arises. If such a question arose before the Act came into force, the succession would be governed by the Hindu Law as it stood then ; but if the question were to arise after the Act, the Act would apply. The only criterion to be applied in determining whether the Act is applicable to a particular case is to enquire when the succession opened and whether the conditions laid down in the Act for its application have been fulfilled. The question of the applicability of the Act will arise only when the succession opens and not before it. 16 P. 215=18 Pat.L.T. 8=1937 P. 117 (F.B.). The Act was designed not only to give a sister a higher position in the order of succession than she previously held in provinces where she was already an heir but also to constitute her an heir even in provinces where she was not previously an heir according to the prevailing view of Hindu Law. 10 O.W.N. 424=1933 O. 231; 168 I.C. 733=1937 Oudh 402=1937 O.W.N. 672. *See also* 57 B. 377=35 Bom.L.R. 397=1933 B. 272; 146 I.C. 511=1933 L. 777. Right to challenge alienation by widow already barred by time—Persons becoming reversioners by reason of this Act—Right of suit. *See* 19 Pat.L. T. 145=1938 P. 510.

Sec. 1 (2): "PROPERTY NOT DISPOSED OF BY WILL"—MEANING OF.—The words "not disposed of by will" which occur at the end of the sub-s. (2) of S. 1 of the Act are comprehensive enough to cover also the case of such property as cannot be disposed of by will. 16 P. 215=18 Pat.L.T. 8=1937 P. 117 (F.B.). It appears to be probable that the Hindu Law of Inheritance (Amendment) Act, 1929, should apply to Jains and that the term 'Hindu' should be interpreted as including Jains more particularly in view of the wording in S 1 (2) of the Act. 1938 N.L.J. 168=1938 Nag. 298. The Act applies not only to persons who were heirs under some sub-schools of the Mitakshara but also to son's daughter, daughter's daughter, sister and sister's son in all the provinces governed by the Mitakshara and makes them heirs in those provinces. 15 Luck. 229=1940 Oudh 138 (F.B.). The Hindu Law of Inheritance (Amendment) Act applies to Hindus including Jains, and to all persons governed by the Mitakshara law including those governed by the Mitakshara law as modified by the Mayukha. Among Jains from Gujarat who have migrated and settled in the Belgaum District, the sister's son is entitled to succeed to a deceased male in preference to a father's sister. The position of the father's sister as a preferential heir as a gotraja sapinda is not saved by S. 3 (*a*) of the Act. I.L.R. (1941) Bom. 250=43 Bom.L.R. 114=1941 Bom. 233.

Sec. 2.—It is quite true that Act II of 1929 is very limited in its scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the property of a female. But where a husband

Provided that a sister's son shall not include a son adopted after the sister's death.

Savings. 3. Nothing in this Act shall—

(*a*) affect any special family or local custom having the force of law, or

(*b*) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(*c*) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

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succeeds to his wife's stridhana property, and if he is dead, it descends in the same way as if it had belonged to the husband himself; and to ascertain as to who the heirs of the husband are, the Court must *ex necessitate rei*, refer to the law governing succession to the property of the husband in force at the time when succession opens out. If at such time Act II of 1929 has come into force, it is that Act which governs succession and the property cannot be deemed to be property of a female. 1937 Lah. 196. *R* gifted certain property inherited from her son to her daughter's son. In April, 1925, the reversioners obtained a decree to the effect that the gift did not affect the reversioner's rights. The donee preferred an appeal and during its pendency Act II of 1929 came into force. The donor being alive, *held*, that the suit should be dismissed because under the new Act the donee was entitled to succeed *R* in preference to the plaintiff. *Semble* : Had *R* died before the Act came into force the position would have been different. 13 L. 178=138 I.C. 291=1932 L. 361. The word "sister" in S. 2 of Act II of 1929 does not include a half-sister either uterine or consanguine. 1933 A. 491=145 I.C. 529=1933 A.L.J. 680 (F.B.). "Sister" in S. 2 of the Act cannot be interpreted as including a half-sister. The Act must be strictly construed and words must not be read into it which are not there. The Legislature must, while passing the Act, be presumed to have been well aware of the well-recognised distinction existing under the Hindu Law between a sister and a half-sister, and if it was their intention to include a half-sister also within the new class of heirs, she would have been specifically mentioned in S. 2. 19 Pat. 382=21 Pat.L.T. 660=1940 Pat. 310. *See also* 47 L.W. 286=1938 Mad. 364; 45 L.W. 688=1937 Mad. 555. The word "sister" as used in S. 2 of Act II of 1929 must be interpreted according to the plain meaning of the word in the English language, which ordinarily means a sister of the full blood. 155 I.C. 94=1935 O.W.N. 545=1935 O. 332. The term "sister" in S. 2 includes half-sister, that is to say, a sister by the same father. I.L.R. (1938) Nag. 115=1938 Nag. 134 (F.B.). The word 'sister' in S. 2 of the Act includes half sister. Consequently the son of the half blood and the son of the full-blood both fall within the class referred to as 'sister's son' in the Act. It does not, however, follow that in contest between the son of a sister of the full-blood and the son of a sister of the half-blood the two would be deemed "equal 172 I.C. 858=1938 Nag. 97. The object of the Act was to legalise the position of certain heirs including the sister and it was not intended to change for the worse the position which the sister holds in the Bombay Presidency. *Held*, that the sister was the preferential heir to the brother's widow. 35 Bom.L.R. 397=1933 B. 272=57 B. 377.

SISTER—RIGHT TO SUCCEED TO MOTHER'S ESTATE.—A sister is an heir and is entitled to succeed to the estate inherited by mother, as such, after her death. 1934 A. 469.

"SISTER'S SON"—MEANING OF—IF INCLUDES SON OF HALF-SISTER.—The words "sister's son" in S. 2 mean only the son of a sister of the full blood and do not include the son of a half-sister. The Act which has introduced modifications in the line of succession ordained by the Hindu Law must be strictly construed. 1937 A.L.J. 767=1937 All. 665. *See also* 45 L.W. 688=1937 Mad. 555. It is quite true that Act II of 1929 is very limited in its scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the property of a female. But where a husband succeeds to his wife's stridhana property, and if he is dead, it descends in the same way as if it had belonged to the husband himself; and to ascertain as to who the heirs of the husband are, the Court must *ex necessitate rei*, refer to the law governing succession to the property of the husband in force at the time when succession opens out. If at such time Act II of 1929 has come into force, it is that Act which governs succession and the property cannot be deemed to be property of a female. 39 P.L.R. 448=1937 Lah. 196 (2).

Sec. 3 (a).—A custom in its legal sense is some established practice at variance with the general law. The practice by which sisters were excluded from inheritance in Oudh is merely in accordance with Hindu Law as interpreted there and hence it is not a special custom within the meaning of S. 3 (*a*) of Act II of 1929 so as to exclude sisters from inheritance after the passing of the Act. 10 O.W.N. 424=1933 O. 231. Whether or not the custom referred to in S. 3 (*a*) must be one in derogation of the law of the school governing the parties, it is clear that judicial decisions based either on inferences drawn from the texts or on the principle of *stare decisis* cannot constitute a custom within the meaning of the Act, I.L.R. (1941) Bom. 250=

THE HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856).

Short title given, Act XIV of 1897.

Declared in force—

Throughout British India, except as regards the Scheduled Districts Act, XV of 1874, S. 3;

In the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3;

In the Angul District, Reg. III of 1913, S. 3.

PREFATORY NOTE.—" Our Legislature has on principle been slow to interfere with the marriage laws of India; and in the legalizing of widow marriage, its interference was not gratuitous, but was sought by the Hindus themselves. Pandit Iswar Chandra Vidyasagar pointed out in his celebrated tract that the re-marriage of widows was not unauthorised by the Sastras; and his opinion was accepted by a considerable body of his educated countryrem; and it was to meet their wishes that the Legislature felt induced to pass Act XV of 1856. This we learn from the preamble to this Act." (*See* Gooroodas Banerjee's *Marriage and Stridhanam*, Tagore Law Lectures for 1878, 2nd Ed., 1896, p. 256.)

The following remarks on the provisions of the Act by Justice Gooroodas Banerjee may well be noted:—

The Act does not give any rules for determining the eligibility of parties for marriage. It is clearly its intention that this matter sholud be governed by the ordinary rules of Hindu Law. But these rules are not sufficient to meet every point which might arise in connection with the re-marriage of widows. Thus, one of these rules of selection requires that the parties to marriage shouln be of different *gotras*; but what is to be regarded as the *gotra* of a widow—the *gotra* of her father, in which she was born or that of her deceased husband, to which she has been transferred by marriage? *Vidyasagara* maintains that her father's *gotra* is to be deemed the *gotra* of a widow for the purposes of her re-marriage, and considering that her father or some other paternal relation is still her guardian in marriage, I think that view is in accordance with the intention of the Act. Again, the ordinary rules about prohibited degrees do not prohibit the marriage of a man with the mother of his wife, however, repugnant to our feelings it may be. No express rule for the prohibition of such marriage is, however, necessary in the Hindu Law, as it prohibits widow marriage altogether. But now that widow marriage has been legalized, the want of such prohibition may be deemed a defect in the law in theory, though, in practice, the universal feeling of repugnance to such improper unions would be sufficient to supply the place of prohibitory rules." (*Ibid..* pp. 259-263.)

It is the general rule of the Hindu Law, as stated by the Privy Council in *Moniram Kolita* v. *Keri Kolitani*, 5 C. 776 (788) " that an estate once vested by succession or inheritance is not divested by any act or incapacity which, before succession, would have formed a ground for exclusion from inheritance." and it was held not to have been established that the estate of a widow formed an exception to the rule. But it is equally clear that there were grounds, which, under the Hindu Law, caused a forfeiture of a vested estate. Change of religion did so before Act XXI of 1850 and the Regulations that preceded it. Degradation from caste had the same effect as was pointed out by the Privy Council in the case above referred to at page 792. It is an important question whether a second marriage is a circumstance, like those just mentioned, which determines a widow's estate.

We cannot expect to find express texts on this point in the usual authorities on Hindu Law, because second marriage was a thing they did not contemplate; we cannot expect more than an indication of the view they took of the nature of a widow's estate.

The view is clearly expressed in the text of *Vrihaspathi* which *Jimutavahana* makes the basis of his reasoning on this subject of a widow's estate (*Dayabhaga XI*, 1.) " of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive?" This is difficult to reconcile with a right in a widow who ceases to be the wife or half of the body of her late husband, and becomes the wife and half of the body of another man, to keep the estate of her late husband. The view that on principle a second marriage determined a widow's estate is strengthened by the fact that where second marriages were sanctioned by custom, the further rule seems almost always to have followed, that such re-marriage entailed a forfeiture of the first husband's estate. (*See* the cases cited in Mayne's Hindu Law, section 512, and in West and Buhler, Bk. I, ch. 3, S. 77-a, 3rd ed., p. 429); and again the adoption of the rule of forfeiture on second marriage in the Hindu Widow's Re-marriage Act (XV of 1856) seems to be an indication that the Legislature considered that rule to be in accordance with the principles of Hindu Law. If, therefore, we had to decide this point upon the principles of Hindu Law, and without reference to express legislative enactments, we should be disposed to hold that the widow's estate was determined by her marrying a second time and we do not think this would be in any way inconsistent with what was held in *Moniram Kolita* v. *Keri Kolitani*, 5 C. 776, namely, that a widow's estate is not forfeited by unchastity during widowhood; for there seems to be a very broad distinction between misconduct on the part of a widow, as a widow and her ceasing to be a widow."—19 C. 289 (292 at (per *Wilson, J.*)

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43 Bom.L.R. 114=1941 Bom. 233. The position of the father's sister as a preferential heir as a *gotraja sapinda* is not saved by S. 3 (*a*) of the Act. I.L.R. (1941) Bom. 250=43 Bom.L.R 114=1941 Bom. 233.

THE HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856).

CONTENTS.

Preamble.
Sections.
1. Marriage of Hindu widows legalised.
2. Rights of widow in deceased husband's property to cease on her re-marriage.
3. Guardianship of children of deceased husband on the re-marriage of his widow.
4. Nothing in this Act to render any childless widow capable of inheriting.
5. Saving of rights of widow marrying, except as provided in sections 2 to 4.
Sections.
6. Ceremonies constituting valid marriage to have same effect on widow's marriage.
7. Consent to re-marriage of minor widow.
Punishment for abetting marriage made contrary to this section.
Effect of such marriage.
Proviso.
Consent to re-marriage of major widow.

An Act to remove all legal obstacles to the marriage of Hindu widows.

Preamble.

Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and

Whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience; and

Whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; It is enacted as follows:—

Marriage of Hindu widows legalised.

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

LEG. REF.

[1] Short title: "The Hindu Widows' Re-marriage Act 1866". *See* the Indian Short Titles Act (XIV of 1897).

NOTES.

Sec. 1: Scope and Application of Act.—Act is not retrospective in its operation. 28 Bom.L.R. 431=94 I.C. 704=1926 B. 381. All cases of re-marriage of Hindu widows are governed by Act XV of 1856. Customs can only take effect within the four walls of that Act. 12 I.C. 623. But *see also* 65 I.C. 117=24 O.C. 297. The Act applies to all Hindu widows irrespective of caste regulations concerning re-marriage. 17 I.C. 133=8 N.L.R. 128. The Act was intended to render re-marriage valid and to legalize the legitimacy of children. It conferred a benefit on those who could not re-marry, but at the same time imposed a restriction on them. It was not intended to deprive those who already possessed the right to re-marry, of whatever rights they enjoyed in their deceased husband's properties. 1932 A.L.J. 941=1932 A. 617 (F.B.). Neither the conversion of a widow into Mahomedanism nor her marriage with a Mahomedan husband after conversion could divest her of her interest in her deceased Hindu husband's estate. 35 A 466=20 I.C. 335=11 A.L.J. 678. But *see also* 59 B. 417=37 Bom.L.R. 150=1935 B. 298.

Custom.—Act does not apply where by custom, a widow is permitted to re-marry and does not forfeit the property inherited by her from her former husband. 65 I.C. 117=24 O.C. 297. *See also* 140 I.C. 631=1932 A.L.J. 941 =1932 A. 617; 19 C. 289; 11 A. 330; 11 B. 119; 31 A. 161; 15 C.W.N. 579; 32 A. 489; 11 A.L.J. 693; 12 I.C. 623; 7 O.W.N. 206=121 I.C. 899; 12 L.L.J. 196; 122 I.C. 512. But *see also* 3 Luck. 610; 1929 M. 765=57 M.L.J. 253 Act does not override the customs prevailing in Punjab as regards non-forfeiture of widow's rights over her deceased husband's property by

Rights of widow in deceased husband's property to cease on her re-marriage.

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then

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virtue of S. 7 of Act IV of 1872 (Punjab Laws Act, 1924), S. 17.

OBJECT OF THE ACT.—It is not the object of the Act to deprive a Hindu widow upon her re-marriage of any right or interest which she had at the time of her re-marriage. 4 Pat.L.T. 650=1924 P. 233.

RIGHT OF INHERITANCE.—When after the re-marriage of a widow her son dies and the question is of her right of succeeding to him, the Act must be held not to affect her rights. 1 Pat.L.T. 650=1924 P. 233. A Hindu widow can inherit from her son by a former marriage, though she had re-married at the date of her son's death. 26 C.W.N. 925=1922 C. 140 (11 W.R. 82, Ref.; 29 B. 91, Ref.). A re-married Hindu widow succeeds to the property of her son by her first husband, whether or not the Act applies. 70 I.C. 1048=39 C.L.J. 88 (11 W.R. 82, Foll.).

Sec. 2: RIGHT OF WIDOW RE-MARRYING ACCORDING TO CASTE CUSTOM—FORFEITURE—CONFLICT OF RULINGS.—S. 2 applies not only to widows who could not re-marry before the passing of the Act but also to those who were not so precluded from re-marrying either by law or custom. In either case, the widow forfeits the estate inherited by her from her former husband. 50 C. 727=27 C.W.N. 669=1924 C. 98. But *see also* 4 Pat.L.T. 650. *Also* 55 A. 240=1932 A.L.J. 941=1932 A. 617 (F. B.) cited *infra.* S. 2 does not apply to the case of those widows who are entitled under the custom of their caste to re-marry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture of the Hindu widow's estate on re-marriage under the Act in such a case, nor can such forfeiture ensue as a matter of equity as it is against natural justice. The proof of mere custom of re-marriage would not be sufficient to involve forfeiture under the Hindu Law and it would be necessary for the party claiming that the estate has been forfeited on account of re-marriage to prove that there is a custom of such forfeiture in such a contingency. 140 I.C. 631=1932 A.L.J. 941=1932 A. 617 (F.B.). But *see* 154 I.C. 372=1935 P. 58. A Hindu widow of the Jat community, among whom the custom of re-marriage has existed even before 1856, does not forfeit her rights in her husband's estate on her re-marriage by virtue of S. 2 of the Act. 49 A. 203=100 I.C. 734=1927 A. 523. S. 2 of the Act applies also to Hindu castes in which widow re-marriage is permissible and a custom permitting the retention, by the re-marrying widow, of her estate in her first husband's property after re-marriage cannot be pleaded in the face of the express statutory forfeiture of such estate enacted by the section. 1929 M. 765=57 M.L.J. 253. *See also*, 122 I.C. 512. S. 2 of the Hindu Widows' Re-marriage Act must necessarily apply where the validity of a Hindu widow's re-marriage arises from the statutory provisions of the Act and is not independent of it, and the widow on re-marriage would forfeit her husband's estate. Whether forfeiture should apply as a matter of course or should depend upon proof of a special custom entailing forfeiture on re-marriage depends upon the further question whether the re-marriage has been contracted under the Act or under a custom wholly independent of the Act. Where a person claims the estate on the ground that the widow had forfeited the estate by her re-marriage, before he can be called upon to establish a custom entailing forfeiture of the estate on re-marriage, it has to be found that the widow validly contracted a second marriage under a custom independent of the Act. Such a custom should be ancient and must be in existence before the passing of the Act of 1856. 1937 A.L.J. 255=1937 A. 343. A Hindu widow, when she re-marries loses the estate which she had inherited from her deceased Hindu husband, even though, in the particular sect to which she belongs, the re-marriage of a widow is permitted. 154 I.C. 875=1935 P. 58. If a Hindu widow is allowed to re-marry by the custom of her caste, there is no need for recourse to the Act for the validity of her marriage and there is, therefore, no forfeiture, under that Act, of her right to maintenance. (31 A. 161, Foll.) 125 I.C. 468=1930 A. 593. A Hindu widow's right to retain property inherited from the husband ceases on her re-marriage, and the reversioners have a right to immediate possession of the properties on her re-marriage. 15 I.C. 602=12 M.L.T. 158; 29 I.C. 612=11 N.L.R. 86. Apart from the Act, under the Hindu Law, a widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she re-marries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. 3 P.L.T. 551 (11 A. 330; 31 A. 161; 32 A. 489, Diss.; 1 M. 226; 41 M. 1078; 21 C.W.N. 906; 22 C. 589; 14 C.W.N. 346; 8 C.L.J. 542, Rel.) An outcaste Hindu widow does not cease to be a Hindu and if she re-marries, the provisions of the Act would apply. An alienation by her of her first husband's property after her re-marriage would be invalid. 54 I.C. 820. A Hindu widow loses all her rights in the property of her first husband even if she is converted and married to a person of another religion. 41 M. 1078=35 M.L.J. 317=48 I.C. 50 (F.B.) (overruling 44 I.C. 299=7 L.W. 411=1918 M.W.N. 274). *See* died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Guardianship of children of deceased husband on the re-marriage of his widow.

3. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

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also 35 A. 466=20 I.C. 335=11 A.L.J. 678. Even a Hindu widow who becomes a Mahomedan and re-marries, loses her right to her husband's property. 3 P.L.T. 551. The expression "any widow" in S. 2 includes all widows who being Hindus became widows and is wide enough to cover the case of such a widow re-marrying a Hindu or a member of another religion. A Hindu widow who therefore becomes a convert to Mahomedanism and then marries a Mahomedan forfeits whatever interest she has in her husband's property. S. 2 would apply to her notwithstanding her renunciation of faith and subsequent marriage with a non-Hindu. 59 B. 417=1935 B. 298=37 Bom.L.R. 150. Where a Hindu woman becomes a widow and afterwards embraces Mahomedanism and marries a Mahomedan, and where afterwards her Hindu sister devises property to her by will, the right of the devisee to the property is not affected. Similarly when the devisee dies leaving a sister who has also embraced Islam after her widowhood and married a Mahomedan the latter sister can succeed to her property. 87 I.C. 621=1925 M. 861. Gift by father-in-law to widowed daughter-in-law—Re-marriage—Effect on gift. 1924 M. 600=47 M.L.J. 1. This Act applies even to widows among whom there is a caste custom permitting re-marriage. This Act operates as a forfeiture not only of property inherited from her former husband but of all existing rights at the time of re-marriage. 31 I.C. 290=11 N.L.R. 116. But *see contra* 61 I.C. 303=24 O.C. 11; 32 I.C. 338; 40 I.C. 783=21 C.W.N. 900. She will also forfeit her right to maintenance out of the deceased husband's property. 40 I.C. 783=21 C.W.N. 906. But *see* 48 L.W. 592=1938 Mad. 994=(1938) 2 M.L.J. 701. Act merely enables widows of those castes to re-marry, who by their custom are prevented from doing so and declares the consequences entitled thereon; it does not alter any customs relating to re-marriage or its legal incidents. 61 I.C. 303=24 O.C. 11. S. 2 of the Act does not apply to a case where a Hindu widow re-marries according to a custom and such custom allows her to retain the property inherited from her first husband. 61 I.C. 303.

ALIENATION BY HINDU WIDOW.—An alienation by a Hindu widow of the property of her deceased husband for purposes not binding on the estate ceases to be effective on her re-marriage, even if such re-marriage be permitted by the custom of her caste and the next reversioner is entitled, on her re-marriage, to possession of the property as against the alienee. There is no analogy as regards the rights of the alienee between surrender and re-marriage. 1932 M. 120=62 M.L.J. 131.

BURDEN OF PROOF.—A Hindu widow who re-marries and who seeks to escape the operation of S. 2 of the Act, has the onus on her of establishing the existence of a custom, which is ancient and which has not come into existence since 1856, sanctioning the re-marriage of widows. 58 A. 1034=1937 A.L.J. 251=1937 A. 230.

Sec. 3.—There is nothing in the provisions of the Act that renders obligatory for the Court to remove a re-married widow from the guardianship of her minor sons. 38 C. 862=15 C.W.N. 579. *See also* 32 P.W.R. 1913; 4 A. 195 (as to meaning of "children"); 24 B. 89. A widow does not cease to be a testamentary guardian of a minor son by re-marriage. 47 P.L.R. 1913=18 I.C. 133. The provisions of S. 3 have no application to a case, where the widow belongs to a caste in which re-marriage is permitted. Hence where the widow has married under the Customary law the provisions of S. 3 are inapplicable to her and therefore she does not forfeit her right of guardianship of her children. 183 I.C. 513=1939 Lah. 125. *See also* 61 I.C. 303. Under Hindu Law the mother is, after the

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in sections 2 to 4.

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

Consent to re-marriage of minor widow.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grand-

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NOTES.

father, the natural and legal guardian of her children and she does not lose her right by re-marriage in cases when such re-marriage is recognised as valid by custom. To such cases S. 3 was obviously not intended to apply. And even under the Act the mother is not considered to be physically dead and may, in appropriate cases, be appointed as guardian though not in her own natural right, but where it is for the welfare of the minor to do so. (1 L. 146 and 38 C. 862, Ref.) 1933 L. 817. On this section, *see also* 15 C.W.N. 579; 11 W.R. 82; 24 B. 89; 33 B. 107.

Sec. 5.—[*See also* notes under secs. 1, 2 and 3, *supra.*] The object of the Act is to remove all legal obstacles to Hindu widow re-marriages. S. 5 was never intended to lay down any proposition regarding the inheritance by a Hindu widow. 45 B. 1247=63 I.C. 947. A re-married Hindu widow is not entitled to inherit as a gotraja sapinda to the relations of her first husband. 45 B. 1247.

Sec. 6.—The purpose of the Hindu Widow's Re-marriage Act is not to limit but rather to increase the rights of Hindu widows and not to restrict any existing custom of re-marriage among Hindu widow's but to give the right to those to whom it had hitherto been denied. S. 6 of the Act does not apply to a case where the re-marriage is among people among whom widow re-marriage is recognized by custom. Where, therefore, the re-marriage is among sweepers, among whom widow re-marriage is generally recognized, it is not rendered invalid merely because the ceremonies necessary for the first marriage, as required by S. 6, have not been gone through. It is sufficient if the conditions essential by custom to validate the re-marriage have been fulfilled and the widow becomes a married wife of the person to whom she is married, within the meaning of Ss. 497 and 498, Penal Code. 30 S.L.R. 421=167 I.C. 366=1937 S. 42. To prove the re-marriage of Hindu widow the same religious rites and ceremonies that are necessary to constitute her first marriage valid should be shown to have been observed in her re-marriage. Where, therefore, a Hindu widow had been validly married in the Brahma form but the observance of the aforesaid rites and ceremonies was not established as regards the re-marriage. *Held*, that the validity of the re-marriage was not established. 7 O.W.N. 753=1930 O. 426.

Secs. 6 and 7.—There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies. The performance therefore of the necessary religious rites is necessary for the completion of a marriage even in a gandhrva form, of which re-marriage of a widow is an instance. So, neither the consent of a widow to re-marry herself under last paragraph of S. 7 nor mere talk by a person in the presence of visitors of his intention to take her as his wife is sufficient to constitute a valid marriage in the absence of the performance of some religious or secular rites. (12 Mad. 72, Rel. on.) 174 I.C. 342=1938 Rang. 59.

Sec. 7—The marriage of a minor widow is not valid unless consented to by the persons enumerated in S. 7. But if the first marriage has been consummated, the consent of the minor widow herself is enough. 9 P.L.R. 1912=12 I. C. 623. *See also* 8 A. 143. Power of mother-in-father, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section.

All persons, knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriage: Proviso.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law: Provided, that in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT (XVIII OF 1937).

[Amended by Acts XI of 1938 and XXXII of 1940.]

[14*th April*, 1937.

An Act to amend the Hindu Law governing Hindu Women's Rights to Property.

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

(2) It extends to the whole of British India, [1][* * * *].

LEG. REF.

[1] Omitted by Act XXXII of 1940.

NOTES.

law to get daughter-in-law married. *See* 1929 Cr.C. 305.

Sec. 1 : VALIDITY OF ACT—"PROPERTY"—MEANING OF—ACT IF AFFECTS SUCCESSION TO AGRICULTURAL LAND.—No objection can be taken to the validity of the Hindu Women's Right to Property Act, 1937, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force, as the Indian Legislature which was in existence immediately before the coming into force of Part III was continued in existence after that date, and was in all respects the same legislature, though its legislative powers were no longer as extensive as they had previously been. Nor can any objection be taken to the validity of the said Act on the ground that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of the Legislature is a matter with which a Court of law is not concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its Speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. The only function of a Court is to pronounce upon the Bill after it has become an Act. Consequently the only date with which the Court is concerned is the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other. 45 C.W.N. (F.R.) 81=1941 F.C. 72=(1941) 2 M.L.J. 12. *See also* 1937 A.W.R. (H.C.) 655; 195 I.C. 636=1941 Sind 114. The Hindu Women's Right to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, do not operate to regulate succession to agricultural land in the Governors' Provinces; but do operate to regulate devolution by survivorship of property other than agricultural land. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property," the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate, and to no other. In the Hindu Women's Rights to Property Act, 1937, the word "property" must accordingly be construed as referring to property other than agricultural land. Though S. 3 of the Act of 1937 does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers, yet there can be no doubt that in the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes

Application.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate [1][* * * * *].

[2][3. (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son]:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies [3][* * *] having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession [4][or by the terms of the grant applicable

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LEG. REF.

The words "leaving a widow" omitted by Act XI of 1938.

[2] Substituted by Act XI of 1938.

[3] The word "intestate" omitted by Act XI of 1938.

[4] Inserted by Act XI of 1938.

NOTES.

away to that extent, the benefit of the rule of survivorship which would have accrued to the remaining coparceners. So far as its effect goes, the Act does legislate "with respect to the law of survivorship. But it is not *ultra vires* the Indian Legislature on that ground, as the subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III of the concurrent list. 45 C.W.N. (F.R.) 81=73 C.L.J. 415=54 L.W. 22 1941 F.C. 72=(1941) 2 M.L.J. 12. The Hindu Women's Rights to Property Act does not operate to regulate succession to agricultural land in the Governors provinces. Hence the widow of a predeceased son has no title except to maintenance according to ordinary Hindu Law. 1941 O.A. (Supp.) 715 (2)=1941 A.W.R. (Rev.) 804 (2)=1941 R.D. 742.

Sec. 3 (2) and (3): INTEREST TAKEN BY WIDOW IN JOINT FAMILY PROPERTY—EXTENT OF —LIABILITY FOR DEBTS.—Under S. 3 (2) of the Act, a widow gets the same interest which her husband had in the joint family property, that is the interest of an undivided member of a joint family in the joint family property. The widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by Cl. (3) of S. 3. As the husband's interest could be seized in execution by a creditor for his debt in his lifetime, the creditor of the husband is entitled to the same remedy against the interest of the widow accrued under the Act in respect of non-agricultural land, the property taken by the widow being liable for the debts of her husband. 54 L.W. 651=(1941) 2 M.L.J. 862. As the Hindu Women's Rights to Property Act as amended by Act II of 1938 is *ultra vires* of the Indian Legislature and does not operate to regulate succession to agricultural land in the Governor's provinces but operates only to regulate devolution by survivorship of property other than agricultural land, where the property left by the deceased is both agricultural and non-agricultural, the widow would have no right under the Act to succeed her husband even to a limited interest so far as the agricultural property is concerned. 1942 O. 216. Sub-Secs. (2) and (3) of S. 3 of the Act do not contemplate that the sons of a deceased Hindu are to be excluded by the widow upon the death of their father. The right conferred upon the Hindu widow by sub-S. (3) is merely a limited right such as a Hindu widow possesses under the ordinary Hindu Law with an additional privilege conferred by the section that she could independently claim partition as a male owner which was denied to her under the Hindu Law. The rights of survivorship in a joint Hindu family possessed by the sons are not taken away by sub-secs. (2) and (3) of sec. 3 of the Act. 1942 O. 216=198 I.C. 443.

thereto] descend to a single heir or to any property to which the Indian Succession Act, 1925, applies.

Savings.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

Meaning of expression "die intestate".

[1][5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.]

THE ILLUSORY APPOINTMENTS AND INFANTS' PROPERTY ACT (XXIV OF 1841).

Year.	No.	Short title.	Amendments.
1841	XXIV	The Illusory Appointments and Infants' Property Act, 1841.	Repealed in part, XXVII of 1866 ; VIII of 1868 ; XVI of 1874 ; Act XII of 1891.

PREFATORY NOTE—ENGLISH LAW AS TO ILLUSORY APPOINTMENTS.—The first statutory alteration of the law relating to Illusory Appointments was made in 1830 by the Act 11, Geo. IV, and 1 William IV, C. 43. It is entitled "An act to amend the law relating to Illusory Appointments." It enacted that no appointment which from and after the passing of the Act should be made in exercise of a power should be impeached in equity or at law as illusory by reason of giving only an unsubstantial or nominal share to any object of the power. It provided, however, that nothing in the Act should prejudice or affect any provisions in any deed, will, or other instrument creating the power which declared the amount of the share from which no object of the power should be excluded ; nor, on the other hand, should anything in the Act contained be deemed to give any other validity, force, or effect to any appointment than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon any object of the power. The enactments are retrospective and apply to powers in *esse* at the time of, but executed after, the passing of the Act [*Reid* v. *Reid*, (1858) 25 Beav. 469=53 E.R. 716.]

According to the old law, where a power of appointment was given to *A* to appoint among a class in such shares as *A* should direct, the presumed intention of the donor of the power was to give an actual and substantial share to each of the objects of the power. *A*, the appointer, could not in exercising the power, exclude any one of the class, as this would be an exclusive appointment and bad [see *Bulteel* v. *Plummer*, (1870), L.R. 6 Ch. 160]. The whole theory is tersely stated by Jessel, M.R., in his judgment in *Gainsford* v. *Dunn*, (1874) L.R. 17 Eq. 405. Speaking of this interpretation of the intention, he says : "That was not according to the literal wording of the power, but it made sense of it ; because if the appointment of a farthing would do, then on the principle of *de minimis non curat lex*, it would make every non-exclusive power an exclusive power. However, that doctrine was found inconvenient. . . "The inconvenience arose from the obvious reason that it was impossible to determine without litigation what precise amount was or was not a substantial sum in accordance with the presumed intention of the donor of the power. The Act therefore put the question aside by making any share, though purely nominal, sufficient to make the exercise of the power non-exclusive. The process of reasoning that inspired this statutory change seems to have been that the practical exclusion of an object could not like the total exclusion, owe its origin to an oversight or omission on the part of the appointer, and therefore it was not a proper case for any interference by a Court of Equity. "One would have imagined," says Jessel, M.R., in the case quoted, "that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get," instead of allowing an appointment to be impeached because the appointer omitted to appoint the necessary farthing. In the same year, 1874, the Statute 37 and 38, Vict. c. 37, rectified the anomaly by enacting that no appointment which, from and after the passing of the Act, shall be made in exercise of a power of appointment, shall be invalid at law or equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby, or in default of appointment take a share or shares of the property subject to the power. But the provisions of the Act are not to prejudice or affect any declaration in a deed, will or other instrument fixing the amount or the share or shares from which no object of the power shall be excluded, or some one or more object of it shall not be excluded. *See* Title "Powers" and "Illusory Appointments" in Ency. of the Laws of England, 2nd Ed,, Vol. VII, pp. 24-25.

LEG. REF.

[1] Added by Act XI of 1938.

CONTENTS.

SECTIONS.
1. [*Repealed.*]
2. Extension of 11, Geo. IV and I Wm. IV, Chaps. 46 and 65.
3. [*Repealed.*]

SECTIONS.
4. Extension of 11, Geo. IV and I Wm. IV, Chap. 47, Ss. 10 and 11.
5. Saving of certain cases and proceedings.

THE ILLUSORY APPOINTMENTS AND INFANTS' PROPERTY ACT (XXIV OF 1841).[1]

An Act for the greater uniformity of the Law administered by Her Majesty's Supreme Courts with that administered in England, in regard to the undisposed residue of the effects of Testators, Illusory Appointments, the transfer of Estates by persons under disabilities pursuant to the direction of Courts, and the better management of the property of such persons and other like matters.

1. [*Extension of* 11 *Geo. IV and* 1 *Will. IV, c.* 46.] *Rep. by the Repealing Act* (*VIII of* 1868).

Extension of 11 Geo. IV & 1 Wm. IV, Chaps. 46 and 65.

2. * * * * * * * The [3]Statute 11, George IV and 1 William IV, Chapter 46, entitled, "An Act to alter and amend the Law relating to Illusory Appointments", and the [1]Statute 11, George IV and 1, William IV, Chapter 65, entitled. "An Act for consolidating and amending the Law relating to property belonging to infants, femme-coverts, idiots, lunatics and persons of unsound mind," shall * * * * be extended to the territories of the East India Company, as far as it is applicable to the same.

LEG. REF.

[1] Short title, "The Illusory Appointments and Infants' Property Act, 1841." *See* the Indian Short Titles Act (XIV of 1897).

The whole Act, except so far as it relates to illusory appointments and infants, and except S. 5 was repealed by the Repealing Act (VIII of 1868).

The Act has been declared, by notification under S. 3 (*a*) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44) and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, *see* Gazette of India, 1881, Pt. I, p. 504.

The Scheduled Districts in Ganjam and Vizagapatam, *see* Fort St. George Gazette, 1898, Pt. I, p. 666, and Gazette of India, 1898 Pt. I, p. 870.

[2] The words "And it is hereby enacted that" at the beginning of S. 2 and the words "from the first day of January next" after the word "shall" in the same section were repealed by the Repealing Act (XVI of 1874).

[3] 11 GEO. IV AND WM. IV, CHAP. XLVI.*

An Act to alter and amend the Law relating to Illusory Appointments.

[16*th July*, 1830.]

Preamble.

Whereas, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property; and whereas appointments in exercise of such powers whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law. And whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law; Be it therefore enacted, etc.

Illusory appointments shall be valid in equity as well as at law.

That no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power

* Short title, "The Illusory Appointments Act, 1830." *See* the Short Titles Act, 1896 (59 & 60 Vict, c. 14).

3. [*Extension of* 11, *Geo. IV and* 1, *Wm. IV, c.* 60.] *Rep. by the Indian Trustee Act* (*XXVII of* 1866).

LEG. REF.

Not to affect any deed which declares the amount of the share; nor to give any other force to any appointment than the same would have had.

2. Provided always, and be it further enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid which shall declare the amount of the share or shares from which no object of the power shall be excluded.

3. Provided also, and be it further enacted and declared, that nothing in this Act contained shall be construed, deemed, or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.

## [1] 11 GEO. IV & 1 WM. IV, CHAP. LXV.*

An Act for consolidating and amending the Law relating to Property belonging to Infants, Femme-Coverts, Idiots, Lunatics and Persons of unsound Mind.

[23*rd July*, 1830.]

* * * * *

Guardians of minors, etc., in order to the surrender and renewal of leases may apply to the Court of Chancery, etc., and by order may surrender such leases and renew the same, etc.

12. And be it further enacted, that in all cases where any person, being under the age of twenty-one years...... is or shall become entitled to any lease or leases made or granted or to be made or granted for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for such person under the age of twenty-one years, or for his or her guardian or other person on his behalf,................. to apply to the Court of Chancery in England, the Courts of Equity of the Counties Palatine of Chester, Lancaster and Durham, or the Courts of Great Session of the Principality of Wales respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and direction of the said Courts respectively such infant........ or his guardian, or any person appointed in the place of such infant........by the said Courts respectively, shall and may be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take, in the place and for the benefit of such person under the age of twenty-one years........one or more new leases of the premises comprised in such lease surrendered by virtue of this Act, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentiond or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise as the said Courts shall respectively direct.

* * * *

Charges attending renewal to be charged on the estates as the Court shall direct.

14. And be it further enacted, that every sum of money and other consideration paid by any guardian............or other person as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant.........for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said Courts and Lord Chancellor, intrusted as aforesaid, respectively shall direct and determine; and as to leases to be made upon surrenders by femme-coverts, unless the fine or consideration of such lease and the reasonable charges shall be otherwise paid or secured, the same, together with interest, shall be a charge upon such leasehold premises for the benefit of the person who shall advance the same.

New leases shall be to the same uses.

15. And be it further enacted, that every lease to be renewed as aforesaid shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease to be from time to time surrendered as aforesaid was or would have been subject to in case such surrender had not been made.

Infants empowered to grant renewals of leases.

16. And be it further enacted, that where any person, being under the age of twenty-one years, ...might, in pursuance of any covenant or agreement, if not under disability be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons, it shall be lawful to and for such infant, or his guardian in the name of such infant,.......by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian,...... ....or of any person entitled to such renewal, from time to time to accept of a surrender of such lease and to make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise, as the Court by such order shall direct.

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* Short title, "The Infants Property Act, 1830." *See* the Short Titles Act, 1896 (59 & 60 Vict., c. 14).

As to the repeal of parts of the Act in England, *see* the Statute Law Revision Act, 1873 (36 & 37 Vict., c. 91).

Extension of 11, Geo. IV and I, Wm. IV, c. 47, S. 11.

4. [1]* * * * Section[2] * * 11 of the 11 [3]George IV and 1 William IV, Chapter 47, entitled "an Act for consolidating and amending the laws for facilitating the payment of debts out of real Estate, "shall [1]* * * * be extended to the territories of the East India Company, as far as it is applicable in the same.

5. [1]* * * * This Act shall not be construed to affect any case

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LEG. REF.

Court of Chancery may authorize leases to be made of lands belonging to infants when it is to the benefit of the estate.

17. And be it further enacted, that where any person, being an infant under the age of twenty-one years, is or shall be seized or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases, and covenants and provisions therein, shall be settled and approved or by a Master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the Master's office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital mansion house and the park and grounds respectively held therewith for any period exceeding the minority of any such infant.

* * * *

So much of 1 G. I, c. 10, S. 9, as enacts that agreements of guardians shall bind infants, repealed.

*25. And whereas by an Act passed in the first year of the reign of King George the First intituled. *An Act for making more effectual Her late Majesty's gracious Intentions for augmenting the Maintenance ofthe poorClergy*‡ it was enacted that the agreements of guardians for and on behalf of infants or idiots under their guardianship should be as good and effectual to all intents and purposes as if the said infants or idiots had been of full age and of sound mind, and had themselves entered into such agreements. And whereas it is desirable that the said powers should be exercised under proper control, and that the same should be extended to all persons against whom a commission of lunacy shall have issued; Be it further enacted, that so much of the said Act of the first year of the reign of King George the First, as is hereinbefore recited, shall be and the same is hereby repealed.

[1] The words 'And whereas it is exendient to adopt the amendments of the English Law touching the delay of action, suits, or other proceedings, by reason of the parol demurring; and touching conveyances made by infants under order of Courts; it is hereby enacted that" and the words "from the first day of January next" in S. 4. and the words "And it is hereby provided, that" in S. 5 were repealed by the Repealing Act (XVI of 1874).

[2] The figures and word "10 and" were repealed by the Amending Act, (XII of 1891).

[3] 11 GEO. IV & 1 WM. IV., CHAP. XLVII.††

An Act for consolidating and amending the Laws of facilitating the payment of debts out of real Estate.

[16*th July*, 1830.]

* * * *

Infants to make conveyances under order of the Court.

XI. §*And be it further enacted that* where any suit hath been or shall be instituted in any Court of Equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such Court of Equity shall decree the estates liable to such debts or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, com-

* This section has been repealed in England by the Statute Law Revision Act, 1875 (36 and 37 Vic., c. 91), Schedule.

† "The Queen Anne's Bounty Act, 1716." *See* the Short Titles Act (59 and 60 Vic., c. 14).

††Short title, "The Debts Recovery Act, 1830." *See* the Short Titles Act, 1896 (59 and 60 Vic., c. 14).

§ The initial words "And be it further enacted that" were repealed in England by the Statute Law Revision Act, 1888 (51 & 52, Vict., c. 57), Schedule.

Saving of certain cases.

which would not have been governed by English law as administered by Her Majesty's Supreme Courts previous to the passing thereof[1] * * * * * *

THE IMMIGRATION INTO INDIA ACT (III OF 1924).[2]

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

"The Imperial Conference have decided in favour of reciprocity of treatment of British subjects resident in various parts of His Majesty's dominions. The present Bill is intended to give effect to that decision. The Union Government of South Africa have recently assented to all the ordinances imposing galling restrictions on Indians, they have promised legislation next year with a view to segregate them. In the circumstances it is necessary, that the Indian Legislature should arm the Government of India with the power to enforce the principle of reciprocity." (*See Fort St. George Gazette*, Part III, p. 433, dated 14th August, 1923).

[1*st March,* 1924.

An Act to regulate the entry into and residence in British India of persons domiciled in other British Possessions.

WHEREAS it is expedient to make provision for regulating the entry into and residence in British India of persons domiciled in the British Possessions on a basis of reciprocity; It is hereby enacted as follows:—

Short title, commencement and extent.

1. (1) This Act may be called THE IMMIGRATION INTO INDIA ACT, 1924.

(2) It shall come into force on such date as the Central Government may notify in the Official Gazette.

(3) It shall extend to the whole of British India, including British Baluchistan.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "British possession" means any Part of His Majesty's Dominions other than British India, the United Kingdom and Ireland, and includes Protectorates and territories which are or may be administered by a Dominion as a mandatory on behalf of the League of Nations;

(*b*) "entry" includes landing at any port in British India during the period of the ship's stay on her way to a destination outside British India.

LEG. REF.

pel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly, and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

* * * *

Such agreements may be made by guardians with the approbation of the Court.

26. And be it further enacted, that the guardian of any infant, with the approbation of the Court of Chancery, to be signified by an order to be made on the petition of such guardian in a summary way, may enter into any agreement for or on behalf of such infant which such guardian might have entered into by virtue of the said last recited Act, if the same had not been repealed.

* * * *

Court of Chancery or Exchequer may order dividends of stock belonging to infants to be applied for maintenance.

32. And be it further enacted that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money, by virtue of any Act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person according to the discretion of such Court, for the maintenance and education or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

* * * *

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[1] The words "or any proceedings at Law or in Equity commenced before the first day of January next," were repealed by the Amending Act (XII of 1891).

[2] For Statement of Objects and Reasons, *see Gazette of India*, 1923, Pt. V, p. 406.

Rules as regards entry into and residence in British India.

3. The Central Government may make rules for the purpose of securing that persons not being of Indian origin, domiciled in any British Possession, shall have no greater rights and privileges, as regards entry into and residence in British India, than are accorded by the law and administration of such Possession to persons of Indian domicile.

Power to make rules.

4. The Central Government may, without prejudice to the generality of the powers contained in section 3 of this Act, make rules—

(*a*) to provide for the establishment of a suitable agency to administer the rules and to define its functions and powers;

(*b*) to provide suitable penalties for the contravention of such rules or attempt to contravene them, or the abetment of such contravention; and

(*c*) to authorize the arrest of any person contravening or reasonably suspected of contravening any such rule, and to prescribe the duties of public servants and others in regard to such arrests.

Person claiming exemption to establish case.

5. If any person alleged to be domiciled in any British Possession and to be subject to the provisions of this Act raises the plea that he is not so domiciled or that the provisions of the said Act do not apply to him, the onus of proving the truth of such plea shall lie on the aforesaid person.

THE IMPERIAL BANK OF INDIA ACT (XLVII OF 1920).

Year.	No.	Short title.	Amendments.
1920	XLVII	The Imperial Bank of India Act, 1920.	Amended VII of 1924; XVII of 1924; III of 1934;* Repealed in part XII of 1927 and XX of 1937.

*[*N.B.*—The amendments made by Act III of 1934 shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India* appoint. *See* S. 1 of Act III of 1934.]

PREFATORY NOTE.—The following are extracts from the Statement of Objects and Reasons :—

" For constituting and regulating the Government Banks, *i.e.*, those banks which had dealings with the Government of the country, statutory aid had been invoked as is instanced by Statute 47, George III, S. 2, Chap. 68 in the days of the East India Company.

Prior to 1862, Acts VI of 1839, III of 1840, IX of 1843, XXI of 1854, and Act XXVII of 1855—Acts of the Governor-General as well as of the Governors-in-Council of Madras and Bombay —constituted and regulated the Banks of Bengal, the Bank of Bombay and the Bank of Madras. In the eight years up to 1870, the Governor-General in Council passed five Acts to the same end. The Governor of Bombay in Council passed three Acts in the same period, and to the Governor of Fort. St. George in Council, Acts VI of 1866 and I of 1871 owe their promulgation. The Presidency Banks Act, 1876, consolidated the scattered legislation amplifying and modernising it in accordance with the company law then prevailing. The Act was amended by Acts V of 1879, XX of 1899, I of 1907 and by Act VIII of 1916.

To foster and promote the growth of improved banking facilities in the country, and to render the money resources of India more accessible to the trade and industry, the fusion of the abovenamed Presidency Banks into a single strong unified Bank in close relation with Government, had long been considered necessary by the thoughtful public and the Government. After mature deliberation, Act XLVII of 1920, was passed creating a great national institution—The Imperial Bank of India—having ample resources for the assistance of trade, constituting itself an example of sound banking to other banks, an institution which will assist not only the State, but the public, and all sections of the public. The proposal, the terms of consolidation and the advantages to accrue were approved by the shareholders and proprietors of the three Presidency Banks, by the Government of India and by the Secretary of State.

The Act cane into effect on the 27th January, 1921, 'the day appointed' [*vide* S. 1, Cl. (2)] by the Governor-General in Council and the Bank of Bengal, the Bank of Bombay and the Bank of Madras as constituted by Act XI of 1876, stood dissolved on that date.

The Act provides for a large initial increase of the capital of the Bank when compared with the total capital of the three defunct banks. The bank is empowered to transact the same class or business with considerable extensions to the same, but it is restricted in its activities in London. It is not permitted to do exchange business but can only keep accounts and deposits for its Indian customers. The Bank can enter into an agreement with the Secretary of State in Council but the instructions of the Governor-General in Council (*vide* S. 10) are to be carried in matters vitally affecting his financial policy. In addition to the branches at present existing, sixty-three in number, one hundred branches are to be opened before the 26th January, 1926.

The general control of the Bank vests in a Central Board constituted by the Board of Governors This Board includes, besides the chief officials of the Bank, the Controller of Currency who represents Government interests on the Board, and Non-official Governors—not to exceed four in number—nominated by the Governor-General in Council. And the object of this provision is to give representation to the general tax-payer in view of the use of the Government balances which the Bank will obtain on the conclusion of the abovementioned agreement with the Secretary of State in Council.

The provisions regulating this statutory corporation have been recast and revised in the light of the further development of company law."

THE IMPERIAL BANK OF INDIA ACT (XLVII OF 1920).

CONTENTS.

SECTIONS.
1. Short title and commencement.
2. Definitions.

CHAPTER I.
ESTABLISHMENT AND INCORPORATION OF THE IMPERIAL BANK OF INDIA.
3. Establishment of the Imperial Bank.

CHAPTER II.
TRANSFER OF THE UNDERTAKINGS OF PRESIDENCY BANKS TO THE IMPERIAL BANK.
4. Transfer of assets and liabilities.
5. Terms of transfer as regards shareholders in the Presidency Banks.
6. Existing officers and servants of Presidency Banks and existing Provident Funds.
7. Dissolution of Presidency Banks.

CHAPTER III.
BUSINESS OF THE BANK.
8. Business which Bank may transact.
9. [*Repealed.*]
10. Bank may do Government business.
11. Acquisition of business premises.
12. Establishment of branches and agencies.
13. Power of Bank to take over business of certain other Banks and for that purpose to increase its capital.
13-A. Power of Bank to grant loans to certain other Banks.

CHAPTER IV.
SHARES.
14. Nature of shares.
15. Certificate of shares.
16. Principal register of shareholders.
17. Branch registers.
18. Trusts not to be entered on the register.
19. Power to close register.

SECTIONS.
20. Inspection of register of shareholders.

CONTRACTS.
21. Form of contracts.

REGULATIONS OF BANK.
22. Regulations of the Bank.

CHAPTER V.
MANAGEMENT.
23. Offices of the Bank.
24. Central Board.
25. Local Boards.
26. Powers of Local Boards.

LOCAL BOARDS AT CALCUTTA, MADRAS AND BOMBAY.
27. Constitution of first Local Boards.

CENTRAL BOARD.
28. Constitution of Central Board.
Board.
29. Constitution of other Local Boards.
30. [*Repealed.*]

CHAPTER VI.
MISCELLANEOUS.
31. Power of Central Board to make bye-laws.
32. References to Presidency Banks.
33 and 34. [*Repealed.*]

SCHEDULE I.
PART I.
Business which the Bank is authorised to carry on and transact.
PART II.
Business which the Bank is not authorised to carry out or transact.

SCHEDULE II.
REGULATIONS OF THE BANK.

SCHEDULE III.—*Repealed.*
Enactments Repealed.

[19*th September*, 1920.

An Act to constitute an Imperial Bank of India and for other purposes.

WHEREAS it is expedient to constitute an Imperial Bank of India and to transfer to the Bank so constituted the undertaking of each of the Presidency

Banks and to dissolve those Banks and to make provision for the regulation and management of the Imperial Bank of India; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE IMPERIAL BANK OF INDIA ACT, 1920.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "appointed day" means such day as the Central Government may appoint for the commencement of this Act;

(*b*) "the Bank of Bengal", "the Bank of Madras" and "the Bank of Bombay" mean, respectively, those Banks as constituted by the Presidency Banks Act, 1876;

(*c*) "dividend" includes bonus;

(*d*) "general meeting" means the annual meeting of the shareholders of the Bank;

(*e*) "goods" includes also bullion, wares and merchandise;

(*f*) "local meeting" means the annual meeting of the shareholders whose names are registered in a branch register;

(*g*) "meeting" includes an adjourned holding of a meeting;

(*h*) "prescribed" means prescribed by by-laws made under this Act;

(*i*) "Presidency Banks" means the Bank of Bengal, the Bank of Madras and the Bank of Bombay as constituted by the Presidency Banks Act, 1876, and a "Presidency Bank" means any one of these Banks;

[1][(*ii*) "secretary" and "deputy secretary" mean, respectively, a secretary and treasurer and a deputy secretary and treasurer of the Bank];

(*j*) "special local meeting" means a meeting of the shareholders whose names are registered in a branch register, convened for the transaction of some particular business specified in the notice convening the meeting;

(*k*) "special local resolution" means a resolution passed at a special local meeting;

(*l*) "special meeting" means a meeting of shareholders convened for the transaction of some particular business specified in the notice convening the meeting; and

(*m*) "special resolution" means a resolution passed at a special meeting.

CHAPTER I.

ESTABLISHMENT AND INCORPORATION OF THE IMPERIAL BANK OF INDIA.

Establishment of the Imperial Bank.

3. (1) A Bank to be called the Imperial Bank of India and in this Act referred to as "the Bank" shall be constituted for the purpose of taking over the undertakings of the Presidency Banks and to carry on the business of banking in accordance with the provisions of this Act.

(2) Every person who, immediately before the appointed day, was registered as a shareholder or as a holder of stock in any of the Presidency Banks, together with such other persons as may from time to time become shareholders in the Bank in accordance with the provisions of this Act, shall, as long as they are shareholders in the Bank, constitute a body corporate with perpetual succes-

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LEG. REF.

[1] Inserted by Act III of 1934, S. 2.

NOTES.

Sec. 1.—O. 20, R. 11, C. P. Code, is not in any way controlled by the provisions of the Imperial Bank of India Act (XLVII of 1920) which limit the power of the Bank in the matter of advancing loans for a period exceeding six months. The Courts are not therefore precluded from granting instalments in proper cases simply because such a course would postpone realisation of the dues by the plaintiff (Imperial Bank) for over six months. 16 N.L.J. 78=146 I.C. 1046=1933 N. 330.

sion and a common seal under the name of the Imperial Bank of India and shall sue and be sued in that name.

(3) Subject to the provisions of this Act, the capital of the Bank shall consist of one hundred and twelve millions and five hundred thousand rupees divided into shares of five hundred rupees each.

(4) The liability of the shareholders of the Bank shall be limited to the amount not fully paid up on their shares.

CHAPTER II.

TRANSFER OF THE UNDERTAKINGS OF PRESIDENCY BANKS TO THE IMPERIAL BANK.

Transfer of assets and liabilities.

4. (1) Subject to the provisions of this Act, as from the appointed day, the undertakings of each of the Presidency Banks shall be transferred to and shall vest in the Bank.

(2) The undertaking of a Presidency Bank shall be deemed to include all rights, powers, authorities and privileges and all property, movable or immovable, including cash balances, reserve funds, investments and all other interests and rights in or arising out of such property as may be in the possession of that Bank immediately before the appointed day, and all books, accounts and documents relating thereto, and shall also be deemed to include all debts, liabilities and obligations of whatever kind then existing of that Bank.

(3) If, on the appointed day, any suit, appeal or legal proceeding of whatever nature is pending by or against any Presidency Bank, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the transfer to the Bank of the undertaking of such Presidency Bank or of anything in this Act, but the suit, appeal or proceeding may be continued, prosecuted and enforced by or against the Bank.

(4) All contracts, deeds, bonds, agreements and other instruments of whatever nature subsisting or having effect immediately before the appointed day and to which any Presidency Bank is a party shall be of as full force and effect against or in favour of the Bank, as the case may be, and may be enforced as fully and effectually as if instead of the Presidency Bank the Bank had been a party thereto.

Terms of transfer as regards shareholders in the Presidency Banks.

5. (1) The name of every person who immediately before the appointed day was registered as a shareholder in any of the Presidency Banks shall be registered in accordance with the provisions of this Act hereinafter appearing as holding the same number of shares in the Bank as stood in his name in the register of such Presidency Bank:

Provided that, for the purposes of this section two half-shares standing in the name of any such person in the register of any Presidency Bank shall be taken as the equivalent of one share, and odd half-shares shall be dealt with as hereinafter provided.

(2) The name of every person who immediately before the appointed day was registered as a holder of stock in any of the Presidency Banks shall be registered in accordance with the provisions of this Act hereinafter appearing as holding one share in the Bank for every Rupees five hundred of stock of which he was the registered holder in such Presidency Bank, and odd amounts of stock not amounting to Rupees five hundred shall be dealt with as hereinafter provided.

(3) The Bank shall issue fractional certificates to the holders of odd half-shares and of odd amounts of stock, not amounting to Rupees five hundred, certifying, as the case may be, that the holder is entitled to one-half of one fully paid share or such fraction of a share as the odd amount of stock is of Rupees five hundred.

(4) Holders of fractional certificates shall, if resident in India, within three months and, in any other case, within six months from the date of the certificate either—

(*i*) surrender their fractional certificates with other similar fractional certificates representing in all one fully paid share, in which case the surrenderer shall be entitled to be registered as a shareholder and to have a fresh certificate for a fully paid share in the Bank issued to him and be entitled to an allotment of new shares in the same way as if he had been the holder of one fully paid share, or

(*ii*) at their option surrender the fractional certificates to the Bank, in which case the Bank shall be entitled to sell the shares represented by the fractions so surrendered from time to time in such manner as the Bank deems expedient, and the aggregate net sale proceeds realized by such sale or sales shall be divided proportionately and paid by the Bank to the holders of fractional certificates for whose account the shares may have been so sold.

(5) Every shareholder of the Bank whose name has been registered in accordance with the provisions of this section shall be entitled, in respect of every share of which he is so registered as the holder, to an allotment to himself or to his nominee (provided that such nominee is approved by the Bank) of two shares in the Bank with the sum of rupees one hundred and twenty-five credited as paid up on payment in respect of each share in the case of a former shareholder or stockholder of the Bank of Bengal or the Bank of Bombay, of Rupees one hundred and twenty-five, and of the Bank of Madras of Rupees two hundred and twenty-five.

(6) The Bank shall cause notice to be published in the Official Gazette and in two daily papers in each Presidency, and shall also send by post to every person whose name immediately before the appointed day was entered in the register of shareholders or stockholders of any of the Presidency Banks, a notice giving particulars of the terms hereinbefore set out as to the allotment of new shares and the surrender of fractional certificates, and as to the manner and form in which application for the allotment of new shares and the surrender of fractional certificates is to be made.

(7) If within a period of three months from the date of publication in the Official Gazette of the notice referred to in sub-section (6), any shareholder has not made an application for the allotment of new shares to which he is entitled, the Bank may offer such shares for public subscription and allot them to any person applying therefor:

Provided that the Bank in the case of shareholders whose addresses are out of British India may, either generally or in any particular instance, fix an extended period for the admission of applications, but in no case shall that period be later than six months from the date of the publication of the notice in the Official Gazette.

Existing officers and servants of Presidency Banks and existing Provident Funds.

6. (1) Subject to the provisions of this Act, every officer and servant employed immediately before the appointed day by a Presidency Bank shall, from the appointed day, become an officer or servant of the Bank, and shall hold his office or service therein by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension or gratuity as he would have held the same under the Presidency Bank if this Act had not been passed.

(2) Any person who, on the appointed day, has been granted or is in receipt of a pension or other superannuation or compassionate allowance from a Presidency Bank shall be entitled to be paid by, and to receive from, the Bank the same pension or allowance so long as he observes the conditions on which

the pension or allowance was granted. Any question whether he has so observed such conditions shall, in case of any difference arising, be determined by the Central Government.

(3) For the directors and officers of the Banks of Bombay and Madras who are at the commencement of this Act the respective trustees of the following funds, that is to say,—

(*a*) the Bank of Bombay Officers' Pension and Guarantee Fund, and

(*b*) the Bank of Madras Pension and Gratuity Fund, and the Bank of Madras Officers' Provident and Mutual Guarantee Fund,

there shall be substituted as trustees of those funds, respectively, the members for the time being and the corresponding officers of the Local Boards of the Bank at Bombay and Madras; and if any doubt arises as to who are the corresponding officers to the officers who are trustees at the commencement of this Act, the decision of the Central Board shall be final.

Dissolution of Presidency Banks.

7. As from the appointed day the Presidency Banks shall be dissolved, and thereafter no person shall make, assert or take any claims, demands or proceedings against any of the said Banks or against a director or officer thereof, in his capacity as such director or officer, except in so far as may be necessary for enforcing the provisions of this Act.

CHAPTER III.

BUSINESS OF THE BANK.

Business which Bank may transact.

8. Subject to the provisions of this Act, the business which the Bank is authorized to carry on and transact shall be the several kinds of business specified in Schedule I, subject to the limitations therein mentioned.

9. [*Business of London Office.*] *Rep. by the Imperial Bank of India* (*Amendment*) *Act* (*III of* 1934), *S.* 3.

Bank may do Government business.

10. (1) It shall also be lawful for the Bank under any agreement with the [1][Reserve Bank of India]—

(*i*) [2][* * *] to pay, receive, collect and remit money, bullion and securities [3][as agent for the Reserve Bank of India] on behalf of [4][any] Government.

(*ii*) to undertake and transact any other business which, [the Reserve Bank of India] may from time to time entrust to the Bank.[1]

(2) [2][* * *.]

Acquisition of business premises.

11. For the purpose of providing buildings and places in and at which to carry on and manage the business of the Bank and proper residences for its officers and servants the Bank may—

(*a*) acquire any interest in immovable property; and

(*b*) sell, buy, re-sell, exchange, let, furnish, repair, insure against fire and other risks or deal with all or any part of the same as it may consider most conducive to the interest of the Bank.

Establishment of branches and agencies.

12. Subject to the provisions of this Act, the Bank may—

(*a*) maintain, as branches or agencies of the Bank, any branches or agencies of the Presidency Banks which were in existence immediately before

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LEG. REF.

[1] Substituted by Act III of 1934.

[2] Certain words omitted by *ibid.*

[3] Inserted by *ibid.*

[4] Substituted by A. O.

the appointed day, and may establish branches or agencies at such places, [1][whether in India or elsewhere], as it deems advantageous for the interests of the Bank, and

(*b*) discontinue any branch or agency maintained or established under this section.

Power of Bank to take over business of certain other Banks and for that purpose to increase its capital.

13. (1) With the sanction of the Central Government, the Bank may enter into negotiations for and purchase and take over the business, including the capital, assets and liabilities, of any Banking company carrying on business in India [2][or elsewhere] of which the capital is divided into shares, and may pay the consideration for such purchase either in cash or by the allotment of shares in the capital of the Bank, or partly in one and partly in the other of these ways, and may (subject to the provisions of this Act relating to the increase of capital) for the purpose of any such allotment of shares, increase the capital of the Bank by the issue of such number of shares as may be determined on by the Bank.

(2) Any business so purchased shall after the purchase be carried on by the Bank subject to the provisions of this Act.

[3][* * *].

Power of Bank to grant loans to certain other Banks.

[4][13-A. Notwithstanding anything contained in Schedule I, the Bank may, either alone or conjointly with other persons, for the purpose of averting the winding up of any company [5][* * *] having a share capital which is expressed in rupees in its memorandum of association or of any society registered under the Co-operative Societies Act 1912, [6][or any other law for the time being in force in British India [7][or British Burma] relating to co-operative societies] or, where any such company or society is being wound up, of facilitating the winding up, advance or lend money to or open a cash-credit in favour of, such company, or society or the liquidators thereof, as the case may be, for any period upon the security of all or any of the assets whatsoever of such company or society.]

CHAPTER IV.

SHARES.

Nature of shares.

14. (1) The shares of the Bank shall be movable property.

(2) Each share in the Bank shall be distinguished by its appropriate number.

Certificate of shares.

15. A certificate under the common or official seal of the Bank specifying the shares held by any shareholder shall be *prima facie* evidence of the title of the shareholder to the shares therein specified.

Principal register of shareholders.

16. The Bank shall keep in one or more books a register of its shareholders (in this Act referred to as the principal register), and shall enter therein the following particulars so far as they may be available:—

(*i*) the names and addresses and occupations, if any, of the shareholders and a statement of the shares held by each shareholder, distinguishing each share by its number, and of the amount paid on the shares of each shareholder;

(*ii*) the date on which each person is so entered as a shareholder; and

(*iii*) the date on which any person ceases to be a shareholder.

LEG. REF.

[1] Inserted by Act III of 1934 S. 5.

[2] Inserted by *ibid*, S. 6.

[3] Omitted by *ibid*.

[4] Inserted by Act XVII of 1924.

[5] Omitted by Act III of 1934, S. 7.

[6] Inserted by *ibid*.

[7] Inserted by A.O., 1937.

Branch registers.

17. (1) The Bank shall cause to be kept at the local head offices of the Bank in Calcutta, Madras and Bombay branch registers which shall be deemed to be part of the principal register, and may do so at any other local head office which may hereafter be established under this Act.

(2) There shall be entered in the branch register to be kept in Calcutta the name of every person who having been registered as a shareholder or stockholder in the Bank of Bengal is entitled under the provisions of section 5 to be registered as a shareholder in the Bank, with the same particulars appended thereto as are required in the case of the principal register, and the same provision shall apply *mutatis mutandis* to the branch registers to be kept in Madras and Bombay.

(3) Any shareholder may apply to the Bank to have his name transferred from one branch register to another in respect of either the whole or any part of the shares standing in his name, and the Bank shall, subject to such conditions as may be prescribed, cause the registers to be amended accordingly.

(4) Subject to the provisions of sub-section (3) no transaction with respect to any share registered in one branch register shall be registered in any other branch register.

Trusts not to be entered on the register.

18. No notice of any trust, express, implied or constructive, shall be entered on the principal or any branch register or be receivable by the Bank.

Power to close register.

19. The Bank may close the principal register or any branch register for any time or times, not exceeding in the whole thirty days in each year.

Inspection of register of shareholders.

20. (1) The principal register of shareholders shall be kept at such places as the Bank, by notification in the Official Gazette, may appoint and, except when closed under the provisions of this Act, that register or any branch register shall during business hours (subject to such reasonable restrictions as the Bank may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any shareholder gratis.

(2) Any shareholder may require a copy of any such register, or of any part thereof, on pre-payment therefor at the rate of six annas for every hundred words or fractional part thereof required to be copied.

[1][(3) A copy of the principal register of shareholders shall be complied within 30 days after the date of the first ordinary general meeting in each year and shall be filed forthwith with the officer performing the duty of registration of companies under the Indian Companies Act, 1913.]

CONTRACTS.

Form of contracts.

21. (1) Contracts on behalf of the Bank may be made as follows:—

(*i*) any contract, which if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the Bank, in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(*ii*) any contract which, if made between private persons, would by law be valid although made by parol only and not reduced to writing, may be made by parol on behalf of the Bank by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

LEG. REF.

[1] Inserted by Act III of 1934, S. 8.

(2) All contracts made according to the provisions of this section shall be effectual in law, and shall bind the Bank and all other parties thereto and their legal representatives.

REGULATIONS OF BANK.

Regulations of the Bank.

22. The provisions contained in Schedule II shall be the regulations of the Bank in regard to the matters to which they relate.

CHAPTER V.

MANAGEMENT.

Offices of the Bank.

23. The Bank shall have local head offices in Calcutta, Madras and Bombay, and at such other places in British India [1][or British, Burma] as the Bank, [2][* * *] may determine [2][* * *].

Central Board.

24. The general superintendence of the affairs and business of the Bank shall be entrusted to a Central Board of [3][Directors] (hereinafter in this Act referred to as the "Central Board"), who may exercise all powers and do all such acts and things as may be exercised or done by the Bank and are not by this Act expressly directed or required to be done by the Bank in general meeting.

Local Boards.

25. Local Boards shall be established at Calcutta, Madras and Bombay, and may be established at such other places in British India [1][or British Burma] as the Central Board [4][* * *] may determine.

Powers of Local Boards.

26. Without prejudice to the powers conferred by Section 24, the Local Boards established at Calcutta, Madras and Bombay shall have power generally to transact all the usual business of the Bank, and shall have power as regards entries in the branch registers, respectively kept at those places, to examine and pass or refuse to pass transfers and transmissions and to approve or refuse to approve transferees of shares and to give certificates of shares.

LOCAL BOARDS AT CALCUTTA, MADRAS AND BOMBAY.

Constitution of first Local Boards.

27. The several persons who were, immediately before the appointed day, respectively the directors of the Presidency Banks shall constitute the first Local Boards of the Bank at Calcutta, Madras and Bombay, respectively, and the persons who were then president, vice-president and secretary, respectively, of the said Banks shall fill the same offices in the respective Local Boards until they vacate office in accordance with the provisions of this Act.

CENTRAL BOARD.

Constitution of Central Board.

[5][28. (1) The Central Board shall consist of th following Directors, namely:—

(*i*) the presidents and vice-presidents of the Local Boards established by this Act;

(*ii*) one person to be elected from among themselves by the members of each Local Board established by this Act;

(*iii*) a Managing Director who shall be appointed by the Central Board for a period not exceeding five years on such terms as the Central Board may

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LEG. REF.

[1] Inserted by A.O., 1937.

[2] In section 23 the words "with the previous sanction of the Governor-General in Council," and the words "The Bank may also, subject to the provisions of this Act as to the business to be transacted there, establish an office in London," have been omitted by Act III of 1934, S. 9.

[3] Substituted by *ibid*, S. 10.

[4] Omitted by Act III of 1934, S. 9.

[5] Substituted by *ibid.*, S. 12.

direct, and may be continued in his appointment by the Central Board for such further periods not exceeding five years in each case as the Central Board thinks fit;

(*iv*) such number of persons not exceeding two and not being [1][officers of the Crown] as may be nominated by the Central Government. Such persons shall hold office for one year but may be re-nominated;

(*v*) a Deputy Managing Director who shall be appointed by the Central Board;

(*vi*) the secretaries of the Local Boards established by this Act; and

(*vii*) if any Local Board is hereafter established under this Act, such number of persons to represent it as the Central Board may prescribe.

(2) The Directors specified in clauses (*v*) and (*vi*) of sub-section (1) shall be at liberty to attend all meetings of the Central Board and to take part in its deliberations, but shall not be entitled to vote on any question arising at any meeting:

Provided that the Deputy Managing Director shall be entitled to vote in the absence of the Managing Director.

(3) The Central Government shall nominate an [1][officer of the Crown] to attend the meetings of the Central Board, and such officer shall be entitled to attend all meetings of the Central Board and to take part in its deliberations but shall not be entitled to vote on any question arising at any meeting.

Constitution of other Local Boards.

29. (1) Where the Central Board establishes any additional local head office of the Bank in British India, [2][or British Burma] a Local Board shall be constituted to manage the local business of the Bank.

(2) The number of the members of any such Local Board shall be such number, not less than three, as may be prescribed and shall be appointed in such manner as may be prescribed.

30. [*Power to remove difficulties.*] *Rep. by the Imperial Bank of India* (*Amendment*) *Act* (*III of* 1934), *S.* 13.

CHAPTER VI.

MISCELLANEOUS.

Power of Central Board to make bye-laws.

31. (1) The Central Board shall, with the previous approval of the Central Government make bye-laws consistent with this Act regulating the following matters, namely:—

(*a*) the maximum amounts which may be advanced, or lent to, or for which bills may be discounted for, any individual or partnership, without the security mentioned in sub-clauses (*i*) to (*iv*) of clause (*a*) of Part I of Schedule I, the conditions under which advances may be made on the said security and the extent of the sums to which accounts may be overdrawn without security;

(*b*) the conditions subject to which alone advances may be made to [3][Directors], members of Local Boards, or officers of the Bank, or the relatives of such [3][Directors], members, or officers, or to companies, firms or individuals with which or with whom such [3][Directors], members, officers or relatives are connected as partners, directors, managers, servants, shareholders or otherwise:

Provided that the bye-laws shall provide that no advance without security shall be made to any officer of the Bank without the specific sanction of the Local Board under which he is serving;

(*c*) the particulars to be contained in [3][the annual and half-yearly balance sheets]; and

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LEG. REF.

[1] Substituted by A. O., 1937.

[2] Inserted by *ibid*.

[3] Substituted by Act III of 1934, S. 14.

(*d*) any matter which by this Act is directed to be prescribed.

(2) The Central Board may, with the previous approval of the Central Government, make bye-laws consistent with this Act regulating the following matters or any of them, namely:—

(*a*) the keeping of the register and branch registers of shareholders;

(*b*) the distribution of business amongst the [1][Directors] and their remuneration, if any;

(*c*) the distribution of business amongst the members of a Local Board and their remuneration, if any;

(*d*) the delegation of any powers of the Central Board or of a Local Board to committees consisting of [1][Directors] or members, as the case may be;

(*e*) the procedure to be followed at the meetings of the Central or Local Boards or of any committees thereof;

(*f*) the first appointment and the appointment of members of a Local Board established under this Act;

(*g*) the powers of Local Boards established by or under this Act;

(*h*) the localities in and with respect to which such Local Boards shall exercise their powers;

(*i*) the books and accounts to be kept at the local head offices of the Bank;

(*g*) the powers of Local Boards established by or under this Act;

(*h*) the localities in, and with respect to which such Local Boards shall exercise their powers;

(*i*) the books and accounts to be kept at the local head offices of the Bank;

(*j*) the renewal of certificates of shares which have been worn out or lost;

(*k*) the conduct and defence of legal proceedings and the manner of signing pleadings;

(*l*) the constitution and management of pension and provident funds for the officers and servants of the Bank;

(*m*) all matters which are by this Act permitted to be prescribed; and

(*n*) generally the conduct of the business of the Bank.

References to Presidency Banks.

32. (1) The references in sections 188, 189 and 289 of the Indian Companies Act, 1913, and references in any other enactment to the Presidency Banks or any of them shall be deemed to be references to the Bank.

(2) Where by any instrument power is given to invest in, to hold or to exercise any rights in regard to shares or stock in a Presidency Bank, then that power may be exercised as if the same power were given by such instrument in regard to shares in the Bank.

(3) A power of attorney in favour of a Presidency Bank or in favour of a Presidency Bank and its officers shall be deemed, as the case may be, to be a power of attorney in favour of the Bank or of the Bank and its officers.

33. [*Amendment of S.* 11 (3) *of Act VII of* 1913.] *Rep. by the Repealing and Amending Act* (*XX of* 1937), *S.* 3 *and Sch. II.*

34. [*Repeals.*] *Rep. by the Repealing Act* (*XII of* VTBG).

SCHEDULE I.

(See *section* 8.)

PART I.

BUSINESS WHICH THE BANK IS AUTHORISED TO CARRY ON AND TRANSACT.

The Bank is authorized to carry on and transact the several kinds of business hereinafter specified, namely:—

LEG. REF.

[1] Substituted by Act III of 1934.

NOTES.

Sch. I, Part I.—Where debentures which were issued by another Bank in favour of (*a*) the advancing and lending money, and opening cash-credits upon the security of—

(i) stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any Act of Parliament or by any [1][Indian or Burman Law] [* *][2] any securities of [1][a Provincial Government, the Government of Burma] or the Government of Ceylon, [3][and shares of the Reserve Bank of India].

(ii) such securities issued by Stated-aided railways as having been notified by the Central Government under section 36 of the Presidency Banks Act, 1876, or may be notified by [1][it] under this Act in that behalf;

(iii) debentures or other securities for money issued under the authority of any Act of a legislature established in British India [4][or British Burma], by, or on behalf of a district board [3][or a municipal board or committee, or, with the sanction of the Central Government debentures or other securities for money issued under the authority of a Prince or Chief of any State in India.];

[3][(iii-a) Subject to such directions as may be issued by the Central Board, debentures of companies with limited liability, whether registered in India or elsewhere.];

(*iv*) goods which, or the documents of title to which, are deposited with, or assigned to, the Bank as security for such advances, loans or credits;

[3][(iv-a) goods which are hypothecated to the Bank as security for such advances, loans or credits, if so authorised by special directions of the Central Board];

(v) accepted bills of exchange and promissory notes endorsed by the payees and joint and several promissory notes of two or more persons or firms unconnected with each other in general partnership; and

(vi) fully paid shares [2][* *] of companies with limited liability or immovable property or documents of title relating thereto as collatreral security only where the original security is one of those specified in sub-clauses (i) to (iv), [5][subject to such directions as may be issued by the Central Board], where the original security is of the kind specified in sub-clause (v):

[1] [Provided that any advances or loans which, under the law for the time being in force, any of the following Governments or authorities. that is to say, the Secretary of State. any Government in British India, the Federal Railway Authority, the Government of Burma or the Burma Railway Board, may lawfully accept from the Bank may, if the Central Board think fit, be made without any specific security.]

(*b*) the selling and realisation of the proceeds of sale of any such promissory notes, debentures, stock-receipts, bonds, annuities, stock, shares, securities or goods which, or the documents of title to which, have been deposited with, or [5][pledged, hypothecated, assigned or transferred to], the bank as security for such advances, loans or credits, or which are held by the Bank or over which the Bank is entitled to any lien or charge in respect of any such loan or advance or credit or any debt or claim of the Bank, and which have not been redeemed in due time in accordance with the terms and conditions (if any) of such deposit [5][pledge, hypothecation, assignment or transfer];

(*c*) the advancing and lending money to Courts of Wards upon the security of estates in their charge or under their superintendence and the realisation of such advances or loans and any interest due thereon, provided that no such advance or loan shall be made without the previous sanction of the Provincial Government concerned, and that the period for which any such advance or loan is made shall not exceed [5][nine months in the case of advances or loans relating to the financing of seasonal agricultural operations or six months in other cases;

(*d*) the drawing, accepting, discounting, buying and selling of bills of exchange and other negotiable securities [2][* * *].

(*e*) the investing of the funds of the Bank upon any of the securities specified in sub-clauses (i) to (iii) of clause (*a*) and converting the same into money when required; and alterting, converting and transporting such investments for or into others of the investments above specified;

(*f*) the making, issuing and circulating of bank-post-bills and letters of credit [2][* *] to order, or otherwise than to the bearer on demand;

(*g*) the buying and selling of gold and silver whether coined or uncoined;

(*h*) the receiving of deposits and keeping cash accounts on such terms as may be agreed on;

(*i*) the acceptance of the charge of plate, jewels, title-deeds or other valuable goods on such terms as may be agreed on;

(*j*) the selling and realising of all property, whether movable or immovable, which may in any way come into the possession of the Bank in satisfaction or part satisfaction of any of its claims, [3][and the acquisition and holding of, and generally the dealing with, any right, title or interest] in any property, movable or immovable, which may be the Banks' security for any loan or advance or may be connected with any such security];

(*k*) the transacting of pecuniary agency business on commission [3][and the entering into of contracts of indemnity, suretyship or guarantee with specific security or otherwise];

LEG. REF.

[1] Substituted by A. O., 1937.

[2] Omitted and inserted by Act III of 1934.

[3] Inserted by *ibid.*

[4] Inserted by A. O., 1937.

[5] Substituted by Act III of 1934.

NOTES.

Imperial Bank of India, were only as collateral securities to promissory notes executed by it, on a prior occasion, the Imperial Bank is not prohibited from entering into the transaction by reason of Part 2 of the Schedule to the Act and can enforce the debentures. **1930 C. 536=57 C. 328=127 I.C. 760.**

(*l*) [5][the administration of estates for any purpose, whether as an executor, trustee or otherwise] and the acting as agent on commission in the transaction of the following kinds of business, namely :—

(i) the buying, selling, transferring and taking charge of any securities or any shares in any public company ;

(ii) the receiving of the proceeds whether principal. interest or dividends, of any securities or shares ;

(iii) the remittance of such proceeds [1][* * * *] by public or private bills of exchange, payable either in India or elsewhere ;

(*m*) the drawing of bills of exchange and the granting of letters of credit payable out of India, [1][* *]

(*n*) the buying, [4][* *] of bills of exchange payable out of India at any usance not exceeding [5][nine months in the case of bills relating to the financing of seasonal agricultural operations or six months in other cases] ;

(*o*) the borrowing of money [1][* *] for the purposes of the Bank's business, and the giving of security for money so borrowed by pledging assets or otherwise ;

[2][(*p*) the subsidizing from time to time of the pension funds of the Presidency Banks ; and]

(*q*) generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business [3][including foreign Exchange business] hereinbefore specified.

PART II.

BUSINESS WHICH THE BANK IS NOT AUTHORISED TO CARRY OUT OR TRANSACT.

The Bank shall not transact any kind of Banking business other than those specified in Part I and in particular—

(1) It shall not make any loan or advance—

(*a*) for a longer period than six months [3][except as provided in clause (*c*) and clause (*n*) of Part I] ; or

(*b*) upon the security of stock or shares of the Bank, or

(*c*) save in the case of the estates specified in clause (*c*) of Part I, upon mortgage or in any other manner upon the security of any immovable property, or the documents of title relating thereto.

(2) The Bank shall not (except upon a security of the kind specified in sub-clauses (*i*) to (*iv*) of clause (*a*) of Part I) discount bills for any individual or partnership firm for an amount exceeding in the whole at any one time such sum as may be prescribed, or lend or advance in any way to any individual or partnership firm an amount exceeding in the whole at any one time such sum as may be so prescribed.

(3) The Bank shall not discount or buy, or advance and lend, or open cash credits on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership.

(4) The Bank shall not discount or buy, or advance and lend, or open cash credits on the security of any negotiable security [3][not being a security in which a trustee may invest trust money under S. 20 of the Indian Trusts Act, 1882] [4][or the corresponding provisions for the time being in force in Burma] having at the date of the proposed transaction a longer period to run than [2][nine months if a bill drawn for the purpose of financing seasonal agricultural operations and six months in other cases] or, if drawn after sight, drawn for a longer period than [2][nine months if a bill drawn or the purpose of financing seasonal agricultural operations and six months in other cases]:

Provided that nothing in this Part shall be deemed to prevent the Bank from allowing any person who keeps an account with the Bank to overdraw such account, without security, to such extent as may be prescribed.

SCHEDULE II.

REGULATIONS OF THE BANK.

(See *section* 22.)

1. SHARE CERTIFICATES.—Every person whose name is entered as a shareholder in the register of shareholders shall, without payment, be entitled to a certificate under the common seal of the Bank (or if the certificate relates to shares registered in a branch register under the official seal of the Bank) specifying the share or shares held by him and the amount paid up thereon : Provided that, in respect of a share or shares held jointly by several persons, the Bank shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders hall be sufficient delivery to all.

Lien.

2. BANK'S LIEN ON SHARES.—The Bank shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share,and the Bank shall also have a lien on all shares standing registered in the name

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LEG. REF.

[1] Omitted by Act III of 1934.

[2] Substituted by *ibid.*

[3] Inserted by *ibid.*

[4] Inserted by A.O., 1937.

of a single person for all moneys presently payable by him or his estate to the Bank. The Bank's lien, if any, on a share shall also extend to all dividends payable thereon.

3. POWER TO SELL FOR DEFAULT.—The Bank may sell in such manner, as it thinks fit, any shares on which it has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or to the person entitled by reason of his death or insolvency to the share.

4. DISPOSAL OF PROCEEDS OF SALES.—The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable, as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

5. CALLS.—The Bank may, from time to time, make calls upon the sharesholders in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than two months from the last calls; and each shareholder shall (subject to receiving at least two months' notice specifying the time or times of payments) pay to the Bank at the time or times so specified the amount called on his shares.

6. LIABILITY OF JOINT-HOLDERS.—The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

7. LIABILITY TO PAY INTEREST ON UNPAID CALLS.—If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of ten per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the Central Board shall be at liberty to waive payment of that interest wholly or in part.

Transfer and Transmissions of shares.

8. EXECUTION OF TRANSFERS.—The instrument of transfer of any share in the Bank shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of shareholders in respect thereof.

9. FORM OF TRANSFERS.—Shares in the Bank shall be transferred in the following Form, or in any usual or common Form which the [1][Bank] shall approve :—

I, *A. B.* of , in consideration of the sum of rupees
paid to me by *C. D.* of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share [or shares] numbered
iu the Imperial Bank of India to hold into the said transferee, his executors, administrators and assigns, susbject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid.

As witness our hand the day of .

Witness to the signature of, etc.

10. POWER TO DECLINE TO REGISTER TRANSFERS.—The Bank may decline to register any transfer of shares, not being fully paid shares, to a person of whom it does not approve, and may also decline to register any transfer of shares on which the Bank has a lien [2][or any transfer of shares to any person who is a minor or has been found by aCourt of competent jurisdiction to be of unsound mind or to or in the name of any firm]. The Bank may also suspend the registration of transfers for any period during which it has under the provisions of this Act directed that the registeres shall be closed.

The Bank may decline to recognise any instrument of transfer unless—

(*a*) a fee not exceeding two rupees is paid to the Bank in respect thereof; and

(*b*) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the Bank smay reasonably require to show the right of the transferor to make the transfer.

Deceased shareholders.

[1][11. The executors or administrators of a deceased sole holder of a share, the holder of succession certificate issued under Part X of the Indian Succession Act, 1925, in respect of the share, and the person in whose favour a valid instrument of transfer of the share was executed by the deceased holder during his lifetime, shall be the only persons who may be recognised by the Bank as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor and, on the death of the last survivor, his executors or administrators or any person who is the holder of a succession certificate in respect of such survivor's interest in the share, and a person in whose favour a valid instrument of transfer of the share was executed by such survivor during his lifetime, shall be the only person who may be recognised by the Bank as having any title to the share.]

LEG. REF.

[1] Substituted by Act III of 1934, S. 16.

[2] Inserted by *ibid.*, S. 17.

12. DEATH OR INSOLVENCY OF SHAREHOLDERS.—Any person becoming entitled to a share in consequence of the death or insolvency of a share holder [1][or in consequence of a transfer by a deceased share-holder during his lifetime] shall, upon such evidence being produced as may be required by the Bank, have the right [1][subject to the provisions of Regulation 10], either to be registered as a share-holder in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made, [2][***]

13. RIGHTS OF PERSONS ACQUIRING SHARES ON DEATH OR INSOLVENCY OF SHAREHOLDER.—Any person becoming entitled to a share in consequence of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a shareholder in respect of the share, be entitled in respect of it to exercise any right conferred on a shareholder in relation to meetings of the Bank.

Forfeiture of shares.

14. FAILURE TO PAY CALL.—If a shareholder fails to pay any call or instalment of a call on the day appointed for payment thereof, the Central Board may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unapid, together with any interest which may have accrued.

15. FORM OF NOTICE.—The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

16. FORFEITURE OF SHARES.—If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Central Board to that effect.

17. DISPOSAL OF FORFEITED SHARES.—A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Central Board thinks fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the Central Board thinks fit.

18. LIABILITY OF SHAREHOLDERS AFTER FORFEITURE.—A person whose shares have been forfeited shall cease to be a shareholder in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the Bank all moneys which, at the date of forfeiture, were presently payable by him to the Bank in respect of the shares, but his liability shall cease if and when the Bank receives payment in full of the nominal amount of the shares.

Alteration of Capital.

19. POWER TO INCREASE OR REDUCE CAPITAL.—The shareholders of the Bank may, by special resolution [1][* *] increase or [2][and with the previous sanction of the Central Government] reduce the capital of the Bank :

Provided that no such special resolution shall be deemed to have been passed, unless at least one-third in number of the shareholders, holding at least one half of the paid-up capital of the Bank for the time being, be present in person or by proxy, and the majority of such shareholders have voted either by show of hands or by poll, as the case may be, in favour of the said resolution.

20. PROCEDURE ON RESOLUTION TO INCREASE CAPITAL.—When any such special resolution to increase the capital has been passed, the Central Board may, subject to the provisions of this Act and to the special directions (if any) given in reference thereto by the meeting at which such resolution has been passed—

(*a*) make such orders as it thinks fit for the opening of subscriptions by the shareholders towards such increase of capital ;

(*b*) allow to the shareholders such period to fill up the subscription as it thinks fit ;

(*c*) direct the manner in which the shareholders shall subscribe and pay into the Bank the proportions of new capital which they may respectively desire to subscribe ; and

(*d*) make such orders as it thinks fit for the disposal and allotment of the amount of new capital that may not be subscribed for and paid up in the manner aforesaid.

21. NEW SHARES.—Any new shares shall be subject to the same provision with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original capital.

22. PROCEDURE ON RESOLUTION TO REDUCE CAPITAL.—When any such special resolution to reduce the capital has been passed, the Central Board may (subject, as aforesaid) determine the manner in which the reduction shall be carried into effect.

Meetings of Shareholders.

23. (1) ANNUAL GENERAL MEETING.—On the first Monday of the month of August in every year, or as soon after such day as is convenient, a general meeting shall be held at such time and at such town where there is a local head office of the Bank as shall from time to time be prescribed by the Central Board, at which meeting the Central Board shall submit to the shareholders a [3][balance sheet] of the Bank made up to the preceding thirtieth day of June :

LEG. REF.

[1] Inserted by Act III of 1934.

[2] Omitted by *ibid.*

[3] Substituted by *ibid.*, S. 20.

Provided that such general meeting shall not be held on two consecutive occasions at one any town in which there is a local head office of the Bank.

(2) A notice convening such meeting, signed by [1][the Managing Directors or Deputy Managing Director] shall be published in the Official Gazette and in such manner as the Central Board may direct at least fifteen days before the meeting is held.

Special meetings.

[1][24. (1) The Central Board shall convene a special meeting on the requisition of any three Directors or of not less than one hundred shareholders holding shares whether fully paid up or otherwise of the aggregate amount of not less than five hundred thousand rupees, upon which all calls or other sums due have been paid, if such requisition is signed by the requisitionists and addressed to the Managing Director or Deputy Managing Director and contains a statement of the object of the proposed meeting.

(2) The requisition may consist of several documents in like form, each signed by one or more of the requisitionists.

(3) Sixty days' previous notice of any such meeting shall be given by the Central Board under the hand of not less than three Directors, and such notice shall state the purpose for which the meeting is convened and the time and place of such meeting, and shall be advertised in the Official Gazette and in not less than three daily newspapers, of which one shall be a newspaper published in the vernacular :

Provided that not less than three months' previous notice shall be thus given of any special meeting held for the purpose of increasing or reducing the capital of the Bank.

(4) The place of such meeting shall be the place where the head office of the Bank is situated at the time of the meeting.

(5) If the Central Board does not proceed within 21 days from the date of deposit of the requisition referred to in sub-sections (1) and (2) to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of deposit of the requisition.]

25. (1) QUORUM.—No business shall be transacted at any meeting, whether general or special unless a quorum of two hundred shareholders, in person or by proxy, is present at the commencement of such business.

(2) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened by shareholders not being [1][Directors], shall be dissolved ; in any other case, it shall stand adjourned to the same day in the following week at the same time and place, and if at such adjourned meeting a quorum is not present, those shareholders who are present shall be a quorum.

26. (1) DECISION BY MAJORITY OF VOTES.—Save as is otherwise provided in this Act in regard to resolutions for the increase or reduction of capital or for the removal of a [1][Director] every election and every matter submitted to a meeting, whether general or special, shall be decided by a majority of votes.

(2) No shareholder shall be allowed to vote at any such meeting in respect of any share acquired by transfer, unless such transfer shall have been completed and registered at least three months before the time of such meeting.

(3) No shareholder shall be entitled to vote at any meeting in respect of any shares held by him alone or jointly, whilst any call due from him alone or jointly remains unpaid.

27. POWER TO DECLARE RESOLUTION CARRIED BY SHOW OF HANDS.—Save as otherwise provided in this Schedule a declaration by the chairman of any meeting, that a resolution has been carried or rejected thereat upon a show of hands, shall be conclusive, and an entry to that effect in the book of proceedings of the Bank shall be sufficient evidence of that fact, without proof of the number or proportion of the votes recorded in favour of, or against, such resolutions, unless, immediately on such declaration, a poll be demanded in writing by ten shareholders present and entitled to vote at such meeting.

28. POLL TO BE TAKEN, IF DULY DEMANDED.—If a poll be duly demanded, it shall be taken either at once or at such time and place and, save as otherwise provided in this Act, either by open voting or by ballot, as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

29. PROCEEDINGS AND RESOLUTIONS AT MEETINGS TO BE BINDING.—The proceedings at any meeting and all resolutions and decisions of such meeting shall be valid and binding on the Bank so far as such proceedings, resolutions and decisions are consistent with the provisions of this Act.

Votes of Members.

30. VOTES.—On a show of hands every shareholder present in person shall have one vote. On a poll every shareholder shall have one vote for every four shares of which he is the holder.

31. VOTES OF JOINT-HOLDERS.—In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders ; and for this purpose seniority shall be determined by the order in which the names stand in the register of shareholders.

LEG. REF.

[1] Substituted by Act III of 1934.

32. VOTES ON BEHALF OF LUNATICS AND MINORS.—A shareholder of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and a shareholder who is a minor may similarly vote by his guardian and any such committee or guardian may, on a poll, vote by proxy.

33. SHAREHOLDERS IN DEFAULT.—No shareholder shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the Bank have been paid.

34. POLL.—On a poll votes may be given either personally or by proxy.

35. FORM OF PROXIES.—The instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorized in writing. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as a proxy, or he has been appointed to act at that meeting as proxy for a corporation.

36. DEPOSIT OF PROXIES.—The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a notarially certified copy of that power or authority, [1][or, in the case of a power of attorney previously deposited and registered with any local head office, a certificate of the secretary of such local head office as to such deposit and registration], shall be deposited at the head office of the Bank in the place where the meeting is to be held not less than ninety-six hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

Local Meetings.

37. ANNUAL LOCAL MEETING.—A general meeting of the shareholders on a branch register shall be held once in every year at the local head office of the Bank at which the branch register is kept. It shall be held on such date as the Central Board may direct.

38. PROCEDURE AT LOCAL MEETING.—The foregoing provisions of this Schedule as to the convening of general and special meetings and procedure at meetings shall, so far as may be, apply to local and special local meetings of the shareholders on a branch register:

Provided that references in the said provisions to shareholders shall be deemed to be references to shareholders on the Branch register, and references to [2][Directors, the Managing Director or Deputy Managing Director] and the Official Gazette shall be deemed to be references, respectively, to the members of the Local Board, secretaries and to the lochl Official Gazette:

Provided, further that ten or more shareholders holding shares to the aggregate amount of fifty thousand rupees may convene a special local meeting and that the number of shareholders to constitute a quorum and to demand a poll in the case of a local meeting shall be, respectively, twenty and five.

Qualifications and disqualifications of [2][Directors] and others.

39. (1) QUALIFICATION AND DISQUALIFICATION OF DIRECTORS AND OF MEMBERS OF LOCAL BOARDS.—No person shall be qualified to serve as a [2][Director] or as a member of a Local Board who is not a holder in his own right of unencumbered shares of the Bank, to the nominal amount of ten thousand rupees at the least:

Provided that this provision shall not apply in the case of a person who is an officer of the Bank or is nominated [3][* * *] by the Central Government.

(2) No person shall be qualified to serve as a [[2]Director] or as a member of a Local Board—

if he holds the office of director, provisional director, promoter, agent or manager of any joint-stock bank established, or having a branch or agency in British India [4][or British Burma] or advertised as about to be established, or to have a branch or agency in British India [4][or British Burma];

Provided that this disqualification shall not apply to any person being a director of a joint-stock bank, who may be nominated as a [2][Director under the provision of clause (*iv*)] of sub-section (1) of section 28; or

if he is a salaried officer of [5][the Crown] not specially authorised by this Act or by the Central Government to serve as a member;

[2][and the office of a Director] or a member of the Local Board shall be vacated—

if the person holding it resigns his office or dies;

if he accepts or holds any other office of profit under the Bank;

if he becomes insolvent or bankrupt, or compounds with his creditors;

if he is declared lunatic, or becomes of unsound mind;

if he is absent from the Central Board or the Local Board, as the case may be, for more than six consecutive months; or

if he ceases to hold in his own right the amount of shares required to qualify him for the office.

(3) No two persons who are partners of the same mercantile firm, or are directors of the same private company, or one of whom is the general agent of, or holds a power of procuration from

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LEG. REF.

[1] Inserted by Act III of 1934

[2] Substituted by Act III of 1934.

[3] Omitted by Act III of 1934.

[4] Inserted by A.O., 1937.

[5] Substituted for 'Government' by *ibid.*

the other, or from a mercantile firm of which the other is a partner, shall be eligible or qualified to serve as members of the Central Board or [1][of the same Local Board] at the same time.

Removal of [1][Directors] and member of Local Boards.

40. REMOVAL OF DIRECTORS.—The shareholders may, by a special resolution passed by a majority of the votes of shareholders holding in the aggregate not less than one-half of the capital, remove any [1][Directors (other than a Director nominated by the Central Government)] before the expiration of his period of office, and appoint, in his stead, a qualified person, who shall in all respects stand in his place.

41. REMOVAL OF MEMBER OF LOCAL BOARD.—The shareholders on a branch register may by a special local resolution passed by the votes of shareholders holding in the aggregate not less than one-half of the capital on the branch register, remove any member of the Local Board before the expiration of his period of office, and appoint, in his stead, a qualified person who shall in all respects stand in his place.

Meetings of Central Board.

42. (1) MEETINGS OF CENTRAL BOARD.—Meetings of the Central Board shall be convened not less than once in every [1][four] months by [1][the Managing Director or Deputy Managing Director] and a meeting of the Central Board shall be held once at least in every year [1][at each of the local head offices established at Calcutta, Bombay and Madras :

Provided that not less than four meetings shall be convened by the Managing Director or Deputy Managing Director in every year].

(2) Any Local Board may require [1][the Managing Director or Deputy Managing Director], to convene a meeting of the Central Board at any time and [1][the Managing Director or Deputy Managing Director] shall forthwith convene a meeting accordingly.

(3) Four [1][Directors] entitled to vote shall form a quorum for the transaction of business.

(4) At each meeting of the Central Board the [1][Directors] present shall elect from among themselves a chairman for such meeting, who, if he is entitled to vote, shall have a second or casting vote in all cases of an equal division of votes.

Local Boards.

43. (1) TERM OF OFFICE AND NUMBER OF MEMBERS OF LOCAL BOARDS.—At the first general local meeting after the commencement of this Act, and at the annual general local meeting thereafter the two members of the Local Board who have been longest in office as members thereof shall go out of office. The vacancies shall be filled by election at a general or special local meeting.

(2) Any member so retiring may be re-elected, and if any question arises as to which of the members who have been the same time in office shall retire, the question shall be decided by the Local Board by ballot.

(3) Subject to any by-laws which may be prescribed, the number of members of any Local Board may be varied by a special local resolution.

(4) Three of the members of a Local Board shall form a quorum for the transaction of business.

(5) Meetings of a Local Board shall be convened by the president, vice-president, or, in their absence, the senior member of the Board, whenever he thinks fit.

44. (1) PRESIDENT, VICE-PRESIDENT AND CHAIRMAN.—[1][(1) At the first meeting of the Local Board which takes place after the first meeting of the Central Board in each year, the Local Board shall elect from among its members a president and a vice-president and the elected Director referred to in clause (*ii*) of sub-section (1) of section 28. They shall continue in their respective offices until the first meeting of the Local Board after the first meeting of the Central Board in the following year, and, whenever the office of president or vice-president or of such elected Director becomes vacant, the Local Board shall at its next meeting elect a successor who shall hold office for the unexpired portion of the period for which his predecessor was appointed.]

(2) The president or, in his absence, the vice president shall be chairman at all meetings of the Local Board [2][at all general or special meetings held in the town where the Local Board is established] and at all general or special local meetings :

Provided that, if both the president and vice-president be absent at any meeting, the persons present at such meeting shall elect a chairman from among [1][the members of the Local Board present]

(3) The chairman shall have a second or casting vote in all cases of an equal division of votes.

45. (1) VACANCIES.—Any vacancy occurring on a Local Board by the death, resignation or disqualification of any member shall be filled up by the remaining members who shall co-opt a duly qualified person to fill the vacancy.

(2) Any member so appointed shall be considered to have held office from the date on which the member in whose place he is appointed was elected or, when such member was appointed under this clause, from the date on which his immediate or immediate predecessor was elected, as the case may be.

LEG. REF.

[1] Substituted by Act III of 1934.

[2] Inserted by Act III of 1934.

General provisions as to Central and Local Boards.

46. PROCEEDINGS OF BOARDS NOT INVALIDATED BY VACANCIES.—No act or proceeding of the Central Board or of a Local Board shall be invalidated merely by reason of the existence of a vacancy or vacancies among its [1][Directors] or members.

47. ACTS OF MEMBERS OF BOARDS VALID NOTWITHSTANDING SUBSEQUENT DISCOVERY OF DISQUALIFICATION.—All acts done by any person acting in good faith as a [1][Director] or as a member of a Local Board shall be as valid as if he was a member of the Central or Local Board, as the case may be, notwithstanding it be afterwards discovered that there was some defect in his appointment or qualification.

48. (1) INDEMNITY OF MEMBERS OF BOARDS.—Every [1][Director] and every member of a Local Board shall be indemnified by the Bank against all losses and expenses incurred by him in or about the discharge of his duties, except such as happen from his own wilful act or default.

(2) A [1][Director] shall not nor shall a member of a Local Board be responsible for any other [1][Director] or member or for any officer or servant of the Bank or for any loss or expense happening to the Bank by the insufficiency or deficiency of value of, or title to, any property or scurity acquired or taken on behalf of the Bank, or by the insolvency, bankruptcy or wrongful act of any customer or debtor of the Bank, or by anything done in the execution of the duties of his office or in relation thereto, or otherwise than for his own wilful act or default.

The Seals.

49. (1) COMMON SEAL.—The common seal of the Bank shall not be affixed to any instrument except in the presence of at least three [1][Directors] including [1][the Managing Director or Deputy Managing Director] who shall sign their names to the instrument in token of their presence, and such signing shall be independent of the signing of any person who may sign the instrument as a witness. Unless so signed as aforesaid, such instrument shall be of no validity.

(2) The Bank shall have for use by the Local Boards at Calcutta, Madras and Bombay, and may have for the use of other Local Boards established under this Act, official seals which shall be facsimiles of the common seal of the Bank with the addition of the name of the local head office where it is to be used.

(3) The official seal shall be affixed to the certificates issued in respect of any shares entered in the branch registeres kept at those places and may be used for such other purposes as may be prescribed.

(4) An instrument to which an official seal is duly affixed shall bind the Bank as if it had been sealed with the common seal of the Bank.

(5) An official seal shall not be affixed to any instrument except in the presence of at least two members of the Local Board and the secretary [2][or Deputy Secretary] who shall sign their names to the instrument in token of their presence, and such signing shall be independent of the signing of any person who may sign the instrument as a witness. Unless so signed as aforesaid such instrument shall be of no validity.

Officers of the Bank.

50. APPOINTMENT, SALARIES, SUSPENSION AND REMOVAL OF OFFICERS.—The Central Board and subject to the provisions of this Act, the Local Boards shall have power—

(*a*) to appoint such officers and servants as may be necessary to conduct the business of the Bank,

(*b*) to grant salaries, pensions and other emoluments to such officers and servants, [2][and to grant gratuities or other financial assistance, either temporary or permanent, to widows, children or other dependents of deceased officers or servants], and

(*c*) to suspend or remove any officer or servant of the Bank.

51. ACCOUNTS, RECEIPTS AND DOCUMENTS OF BANK BY WHOM TO BE SIGNED.—The managing [2][Director and Deputy Managing Director], the secretaries and such other [1][employees] of the Bank as the Central Board may authorise in this behalf by notification in the Gazette Official are hereby severally empowered for and on behalf of the Bank,, to endorse and transfer promissory notes stock receipts, stock debentures, shares, securities and documents of title to goods, standing in the name of, or held by, the Bank and to draw, accept, and endorse bills of exchange, bank post-bills, and letters of credit in the current and authorized business of the Bank, [4][*] to sign all other accounts, receipts and documents connected iwth such business [3][and to execute proxies to vote at meetings on behalf of shareholders from whom the Bank holds general powers of attorney].

LEG. REF.

[1] Substituted by Act III of 1934.
[2] Inserted by Act III of 1934.
[3] Inserted by Act III of 1934.
[4] The word 'and' omitted by Act III of 1934.

NOTES.

SCH. II, S. 50 : CONWSRUCTION—SERVANT OF BANK—TENURE OF —DISMISSAL WITHOUT NOTICE —IF JUSTIFIED.—It cannot be held that a servant of the Imperial Bank of India holds his office at pleasure and is liable to be dismissed without notice. Servants even of a statutory body do not hold office at pleasure, merely because the statute provides the body or person by whom they may be dismissed. It is not right to assume that the power of dismissal is a power of summary dismissal. Where no stipulation exists as to notice, a hired servant can be dismissed only on reasonable notice. 49 L.W. 514=1939 M. 580=(1939) 1 M.L.J. 615.

52. OFFICERS FORBIDDEN TO ENGAGE IN OTHER COMMERCIAL BUSINESS.—No managing [1][Director] secretary, inspector, manager or accountant in the service of the Bank and, without the previous sanction of the Board no *khazanchi*, cashier, or shroff, in the service of the Bank and no agent, at any branch or agency of the Bank shall, engage in any other banking or commercial business, either on his own account or as agent for any other person or persons, or shall act as broker or agent for he sale or purchase of Government or other securities.

53. SECURITY FROM OFFICERS.—Every person appointed to hold or act in any one or more of the said offices, and every other officer from whom the Central Board may think fit to require it, shall give security to the Bank for the faithful discharge of his duty to the satisfaction of the Central Board in such amount and in such manner as it thinks proper. The security to be given as aforesaid by the person holding or acting in the office of secretary shall not be in a less amount than fifty thousand rupees.

Accounts and Dividends.

54. (1) BOOKS TO BE BALANCED TWICE A YEAR.—The Central Board shall cause the books of the Bank to be balanced on every thirty-first day of December and every thirtieth day of June.

(2) A statement of the balance at every such period, signed by a majority of the [1][Directors] shall be forthwith sent to the Central Government.

[1][(3) The statement of the balance shall contain the particulars and shall be in the form required by section 132 of the Indian Companies Act, 1913, and the provisions of that section and of section 136 of the same Act, shall apply to the Bank in like manner as they apply to a banking company.]

55. (1) DIVIDENDS TO BE DETERMINED HALF-YEARLY.—An Account of the profits of the Bank during the previous half-year shall be taken on or immediately after every thirty-first day of December and every thirtieth day of June, and a dividend shall be made as soon thereafter as conveniently may be and the amount of such dividend shall be determined by the Central Board.

(2) No unpaid dividend shall bear interest as against the Bank.

56. TRANSFER TO RESERVE.—The Central Board may, before declaring any dividend, set aside out of the profits of the Bank such sums as it thinks proper as a reserve or reserves which shall at the descretion of the Central Board, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the Bank may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Bank or be invested in any of the securities specified in sub-clauses (i) to (iii) of clause (*a*) of Part I of Schedule I.

57. JOINT-HOLDERS.—If several persons are registered as joint-holders of any share, any one one of them may give effectual receipts for any dividends payable on the share.

Audit.

58. (1) AUDITORS.—Three auditors shall be elected and their remuneration fixed at the annual general meeting. The auditors may be shareholders, but no [1][Director] or member of a Local Board or other officer of the Bank shall be eligible during his continuance in office Any auditor shall be eligible on quitting office for re-election.

(2) The first auditors of the Bank may be appointed by the Central Board before thee annual general meeting and if so appointed shall hold office only until the first annual general meeting. All auditors elected under this clause shall severally be and continue to act as auditors until the first general meeting after their respective elections :

Provided that, if any casual vacancy occurs in the office of any auditor elected under this section [1][the vacancy may be filled by the Central Board].

59. GOVERNMENT AUDITORS.—Without prejudice to anything contained in the foregoing provisions, the Central Government may appoint such auditors as it thinks fit to examine and report upon the accounts of the Bank.

60. (1) RIGHTS AND DUTIES OF AUDITORS.—Every auditor shall be supplied with a copy of the half-yearly balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto. Every auditor shall have a list delivered to him of all books kept by the Bank, and shall at all reasonable times have access to the books, accounts and other documents of the Bank, and may, at the expense of the Bank if appointed by it and at the expense of the Central Government if appointed by it, employ accountants or other persons to assist him in investigating such accounts, and may, in relation to such accounts, examine any [1][Director] or any member of a Local Board, or any officer of the Bank.

LEG. REF.

[1] Substituted by Act III of 1934.

(2) The auditors shall make a report to the shareholders or to the Central Government, as the case may be, upon the annual balance sheet and accounts and in every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance-sheet containing the prescribed particulars and properly drawn up so as to exhibit a true and correct view of the state of the Bank's affairs, and in case they have called for any explanation or information from the Central Board, whether it has been given and whether it is satisfactory. Any such report made to the shareholders shall be read together with the report of the Central Board at the annual generall meeting.

[2][60-A. LIQUIDATION. Notwithstanding anything contained in this Act or in section 271 of the Indian Companies Act, 1913, if the shareholders of the Bank pass a special resolution that the Bank be wound up voluntarily under the provisions of the Indian Companies Act, 1913, the Bank shall be wound up in accordance with the provisions of that Act with regard to the voluntary winding up of a company :

Provided that, for the purposes of this section, no such special resolution shall be deemed to have been passed, unless at least one-third of the shareholders holding at least one-half of the paid-up capital of the Bank for the time being be present in person or by proxy and a majority poll by open voting in favour of the said resolution and such resolution is thereafter confirmed by a majority of the shareholders at a subsequent special meeting held at an interval of not less than two months or more than three months from the date of the meeting at which the resolution was first passed.

Notices.

61. (1) SERVICE.—A notice may be given by the Bank to any shareholder either personally or by sending it by post to him to his registered address or (if he has no registered address in British India [2][or British Burma]) to the address, if any, within British India [2][or British Burma] supplied by him to the Bank for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

[1][62. ABSENCE OF REGISTERED ADDRESS. A shareholder who has no registered address in India [2][or Burma] and has not supplied to the Bank an address for the giving of notice to him shall not be entitled to any notice, notwithstanding anything contained in this Act.]

63. NOTICE ON JOINT-HOLDERS.—A notice may be given by the Bank to the joint-holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

64. NOTICE TO LEGAL REPRESENTATIVE.—Any notice given in accordance with the foregoing provisions shall be deemed to have been duly given notwithstanding that the shareholder be then deceased and whether or not the Bank had notice of his decease, and shall in that event, be deemed to be a notice to his legal representative.

65. SERVICE OF NOTICE ON BANK.—A notice may be served on the Bank by leaving it at, or sending it by post to, any local head office of the Bank.

[*N. B.*—The following S. 41 of the Act, the Amending Act III of 1934 is to be read along with this Act]

"41. TEMPORARY SAVING GF EXISTING CENTRAL BOARD. Notwithstanding any amendment made in the said Act by this Act (III of 1934) in regard to the manner in which the Central Board shall be constituted, the Central Board existing at the commencement of this Act, shall, until it has been re-established in accordance with the said Act as amended by this Act, continue to transact business and shall have all the powers of the Central Board under the said Act as so amended."

SCHEDULE III.

ENACTMENTS REPEALED. [*Repealed by Act XII of* 1927).

INDIAN INCOME-TAX ACT (XI OF 1922).

Act.	How amended.
The Indian Income-tax Act, 1922 (XI of 1922.)	Repealed in part, XII of 1927; Amended, XII of 1922, S. 7; XV of 1923; XXVII of 1923; IV of 1924; VII of 1924; XI of 1924; V of 1925; XIII of 1925; XVI of 1925; XIX of 1926; XXIV of 1926; *see* V of 1927; XXVIII of 1927; III of 1928; V of 1928; XVI of 1928; VI of 1929; XII of 1929; XV of XXI, XXII and XXIII of 1930; IV of 1931; *see* the Indian Finance Act, 1931; VII, XII and XVIII of 1933; XX of 1934; XXIV of 1934; XXIX of 1934; the Indian Finance Act, 1935; XII of 1935 and the Indian Finance Act, 1936; IV of 1937; XX of 1937; the Indian Finance Act, 1938; VII of 1939; the Indian Finance Act, 1939; XXXIV of 1939; XII of 1940; XL of 1940; VII of 1941; XXIII of 1941 and Finance Act of 1942.

CONTENTS.

SECTIONS.
1. Short title, extent and commencement.
2. Definitions.

CHAPTER I.
Charge of Income-tax.
3. Charge of income-tax.
4. Application of Act.
4A. Residence in British India.
4B. Ordinary residence.

CHAPTER II.
Income-tax Authorities.
5. Income-tax authorities.

CHAPTER II-A.
Appellate Tribunal.
5A. The Appellate Tribunal.

CHAPTER III.
Taxable Income.
6. Heads of income chargeable to income-tax.
7. Salaries.
8. Interest on securities.
9. Property.
10. Business.
11. *Omitted.*
12. Other sources.
12A. Managing Agency Commission.
13. Method of accounting.
14. Exemptions of a general nature.
15. Exemption in the case of life insurances.
16. Exemptions and exclusions determining the total income.
17. Determination of tax payable in certain special cases.

CHAPTER IV.
Deductions and Assessment.
18. Payment by deduction at source.
19. Payment in other cases.
19A. Supply of information regarding dividends.
20. Certificate by company to shareholders receiving dividends.
20A. Supply of information regarding interest
21. Annual return.
22. Return of income.
23. Assessment.
23A. Power to assess individual members of certain companies.

SECTIONS.
24. Set-off of loss in computing aggregate income.
24A. Assessment in case of departure from British India.
24B. Tax of deceased person payable by representative.
25. Assessment in case of discontinued business.
25A. Assessment after partition of a Hindu undivided family.
26. Change in constitution of a firm.
26A. Procedure in registration of firms.
27. Cancellation of assessment when cause is shown.
28. Penalty for concealment of income or improper distribution of profits.
29. Notice of demand.
30. Appeal against assessment under this Act.
31. Hearing of appeal.
32. *Omitted.*
33. Appeals against orders of Appellate Assistant Commissioner.
33A. Power of revision by Commissioner.
34. Income escaping assessment.
35. Rectification of mistake.
36. Tax to be calculated to nearest anna.
37. Power to take evidence on oath, etc.
38. Power to call for information.
39. Power to inspect the register of members of any company.

CHAPTER V.
Liability in special cases.
40. Guardians, trustees and agents.
41. Courts of Wards, etc.
42. Non-residents.
43. Agent to include persons treated as such.
44. Liability in case of a distcontinued firm or association.

CHAPTER VA.
Special provisions relating to certain classes of shipping.
44A. Liability to tax of occasional shipping.
44B. Return of profits and gains,
44C. Adjustment,

SECTIONS.

CHAPTER VB.

Special provisions relating to avoidance of liability to Income-tax and Super-tax.

44D. Avoidance of income-tax by transactions resulting in the transfer of income to persons resident or ordinarily resident abroad.

44E. Avoidance of tax by certain transactions in securities.

44F. Avoidance of tax by sales *cum* dividend.

CHAPTER VI.

Recovery of tax and Penalties.

45. Tax when payable.

46. Mode and time of recovery.

47. Recovery of penalties.

CHAPTER VII.

Refunds.

48. Refunds.

48A. *Omitted.*

49. Relief in respect of United Kingdom income-tax.

49A. Relief in respect of Indian State and Dominion Income-tax.

49B. Income-tax on company's dividend deemed to have been paid by shareholder.

49C. Relief granted to a company to be deemed relief granted to shareholder.

49D. Relief in respect of tax charged in country not providing for relief in respect of British Indian income-tax.

49E. Power to set off amount of refunds against tax remaining payable.

49F. Power of representative of deceased person or person disabled to make claim on his behalf.

50. Limitation of claims for refund.

50A. *Omitted.*

CHAPTER VIII.

Offences and Penalties.

51. Failure to make payments or deliver returns or statements or allow inspection.

52. False statement in declaration.

53. Prosecution to be at instance of Inspecting Assistant Commissioner.

54. Disclosure of information by a public servant.

CHAPTER IX.

Super-tax.

55. Charge of super-tax.

56. Total income for purposes of super-tax.

57. *Omitted.*

58. Application of Act to super-tax.

CHAPTER IXA.

Special provisions relating to certain classes of providend funds.

58A. Definitions.

58B. The according and withdrawal of recognition.

SECTIONS.

58C. Conditions to be satisfied by a recognised provident fund.

58D. Power to relax restrictions of employer's contributions in certain cases.

58E. Annual accretion deemed to be income received.

58F. Exemption of annual accretion from income-tax.

58G. Exemption of accumulated balance from income-tax and super-tax.

58H. Deduction at source of income-tax payable on accumulated balances due.

58I. Accounts of recognised provident funds.

58J. Treatment of balances in newly recognised provident funds.

58K. Treatment of fund transferred by employer to trustee.

58L. Provisions relating to rules.

58M. Application of this Chapter.

CHAPTER IXB.

Special provisions relating to certain classes of Superannuation funds.

58N. Definitions.

58O. Approval and withdrawal of approval.

58P. Conditions for approval.

58Q. Application for approval.

58R. Exemption of superannuation fund from income-tax.

58S. Treatment of repaid contributions.

58T. Deduction from pay of, and contributions on behalf of, employee to be included in return under section 21.

58U. Liabilities of trustees on cessation of approval of fund.

58V. Particulars to be furnished in respect of superannuation funds.

CHAPTER X.

Miscellaneous.

59. Power to make rules.

60. Power to make exemptions, etc.

61. Appearance by authorised representative

62. Receipts to be given.

63. Service of notices.

64. Place of assessment.

65. Indemnity.

66. Statement of case by Appellate Tribunal to High Court.

66A. References to be heard by Benches of High Courts and appeal to lie, in certain cases to Privy Council.

67. Bar of suits in Civil Court.

67A. Computation of periods of limitation.

67B. Act to have effect pending legislative provision for charge of income-tax.

68. *Repealed.*

SCHEDULE.—Rules for the computation of the profits and gains of insurance business.

[5*th March*, 1922.

An Act to consolidate and amend the law relating to Income-tax and Super-tax.

WHEREAS it is expedient to consolidate and amend the law relating to Income-tax and Super-tax; It is hereby enacted as follows :—

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1921, Pt. V, p. 159; and for Report of Joint Committee, *see ibid.*, 1922 Pt. V, p. 31.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN INCOME TAX ACT, 1922.

LEG. REF.

This Act has been declared in force in the district of Khondmals by S. 3 and Sch. of the Khondmals Laws Regulation, 1936 (IV of 1936) and in the district of Angul by S. 3 and Sch. of the Angul Laws Regulation, 1936 (V of 1936).

The Act has been applied with certain exceptions to persons in the Chittagong Hill-tracts, by S. 2 of the Chittagong Hill-tracts Laws Regulation, 1937 (Ben. Reg. II of 1937).

NOTES.

Sec. 1: SCOPE OF THE ACT.—(Per *Mukerjee.*) 52 C. 1=28 C.W.N. 1074=1925 C. 34 (22 C. 788; 23 C. 563, Ref.). *See also* 18 S.L.R. 68=1925 S. 130.

CHARACTERISTIC OF INCOME-TAX—INCOME-TAX AND POOR RATE—DIFFERENCE BETWEEN.—The purpose of the Income-tax Act is to tax a person's total income from all sources; the method of assessing income derived by ownership or occupation of hereditaments is somewhat arbitrarily based on annual value and not on actual income, but that does not alter the essential characteristic of income-tax that it is a tax on income generally. On the other hand, the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the rate payer is in fact deriving profits or gains from such occupation. A dwelling-house is a burden, not a source of profit, for the occupier, who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. This marks the essential difference in character between income-tax and rates. 162 I.C. 479 (P.C.). Per *Beaumont, C.J. and Broomfield, J.*—It is clear that in a statute imposing income-tax, that is a tax on total income, the *tax relating to land is none the less income-tax* because it is assessed on the annual value of the land and not on the actual income. But it does not follow from that proposition that every statute which charges a tax in relation to annual value of land is charging a tax on income. *Prima facie*, a tax on the annual value of land is not a tax on income. 1940 Bom. 65. *Kania, J.*—In determining the nature of a tax though consideration may be given to the standard on which the tax is levied, that is not the determining factor. I.L.R. (1940) Bom. 58=42 Bom.L.R. 10=A.I.R. 1940 Bom. 65 (F.B.). *Krishnaswami Ayyangar, J,*—(1) The Income-tax Act, being a taxing statute, should receive a strict construction that is a construction in favour of the subject and not in favour of the Crown. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under the one which leaves him with a lighter burden. I.L;R. (1940) Mad. 178=51 L.W. 222=A.I.R. 1940 Mad, 866=(1940) I M.L.J. 319 (F.B.)

CONSTRUCTION.—On points specially dealt with in the Act it should be interpreted without reference to previous state of law. 28 C.W.N. 1074=52 C. 1=1925 C. 34. Construction most beneficial to the subject should be adopted. 48 C. 161; 43 A. 139. "If the Crown, seeking to recover tax cannot bring the subject within the letter of the law, the subject is free"—(Per *Lord Cairns* in *Farlington* v. *Attorney-General*, L.R. 4 H.L. 100). But the Court cannot undertake, out of its notions of what is fair, to adopt or re-arrange the machinery of the Act upon a question as to whether a certain payment made by the assessee is allowable or not in computing income-tax. 57 C. 918=1930 C. 641. Per *Beaumont, C.J.*—In construing a taxing Act, the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the "Statute." 55 B. 312=33 Bom.L.R. 388=1931 B. 333. *See also* I.L.R. (1940) Mad. 178=1940 Mad. 366=(1940) 1 M.L.J. 319 (F.B.). It is obviously undesirable that in construing an All India Act like the Income-tax Act different constructions should be placed upon the Act in different provinces. 1940 I.T.R. 1, As to mode of keeping accounts for income-tax, *see* 7 Mys.L.J. 287. Income, of previous year as basis of income-tax, *see* 1929 M. 35=55 M.L.J. 844 (F.B.). A man who is liable to pay a tax is entitled to take shelter under all devices which he may adopt within the law to avoid payment of the tax. 1929 A. 919=1930 A.L.J. 26. *See also* 26 A.L.J. 280=50 A. 495 (F.B.); 1940 Mad. 366=(1940) 1 M.L.J. 319 (F.B.); 43 Bom. L.R. 258=1943 Bom. 205=I.L.R. (1941) Bom. 384; 1938 Lah. 194. The amounts received from the sale of timber trees are income and as such liable to income-tax. 54 M. 21=1930 M. 764=59 M.L.J. 265 (F.B.).

INTERPRETATION.—Where a statute has been punctuated, the punctuation marks must be taken as part of the Statute. 46 M.L.J. 42=1924 M. 455.

INCOME-TAX MANUAL.—The Income-tax Manual merely contains departmental instructions for administering the Act and for guidance of officials and is not authoritative of the statute which is binding on the Courts. 131 I.C. 193=1931 L. 320 (2) (F.B.); 49 M. 22=1926 M. 287=50 M.L.J. 63. *See also* 12 L. 757=1931 L. 441 (as to the effect of R. 25 of the Income-tax Manual).

OPERATION AND COMMENCEMENT.—Where the proceedings, such as issue of notice, etc., were taken under the Income-tax Act of 1918, the subsequent coming into force of the Act of 1922 does not make the latter applicable. 80 I.C. 362.

ENGLISH AND INDIAN LAW.—The English and Indian Income-tax Acts, not being *in pari materia* decisions of the English Courts are not as a rule useful guides on the construction of the Indian enactment. 59 I.A. 206=36 C.W.N. 653=63 M.L.J. 124 (P.C.); 52 C. 1=28 C.W.

[1][(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas and applies also, within the Indian States and the tribal areas, to British subjects who are in the service of the Crown or of a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf, and to all other servants of the Crown in the said States and areas.]

LEG. REF.

[1] Substituted by A.O., 1937.

NOTES.

N. 1 074. *See also* 67 I.A. 239=I.L.R. (1940) 2 Cal. 215=1940 P.C. 124=(1940) 2 M.L.J. 577 (P.C).

CONTRA.—English decisions are not decisions of "foreign Courts" and the decisions of English Courts on the English Income-tax Act are the best guides to the interpretation of the Indian Act. 44M. 718=41 M.L.J. 177; 52 C. 1=28C.W.N. 1074; 1933 P.C. 145=65 M.L.J. 285=60 C. 1029=60 I.A. 196 (P.C.). Extreme care, must be taken in applying English decisions to cases under the Burma Income-tax Act, because the Scheme of the English Income-tax Act, 1918, and the Scheme of the Burma Income-tax Act 1922 are entirely different. 1938 Rang.L.R. 346=175 I.C. 287=1938 Rang. 151 (S.B.). An assessment is valid in law when the source of income is non-existent in the year of assessment but had been in existence in the previous year. Per *Rankin, C.J.*—The general scheme of the Income-tax Law in England is that tax is payable in respect of a source of income existing in the year of assessment, though the amount is often measured by the results of previous years. But under the Indian Income-tax Act the income of the previous year is not merely the standard by which the next year's income is to be computed but is itself the subject-matter of the tax. 54 C. 637=31 C.W.N. 557=1927 C. 553. The Indian Law bases the liability of a person to taxation on the place where the income accrues or arises, or is received, but not on the place of his residence. 10 L. 657=1929 L. 609 (F.B.). The invocation of *Imperial Income-tax Code* and of decisions pronounced upon it is apt to be very misleading in the interpretation of Indian Income-tax legislation which is framed on other and fortunately much simpler lines. 60 I.A. 196=1933 P.C. 145=65 M.L.J. 285 (P.C.).

LEGAL OPINIONS.—It is not proper for the Income-tax Officer to ask the assessee to produce opinions of legal practitioners in support of his contention. Where such opinions are annexed by the assessees to their petitions the proper course is for the tribunal to state that the petitions cannot be received until the statements as to opinions are removed. 12 P. 5=14 P.L.T. 171=1933 P. 123.

INCOME, WHAT IS.—The word 'income' is not defined in the Act. It connotes a periodical monetary return "coming in" with some sort of regularity or expected regularity from definite source. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. 59 I.A. 206=59 C. 1343=1932 P.C. 138=63 M.L.J. 124 (P.C.). *See also* 37 Bom.L.R. 126; 1933 P.C. 145=60 I.A. 196=65 M.L.J. 285, cited under S. 3.

APPEAL TO PRIVY COUNCIL.—LIMITATION.—An *application for leave to appeal to Privy Council* in a case under the Income-tax Act is governed by Art. 179 rather than by Art. 181 of the Limitation Act and the date of the judgment is the starting point of limitation. 59 C. 251=36 C.W.N. 127=1932 C. 587. The Commissioner of Income-tax preferring an appeal to Privy Council is entitled in computing the period of limitation to deduct the period taken for copies of judgment. 59 C. 251.

PRESUMPTION OF GOOD FAITH OF ASSESSEE.—The normal presumption is in favour of good faith and not of bad faith on the part of the assessee. To start with, the assessee is entitled to the presumption that an entry in his accounts is made in the ordinary course and not with an intention to conceal the real income. 12 Mys. L.J. 245. Where a system of accountancy has been adopted by an assessee and recognised by the Income-tax authorities in previous years as correct, and on that basis a particular item has been allowed as deductible in the computation of profits in previous years, the income-tax authority will not be justified in subsequent years to turn round and refuse to accept that system of accountancy; a party cannot both approbate and reprobate at the same time. 12 Mys.L.J. 245.

DOUBLE TAXATION, RELIEF AGAINST—ENGLISH FINANCE ACT.—*Held*, in order to claim relief afforded in respect of double taxation it is necessary to prove (i) payment of or liability to pay United Kingdom income-tax for a year of assessment or a part of the year's income, and (*ii*) payment of dominion tax for that year in respect of the same part of the assessee's income; those parts had to be ascertained by excluding from the statutory incomes in the two countries items which do not satisfy the conditions according to the true construction of the section; and it is the smaller of these two incomes in respect of which relief is afforded; (*ii*) the word "income" in the section meant not real income, but "statutory" or "notional income," by means of which tax is calculated; (*iii*) an analysis of the two incomes, for the purpose of comparing, for example, the respective allowances for repairs or depreciation, is inadmissible; (*iv*) that nothing need be regarded except the two statutory incomes of the business, taking care, of course, to see that neither includes income from any other source; (*v*) that the rules which determine in the United Kingdom or in a Dominion the allowances or deductions which are permissible for the purpose of assessing a tax payer to income-tax in either country must be disregarded in determining the comparable incomes, provided that the incomes are derived from the same source; (*vii*) that actual payment, and not ultimate incidence, was the

(3) It shall come into force on the first day of April, 1922.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "agricultural income" means—

NOTES.

criterion both of the right to relief and of the right to deduct. 1939 I.T.R. 59.

CLAIM ALLOWED IN ONE YEAR—IF BINDS INCOME-TAX OFFICER NEXT YEAR.—The fact that in a previous year an Income-tax Officer had allowed a certain claim does not bind the Income-tax Officer in a subsequent year. 154 I.C. 191=1935 L. 81 (S.B.). As to application of principle of *res judicata*, *see* 1941 P. 527=194 I.C. 264. As to estoppel, *see* 1938 Cal. 557.

"OFFICER OF CROWN"—MEANING OF—COLLECTOR—POSITION OF.—The expression "officer of the Crown" as used in the Income-tax Act clearly covers a Collector. The latter is in one sense an officer of the Provincial Government, but there can be no doubt that in India he is also an "officer of the Crown." 20 Pat. 573=1941 I.T.R. 386=194 I.C. 663=22 Pat.L.T. 863=1941 Pat. 306 (S.B.). The proceedings before the Income-tax Officer are not judicial proceedings in the sense in which this term is ordinarily used, and all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words, to conduct himself in accordance with the rules of justice, equity and good conscience; and the control exercisable by the High Court on the Income-tax Officer in these circumstances is slight. 39 P.L.R. 1028=A.I.R. 1937 Lah. 721.

AVOIDING INCOME-TAX by means not forbidden by laws is not unlawful. 26 A.L.J. 280=1928 A. 81 (F.B.); 1930 A.L.J. 26=120 I.C. 435; though it may be an offence by false return or concealment to evade payment of income-tax. 1928 A. 81 (F.B.). *See also* 1929 A. 919. Any subject of the State is entitled to escape paying taxes if he can devise a lawful method of doing so but by dividing what is in fact a single transaction between two documents he does not achieve his object nor does he change the nature of the transaction. 9 P. 194=1930 P. 33 (S.B.). *See also* 57 C. 918=1930 C. 641; 1929 A. 919; 1928 A. 81.

SECOND INCOME-TAX cannot be imposed without sanction of Governor-General. 106 I.C. 882=1928 L. 53.

Sec. 2 (1) : AGRICULTURAL INCOME.—Forest income is "agricultural income." 45 M. 518=1922 M. 325. Income derived from pasturage is agricultural income. *See* 1924 Rang. 337; 1924 Cal. 668; 184 I.C. 31. Where cattle are wholly stall-fed and not pastured upon the land at all, doubtless, it is trade and no agricultural operation is being carried on; where cattle are being exclusively or mainly pastured and are nonetheless fed with small amounts of oil cake or the like, it may well be that the *income derived from the sale of their milk is agricultural income.* But between the two extremes there must be a number of varying degrees, and the task for the Income-tax Officer is to apply his mind to he two distinctions and to decide in any particular case on which side of the fence the matter falls. The Income-tax Officer has to see whether the cattle derived sustenance to a material extent from the produce of the ground, and whether they did so or not is entirely a question of fact for him and one which cannot be reviewed by the High Court. 176 I.C. 601=1938 Rang. 260 (F.B.). In order to determine whether certain income is agricultural income or not, regard must be had to the source of such income and annual sum in the nature of an *ex gratia* payment made by the Bettiah Raj to the assessee in consideration of some services rendered by an ancestor of his in the remote past is not derived from land and could not be regarded as agricultural income within the meaning of S. 2 (1) of the Act. 1941 Pat. 27=1940 I.T.R. 416. Agricultural income does not lose its right to exemption because it can be brought under one of the heads of income set out in S. 6 of the Income-tax Act. 45 C.W.N. 647=1941 I.T.R. 292=1941 Cal. 598. Profits derived by money-lender from usufructuary mortgage is "agricultural income". 62 I.A. 215=69 M.L.J. 474 (P.C.). 'Dharat' which means weighing charges levied by the landlord on the tenants in addition to the rent is also agricultural income and is exempt from assessment. 165 I.C. 141=1936 L. 602. S. 2 (1) of the Act applies to the case of a person who gets agricultural income from the use of the land by direct operation. It is not applicable to a lambardar who gets certain fees which constitute his remuneration for the work of the collection of the land revenue. Lambardari fees are not, therefore, within the definition of agricultural income. 38 P.L.R. 402=1936 L. 595. The rent of the site of a flour mill cannot be regarded as agricultural income, as the working of a flour mill is not an agricultural purpose. 38 P.L.R. 402=1936 L. 595. The net profit from commission charged to tenants for sale of their produce on their behalf does not fall within the definition of agricultural income. 38 P.L.R. 402=1936 L. 595. Where the tenant had executed a pro-note for arrears of rent, interest earned, on the pro-note is not "agricultural income" and is taxable. 55 M. 830=63 M.L.J. 20. *See also* 1941 Cal. 443. Where the assessee being a usufructuary mortgagee is in the position of a landlord with respect to the actual cultivating tenants, the income derived from such lands must be agricultural income within the meaning of the Income-tax Act and is therefore exempt from taxation. 13 P. 336=15 P.L.T. 85=1934 P. 178 (S.B.). Simple mortgagee—Rents and profits collected by receiver and deposited in Court—Payment to mortgagee—If not agricultural income—Income—When accrues or arises or is received. 53 L.W. 714=1941 Mad. 246=(1941) 1 M.L.J. 262. Cash remuneration received by Mutwalli, where wakf properties consisted entirely of agricultural income is taxable. 45 C.W.N. 647=1941 Cal. 598. Income derived from toddy extracted from cocoanut trees situated on lands assessed to Government revenue is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. 50 M. 923. If the income is obtained by a person who has (*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by [1][officers of the Crown] as such ;

(*b*) any income derived from such land by—

(*i*) agriculture, or

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (*ii*) ;

LEG.. REF.

[3] Substituted for " Officers of Government" by A.O., 1937.

NOTES.

produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income. 50 M. 923=1927 M. 1038=53 M.L.J. 666 (F.B.). Income from lease of fishery rights is not "agricultural income" which is exempt from taxation. 1932 M. 757=63 M.L.J. 634 (F.B.). The words "agricultural purposes" in S. 2 (1) of the Act cannot be held to cover the process of flooding the land occupied by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. Consequently a licensee of salt factory is liable to pay income-tax on the profits he makes by the manufacture of salt. 50 M. 204=1927 M. 848 =53 M.L.J. 377 (F.B.). Fees received from land used for storing purchases of crops do not come within the definition of "agricultural income" and cannot therefore be exempted from assessment. 31 C.W.N. 1047=1927 C. 793.

It is not possible to lay down any general rule that payments in the nature of *salami* or *nazarana* must be regarded as payments of rent and, therefore, income. The question would depend on the facts and circumstances of each case. *Salami* or *nazarana* may in certain cases be payment of rent in advance, but in other cases it may well be a lump payment for the transfer of the leasehold interest. The nature of the payment whether capital or income, cannot be decided as a question of law, but can only be decided after a full investigation of all the facts relating to the settlements for which the sums are payable. It must also be ascertained whether the holdings settled are holdings connected or unconnected with agriculture. If they are connected with agriculture, the payments would be agricultural income. 1940 P.W.N. 702=1941 Pat. 39. *See also* 31 C.W.N. 1047 =1927 Cal. 793. Nor does nazar paid by tenants to zamindar. 1941 P. 39. As to income received from *Mukarraridars* or permanent leaseholders, *see* 1941 Pat. 39= 1940 P.W.N. 702=1941 P. 39. As to income from quarries, *see* 25 A.L.J. 816=50 A. 98 =1927 A. 703. Income derived by letting out land for purposes of stocking timber is not agricultural income. 86 I.C. 1028=1925 L. 488. "Selami" or premium when paid for recognition of a transfer of a holding from one tenant to another is not agricultural income. 25 C.W.N. 80=61 I.C. 112; 53 C. 34=1925 C. 929. *Maintenance allowance* is not agricultural income though paid out of the income from land. *See* 52 M. 827=1929 M. 598=57 M.L.J. 36; 10 O. W.N. 1003=1933 O. 475. *See also* 60 I.A. 196 =60 C. 1029=1933 P.C. 145=65 M.L.J. 285 (P.C.). Annuity reserved on a sale of an estate is not "agricultural income." 62 I.A. 207= 1935 P.C. 143=69 M.L.J. 190 (P.C.). The question whether the rent derived from certain lands leased out by an assessee on patni leases is agricultural income or not stands to be determined not with reference to the nature of the leases by which they were let out but by reference to the use to which the land has been put. Where a certain portion of the lands which a zamindar has given on patni lease is used for non-agricultural purpose, it follows that the rent paid by the patnidar to the zamindar which is attributable to that portion of the lands is not "agricultural income" within the meaning of the Act. The question whether any portion of the income derived from the patnidar by the zemindar is agricultural or not is essentially a question of fact. 1940 I.T.R. 378. *See also* 1941 Pat. 39=1940 P.W.N. 702. Mutation fees paid by transferee of occupancy holding and the landlord's fees paid under S. 12, Bengal Tenancy Act, are agricultural income exempt from income-tax. 7 P. 550=9 Pat.L.T. 439= 1928 P. 468. *See also* 118 I.C. 593=1929 P. 449 (F.B.); 1929 P. 449=9 P. 1 (F.B.). Profits derived from the sale of sugar manufactured from sugar cane grown is not "agricultural income". 53 I.C. 301 (F.B.). Interest on arrears of rent collected by a landlord from agricultural tenants under S. 67 of the Bengal Tenancy Act of 1885 is not agricultural income as defined by S. 2 (1) (*a*) of the Income-tax Act and is therefore assessable to income-tax. Such interest is neither rent nor revenue derived from land. 1941 Cal. 443=1940 I.T.R. 460.

Sec. 2 (1) (b) (ii).—*See* 46 L.W. 247=1937 Mad. 745=(1937) 2 M.L.J. 310 (S.B.).

S. 2 (1) b (ii) "MARKET"—The word "market" in the section implies a real centre of economic exchange. The purchase by jails of aloe leaves for preparing fibre out of them through prisoners by crude methods is merely an artificial condition having no relation to a market for agricultural produce. 9 P. 185=123 I.C. 610=1930 P. 44 (S.B.). The process *"ordinarily employed by cultivators"* must mean one in ordinary use amongst cultivators generally. The Income-Tax Act so far as agricultural income is con-

(*c*) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (*ii*) and (*iii*) of clause (*b*) is carried on ;

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling house, or as a store-house, or other out-building ;

(2) " assessee " means a person by whom Income-tax is payable ;

(3) [1][" Appellate] Assistant Commissioner " means a person appointed to be an [1][Appellate] Assistant Commissioner of Income-tax under section 5 ;

(4) " business " includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce, or manufacture ;

[2][(4*A*) " the Central Board of Revenue " means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924 ;]

(5) " Commissioner " means a person appointed to be a Commissioner of Income-tax under section 5 ;

[3][(6) " company " means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;]

[4][(6*A*) " dividend " includes—

LEG. REF.

[1] Inserted by S. 2 of Act VII of 1939.

[2] Inserted by S. 4 and Sch. of Act IV of 1924.

[3] Substituted by S. 2 of Act XL of 1940.

[4] Inserted by S. 2 of Act VII of 1939.

NOTES.

cerned only relieves the producer from liability to income-tax so long as he is a *bona fide* agriculturist carrying on that business in the ordinary course of good husbandry. Where cotton is first ginned and then sold in market, then, although it may be distinctly advantageous even from the mere point of view of transport to do so, it cannot be said that ginning is essential in order to enable the produce to be fit to be taken to market. 139 I.C. 316=1932 N. 61. Manufacture of *biris* or cigarettes made of tobacco wrapped in tendu leaves—Tendu plant growing wildly without human effort—Profits from business—Not exempt as agricultural income. 1939 I.T.R. 493.

Cl. (1) (c).—In order that the income derived from any building may be held to be agricultural income, it is necessary that the building must be in the immediate vicinity of the land and it is a building which the receiver of the rent or revenue or the cultivator requires as a dwelling house or as a storehouse or other out-building. It is not open to the Commissioner to decide in the case of a large building of a zamindar, for instance, what portion of the building the assessee does in fact require as dwelling house by reason of its connection with the land. The word "requires" in S. 2, sub-S. 1, Cl. (*c*) cannot be interpreted as "needs". The phrase "by reason of his connection with the land" has a qualitative and not a quantitative significance. (7 P. 550, Ap pr.) 9 P 1=118 I.C. 393=1929 P. 449 (F.B.). Zamindar having a large house to keep up his social position—Income of house not assessable—Income-tax Officer is not competent to judge of the necessity to the zamindar for such big house. 7 P. 550=9 P.L.T. 439=1928 P. 468. *See also* 158 I.C. 810=1935 O.W.N. 1143. (Maintenance allowance paid out of estate not agricultural income).

Sec. 2, Cl. (2).—A registered firm is an assessee within the meaning of the Income-tax Act. 26 N.L.R. 75=1930 N. 183.

Cl. (3) : ASSISTANT COMMISSIONER.—Powers of appeal limited to subject-matter of assessment. 6 Pat.L.T. 166=4 P. 385.

Cl. (4) : "BUSINESS" includes manufacture. 52 C. 1=1925 C. 34=28 C.W.N. 1074. *See also* 1941 I.T.R. 244. The negotiation of the sale of a large mill is "business". 47 A. 372=23 A.L.J. 65. *See also* 52 M. 827=1929 M. 595=57 M.L.J. 36. A company which is not registered under the Companies Act, although it is partnership of thirteen unregistered firms composed in turn of individual members, the aggregate number of whom exceeds twenty, is liable to income-tax on the profits. 32 P.L.R. 335=1931 L. 376. *Succession to a trade* means the taking over of a trade and continuing it as that trade. It does not include the incorporation of a wholesale trade in a retail. There is no succession when the trade carried on by the predecessor is merged in the different trade of the successor. 1939 I.T.R. 118.

(6-A).—Where in accordance with a resolution passed at a general meeting of a company, its accumulated profits are capitalised and distributed to the shareholders in the form of (*a*) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(*b*) any distribution by a company of debentures or debenture-stock, to the extent to which the company possesses accumulated profits, whether capitalised or not ;

(*c*) any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company :

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included ; and

(*d*) any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not :

Provided that 'dividend' does not include a distribution in respect of any share issued for full cash consideration which is not entitled in the event of liquidation to participate in the surplus assets, when such distribution is made in accord ance with sub-clause (*c*) or (*d*).

Explanation.—The words 'accumulated profits,' wherever they occur in this clause, shall not include 'capital profit.'] ;

[1][[2] (6*B*) "firm," "partner" and "partnership" have the same meanings respectively as in the [3][Indian Partnership Act, 1932] ; [4][provided that the expression 'partner' includes any person who being a minor has been admitted to the benefits of partnership ;] ;

[5][(6*C*) "income" includes anything included in 'dividend' as defined in clause (6*A*) and anything which under *Explanation* 2 to sub-section (1) of section 7 is a profit received in lieu of salary for the purposes of that sub-section and any sum deemed to be profits under the second proviso to clause (*vii*) of sub-section (2) of section 10 and the profits of any business of insurance carried on by a [6][mutual insurance association] computed in accordance with Rule 9 in the Schedule ;

(6*D*) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assisting Commissioner of Income-tax under section 5] ;

(7) "Income-tax Officer" means a person appointed to be an Income-tax Officer under section 5 ;

(8) "Magistrate" means a Presidency Magistrate or a Magistrate of the first class, or a Magistrate of the second class specially empowered by [7][the Central Government] to try offences against this Act ;

(9) "person" includes a Hindu undivided family [8][and a local authority] ;

(10) "prescribed" means prescribed by rules made under this Act ;

LEG. REF.

[1] Inserted by S. 2 of Act XXI of 1930.

[2] The original clause (6*A*) was reletterdd (6*B*) by S. 2 of Act VII of 1939.

[3] Substituted for the words and figures "Indian Contract Act, 1872," by Act VII of 1939.

[4] Added by Act VII of 1939.

[5] Inserted by Act VII of 1939.

[6] Substituted by Act XXIII of 1941.

[7] Substituted "the Local Government by A. O., 1937.

NOTES.

bonus shares, unless the distribution amounts to a "release" of assets by the company to the shareholders, the shareholders cannot claim the value of the shares to be a dividend within the meaning of S. 2 (6-A) of the Income-tax Act. Though the company's profits have been taxed at the maximum rate, a shareholder receiving such bonus shares is not entitled to claim a refund of the difference between the maximum rate, and what he would have paid if the tax had been levied according to the rate appropriate to his income. 1941 Mad. 922=(1941) 2 M.L.J. 900 (S.B.).

Sec. 2 (6-A) and (14).—Firm—Partnership between Hindu coparcener in individual capacity and himself as manager of the family not partnership in law—No right to be registered. 1940 Pat. 610=1940 I.T.R. 369.

Sec. 2 (9).—"Hindu undivided family"—Meaning—Existence of coparcenary property—If an essential ingredient—Property not ancestral nor thrown into common stock—Income from—If income of undivided family. 40 C.W. N. 517.

(11) "previous year" means [1][in respect of any separate source of income, profits and gains]—

(*a*) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up:

[2][Provided that where an assessee has once been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit; or];

(*b*) in the case of any person, business or company or class of person, business or company, such period as may be determined by the [3][Central Board of Revenue] or by such authority as the Board may authorise in this behalf; [4][or

(*c*) where a business, profession or vocation has been newly set up in the financial year preceding the year for which assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under sub-clause (*b*), or, if the accounts of the assessee are made up to some other date than the 31st day of March and the case is not one for which a period has been determined by the Central Board of Revenue under sub-clause (*b*), then at the option of the assessee, the period from the date of the setting up of the business, profession or vocation to such other date:

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March, it shall be deemed that there is no previous year; and

when the assessee is a partner in a firm, 'previous year' in respect of his share of the income, profits and gains of the firm means the previous year as determined for the assessment of the income, profits and gains of the firm;]

(12) "principal officer", used with reference to a local authority or a company or any other public body or [5][any] association, means—

(*a*) the secretary, treasurer, manager or agent of the authority, company, body or association, or

(*b*) any person connected with the authority, company, body or association upon whom the Income-tax Officer has served a notice of his intention of treating him as the principal officer thereof;

(13) "public servant" has the same meaning as in the Indian Penal Code;

[6][(14) "registered firm" means a firm registered under the provisions of section 26A];

LEG. REF.

~~[1] Inserted by S. 2 of Act VII of 1939.~~

[2] Substituted by Act VII of 1939.

[3] Substituted for "Board of Inland Revenue" by Act IV of 1924.

[4] The word "or" and sub-clause (c) added by S. 2 of Act VII of 1939.

[5] Inserted by S. 2 of Act XI of 1924.

[6] Substituted by S. 2 of Act XXI of 1930.

NOTES.

Cl. (11).—*See* 7 L. 223=96 I.C. 368=1926 L. 421; 60 B. 679=38 Bom.L.R. 450=1936 B. 225. It does not rest with the assessee to say when he could write off a bad debt. It must be written off within a reasonable time. Where a debt was twelve years old and the debtor had been adjudged an insolvent five years previously and the assessee sought to have the same taken into account after the expiry of that long period, *held*, that the old debt which had become by that time irrecoverable could not be so taken into account. The Commissioner has not got an arbitrary discretion to say that a bad debt should be written off in a particular year; he or the Assistant Commissioner has to hear the evidence in each particular case. It is for the assessee in each case to establish by evidence that a debt became irrecoverable during the year in which the income, profits or gains are to be ascertained, the same being a question of fact. 54 B. 430=32 Bom.L.R. 309=1930 B. 201.

Sec. 2, Cl. (12): PRINCIPAL OFFICER--OFFICIAL LIQUIDATOR OF COMPANY.—The Official Liquidator of a company can be treated as its principal officer and if he is managing the business of the company he comes within the definition of principal officer under S. 2 (12). 1934 A.L.J. 221=1934 A. 170=56 A. 685.

Cl. (14).—Sale of whole concern shown as at a profit—Profit not taxable in all cases. *See* 102 I.C. 17=1927 P.C. 76 (P.C.). It

(15) " total income " means total amount of income, profits and gains [1][referred to in sub-section (1) of section 4] computed in the manner laid down in [2][this Act], and

[3][" total world income " includes all income, profits and gains wherever accruing or arising except income to which, under the provisions of sub-section (3) of section 4, this Act does not apply ; and]

(16) " unregistered firm " means a firm which is not a registered firm.

CHAPTER I.

CHARGE OF INCOME-TAX.

Charge of income-tax.

3. Where any [4][Act of the Central Legislature] enacts that income-tax shall be charged for any year at any rate or rates [5][* * * * *] tax at that rate or those rates shall

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LEG. REF.

[1] Substituted for " from all sources to which this Act applies" by S. 2 of Act VII of 1939.

[2] Substituted for " section 16 " by Act VII of 1939.

[3] Added by S. 2 of Act VII of 1939.

[4] Substituted for " Act of the Indian Legislature " by A.O., 1937.

[5] The words " applicable to the total income of an assessee " omitted by S. 3 of Act VII of 1939.

NOTES.

cannot be said that it is implied that a complete instrument only is intended to be valid for registration under S. 2, that is an instrument which does not require supplementing by other evidence, but contains in itself the complete agreement constituting the partnership and by itself solely operates to create the partnership. It is not impossible that a firm should be constituted under an agreement, although the agreement has not been executed by all the partners. 58 C. 1005=1931 C. 682 (S.B.). It is essential that an application for registration should be signed by at least one of the partners of the firm. An application made in that behalf by an agent of the partners would not comply with the statutory rules prescribing the manner in which registration is to be effected and the registration by the Income-tax Officer of such an application would be *ultra vires* and void. 1933 R. 229=11 R. 380. *Held,* (1) that the Income-tax Officer has power under the law to refuse an application for registration made in the prescribed manner with partnership deed prior to assessment ; (2) that the law gives the Income-tax Officer power to call for evidence of dissolution of the joint family for the purpose of registration under S. 2 (14) over and above the documentary evidence adduced by the partnership deed. 34 C.W.N. 363=1930 C. 449. As to the competence of Income-tax authorities to refuse to register or recognize a firm, *see* 1930 S. 301. *See also* 34 Bom.L.R. 100=1932 B. 116. A firm or partnership which cannot be recognized as such by S. 239, Contract Act, can be defined to be registered as a "firm" under this Act. 137 I.C. 903=34 Bom.L.R. 100=1932 B. 116. The certificate to be given in the form prescribed in the Income-tax Rules is not that the profits will be divided or credited within some fixed period. Thus, where a certificate is given in good faith and the persons constitute a firm and intend to divide the assets whenever it may be necessary or convenient for them to do so, that firm is entitled to be registered. 121 I.C. 38=1930 N. 6. *See also* 139 I.C. 497=1932 C. 409 (S.B.).

Sec. 2 (15): Partner drawing money in course of Business—If Profits.—Where a partner draws money in the course of business, that will be taken into consideration at the end of the year, and, if there are any overdrawings by one partner, they will be debited to the account of that partner or set-off against his profits and because a partner draws some moneys during the year of account, it cannot be said at once that represents his share of the profits. 31 L.W. 215=1930 M. 119 (S.B.). "Total income"—If includes unrealised decree. *See* 1935 A.L.J. 374=1935 A. 378. *See also* 62 I.C. 394; 63 M.L.J. 124=59 I.A. 206 (P.C.); 48 B. 503.

Sec. 3.—Income signifies what comes in. The entire income of land is "income" within S. 3. 62 I.C. 394. *See also* 59 I.A. 206=59 C. 1343=63 M.L.J. 124 (P.C.). S. 3 does not limit Chap. III of the Act. *See* 41 C.W.N. 46 =I.L.R. (1937) 2 Cal. 36.

Scheme of taxation.—The scheme of taxation under the Income-tax Act, 1922, is a definite departure from the system prevailing under the previous Income-tax Act of 1918. By S. 3 of the Act of 1922, the tax to be charged for any year is in respect of income of the previous year. The intention of S. 3 is not to treat the income of the previous year merely as a measure of the unascertained income of the year of assessment, but to tax the assessee in the year of assessment upon the income received by him in the previous year. 61 I.A. 1=56 A. 1=66 M.L.J. 127 (P.C.). The total income for the purpose of S. 16 means the total amount of income, profits or gains from all sources including (1) certain receipts on which an assessee is exempt from paying income-tax and (2) the amount of tax deducted at the source by companies when paying dividends. 26 Bom.L.R. 366=48 B. 504. When the Act by S. 3 subject to charge "all income" of an individual, it is what reaches the individual as income which it is intended to charge. Where, therefore, a decree of the Court charges the assessee's whole resources with a specific payment to his step-mother, it to that extent diverts his income from him, and directs it to his step-mother ; to that extent what he receiver for her is not his income. It is not a case of the application by the assessee of part of his be charged for that year in accordance with, and subject to the provisions of, this Act in respect of [1][the total income] of the previous year of every [2][individual, Hindu undivided family [3][company and local authority, and of every firm and other

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LEG. REF.

[1] These words substituted for "all income, profits and gains," by Act VII of 1939.

[2] Substituted for the words "individual, company, firm and Hindu undivided family" with effect from 1st April, 1923, by Ss. 3 and 11 of Act XI of 1924.

[3] These words substituted for "company, firm and other association of individuals" by S. 3 of Act VII of 1939.

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income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands. (1901 A.C. 26, Expl.) 1933 P.C. 145=60 I.A. 196=60 C. 1029=65 M.L.J. 285 (P.C.). In the case of assessment of a Hindu undivided family, the whole of the income of the family is liable to assessment, and sums paid to the widow of a deceased coparcener by way of maintenance under a decree of Court cannot be deducted from the assessable income. The decree for maintenance does not amount to a severance or take the widow out of the family, and does not in any way alter the character of the sum which the widow receives as maintenance as a widow in the joint family, though the amount is fixed by the decree. She gets it in her capacity ultimately as a member of the family and the amount paid to her is a share of the income going to one of the members of the family. I.L.R. (1937) Bom. 827=39 Bom.L.R. 907=1937 B. 479. An allowance received by the Lord Bishop of Lucknow as such from the Colonial Bishopric Fund in England is an income within the meaning of S. 3. 54 A. 223=1932 A. 151. The tax is charged on profits "accruing, arising or received" in British India. It is immaterial if the work was done and money spent abroad to earn it. So, a non-resident company assessed under S. 42 in respect of a business in which the manufacture of a commodity takes place in a foreign country and the sale thereof takes place in British India, is not entitled, in computing the profits and gains of such business, to make a deduction representing the proportion of profits earned by manufacture in the country of origin. 59 C. 1226=36 C.W.N. 563=1932 C. 626. *See also* 62 I.A. 207=1935 P.C. 143=69 M.L.J. 190 (P.C.). In the case of a business of buying in one place animals for human consumption and selling them in another place, the profit would arise only at the place of sale that the profit made by the assessee could only be calculated on what the goats and sheep actually cost the assessee and the amount at which they were actually sold in Colombo, and the figures in the invoices whether inflated or not, would not matter. 194 I.C. 76=1940 I.T.R. 619=1941 Mad. 229=(1941) 1 M.L.J. 99. Rate of income-tax on salaries is on estimated income for year of payment. 1 R. 335=1924 R. 30. Liability of mutation nazarana to income-tax. 29 C.W.N. 960=89 I.C. 997=1925 C. 929 (F.B.). Income to be taxable, must come in from outside and not from within. 1923 M. 604=47 M. 1 (F.B.). "Uttarayam" being a voluntary payment made by tenants at a particular season of the year for a particular purpose, is not exempt from assessment. 25 C.W.N. 80=61 I.C. 112=32 C.L.J. 433. A capitalist is not entitled to interest on the money invested for arriving at the net profits of a venture. 14 I.C. 628=5 Bur.L.T. 15. Money raised by borrowing and remitted to another branch of the firm—Borrowed money paid out of mixed funds—Payment liable to taxation. 1932 M. 573=63 M.L.J. 227 (S.B.). A body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under S. 3 of the Act on the combined profits of the four shops. 1927 M. 1052=53 M.L.J. 719 (S.B.). The fact that in S. 3 the legislature drew a distinction between a *company* and a *firm* or *other association of individuals* clearly shows that the provisions of the Act do not prevent an association formed for the purpose of doing business from being made liable to income-tax on the profits, even if it has not been registered in accordance with the law relating to the incorporation of companies. *See also* notes under S. 2, Cl. (4). Association incorporated under S. 26, Companies Act—Liability to assessment—Non-applicability of S. 48 to such an association—If relevant consideration. 1936 A.L.J. 1085=1936 A. 764. Selling association of a number of ice firms, if a separate firm. *See* 13 O.L.J. 381=92 I.C. 257=1926 O. 191. Fund claiming exemption —Essence is mutuality and aim must be not to make profit. 1927 M. 1078=53 M.L.J. 881 (F.B.). The sum of *money allocated by a Life Insurance Company for distribution amongst policy-holders* must be considered to be a portion of the profits of the company and as such assessable to income-tax and not an expenditure incurred solely for earning the profits within the meaning of S. 10 (2) (*ix*). Per *Bhide, J.*—The "profits of a business" mean the nett proceeds of the concern, after deducting the necessary outgoings without which those proceeds could not be earned and the nett proceeds must be taken to be the basis for the assessment of income-tax irrespectively of their subsequent application or allocation. 132 I.C. 861=1931 L. 739. As between *preference and ordinary shareholders*, the former are not entitled to have their preference dividends paid free of income-tax, in the absence of express words to that effect in the contract regulating the rights of the parties. 42 B. 579=41 I.C. 968=19 Bom. L.R. 665. An Income-tax Officer of a District in British India has no power to levy income-tax on a resident of Native State, unless there is proof that the profits earned by the assessee in a Native State arose or were received in British India. 27 Bom.L.R. 1507. For assessment of income of Hindu joint family, *see* notes under Ss. 4 to 6, *infra*. Undervaluation of opening and closing stocks of previous year—Mode of ascertaining profits. *See* 30 Bom.L.R. 1160.

association of persons or the partners of the firm or members of the association individually]].

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JOINT HINDU FAMILY.—No partnership can legally be constituted between a firm and an association of a joint Hindu family. 1933 A. L.J 554=1935 A. 523. Joint Hindu family converted into registered firm—Rate of assessment. 49 A. 611=102 I.C. 189=1927 A. 397. As to liability of joint Hindu family and as to the effect of partition arrangement, *see* 49 M. 833=1926 M. 949=51 M.L.J. 123. The income derived from an ancestral impartible estate by the holder thereof for the time being is in no respect different from the income derived from the personal exertions of the holder or his other self-acquisitions. Though he is a member of a joint Hindu family, the income received by him as holder of the impartible estate is in no sense received by him as a member of a Hindu undivided family. In respect of such income, the holder must be assessed as an individual under S. 3 of the Act and not as the representative of a Hindu undivided family. 45 L.W. 573=(1937) 1 M.L.J. 707 =I.L.R. (1937) Mad. 797=1937 Mad. 515 (F.B.). Joint family consisting of father and son —Death of father in 1938 leaving widow—Son and widow (step-mother) sole surviving members —Mode of assessment—Hindu Women's Rights to Property Act, S. 3 (1)—Effect of. *Held*, whether or not the effect of S. 3 (1) of the Hindu Women's Rights to Property Act was to make the step-mother a coparcener in the full sense of the word, it was clear that she obtained an interest in the joint family property and as she was a member of the joint family the income of the property must be regarded as the income of a joint family composed of the assessee and his step-mother. The assessment should therefore be made on the assessee and his step-mother as a Hindu undivided family. 52 L.W. 805=1940 M.W.N. 1221=1940 I.T.R. 545=1940 Mad. 942=(1940) 2 M.L.J. 834 (F.B.).

'FIRM'—MEANING OF.—A firm for the purposes of the Income-tax Act is a collective term for a number of persons who enter into partnership with one another. 1935 L. 100.

"OTHER ASSOCIATION OF INDIVIDUALS".—The expression "association of individuals" in S. 3 of the Income-tax Act does not include an association of companies. "Individual" must mean a human being, and therefore an association of individuals must be an association of human beings only. The Ahmedabad Millowners' Association consisting of 61 members, 60 of whom are limited companies and one an individual person, cannot be treated as an association of individuals for purposes of S. 3 oft he Income-tax Act. I.L.R. (1939) Bom. 451 (2)= 1939 I.T.R. 369=41 Bom.L.R. 656=1939 Bom. R.B. 180*also* 1941 Sind 71=1940 I.T.R. 114. The words "other association of individuals" in S. 3 of the Income-tax Act must be construed according to the *ejusdem generis* rule with reference to the word "firm" preceding it and they do not cover the members of a formerly undivided *Mitakshara* family after a preliminary decree for partition has been made. I.L.R. (1937) 2 Cal. 358=1937 Cal. 583. The words "association of individuals" in S. 3 of the Income-tax Act have to be construed in their plain, ordinary meaning and cannot be read *ejusdem generis* with the word immediately preceding it, *viz.*, firm. The only limit to be imposed is that the association must be one which produces income, profits or gains. An association of two or more persons for the acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words "other association of individuals" in S. 3 of the Act; and under S. 9 of the Act, the association is the owner of the property, and is such as assessable. The fact that one of the assessees during the year of assessment is a minor does not affect the question of the liability to assessment. All of them can be rightly assessed as owners under S. 9 (1). I.L.R. (1937) Bom. 830=39 Bom.L.R. 910. Association of individuals—Hindu widows wives of brothers carrying on business but not as registered firm—Widows earning income from depostit in joint names—Assessment as association of persons Is juslified. 1942 I.T.R. 84. The expression "association of individuals" in S. 3 includes cases of all trustees and does not exclude cases where the beneficiary is not a living person and as such the income of a newspaper and press run by trustees in the hands of the trustees, is liable to be assessed. 16 L. 829 =1935 L. 570)=1940 I.T.R. 501 (F.B.) *See also* 1930 Lah. 929. *Held*, (1) that a Bank which can be described as an "association of individuals" within the meaning of S. 3 could be assessed to income-tax as such; (2) that the words "other association of individuals" in S. 3 would apply to a corporate body which for the most part is composed of Co-operative Societies, and would embrace an association of corporate bodies; (3) where the assessee bank carries on a banking business with non-members it cannot maintain its claim to be a mutual benefit society. I.L.R. (1940) Mad. 627=190 I.C. 388= 1940 I.T.R. 269=1940 Mad. 612=(1940) 2 M. L.J. 160 (F.B.). Where a partnership union purports to consist of two firms and one Hindu undivided family and the shares of the members of the firm are not mentioned in the deed of partnership and the parnership is undoubtedly a trading concern, it cannot fall within the definition of the word 'firm' as given in the Income-tax Act. It is more appropriate to regard it as 'other association of individuals'. 1936 L. 548. *See also* 1936 L. 817. A body of trustees comes within the meaning of "other association of individuals" as used in S. 3 and elsewhere in the Act and can be grouped as a unit for the purposes of taxation. 1930 L. 929. In cases of trust not covered by Ss. 40 to 43 of the Act, the person liable to assessment is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. If the beneficiary receives the income or profits, he is liable to be assessed; if the trustee receives and controls them, he is primarily so liable. (*Williams* v. *Sinjer*, (1921) 1 A.C.65, Ref.) But

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the trustees of Currimbhoy Ebrahim Baronetcy, having been created a corporation sole by their Act constituted an "individual" within the meaning of S. 3 and a taxable unit and as a matter of convenience may be assessed to income and super-tax. 33 Bom.L.R. 1549. The term "association of individuals" in S. 3 has no technical meaning. It merely means a group when the properties of a number of individuals are put together and one business is carried on with the combined resources (for instance by a guardian on behalf of several minors having distinct and specified shares in the properties) it is open to the Income-tax Officer to regard it as one business carried on by an association of individuals within the meaning of S. 3 and make a single assessment on the guardian as representing that association. He is not bound to assess each minor separately. It may be different of course if no business is carried on and the trustee or guardian is merely in receipt of the income on behalf of the beneficiaries or minors. 55 M. 891=62 M.L.J. 600 (F.B.) The words "association of individuls" in S. 3 of the Income-tax Act must be construed with reference not merely to the word "firm" immediately preceding them, but with reference to the other associations of individuals, namely, a Hindu undivided family and company which appear in the section. An association of individuals resembling a Hindu undivided family is an association of individuals contemplated by sec. 3 of the Income-tax Act. The question whether certain persons form an association of individuals under sec. 3, is a question which must depend upon the particular facts and circumstances of each case. 1941 Sind 71=1940 I.T.R. 114. Where several persons join together and remain joined together for the purpose of buying, holding or owning, and using property in order to make gain by it, they become and are an "association of individuals" within the meaning of sec. 3 of the Act. 63 C. 538=40 C.W.N. 476. It is the intention of the legislature that the expression "other association of individuals" in sec. 3 should be *ejusdem generis* with the word immediately preceding, *i.e.*, the word "firm". Thus, before there can be an association of individuals within the meaning of the section, it must first be shown that the association has at least some of the attributes of a firm or partnership, though not in the strictly legal sense of the term. Accordingly the mere appointment by a body of co-owners of a common collecting agent will not convert such body of co-owners into an "association of individuals" within the meaning of the section. 1936 A.L.J. 1109=1936 A. 817. Fund registered as company—Capital consisting of recurring subscriptions—"Guaranteed interest" thereon, if taxable as profits—Subscriptions if borrowed capital. *See* 1933 M. 347=64 M.L.J. 260 (F.B.), cited under sec. 10, *infra*.

"COMPANY"—COMPANY IN LIQUIDATION.—A company which has gone into liquidation is a "company" within the meaning of sec. 3 and the Official Liquidators can be assessed as representing the company. 1934 A.L.J. 221=1934 A. 170. *See also* Notes under S. 2 (12).

Secs. 3 and 4: COMPANY—FOREIGN INCOME—LIABILITY TO ASSESSMENT.—In the case of a non-resident, income which neither accrues nor arises nor is received within British India may be liable to tax under the combined operation of secs. 3, 4 and 42. Profits made by an insurance company outside British India on premiums of participating policies collected and sent by its branches in India by investment outside India are profits or gains which are liable to tax in India. 57 B. 519=35 Bom.L.R. 896=1933 B. 427. The assessee, a resident of British India owned a saw-mill in Burma, which in the account year commencing from April, 1936, resulted in a loss, and the income of the assessee consisted solely of interest received from investments. For purposes of assessment to income-tax, the assessee sought to set-off the loss sustained in the saw-mill in Burma against the profits derived from the innvestments. The Income-tax authorities held that as Burma ceased to be part of British India from 1st April, 1937, the loss sustained in Burma which was thus outside British India could not be set-off against the profits from the investments. *Held*, that when the assessee worked the saw-mill Burma was part of British India, and reading secs. 3 and 4 together—the sections should be so read the loss must be deemed to have been sustained in British India, and therefore the set-off claimed ought to be allowed. I.L.R. (1939) Mad. 388=49 L.W. 21=1939 Mad. 77=(1939) 1 M.L.J. 31 (F.B.)

Secs. 3 and 4 (3-vii)—"Income"—Suit by widow for possession of movable and immovable properties left by her husband—Decree in favour of widow awarding certain movable properties and also damages for wrongful detention of movables—Receipt of sums towards damages not taxable. 19 Pat. 86=1939 Pat. 662 (S.B.)

Secs. 3, 6 and 9.—*Held* (1) that a difference must be made between a private wakf created, if not primarily, at least in part, for the maintenance of the settlor's family and a wakf created for charitable or religious purposes falling within the exception in sec. 4 (3) (1) of the Income-tax Act; (2) that so far as the wakf might operate as a wakf for charitable and religious purposes, to that extent immunity from taxation could be claimed, but so far as the wakf operated for the maintenance of the settlor's family, or other quasi-secular purposes, to that extent the income was liable to taxation; (3) that in the case a private wakf the estate is vested in the beneficiaries; (4) that for purposes of secs. 6 and 9 of the Income-tax Act the trustees could not be regarded as the owners of the income; (5) that the income in this case was bound up with the beneficiaries and should be taxed in their hands. 1940 I.T.R. 501. *See also* I.L.R. (1939) Bom. 284=41 Bom.L.R. 232=1939 Bom. 195. The assessees, two brothers, became entitled as residuary legatees under the will of their grandfather to certain house properties in Bombay in the year 1929. They got possession of the properties and managed it as joint owners and derived profit therefrom. *Held*, that as soon as they elected to retain the properties **and** manage them as a joint venture producing income, they became an association of individuals within the meaning

Application of Act.

4. [6][(1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

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[1] Sub-Ss. (1) and (2) were substituted by S. 4 of Act VII of 1939.

NOTES.

of sec. 3 of the Income-tax Act, and they were properly liable to be assessed as the owners of the properties under S. 9. 177 I.C. 447=40 Bom.L.R. 455=1938 Bom. 353. *See also* 1941 Sind 71.

Secs. 3 and 9.—The income of an impartible estate to which the assessee has succeeded by the rule of primogeniture prevailing in Hindu Mitakshara family is not chargeable to income-tax in his hands as that of an individual. The owner of the property for the purposes of sec. 9 of the Income-tax Act is the Hindu undivided family and not its incumbent for the time being. I.L.R. (1939) Lah. 520=1940 Lah. 113=1939 I.T.R. 427.

Secs. 3 and 14 (1): CLAIM TO EXEMPTION FROM TAX—ONUS OF PROOF.—The burden is no doubt on the revenue authorities to show that income which is sought to be taxed is income which is rendered liable to tax by the statute; but the onus of showing that a particular class of income is exempted from taxation lies on the assessee. In a case where the revenue authorities have discharged the onus which lay on them by showing that the assessee is in receipt ot income, sec. 3 of the Act renders that liable to taxation; it is for the assessee then to prove that the income which he is in receipt of is exempted from taxation by the Act. For the purposes of sec. 14 (1) of the Act, what the assessee has shown is (1) that he is a member of a Hindu undivided family, and (2) that he receives the income in question as a member of the family. 14 P. 785=1935 P. 342 (S.B.).

Secs. 4 and 6. INCOME LIABLE TO BE TAXED.—The two terms "*arising*" and "*accruing*" denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. 10 L. 657=1929 L. 609 (F.B.). *See also* 114 I.C. 296=1929 R. 1 (F.B.). The words "*accruing or arising*" merely refer to the connexion between the income and the country in question and they do not explain what is or is not income. 1935 A.L.J. 374=1935 A. 378. The words "accruing or arising" in sec. 4 (1) of the Income-tax Act extend the scope of the Act to income which may not be received in British India; and if moneys are earned by carrying on a business by exercising a profession in British India, liability to tax cannot be avoided by arranging that the moneys are to be paid outside India. The question to be determined is the place where the profits accrue or arise, and not the place where the business in which the profits are earned is carried on or where the assessee resides. 37 Bom.L.R. 753=1935 B. 423. *Held,* that in the case of Government of India Promissory Loan Notes repayable at Calcutta, the interest received by the assessee at Hyderabad (Deccan) was liable to be assessed to income-tax and super-tax. Meaning of expression "accruing or arising in sec. 4 (1) of the Income-tax Act discussed. 32 Bom.L.R. 671. *See also* 10 L. 657=1929 L. 609; 1941 I.T.R. 358; (1941) 1 M.L.J. 262; 1941 I.T.R. 610; (1940) 2 M.L.J. 110. It is not just and equitable to treat the unrealised interest, although formally credited to the kasar khata, as income, profits or gains derived accruing or arising or received, for purposes of the Income-tax Act. The test to be applied is whether any profits in the shape of interest have become due to the creditor (assessee) in such a manner as to be immediately available to him in the account year so as to be capable of being received by him at his choice and pleasure. If the interest money has become due to the assessee in the manner and in the sense that it was so completely under his control that, he by an act of his will, could receive it in cash without greater trouble than is involved in cashing a cheque, then only it could be called "income" such as would be liable to payment of tax, otherwise not. 25 N.L.R. 35=1929 N. 50 (F.B.). The words "accruing" and "arising" in S. 4 (2) denote the same idea and are used in contradistinction to the word "receive" and indicate a right to receive. Income cannot be said to have accrued or arisen in a particular country merely by reason of the fact that it is earned in that country. It accrues or arises in the country where there is a right to demand payment of it or where it is in fact paid. Where an assessee receives in the United Kingdom payments of pension granted by the Madras Government under the Civil Service Regulations of the Government of India, such payments, when not brought into British India are not income accruing or arising in British India within the meaning of S. 4 (1). 38 P.L.R. 911=1936 L. 713. *See also* 37 Bom. L.R. 753=1935 B. 423. All income from 'business' arising or received or deemed to arise or be received in British India is taxable under the Act. 52 C. 1=1925 C. 34. *See also* 6 P.L.J. 62=2 P.L.T. 188=60 I.C. 357. The ordinary presumption is that money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profit and not capital unless the assessee proved the contrary. (1926 M. 767 and 1930 M. 449, Rel. on.) 1936 L. 836. *See also* 37 Bom.L.R. 753=1935 B. 423. Interest on foreign investments—Reinvestment abroad—Interest taken into account in determining amount of profits available for distribution as dividend not to be deemed to be received in British India. 40 Bom.L.R. 980=1938 Bom. 490. Revenue free villages situated in Nizam's territory—Rent realized from tenants of—Income from rents brought into Berar is taxable. 107 I.C. 661=1928 N. 146. The profits or gains of a business are generally speaking the difference between the receipts and the expenses incurred in earning them. 21 N.L.R. 175. The profits or gains arising to the assessee from the buying in of the mortgaged property are deemed to have arisen on the date when the sale is confirmed. Profits cannot be said to have accrued when

NOTES.

the Court enters up satisfaction of the decree. 3 P. 48=1929 P. 476 (F.B.). Where the profits or gains arising to the assessee from the buying of the property mortgaged to him are taxable, such profits or gains must be deemed to have arisen from the date of the confirmation of the sale. 60 I.A. 133=12 P. 305=1933 P.C. 101=64 M.L.J. 544 (P.C.). When an assessee purchases with the permission of the Court property which is mortgaged to him, the price which he bids for the property is the market value.60 I.A. 133 When a mortgagee decree-holder with the permission of the Court, bids for and purchases the mortgaged property at a judicial sale, under O. 21. R. 72 (2), C. P. Code to the extent, that the purchased price exceeds the principal sum due and the expenses incurred for the sale there is a realization of interest, *i.e.*, a payment of interest and this amount can be taxed. 60 I.A. 133, For purposes assessment of income-tax, there must be an actually realized or realizable profit or loss. Assessees accepted a new mortgage in discharge of a prior one and the arrears of interest thereon. *Held*, that there was no realization of principal and interest of the original mortgage, that the acceptance of the new mortgage did not amount to receipt of payment of interest and principal but, amounted only to a substituted security for an existing debt and that the assessees were not liable to be assessed on this sum as income received. 60 I.A. 133=12 P. 305=1933 P.C. 101=64 M.L.J. 544 (P.C.).

"INCOME", "PROFITS" OR "GAINS"—MEANING OF.—37 Bom.L.R. 126; 11 R. 521=148 I.C. 633=1934 R. 27 (S.B.). *See also* 62 I.A. 207=1935 P.C. 143=69 M.L.J. 190 (P.C.). Where a company passes a resolution by which capital is increased by a new issue of shares and a portion of the accumulated profits standing to the credit of the reserve fund of the company corresponding to the amount payable on allotment of the shares, is transferred to the credit of the share capital account, the new share being then allotted as fully paid up among the shareholders *pro rata*, the transaction in effect is not a declaration of the dividend and the shareholder cannot be deemed to have received any *income*, *profits or gains* within the meaning of S. 4. The personal motive or purpose of the individual shareholders even if they hold a controlling interest in the company, is irrelevant if it is made out that the company has in fact capitalized the accumulated profits. 63 I.A. 451=40 C.W.N. 1189=1936 P.C. 238=71 M.L.J. 525 (P.C.). *See also* 1941 I.T.R. 610.

"INCOME RECEIVED IN BRITISH INDIA."—What constitutes—Liability to tax. 3 L. 329=1923 L. 14 (F.B.). The assessees were a firm carrying on business in Bombay and acting as general agents for a company at Indore. By the terms of the agreement between them, the agents were entitled to a commission on sales effected by them and to retain that commission out of the proceeds. But, as a matter of fact, all the proceeds were sent to Indore by the Bombay firm and the commission was paid only at Indore. On a question arising whether the commission was "money arising or accruing in British India", it was held that the fact that the commission might have been segregated and paid in British India indicated that the income accrued in British India and was assessable accordingly. (32 Bom.L.R. 671, Dist.) 33 Bom. L.R. 382=55 Bom. 231=1931 Bom. 236. Non-resident foreigner having business connection in British India is liable to income-tax in British India. 44 M. 773=41 M.L.J. 191=64 I.C. 239; 49 M. 833=1926 M. 949=51 M.L.J. 123. Liability to income-tax of foreign company. 28 C.W.N. 1074=1925 C. 34. But *see* 44 M. 718=41 M.L.J. 177. The English Income-tax Acts lay down a territorial limit. The Indian legislature appears to have gone beyond that limit. Having regard to the essential difference in language between the English and Indian Acts upon the point under consideration, English cases are of no authority in India 28 C.W.N. 1074.

PROFITS EARNED OUTSIDE BRITISH INDIA.—Liability to assessment—Same sum of money cannot be received as income twice over once outside British India, and once inside it. 46 M. 706=44 M.L.J. 523=1923 M. 574. Business outside British India—Profits not remitted to British India—Tax. 43 M. 7=37 M.L.J. 663 (F.B.). *See also* 10 L. 659=1929 L. 609 (F.B.). As to foreign firm lending money to resident firm, *see* 30 Bom.L.R. 1172. The profits arising out of the manufactures of a company carrying on its business and distributing a large part of the manufacture outside British India cannot be said to accrue or be received in British India simply because the head office is in British India and the Directors control the business of British India. 45 B. 1286=64 I.C. 9=23 Bom.L.R. 570. Under certain circumstances, it is open to the Income-tax Officer to assume that the amount remitted to British India from the branch of the business outside British India represents profits made in such branch, in spite of the fact that the total amount of such remittances is less than what has been sent from British India to such branch. (5 I. T. C. 55, Rel. on.) 1935 L. 727. Assessee was carrying on money-lending business in Tinnevelly and also in Penang. Deposits made with him in his Tinnevelly shop were repaid by him by means of hundis on his Penang shop, and the moneys having been paid at Penang, the payments were recorded in the Penang folio of the Tinnevelly books and in the Tinnevelly folio of the Penang books. The profits in Penang were sufficient to cover the payments made. *Held*, that what the assessee did was to use in British India moneys available to him in Penang, and this amounted to a receipt in India by him of gains made outside India and were therefore taxable under S. 4 (2). It is not neccessary that there should be an actual transfer of the money and the receipt thereof in India to constitute "receipt" under S. 4 (2). 1935 M.W.N. 1191=69 M.L.J. 844 (F.B.). Receipt in British India—What constitutes—Donation to temple in British India paid by hundi drawn on firm outside British India—Hundi cashed and amount paid outside not to be deemed received in British India. 59 M. 385=1936 M. 780=71 M.L.J. 72 (F.B.) Receipt in British India—What constitutes—

NOTES.

—Purchase by assessee of house-suits in British India with profits arising outside—Payment outside followed by agreement of purchase and completed by sale deed subsequently—Date of receipt of profits—Date of profit or date of sale deed. 59 M. 263=44 L.W. 146=1936 M. 776=71 M.L.J. 35 (F.B.) Appropriation by creditor contrary to agreement with debtor—Income-tax authorities, if can ignore. *See* 1938 Cal. 20.

COMPANY INCORPORATED IN ENGLAND.—Branches in India and elsewhere—Taxable profits in British India. 44 M. 489=63 I.C. 485=40 M. L.J. 560 (F.B.)

INCOME RECEIVED IN NATIVE STATES.—British subject—Receipt of money in Native State—Money credited with bank. 4 P. 210=85 I.C. 164=1925 P. 281; 92 I.C. 351=1926 B. 50. Bank in British India having branches in Cochin and Travancore—Liability to income-tax. 1926 M. 1048=51 M.L.J. 403 (F.B.). *Se also* 107 I.C. 661=1928 N. 146. Forest officer in the pay of Siamese Government—Remuneration paid at Bangkok—Liability to assessment to income-tax. 114 I.C. 296=1929 R. 1 (F.B.) A lady enjoying an annuity in Mysore State and receiving instalments through her agent while in British India, is liable to be taxed. 39 M. 885=31 I.C. 404. Native State carrying on business in British India—Liability to assessment to income-tax. *See* 1930 A.L.J. 579.

TAXABLE INCOME—ILLUSTRATIVE CASES.—*See* 1937 R. 337 (S.B.). The profits or losses arising from wagering contracts are to be taken into account in an assessment for income-tax purposes. 47 A. 368=23 A.L.J. 63. In the case of a permanent lease the landlord or lessor permanently parts with the direct enjoyment of the property by himself and his successors, and the lessee is the purchaser of a large interest therein. The *salami* or premium paid by the tenant to the landlord, which is paid once for all and is not a recurring payment is not "income" within the meaning of S. 4 of the Income-tax Act, but must be treated as a capital receipt which is not taxable under the Act. 18 Pat. 805=1940 Pat. 24. *Manohar Lal, J.*—Though it would be impossible to lay down a hard and fast rule that a *salami* can in a case be taxable, which is a question depending on the facts and circumstances of each case, the *salami* paid before the land is put into use by the lessee, and not because of the use of the land is a capital receipt in the hands of the lessor as it was a capital payment on behalf of the lessee. 1940 Pat. 24=18 Pat. 805=1939 P.W.N. 731=1939 I.T.R. 536. Income derived from forests and fisheries in a permanently settled estate are exempted from liability to income-tax. 45 M. 518=1922 M. 325. *See also* 84 I.C. 31=1924 C. 668; 92 I.C. 338=1925 P. 313. Income, from *hats ghasalgi* and *Jalkar*, whether included in the assets of permanent settlement—If liable to income-tax—Illegal dues realised in *hats*—Income of *hats* not specifically mentioned at the time of Permanent Settlement whether assessable—Onus, on assessee or Crown. 6 Pat.L-T. 55=1925 P. 313. *Royalty*—Payment of lump sum—Mining lease—Liability to tax. 5 Pat.L.T. 497=82 I.C. 655=4 P. 73. The income of the royalty of a local mine received by its owner, is not an income from business but it falls under S. 5 (*iv*) [now S. 6 (*vi*)] as one derived from other sources. 6 P. L.J. 62=2 Pat.L.T. 188=60 I.C. 357. Joint family property—Impartible estate—Income of. 1924 P. 679=4 P. 73. Mere constitution of the partnership between some members of the family will not preclude the assessment in cases where the partnership is carried on on behalf of and for the benefit of the joint family. 45 M.L.J. 150=46 M. 673=1923 M. 682. Bonus shares issued out of accumulated profits as dividends to a share-holder are an addition to the shareholder's capital and not income taxable by the Crown. 3 Mys.L.J. 65. A club is liable to pay income-tax in respect of its house property. Subscriptions received from the members are not "income" and therefore not liable to income tax under the Act. 61 I.C. 886=2 L. 109. A partnership is, for income-tax purposes, not an entity known to law, and there is, for this purpose, no distinction between registered and unregistered firms. 47 M. 660=77 I.C. 772=46 M.L.J. 68. Income—Interest not realised is not taxable. 16 L.W. 174=1922 M. 426. Where a Nattukottai Chetty carrying on money-lending business in British India lends money-in the course of such business, to persons outside British India on the *tavanai* system, the interest due and unpaid at the end of each *tavanai* must be taken into account in assessing him to income-tax, although it was not actually received in cash. 1929 M. 675=57 M.L.J. 60 (F.B.). Interest which became due but not actually realised in cash or by adjustment is not liable to tax. 44 M. 65=59 I.C. 482=39 M. L.J. 649 (F.B.). Interest does not cease to be an income, profits or gain because at the end of a certain specified period it is added to the capital so that it may bear interest. 9 P. 45=1929 P. 476 (F.B.). When a creditor executes a mortgage decree and puts to sale the mortgaged property in satisfaction of the decree and the total sum realised by the sale is less than the total of principal, interests and costs, the amount realised should be taken first after satisfaction of costs not towards the payment of interest and the balance only to be credited towards the satisfaction of the principal. If the creditor has made a declaration declaring what portion of the amount realised was interest and what portion was principal and has made an appropriation accordingly, the Income-tax Officer cannot insist on appropriating the realisations to interest first. 9 P. 45.

Sec. 4: 'INCOME' AND 'PROFITS'—DISTINCTION BETWEEN.—In the wide sense, 'income' when contrasted with 'capital' means and includes not only income in its strict meaning, but also profits and gains. But in the strict sense, "income" as contrasted, not with 'capital,' but with 'profits' or 'gains' means a periodical monetary return coming in, and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in S. 2 (4). In this sense, 'income' connotes incomings without regard to out-goings. Profits are "the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of carrying those receipts." 11 R. 421=

NOTES.

1934 R. 27 (S.B.) *See also* 37 Bom.L.R. 126=156 I.C. 274=1935 B. 197 (Assessee paying part of profits to third party under a contract not exempt); I.L.R. (1939) All. 832; 1936 P.C. 238=71 M.L.J. 525 (P.C.); 62 I.A. 207=1936 P.C. 143=69 M.L.J. 190 (P.C.).

SALE OF PATENT—PRICE—IF 'INCOME' OR 'CAPITAL RECEIPT'—TEST.—If a transaction is an out-and-out sale of the patent by the patentee for a definite fixed price, even though it is not payable in lump sum but in instalments, there can be no doubt that any such instalment received during the accounting period cannot be treated as taxable 'income', but is a 'capital receipt' and as such exempt from assessment. If, on the other hand, it is merely a 'working license' granted for an annual payment, it is clearly 'income' and as such is taxable. 1937 Lah. 880. If the assessee has been carrying on the business of acquiring and selling of patents as a regular trade, the price received by him by the sale of any particular patent would be income within the meaning of the Income-tax Act and assessable as such. In that event, the case would be similar to that of a speculator in immovable properties, who purchases and sells such properties as a regular trade. The profit made by him in any transaction would clearly be his taxable income. But this would not be so if a person who had inherited immovable property or had acquired it as an investment, subsequently sold it at a profit. 1937 Lah. 880. If a transaction is a working license for a number of years in which no fixed sum is to be paid to patentee but he is to receive a royalty on a percentage basis on the net profits made by the grantee, the amount of the royalty so received would clearly be assessable in the hands of the grantors. 1937 Lah. 880.

"SOURCE."—The source of the income must be considered in its proximate rather than in its ultimate significance. 13 P. 336=1934 P. 178 (F.B.) (Per *Beasley*, *C. J.* and *Bardswell*, *J.*, *Cornish*, J., dissenting):—The rentals derived from properties taken over in discharge of debts in the course of foreign money-lending business and treated as assets of that business can be assessed as part of the profits of that business when remitted to British India under S. 4 (2) of the Act. 1933 M.W.N. 1362=65 M.L.J. 849 (F.B.).

Sec. 4 (1).—*See* 1935 B. 423. Where an agency is not for fixed period, compensation received by the company as agents of a business concern for determination of the agency, such compensation not being commission in lieu of notice does not lose its character of capitalised value of future annual taxable income, merely by reason of the fact that it is described as commission for the year of receipt. The measure of such compensation is no test of its character as capital or income, whether such payment is enforceable as a claim for damages is immaterial. Also it does not become an *ex gratia* payment merely because the principal has been generous. 58 C. 1153=35 C.W.N. 361=1931 C. 676. Goods sold by agent in Europe and money forwarded to India through bank—Agent getting a part of the proceeds by compromise between him and principal in Kabul—Agent is liable to pay tax on such amount. 102 I.C. 298=1927 L. 512. Commission earned by a person in British India for services rendered in British India as an employee there, but actually received by him in the United Kingdom, while on leave, accrues or arises within British India within the meaning of S. 4 (1) of the Income-tax Act, when by the terms of his agreement he is required to serve his employers only in British India. The words "accruing and arising" in S. 4 (1) are very wide and mean something different from "being received". I.L.R. (1937) 2 Cal. 327=41 C.W.N. 823. *See also* 1939 A. L.J. 631=1939 All. 593=I.L.R. (1939) All. 832; 1939 I.T.R. 160. Railway Company—Receipt of guaranteed interest on capital in England from Secretary of State for India—Amount subsequently recouped out of profits of company in India—Interest received is assessable to Indian Income-tax. I.L.R. (1940) Mad. 889=52 L.W. 208=1940 Mad. 598=(1940) 2 M.L.J. 110 (S.B.).

Sec. 4 (1) and (2).—(*See also* notes under Ss. 3 and 42). S. 4 (2) is for the purpose of ascertaining the profits of a partner and got from the business carried on outside British India and when such profits come into British India, that will be taken into consideration in assessing him. If a firm receives such profits from another firm, it is the firm that should be taxed. 31 L.W. 215=122 I.C. 349=1930 M. 119 (S.B.). *See also* 54 A. 223=1932 A. 151; 59 C. 1226=36 C.W.N. 563=1932 C. 626. What the Income-tax Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is deemed so to arise or accrue or be received by reason of being brought into British India. But if income arising or accruing without British India is spent or otherwise so dealt with that it ceases to be income instead of being brought into British India, it is not chargeable under the Act merely because the thing upon which it has been expended or into which it has been turned is subsequently brought into British India. It is not necessary. of course, in order to attract the tax that the income received abroad should be brought into India in the exact form in which it has been received. Where the interest on certain sterling bonds belonging to the assessee company carrying on business in British India was payable in England and was in fact received by an agent of the company and expended on the purchase of certain mill stores and machinery which were later on sent to India and used for the purpose of the business of the company it was contended that the machinery bought with the sterling equivalent of the interest on the securities on their arrival in British India, resulted in so much of foreign income being brought into British India but it was overruled and held that the income on the securities were not liable to be taxed under S. 4 (2) of the Act. 67 I.A. 115=I.L.R. (1940) Bom. 332=51 L.W. 61=71 C.L.J. 156=1940 P.C. 36=(1940) 1 M.L.J. 137 (P.C.). The Court must look at the substance of the transaction and when that is done, the proper conclusion to be drawn should be that there was here a remittance of profits. The test is from where did the money for the remittance come. (1940) 2 M.L.J. 217 (S. B.). *Krishnaswami Iyengar, J.*—It would not be necessary that the assessee should receive the profits in the exact form in which they were made, but he must receive them in British India *substantially* as profits. The mere existence of an overdraft cannot save foreign income from liability to taxation, as money paid out of the overdraft and remitted to British India is not necessarily the money of the lender, and may be that of the recipient. There is no abstract rule of law to be applied generally to cases of this kind. The question in each case is what is the correct inference to be drawn; and the Court is entitled to get behind appearances in order to discover the truth. I.L.R. (1940) Mad. 715=22 L.W. 108=1940 Mad. 593=(1940) 2 M.L.J. 217 (S. B.). *See also* 1940 I.T.R. 474; *Ibid.* 432; *Ibid* 297; 1940 Mad. 416=(1940) 1 M.L.J. 543. A person in British India carrying on business there and controlling transactions abroad in the course of such business is not by these mere facts liable to tax on the profits of such transactions. If such profits have not been received in or brought into British India it becomes necessary to consider on the facts of the case where they accrued or arose. It cannot be said that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters--acts done under the contract for example— cannot be ruled out *a priori.* Where the contract is neither framed nor carried out in British India, the profits cannot be said to have accrued or arisen in British India. I.L. R. (1938) Bom. 752=40 Bom.L R. 916=48 L.W. 204=42 C.W.N. 1070=67 C.L.J. 554=1938 P.C. 232 (P.C.). If there are profits in an assessee's foreign business sufficient to cover remittances to British India during the year of assessment, the presumption is that the remittances were from profits, and not from capital, and the onus of showing that they were from capital and not from profits lies upon the assessee, as also the onus of showing that they were profits earned more than three years before the date of the remittances. Where it is shown that the foreign business as a debtor is unable to pay the foreign business's debt and the assessee takes the debtor's land in British India in satisfaction of his claim against his debt, the land so taken in British India is not taxable as foreign profits under S. 4 (2) of the Indian Income-Tax Act. 1930 M. 457=58 M. L.J. 602 (F.B.). *See also* 1932 M. 573=63 M.L.J. 227 (F.B.). *See also* 1940 Mad. 416=51 L.W. 362=(1940) 1 M.L.J. 543. The presumption that where money is remitted from a business abroad where profits have been made the remittance is a remittance out of profits is rebuttable. Where a partner receives moneys from the general account of the firm before profits are ascertained, the moneys so received cannot be treated as profits received and cannot be taxed, because profits may never accrue and he may have to refund moneys overdrawn. 1939 I.T.R. 40. The assessees who were partners in a money lending firm in foreign territory carried on the same kind of business in British India. The foreign firm was compelled to take over in satisfaction of debts due to it immovable properties which had been mortgaged as security for the debts. The value of these properties were treated as representing in part the return of capital and in part profits. The assessees in the year of account remitted to British India certain amounts and they contended that the profits represented by immovable properties were not capable of remittance, and so the remittances should not be taxed as profits. *Held,* that the withdrawals from the foreign firm and remittances to British India must be treated as withdrawals of profits. I.L.R. (1939) Mad. 480=48 L.W. 957=1939 Mad. 78=(1939) 1 M.L.J. 43 (F.B.). Receipt of profits by assessee in British India—What amounts to—Loan out of foreign profits to person residing in British India—If receipt of profits in British India not taxable. 1939 I.T.R. 160. It is enough for the purpose of liability to assessment if the profits of a business carried on by the assessee are received in British India and the place where the business is carried on is not material. The Pondicherry Railway Company worked the railway in the French Territory, but they had an office at Trichinopoly in British India where the agent received the gross proceeds of the line from that place; the agent transmitted the net profits to the London Office. *Held,* the income in question was "received" in British India and liable to be assessed to income-tax. 58 I.A. 239=54 M. 691=61 M.L.J. 251 (P.C.). Dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in S. 2 (6) of the Act and assessed to income-tax in British India are not to be taken into account as part of the total income of the assessee for the purposes of the income-tax assessment. 55 B. 734 =33 Bom.L.R. 776=1931 B. 420; 58 M.L.J. 581. The assessees were a company with their registered office in Calcutta. Their income, profits and gains were derived from the sale of tea grown and manufactured on a tea estate in an Indian State and then sent to Calcutta and sold there. *Held,* that sub-S. (2) of S. 4 of the Act contemplates a case where income, profits and gains have assumed their form as such outside British India and are thereafter received in or brought into British India, that in the circumstances of this case, no income, profits or gains arose or accrued until the manufactured tea was sold in Calcutta which was, therefore, the place where the income, profits and gains arose and accrued within the meaning of S. 4 (1) and that accordingly S. 4 (2) and the provisos thereto had no application to the case. I.L.R. (1937) 2 Cal. 201. *See also* (1937) 2 M. L.J. 310. In the case of coffee the processes subsequent to the picking of the seed are not treated as in the nature of manufacture, as in the case of tea, but are regarded only as process "ordinarily employed by the cultivator to render the produce fit to be taken to the market" within the meaning of S. 2 (1) (*b*) (*ii*). 46 L.W. 247=1937 Mad. 745=(1937) 2 M.L.J. 310 (S.B.). The assessee was the owner of and worked coffee estates in the Mysore State outside British India, maintaining an office on the estates for the supervision of the labour which

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he employed in respect of them. At a place within British India he recruited most of the labour and purchased materials and equipment which he had sent from there to the estate. The crops were brought to the place within British India in their raw state, and he had the raw coffee cured for payment within British India where also he sold through his agents and realised and retained the proceeds. He kept a separate staff in British India for the operations which he conducted there. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce were controlled from within British India and the accounts were incorporated in a consolidated profit and loss account kept in British India. The assessee contested an assessment made upon him on an income which was computed as his profits from the said business of growing, curing and selling coffee for profit. *Held*, that the assessee was carrying on)a "business" within the meaning of Ss. 2 (4 and 10 of the Act inasmuch as the profit which he derived from his land was derived from the business. It was impossible to regard the green coffee itself as income within the meaning of the Act, or arbitrarily to divide into two parts the business operations which must be regarded as a whole. *Held further*, that assuming that the assessee's income had accrued without British India and the second proviso to S. 4 (2) was applicable, the assessee must in any case be held liable to tax under S. 4 (1), by reason of the fact that the income was received by him originally, and as income in British India and that no part of the income in question was exempt from taxation by virtue of the second proviso to S. 4 (2) of the Act. (69 M.L.J. 474 =L.R. 62 I.A. 215=14 Pat. 623 (P.C.) (Dist.) 66 I.A. 23=41 Bom.L.R. 157=43 C.W.N. 225 =68 C.L.J. 581=49 L.W. 1=1939 P.C. 1= (1939) 1 M.L.J. 45 (P.C.). Income arising in British India—Mercantile basis of accountancy —Amount shown as interest in accounts— Liability to income-tax—Actual receipt of amount if necessary—Assessee adopting mercantile basis of accountancy—Income-tax on cash basis—Plea of, by assessee—Right af. 50 M. 765=1927 M. 841=53 M.L.J. 379 (F.B.). "Person resident in British India"—Meaning of —Date to be considered. 29 L.W. 61=a929 M. 35. Bank in British India—Branches in Cochin and Travancore—Profits or gains—"Received or brought in"—What amounts to. *See* 49 M. 910. Profits received in British India—Foreign business having two funds—One alone being taxed —Remittance to British India—Presumption. 36 L.W. 873=63 M.L.J. 796 (F.B.) Business outside British India—Profits earned, more than three years before the year of assessment and profits earned within that period—Remittance of amount to British India—Presumption whether remittanee made from earlier profits. 50 M. 853=1927 M 772=53 M.L.J. 416 (F.B.). *See also* 54 L.W 101=1941 Mad. 677=(1941) 2 M.L.J. 172 S.B.)—(Foreign profits—Time of receipt in British India); (1940) 2 M.L.J. 217 Remittances of foreign income to British India—Test to find out whether remittance is of profits or capital). The presumption that a remittance made by a foreign business is a remittance from out of the profits of the foreign business, is rebuttable. Where the assessee purchases timber in Burma, converts it into a saleable commodity in Burma and then consigns it to India to be sold, all expenditure incurred up to the stage the timber reaches the sales depots in India must be regarded as a capital expenditure of the Burma business and therefore to the extent of the costs of production of the timber consigned to India all remittances from India must be regarded as remittances of working capital and not remittances of profits. 197 I.C. 42=1941 R. 274. (S. B.). *See also* 194 I.C. 733=(1940) 2 M.L.J. 217 (S.B.). Where money or something equivalent to money, that is something which can forthwith be used as an ascertained sum of money is remitted to British India from a foreign country where a firm does business and profits are available in that country, the onus lies upon the person denying that the remittance is of profits to prove his case, but no such presumption arises that stock in trade brought into India by a firm whose normal business is investing in a commodity, importing it and selling it, is profit 1937 Lah. 884.

In deciding whether sums which are brought in from a business abroad are income, profis, or gains, the Income-tax officer must have regard to the business as a whole where an assessee carries two money-lending businesses outside British India in close proximity, both being his sole businesses having, current transactions and controlled by him, and where one of the two businesses has suffered loss and the other has profits, and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under S. 4 (2) the results of both the businesses should be considered together, and the assessee is entitled to set off his loss in one business against the profits of the other to arrive at the resultant profit available for remittance to be taxed. 48 L.W. 899 (S.B.). Resident in British India—Company or partnership having several places of business within and outside British India—When can be said to have several residences. 50 M. 847=1927 M. 732=53 M. L.J. 249 (F.B.). *See also* 58 C. 999=134 I.C. 937=1931 C. 727. On dissolution of a partnership an outgoing partner has the right to receive, not, as in the case of a shareholder in winding up a company, only a share of the assets: but to receive payment of his profits, which were his before dissolution and do not cease to be his on dissolution. The amount of interest on capital which he receives is received by him as payment of profits and not as capital and as such is assessable to income-tax. (67 M. L.J. 401=1934 M. 633, Reversed.) 62 I.A. 203=58 M. 881=1935 P.C. 117=69 M.L.J. 187 (P.C.). Limited Company in Bombay having income in London—Investment of such income in purchase of stores and machinery in England—Such stores and machinery sent to India but not for sale. *Held*, that the income received in London was capitalised by the purchase of machinery and stores, and the assessees were not therefore liable under S. 4 (2) to pay income-tax on the stores and machinery (*a*) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(*b*) if such person is resident in British India during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in British India during such year, or

(ii) accrue or arise to him without British India during such year, or

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which represented the income received by them in London. I.L.R. (1938) Bom. 171=40 Bom. L.R. 171=1938 Bom. 207. Where in discharge of certain debts due in respect of a foreign business, a British Indian decree is assigned in British India. *Held*, that the transaction amounts to remittance in British India of money or money's worth even though no money was actually realised in respect of the assigned decree. 46 L.W. 908=1938 Mad. 52=(1938) 1 M.L.J. 14 (F.B.).

Sec. 4 (1) and 13.—Where an assessee having his head office in British India with branches in British India and Native States contended that the sums credited to the capital account of the head office in the books of the branches in the Native States, but for which there were no corresponding entries in the head office account, could not be said to have accrued or received in British India so as to make him liable to tax in respect of such sums and where the assessee had kept his accounts according to the mercantile system, and had in the prior years treated similar sums as profits of the firm it was held that the profits in question though they did not actually arise or accrue in British India and were not physically transferred to, or received in British India, such profits, however, must be deemed by reason of S. 13 of the Act to have arisen or accrued in British India. Further as the assessee had in past years treated such profits as having been received in British India and his accounts on that basis had always been accepted by the taxing authorities, by reason of S. 13 of the Act the assessees could not now seek suddenly to change their method of accounting. 1938 A.L.J. 1015 =I.L.R. 1938 A. 1004=1939 A. 7..

Sec. 4 (3) (i) and (ii): PROPERTY HELD IN TRUST, what amounts to. *See* 105 I.C. 155. *See also* 49 M. 833=1926 M. 949=51 M.L.J. 123. For the purposes of construing the words "religious or charitable purposes" in the Income-tax Act it is quite unnecessary to investigate the meaning of the words in the particular system of jurisprudence that may be followed by the assessee. The proper rule is in the case of such a general Act to construe it according to the jurisprudence of the country wherein it was drafted. (1892 A.C. 531, Rel. on.) 131 I.C. 689=1931 L. 578 (F.B.). The words "religious and charitable purposes" in the Income-tax Act are to be judged not by the personal law of the assessees, but according to the general principles of construction applying to statutes. 165 I.C. 32=1936 P. 532. The word "charitable" in the Income-tax Act has a technical significance other than the meaning which it bears in common parlance. Every institution whose object is to benefit the public or a section of the public is not necessarily "charitable." Before an institution can be held to be "charitable", there must be an element of altruism; that is to say, the beneficiaries must not be able to *claim* the benefit. This condition is wanting in the case of a mutual association, like the Chamber of Commerce, whose ostensible object is to provide facilities of trade and to improve business and whose whole idea is that the particular members composing it should be benefited. Such an association, therefore, is not a "charitable institution" within the meaning of S. 4 (3) (*ii*) of the Act and is not as such exempt from tax. 1936 A.L.J. 1085= 1936 A. 764. An object of "general public utility" within the meaning of the proviso to S. 4 (3) of the Income-tax Act is an object of public utility which is available to the general public as distinct from any section of the public; in other words the object in question should not be to benefit work of public utility confined to a section of the public, *i.e.*, those interested in commerce. 40 B.L.R. 1227=A.I.R. 1939 B. 45. Whether a particular object or purpose is of general public utility so as to be a charitable purpose is not to be decided by what the testator or settlor considered to be beneficial to the public. The Court has a responsibility in coming to a finding on the point, and there is nothing in the Income-tax Act to discharge the Court of its responsibility. Where a newspaper is started with the object of supplying the province with an organ of educated public opinion, it should *prima facie* be held to be an object of general public utility. Such an object is not outside the ambit of the exemption clause S. 4 (3) (1) of the Income-tax Act. 66 I.A. 241=43 C. W. N. 1065=1939 P. C. 208=(1939) 2 M. L.J. 444 (P.C.). Where a Mussalman executed a wakfnama and directed that the property should be in his possession as manager and that he could spend the income according to his wishes for the maintenance of himself and his family and also for religious or charitable purposes and the deed further conferred a similar right on his heirs: *Held*, that the property cannot be said to be in trust wholly for religious or charitable purposes and the income was assessable to income-tax while it was spent wholly for the maintenance of the assessee and his children. 132 I.C. 689=1931 L. 578 (F.B.). The expression "charitable purposes" in S. 4 (3) (*i*) must be construed strictly and can only be applied to a public charity. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and therefore S. 4 (3) was amended in 1939 in order to put beyond all doubt the intention of the Legislature not to exempt even private trusts for religious purposes. Consequently, the exemption in S. 4 (3) (*i*) only applies to a trust the object of which is public utility. A provision in a wakf deed for the maintenance, education marriage, funeral and other necessities of the poor and

(iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are brought into or received in British India by him during such year, or

(*c*) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year :

Provided that there shall not be included in any assessment for the year ending on the 31st day of March, 1940, both the amount of the income, profits and gains referred to in sub-clause (*ii*) of clause (*b*) and the amount of the income, profits and gains referred to in sub-clause (*iii*) of clause (*b*) but only the greater of these two amounts :

Provided further that, in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without Btirish India shall not be so included unless they are derived from a bsuiness controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year :

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees.

Explanation 1.—Income, profits and gains accruing or arising without British India shall not be deemed to be received in or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in a balance sheet prepared in British India.

Explanation 2.—Income which would be chargeable under the head 'Salaries' if payable in British India and not being pension payable without India shall be deemed to accrue or arise in British India wherever paid if it is earned in British India.

Explanation 3.—A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

(2) For the purposes of sub-section (1), where a husband is not resident in British India, remittances received by his wife resident in British India out of any part of his income which is not included in his total income shall be deemed to be income accruing in British India to the wife.] ;

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needy among the descendants of the wakf in the male line cannot be said to constitute a trust for general public utility. The trust being clearly of a private nature, the income allotted under the wakf deed for the purposes mentioned therein which remains unspent for want of beneficiaries is assessable in the hands of the mutwali. I.L.R. (1941) Mad. 862=54 L.W. 167=1941 Mad. 535=(1941) 2 M.L.J. 148 (S.B.). What an assessee has to establish, if he is to avoid liability to income-tax under S. 4 (3) (*i*) is that the income assessed is derived from property held under trust or other legal obligation for religious or charitable purposes. If the purpose of an association is charitable, such as the relief of the poor, it is nonetheless charitable because some political body may consider that it affords the best method of relieving the poor and may therefore adopt the scheme. The fact that it is intended to advance the purposes of a political party, does not make it a purpose which is not charitable. But unless at the time when the profits were made, the assessee (Association), was under a legal obligation to devote the profits, to a chraitable purpose the fact that in practice the profits have been devoted to charitable purposes would not create a legal obligation or trust. If the association is not bound to devote its profits to charitable purposes, and the members are free to apply the profits to any purposes they chose, it cannot be held that the property is held under trust or other legal obligation for charitable purposes, and S. 4 (3) (i) cannot apply so as to exempt the profits from tax. 43 Bom. L. R. 742=1941 Bom. 374. "Charitable purposes" in S. 4 (3) of the Income-tax Act would include relief of the poor, education, medical relief and the advancement of any other object of general public uttility. Trusts for the benefit of the inhabitants of a particular locality are regarded as charitable, but trusts for the benefit of a particular political party or for the advancement of particular political purposes opinions are not regarded as charitable. A gift for such purposes as a particular individual or individuals may consider to be charitable is not a good charitable purpose although a gift for such charitable purposes as the managing committee of a trust may think fit would be good, because the committee would be bound to keep within the ambit of charity

(3) [1][Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them] :

(*i*) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto.

[2][(*ia*) Any income derived from bsuiness carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(*a*) the business is carried on in the course of the carrying out of a primary purpose of the institution, or

(*b*) the work in connection with the business is mainly carried on by beneficiaries of the institution] :

(*ii*) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.

(*iii*) The income of local authorities [3][except income from a trade or business carried on by the authority so far as that income is not income arising from the supply of a commodity or service within its own jurisdictional area.]

(*iv*) Interest on securities which are held by, or are the property of, any Provident Fund to which the Provident Funds Act, [4][1925], applies, [5][* * *]

LEG. REF.

[1] Substituted for " This Act shall not apply to the following classes of income " by S. 4 of Act VII of 1939.

[2] Inserted by Act VII of 1939.

[3] Added by S. 4 of Act VII of 1939.

[4] Substituted for " 1897," by Act VII of 1939.

[5] The words " or any Provident Insurance

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and if they go beyond the legal boundary, they can be controlled by the Court. The objects of a trust created by a deed were (1) the advancement of any purpose which might in the uncontrolled opinion of the managing committee be national or of national importance for the inhabitants of British India by any means which in the like opinion of the managing committee be constitutional ; (2) the political advancement of India having for its goal the acquisition of complete autonomy or "swarajya" to be attained by all constitutional agitation and means; (3) the diffusion of political education and knowledge as to the political affairs of India and propaganda work both in India as well as in any part of the world outside India having for its aim the acquisition of complete national autonomy or "swarajya" as aforesaid; (4) .any object which may conduce to any of the aforesaid objects. *Held*, (1) that the objects specified in the four clauses were clearly distributive and since the whole of the trust fund could be applied for any one or more o the objects specified, the trust could not be regarded as charitable if any of those objects did not fall within the term "charity"; (2) that clauses (1) and (2) went too far, and the gift was for a political purpose; (3) that the trust for a national or political purpose could not be regarded as charitable so as to fall within the purview of S. 4 (3) (i) of the Income-tax Act; (4) that the case fell within the first proviso to S. 41 (1) of the Income-tax Act and the maximum rate of income-tax was leviable. Although it was rather hard on the trust, that was not a matter with which they could deal. 43 Bom. L. R. 1027. A. I. R. 1942 B. 61. The word "wholly" in S. 4 (3) (*i*) must be read in its ordinary acceptation and is in this respect closely akin to the word "solely". The word does not mean "mainly". 105 I. C. 155. Professional income dedicated to educational objects —No exemption from income-tax. 4 R. 538=1927 R. 95 (F.B.). Where a fund alleged to be for charitable purposes is found completely within assessee's volition no deduction can be allowed. 1928 N. 102=3 I.T.C. 57. Stud farm —No trust deed—Officer commanding operating on stud fund given discretion in disbursement—Money spent for non-charitable purposes —Fund, not exempt from income-tax. 165 I.C. 141=1936 L. 602. Where a temple has a share in a partnership the income derived from the partnership cannot be said to be income derived from property held under trust for a religious or charitable purpose and hence is not exempt from taxation. 47 A. 68=22 A.L.J. 913=1925 A. 115. Where an assessee carries on business at places within and without British India and remittances are made from the place outside British India and into British India and spent on charitable and religious institutions by the assessee, the moneys, remitted are liable to assessment to income-tax unless it is shown that they were impressed with a trust before they left the foreign places for British India. The mere fact that they were allotted to a trust after their receipt in British India is not sufficient to secure exemption from liability to assessment. 40 M. 35=54 M.L.J. 226 (F.B.). Where the property is vested in the head of a community under deeds of trust, but the trust property is applicable to purposes, many of which are neither religious nor charitable, and it is not suggested that any part of the property is set aside for any charitable or religious purposes, so that it can be identified as appropriated exclusively for such purposes, then the income of the whole of the property is assessable to income-tax. 57 I.A 260=59 M.L.J. 905=1930 P.C. 226 (P.C.).

Sec. 4 (3) (iv).—Under S. 4 (3) (*iv*) of he Act, the accumulated balance at the credit

[1][* * * * * * *]

(*vi*) Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit.

(*vii*) Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee.

LEG. REF.

Society to which the Provident Insurance Societies Act, 1912, is, or but for an exemption under that Act would be applicable " omitted by S. 4 of Act XI of 1924.

[1] Omitted by S. 4 of Act VII of 1939.

NOTES.

of a subscriber to a Provident Fund to which the Provident Funds Act of 1897 applies is exempt from income-tax. That Act was repealed and partially re-enacted by the Provident Funds Act, 1925, and it applies [Cl. (2) of S. 2] to any Government Provident Fund "constituted by the authority of Government for any, class of its employees". The officers of the Court of Wards fall within the class of Government employees and the accumulated balance at the credit of the manager of the Court of Wards in the Bettiah Raj Estate to the Provident Fund is exempted from taxation. 10 P. 315=1931 P. 451.

Sec. 4 (3) (v).—The word "injuries" in Cl. (v) denotes personal injuries and no other. 1932 M. 424=62 M.L.J. 656 (F.B.). [This clause was omitted by Act VII of 1939].

Cl. (3) (v) and (vii).—*Government servant who was compulsorily retired receiving compensation amount* is liable to be assessed as for receipt of salary under S. 6. 1932 M. 424=62 M.L.J. 656 (F.B.). A capital sum received by the manager of the Court of Wards in *commutation of the whole of his pension* falls within S. 4 (3) (*iv*) and is exempt from taxation. That paragraph makes no distinction between pensions which may be demanded as of legal right and those which are granted voluntarily and between those payable by Government and those payable by any private body or individual. In deciding if the payment is *pension* or a *gratuity*, the Court has to look into the real nature of transaction and the fact that it is called by one name in the Government letter is not conclusive. But the amount is not exempt under S. 4 (3) (*vii*) as such payment must be considered to have 'arisen from' his occupation. (56 C. 211, Foll.) 10 P. 315=1931 P. 451. *See also* 12 R. 477=152 I.C. 989=1934 R. 377 (S.B.). Officer's The allotments made to the fund in the name of an officer of the company were not in the nature of salary for current services, but were merely the measure of a sum which the company volunteered to pay to him on the termination of his service, and that this sum when paid was not "income" and therefore not taxable. *Held also*, that the amount received was just as much a capital receipt in the hands of an employee as would be the payment of a lump sum from a provident fund on the emlyoyee's retirement. The latter would, apart from the specific exemption in S. 4 (3) (*v*) of the Income-tax Act, be by its nature, capital and not income. [affirm. 1935 Mad. 953=69 M.L.J. 611 (S. B.) 1932 P. C. 138, Rel. on.] 64 I. A. 323=39 Bom.L.R. 1050=66 C.L.J. 36=41 C.W.N. 1157=46 L.W. 214=1937 P. C. 261 (P. C.). Where the *maintenance allowance* received by a junior member of a Hindu family possessed of an impartible raj, is not received by him as a member of an undivided Hindu family, his source is not the original source through which the estate received the money and his immediate source is the bounty or gift by the estate, in which case it cannot be considered to be agricultural income and cannot be exempt from income-tax under S. 4 (3) (*viii*). 149 I.C. 306 =1934 A. 818. S. 4 (3), Cl. (*vii*) can only apply when the receipt is not by way of addition to the remuneration of the employee. 42 L.W. 812=1935 M. 953=69 M.L.J. 611 (S.B.). The principle of sub-cl. (*vii*) is that it is only income from business carried on with the object of producing a definite return that is taxable. Anything in the nature of a windfall is excluded. 59 I.A. 206=59 C. 1343=1932 P.C. 138=63 M.L. J. 124 (P.C.). A mere speculation, not in the nature of trade, cannot, by any process of reasoning, be regarded as an adventure in the nature of trade. Whether a particular transaction of purchase of a commodity with a view to selling at a profit is called a speculation or whether it is called adventure, is of no account; the dividing line between assessability and exemption depends on whether what is done is done in the nature of trade or not. It is erroneous to hold that if an investment is safe and is a lock-up investment made without the intention of resale being in the forefront of the investor's mind, then it may be regarded as an accretion of capital and non-assessable, but that the instant speculation comes in, it is an adventure in the nature of trade. The fact that the assessee employs a business man whether her husband or a stranger to purchase the commodity and later to sell it, falls short of making her an adventurer in trade, when the transaction is an isolated transaction. In order to constitute an isolated transaction an adventure in the nature of trade, there must be some activity of a trading nature between the purchase and the sale, undertaken in order to make the property marketable, *i.e.*, to put it into a saleable state or to attract purchasers. 1939 Rang.L.R. 757=184 I.C. 497=1939 Rang. 337. Profits made by

NOTES.

money-lender out of exchange fluctuations—If assessable. 45 M.L.J. 707=1924 M. 208. No general rule can be laid down in cases where a money-lending business takes property in satisfaction of the debts due and sells them. But where, as a matter of fact, in a money-lending business, profits are generally got by taking lands in satisfaction of the debts due and selling them for profits later on, such profits must no doubt be considered as derived from such business and cannot escape taxation by saying that the profits have nothing to do with the business of the firm which was merely money-lending. 31 L. W. 215=1930 M. 119 (S.B.). The mortgagee who carried a money-lending business advanced a loan and the transaction was embodied in indentures. One of these was described as a zarpeshgi lease with usufructuary mortgage. 'The mortgagee lessee was to be in possession of the properties, and, in his relation to the cultivators of the soil he stood in the position of landlord, dealing directly with them and collecting the rents. He had moreover to pay the Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejectment and was able to settle lands with raiyats and tenants in all the properties; in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her khas possession." *Held*, that the thika profits which formed part of the rents were agricultural income within the meaning of S. 2 (1) (*a*) and as such were exempt from assessment. *Held, further*, that the fact that the recipient was a money-lender did not matter, as the business of money-lending may bring in an income which is exempt from income-tax on the ground that it is derived from agricultural land. The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient. 62 I.A. 215=14 P. 623=1935 P.C. 172=69 M.L.J. 474 (P.C.). *See also* (1937) 1 M.L.J. 351. Ordinarily profits arising out of an isolated transaction outside the scope of the business are not assessable to income-tax as a business profit and such profits are not taxable unless there is evidence that the income derived from, and the expenses incurred in, the transaction were included and made part of the assessee's business accounts. (*Beynon & Co., Ltd.* v. *Ogg*, 7 Tax Cases 125, Ref. to.) 1930 M. 123=58 M.L.J. 95 (F.B.). The question whether the profit that accrues to a banker and money-lender from an isolated transaction of a purchase and sale of certain property is taxable as profit arising from his business or exempt for taxation as arising from occupation of a casual nature within the meaning of S. 3 (2) (*viii*) of the Income-Tax Act of 1918, is one of fact. 58 M.L.J. 68=1930 M. 121 (F.B.). A receipt of a casual and non-recurring nature arising from business or the exercise of a profession, vocation or occupation does not come within exception. 47 A. 372=23 A.L.J. 65. Isolated transaction—Unusually heavy commission is not of "casual or non-recurring" natural. 47 A. 372. Purchase by assessee of large area of building site—Sale after several years in small plots to several persons—Profits earned is taxable—Claim to exemption as casual and non-recurring receipts not arising from business is not sustainabile. 1939 I.T.R. 154. Where a certain company passed a resolution for voluntary winding up and at the same time voted a certain sum to the aseessee company who acted as the managing agents of the former by way of compensation for the loss of their office, *held*, that the amount so received was not exempted from assessment. 56 C. 211=33 C.W.N. 112=1929 C. 212. Compensation received by a company as agent of a business concern for determination of the agency, is a receipt arising from business, and consequently, if income, it would be taxable under S. 10 as being an income from business, or at least under S. 12 as being income from other sources. The circumstances that it is casual or non-recurring does not exempt it from taxation under S. 4 (3) (*vii*). 58 C. 1153=35 C.W.N. 361=1931 C. 676. If a man claims an interest in the capital of a business and receives a sum of money in satisfaction of all claims he may have in the capital of the business, that income is not liable to income-tax. 34 C.W.N. 788. A remuneration earned by a cotton merchant who is appointed under a power-of-attorney to realize cotton which another merchant had purchased will be "*receipts arising from business*" and liable to be assessed to income-tax. 27 Bom.L.R. 478 =1925 B. 318. The phrase, "*receipts arising from business*" as used in S. 4 (3) (*vii*) is not confined to receipts arising from a business carried on continuously during the year. Even if they are from a single adventure in business they would be liable to be taxed. 1925 B. 318 The question of the assessability to income-tax of profits realised by a banking concern from the sale of securities and shares must be determined on the facts of each case whether the banking concern had been dealing in securities and shares as part of its business. In this matter the finding of fact arrived at by the Income-tax authorities is conclusive unless it is found that that finding was based on no material. It does not necessarily follow from the circumstance that such profits have not been utilised in the revenue account and that they have been carried to the reserve capital *en bloc* that they were not trading profits. I.L.R. (1938) Lah. 526 =1938 Lah. 852. *See also* 45 M.L.J. 707=1924 M. 208. A solicitor who was employed by a shareholder of company interviewed the managing agents of the company and came to an arrangement with them which benefited substantially his client and the other shareholders for which he was duly paid for by his client. The arrangement incidentally benefited two firms of stock brokers who did not employ the solicitor. One of the firms paid a sum of Rs. 10,000 to the solicitor. *Held*, it was a receipt by him arising from the exercise by him of his profession and was part of his income which was not exempt from tax under S. 4 (3) (*vii*) of the Act, assuming that it was of a casual or non-recurring nature. The sum received by the

NOTES.

solicitor was not a testimonial to his ability or qualities as a solicitor generally, but was directly connected with a particular professional act, namely, the part he played in procuring the new issue of shares by which the payers had derived great benefit. I.L.R. (1941) 1 Cal. 562 =1941 I.T.R. 261=45 C.W.N. 542=1941 Cal. 666.

SPECULATION IN STOCKS AND SHARES.—A man may either buy shares or securities with the object and intention of making a gain from the sale when those sharers or securities have risen to a higher price or he may purchase the shares or securities with the intention of keeping his capital safe and receiving meanwhile a certain amount of dividend or interest. The intention must be deduced from acts and from the circumstances of the case. It is only in the former case that the profits are taxable and the losses deductible. 1934 A.L.J. 61=1934 A. 370. *See also* 1939 Rang.L.R. 757=1939 Rang. 337. As to taxability of gratuity received by employee on termination of service, *see* 12 R. 477=1934 R. 377 (S.B.). Relief granted to decree-holder in respect of auctioneer's commission is exempt from tax. I.L.R. (1938) A. 691=1938 A.L.J. 736=1938 All. 464 (S.B.).

PURCHASE OF MORTGAGED PROPERTIES IN SATISFACTION OF DECREE—SUBSEQUENT SALE FOR PROFIT—PROFITS, IF EXEMPT FROM TAX. —The assessee, a professional money-lender, got an assignment of a mortgage from another, sued on the mortgage and having obtained a decree for a large amount, took possession of the mortgaged properties in satisfaction of the decree. Later on, he sold the properties for cash and made a large profit out of the transaction. On the not profits being assessed to income-tax, the assessee claimed exemption under S. 4 (3) (*vii*) of the Income-tax Act, on the ground that the transaction was not one in the course of his business, but an isolated venture, speculative and casual in nature. *Held*, that the taking of the assignment was of a nature coming within the ambit of money-lending and not such an isolated transaction as to take it out of the category of his business, though it might be speculative; that the transaction could not be held to have been entered upon otherwise than as a matter of business and hence the profits were liable to be assessed to income-tax. 58 M. 105=1934 M. 539=67 M. L.J. 247 (F. B.). *See also* 1930 M. 119 (S. B.) Where a profit is made out of a single sale transaction the test to be applied in deciding as to whether it is capital assets or gain is to see whether there was a gain made it an operation of business in carrying out a scheme for making profits. 177 I.C. 630=1938 Rang. 315 (S.B.).

RECEIPT OF CASUAL NATURE.—Assessee financing an appeal—Additional sum received by him on appeal being successful is taxable. 154 I.C. 963=1935 A.W.R. 518=1935 A.L.J. 405=1935 A. 495. The assessee who was a tin mine owner and worker lent certain sums of money to *W* to enable him to work a tin area. Subsequently he again advanced a loan to *W* in order to enable the latter to do certain work and sell the mine and *W* executed an agreement by which he agreed to pay the assessee a third of the consideration which might be realised by the sale. *Held*, that the transaction was a private venture and not part of the assessee's business and was a receipt of a casual nature under S. 4 (3) (*viii*) and not profits or gains under S. 10 or S. 12 (3). 11 R. 454.

Sec. 4 (3) (vii) and (viii): ROYALTIES FOR PREPARING BRICKS.—Royalties for preparing bricks are assessable to income-tax. On the assessee's land, there was a quantity of earth suitable for brick-making. He granted licences to brick-makers to erect brick kilns upon the land, to take away brick earth and use it for making bricks. The assessee charged fees at certain rates for the licences. *Held*, the income was not of a casual or non-recurring nature, or agricultural income; it could not be considered as in the nature of a capital sale of the assets of the assessee and that it was assessable to income-tax. 10 P. 275=1931 P. 264. An assessee who owned patent rights which were originally used in his business conveyed the working rights under licence to another person against payment of a share in the profits. He subsequently cancelled this agreement and converted his rights under that conveyance into licence under an agreement against an annual payment during subsistence of agreement. Thus what was transferred by the assessee was not the corpus but the usufruct of the patent for an uncertain period in consideration of amount which had not been definitely known. *Held*, that the annual receipts under the agreement were income, profits or gains and were not exempted by S. 4 (3) (*vii*). 1937 Lah. 880.

Secs. 4 (3) (vii), 10 and 66 (5) ; PROFITS FROM INVESTMENT OF CLIENT'S DEPOSITS IS TAXABLE.—Where an assessee doing business as a produce agent, receives large sums of money from his clients as deposits and invests them in Government securities and realises a profit by the sale of such securities on the questions whether such an investment was in the nature of fixed capital or of stock-in-trade, and whether such profits were exempt from payment of income-tax under S. 4 (3) (*vii*) of the Act. *Held*, that if an investment is made with the object of permanently excluding a certain sum from the floating capital of a concern, it might be held to be fixed capital. But if the investment is part of the business and the sum is intended to serve as stock-in-trade, the profits arising therefrom will form part of the income of the concern. *Held, further on the facts*, that the business of the assessee was a *quasi* banking business and it received moneys from clients for the purposes of the business, and that the investments had been made as part of the same business, and hence the receipts therefrom were to all intents and purposes receipts from business. Even if they were of a casual or non-recurring nature they will not be covered by S. 4 (3) (*vii*). An exemption under S. 4 (3) (*vii*) if claimed for any item of income it is for the assessee to show that the receipt does not arise from business and is of a casual and non-recurring nature. In matters where the intention of the assessee is the factor to be considered, where the Department has found such an intention as a matter of fact, it is doubtful (*viii*) Agricultural income.

[1][(*ix*) Any income received by trustees on behalf of a recognised provident fund as defined in clause (*a*) of section 58A.]

[2][(*x*) Any income received—

(*a*) by a person accredited as representative in British India for political purposes of an Indian State or the Ruler thereof, as his remuneration from the State or Ruler for service in such capacity ;

(*b*) by a Consul General, Consul, Vice-Consul or Consular Agent of a foreign State, as remuneration from such State for service in such capacity ;

(*c*) by a person employed by the consulate of a foreign State, not being a British subject or the subject of an India State, as remuneration from such foreign State for service in such capacity ;

(*d*) by a Trade Commissioner or other official representative in British India of the Government of any other part of the British Empire or of a foreign Government, as his official salary, if the official salary of the corresponding officials, if any, of the Central Government resident for similar purposes in the country concerned enjoy a similar exemption in that country ;

(*e*) by a member of the staff of a Trade Commissioner or official representative referred to in sub-clause (*d*), as his official salary, when such member is a subject of the country represented, and the country represented has made corresponding provisions for similar exemptions in the case of members of the staff of the corresponding officials of the Central Government.

LEG. REF.

[1] Added by S. 2 of Act XII of 1929.

[2] Cls. (*x*) and (*xi*) inserted by Act XXIII of 1941.

NOTES.

whether the High Court could go behind such a finding. 40 P.L.R. 256=18 Lah. 706=1938 Lah. 44.

Sec. 4 (3) and (viii)—[*See also* Notes under S. 2 (1)] *Usufructuary mortgagee leasing mortgaged property* to mortgagor on fixed annual payments —Such payments are agricultural income and should be excluded from income-tax. 26 A.L.J. 280=1928 A. 81 (F.B.). *See also* 160 I.C. 948=43 L.W. 264=1936 M. 144=70 M.L.J. 24 (S.B.); 13 P. 336=147 I.C. 1236=1934 P. 178 (S.B.); 1928 M. 543=54 M.L.J. 524 (F.B.). *Quaere.*—A usufructuary mortgage was created in favour of the assessee at a specified rate of interest. On the same day and as part of the same transaction, the mortgagee gave the property to mortgagor on lease reserving rent exactly equal to the amount of interest on the money advanced at stipulated rate. The Government revenue was to be paid by the mortgagor and in default the mortgagee was entitled to proceed against mortgagor. In default of payment of the lease rent, the mortgagee was entitled to take possession of the mortgaged property. In the event of any reduction of the principal, the rent payable was also to be reduced in proportion. *Held*, that the interest reserved by the documents in this case and paid to the assessee during such period as he was not in possession of the leased property was assessable to income-tax. 9 P. 194=123 I.C 617=1930 P. 33 (S.B.). *See also* 13 P. 336=1934 P. 178 (S.B.). Per *Das, J.*—There is a clear *distinction between rent and interest.* Rent is the return from land for the use of one's land and signifies the sum payable in respect of the use of land. Interest is the return from money for the use of one's money and signifies the sum payable in respect of the use of money. Rent issues out of the land demised, whereas interest is revenue derived from the money lent. 9 P. 194. Per *Kulwant Sahay, J.*—If the income is derived from land used for agricultural purposes as rent or revenue, then such income is exempt from assessment. The income cannot be made taxable unless and until it can be brought strictly within the letter of the law. 13 P. 336=1934 P. 178 (S.B.). Income from quarries, if income from agricultural purposes. *See* 50 A. 98. As to what is taxable income in case of royalty in respect of a mortgage and lease of a coal mine, *see* 13 P. 197=1934 P. 116 (S.B.). Where the assessee among other activities of an *agricultural nature* cultivates aloe plants and from them by *means of machinery prepares sisal fibre* which he sells in the market, the whole of the profits are exempt as being purely agricultural income. 9 P. 185=123 I.C. 610=1930 P. 44 (S.B.). But *see also* 48 C. 161. Income from *fisheries* in tanks and supply channels is not agricultural income and is not exempt from income-tax. 140 I.C. 450=1932 M. 757=63 M.L.J. 634 (F.B.). *See also* 3 P. 470; 53 C. 524. The maintenance allowance obtained by a widow under a compromise though derived from an agricultural estate is not agricultural income within the meaning of S. 2 (1) (*a*), and hence is not exempt from income-tax under S. 4 (3) (*viii*). 146 I. C. 651=10 O.W.N. 1003=1933 O. 475. Where the assessee receives certain sum every year under S. 8-A (*b*), Punjab Laws Act, from his elder brother on whom the impartible estate devolves under S. 8, Punjab Laws Act, as maintenance out of the assignment, which is agricultural income and exempt as such, the allowance is a part of the assignment and cannot be taxed. 1937 Lah. 905. *See also* 158 I. C. 810=1935 O.W.N. 1143.

(*xi*) With effect from the 2nd day of September, 1939, the income chargeable under the head "Salaries" of a Nepalese member of the Nepalese Military Force serving with His Majesty's Forces, or of any member of an Indian State Force, so serving, and any other income accruing or arising without British India which is received in or brought into British India by any such member while the Force to which he belongs is serving with His Majesty's Forces.]

In this sub-section "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, [1][but nothing contained in clause (*i*), clause (*ia*) or clause (*ii*) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public].

Residence in British India.

[2][4A. For the purposes of this Act—

(*a*) any individual is resident in British India in any year if he—

(i) is in British India in that year for a period amounting in all to one hundred and eighty-two days or more ; or

(ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in British India for any time in that year; or

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in British India for any time in that year otherwise than on an occasional or casual visit;

[3][or (*iv*) is in British India for any time in that year and the Income-tax Officer is satisfied that such individual having arrived in British India during that year is likely to remain in British India for not less than three years from the date of his arrival] :

(*b*) a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India : and

(*c*) a company is resident in British India in any year (*a*) if the control and management of its affairs is situated wholly in British India in that year, or (*b*) if its income arising in British India in that year exceeds its income arising without British India in that year.

LEG. REF.

[1] Added by Act XII of 1929.

[2] Ss. 4A and 4B inserted by S. 5 of Act VII of 1939.

[3] Added by Act XXIII of 1941.

NOTES.

SCOPE AND OBJECT.—S. 4 (3) (*viii*) read with S. 2 is designed to protect the producer by giving him exemption from liability to income-tax as a *bona fide* agriculturist carrying on business of a farmer in the ordinary course of good husbandry. 53 I. C. 301 (F. B.). *See also* 25 A.L.J. 116=50 A. 98=1927 A. 703; 1928 M. 543=54 M.L.J. 524 (F.B.) ; 45 C.W.N. 647=1941 Cal. 598; 1937 Rang.L.R. 191=1937 Rang. 337 (S. B.).

Secs. 4 and 24.—The assessee purchased shares to the value of a big amount in a limited company. The company afterwards went into liquidation, and out of that liquidation a new company was formed. This company having acquired the assets of the old company agreed to allot certain shares and debentures to the assessee, but the agreement was not fulfilled, with the result that the assessee lost a considerable sum of the money of his original investment made in the old company. *Held*, that the difference between what the assessee has in fact got and what he originally invested was a loss which was clearly a loss of capital and therefore it could not be taken into consideration for the purpose of arriving at the assessable income. 182 I. C. 841=1939 Pat. 107. In the process of preparing tea for the market, the part when the tea is planted and plucked is agriculture, and the part when the leaf is dried, rolled and stored, is manufacture. For assessing income-tax, the profits from the agricultural process are exempt and only that from the manufacture is liable to assessment. 48 C. 161=61 I.C. 107. But *see also* 9 P. 185. *See also* 158 I.C. 810=1935 O. W.N. 1143. Income derived from *jalkar* (fishery) *hats* and *ghatlagi* is not agricultural income and is not exempt from income-tax. 3 P. 470=1924 P. 474; 104 I.C. 841. *See also* 53 C. 524=30 C.W.N. 524=1929 C. 819; 1932 M. 757=63 M.L.J. 634 (F.B.).

S. 4-A (b) : HINDU JOINT FAMILY—RESIDENCE.—S. 4-A (*b*) does no more than clarify the existing position by pointing out that in the case of a joint Hindu family business the residence of individual members of the undivided family

Ordinary residence.

4B. For the purposes of this Act—

(*a*) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years ;

(*b*) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India ;

(*c*) a company, firm or other association of persons is ordinarily resident in British India if it is resident in British India.]

CHAPTER II.

INCOME-TAX AUTHORITIES.

Income-tax authorities.

[1][5. (1) There shall be the following classes of Income-tax authorities for the purposes of this Act, namely :—

(*a*) the Central Board of Revenue ;

(*b*) Commissioners of Income-tax ;

(*c*) Assistant Commissioners of Income-tax who may be either Appellate Assistant Commissioners of Income-tax or Inspecting Assistant Commissioners of Income-tax ;

(*d*) Income-tax Officers.

(2) The Central Government may appoint a Commissioner of Income-tax for any area specified in the order of appointment, and may appoint Commissioners of Income-tax, not more than three in all, each to discharge, without reference to area, and to the exclusion of any Commissioner appointed for any area, the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue.

(3) The Central Government may appoint [2][* * *] as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income-tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons [3][or of such incomes or classes of income or] in respect of such areas as the Central Board of Revenue may direct, [4][and, where such directions have assigned to two or more Appellate Assistant Commissioners of Income-tax, the same persons or classes of persons or the same incomes or classes of income or the same area] in accordance with any orders which

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LEG. REF.

[1] Substituted for the original section by S. 6 of Act VII of 1939.

[2] The words "for any area" omitted by S. 3 of Act XL of 1940 and shall have effect from 1st April, 1939.

[3] Substituted for "and of such incomes or classes of income and" by Act XL of 1940 and shall have effect from 1st April, 1939.

[4] Substituted for the words "and, where two or more appellate Assistant Commissioners have been appointed for the same area," by Act XL of 1940 and shall have effect from 1st April, 1939.

NOTES.

cannot be material from which it could be inferred that the family resided there if such residence were fortuitous and divorced from control and management of the business. Consequently the family cannot be said to reside in all those places where members of the family live, and the fact that one member of the undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there. 197 I.C. 260=1941 I.T.R. 685=1941 Rang. 273 (S.B.).

Sec. 5.—The Income-tax Officer of the area in which the principal place of business is situated has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. 47 A. 631=23 A.L.J. 379. Where the Commissioner of Income-tax gave a direction to the effect that that he appointed an Income-tax Officer to perform all the functions of an Income-tax Officer in respect of those persons in Calcutta whose cases may be made over to him from time to time, *held*, that that the persons referred to in the direction do not constitute "a class of persons" within the meaning of Cl. (4) of S. 5 of the Act. 33 C.W.N. 1206. As to transfer of cases of assessment from one officer to another, *see* I.L.R. (1940) Bom. 650=42 Bom.L.R. 414=1940 Bom. 234; 1941 I.T.R. 679. *See also* 43 B.L.R. 1009=1942 B. 64.

the Central Board of Revenue may make for the distribution and allocation of the work to be performed.

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons [1][or of such incomes or classes of income or] in respect of such areas as the Commissioner of Income-tax may direct, [2][and, where such directions have assigned to two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers, the same persons or classes of persons or the same incomes or classes of income or the same area] in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. The Commissioner may, with the previous approval of the Central Board of Revenue, by general or special order in writing, direct that the powers conferred on the Income-tax Officer and the Appellate Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Inspecting Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively.

(6) The Central Board of Revenue may, by notification in the Official Gazette, empower Commissioners of Income-tax, Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers to perform such functions in respect of such classes of persons or such classes of income [3][or such area] as may be specified in the notification, and thereupon the functions so specified shall cease [4][* * *] to be performed in respect of the specified classes of persons or classes of income [5][or area] by the other authorities appointed under sub-sections (2) and (3).

(7) Assistant Commissioners of Income-tax and Income-tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioner of Income-tax appointed without reference to area, to that Commissioner.

[6][(7*A*) The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Income-tax Officer from whom the case is transferred.]

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his Appellate functions.]

[7][CHAPTER II-A.

APPELLATE TRIBUNAL.]

[8][5A. (1) The Central Government shall appoint an Appellate Tribunal

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LEG. REF.

[1] Substituted for " and of such incomes or classes of income and " by S. 3 of Act XL of 1940 and shall have effect from 1st April, 1939.

[2] Substituted for " and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed the same area," by Act XL of 1940 and shall have effect from 1st April, 1939.

[3] Substituted for " and for 'such area," by Act XL of 1940 and shall have effec from 1st April, 1939.

[4] The words " within the specified area" were omitted, *ibid.*, with effect from 1st April, 1239.

[5] Inserted by S. 3 of Act XL of 1940 and shall have effect from 1st April, 1939.

[6] Inserted, *ibid.*

[7] Inserted by S. 4 of Act XL of 1940.

[8] Inserted by S. 85 of Act VI, of 1939.

The Appellate Tribunal.

consisting of not more than ten persons to exercise the functions conferred on the Appellate Tribunal by this Act.

(2) The Appellate Tribunal shall consist of an equal number of judicial members and accountant members as hereinafter defined.

[1][Provided that the Tribunal shall not be deemed to be invalidly constituted merely by reason of a temporary inequality caused by the death, retirement or removal of any member.]

(3) A judicial member shall be a person who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge; and an accountant member shall be a person who has, for a period of not less than six years, practised professionally as a Registered Accountant enrolled on the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932:

Provided that the Central Government may appoint as an accountant member of the Tribunal any person not possessing the qualifications required by this sub-section; if it is satisfied that he has qualifications and has had adequate experience of a character which render him suitable for appointment to the Tribunal.

(4) The Central Government shall appoint a judicial member of the Tribunal to be president thereof.

(5) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted from members of the Tribunal by the president of the Tribunal.

(6) A Bench shall consist of not less than two members of the Tribunal, and shall be constituted so as to contain an equal number of judicial members and accountant members, or so that the number of members of one class does not exceed the number of members of the other class by more than one.

(7) If the members of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it.

(8) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure, and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the [2][places] at which the Benches shall hold their sittings].

CHAPTER III.

TAXABLE INCOME.

Heads of income chargeable to income-tax.

6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing namely:—

(*i*) Salaries;

LEG. REF.

[1] Added by Act XXIII of 1941.

[2] Substituted for "place" by S. 4 of Act XL of 1940.

NOTES.

Chap. III.—*See* under S. 4. *Panckridge, J.*—The provisions of Ch. III of the Act are not limited by S. 3 of the Act, and must be construed as they stand, and S. 10 (1) does not require that the business should be carried on by the assessee personally. The assessee must be held to carry on the business, though he may not have any executive control over the conduct of it, and he is consequently liable to be assessed on the full profits and gains of the business which is his business. 41 C.W.N. 46=I.L.R. (1937) 2 Cal. 36.

CONSTRUCTION OF SECTION—Per *Courtney-Terrell, C. J.*—The words "profits" and "gain" in S. 6 are an amplification and not a limitation upon the word "income." The words "other sources" indicate that anything which can properly be (*ii*) Interest on securities ;

[1][(*iii*) Income from property ;

(*iv*) Profits and gains of business, profession or vocation ;

(*v*) Income from other sources].

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[1] Substituted for the original clause (*iii*), (*iv*) (*v*) and (*vi*) by S. 7 of Act VII of 1939.

NOTES.

described as income is taxable unless expressly exempted. 13 P. 661=1934 P. 384 (F.B.). *See also* 63 C. 109; 14 P.552=62 I.A.207=69 M.L.J. 190 (P.C.) The word "income" is not specifically defined in the Income-tax Act. The word is used along with the words 'profits and gains', and it may be that those words are explanatory of the word "income." Moneys paid to a Railway Company by the State by way of subsidy under the terms of an agreement between the company and the Secretary of State, in order to make up the minimum guaranteed interest payable to the shareholders should properly be described and treated as income of the company assessable to income-tax. Moneys which are in the coffers of the company and are available in the same way as earnings for the purpose of payment out as interest or dividend are "income." The subsidy being in lieu of moneys which might have been earned by the company, and having the same nature as moneys earned by the company, as far as liability to income-tax is concerned, once that is paid by the State to the company, it is income and as such comes within the grip of the Income-tax Act, and is liable to income-tax in spite of the fact that it is intended to be paid to the shareholders. Such moneys cannot be deducted under S. 10 (2) (*iii*) of the Act. 63 C. 109.

Sec. 6, Cl. (i).—Compensation amount paid to Government servant who had been compulsorily retired is liable to assessment as for salary received. 137 I.C. 557=1932 M. 424=62 M.L.J. 656 (F.B.). (56 C. 211, Ref. to). *See also* 137 I.C. 84, cited under S. 7.

Cl. (ii).—The border line between a case where interest is chargeable to tax and a case where it is not so chargeable appears at times to be extremely fine. Where interest is awarded under the provisions of S. 28 of the Land Acquisition Act, it is in the nature of compensation for the loss of the late owner's right to retain possession of the property acquired. In other words it is damages assessed in terms of interest for loss of possession of property up to date of receipt of its consideration. Further, the awarding of such interest is not mandatory but is discretionary with the Court; and the claimant is not entitled to it as of right under any rule of law. Hence such interest is not income and is not assessable as such to tax. I.L.R. (1941) All. 54=193 I.C. 731=1940 A. L.J. 860=1941 All. 135.

Cl. (iii).—Royalty on mines cannot fall within the heading "income from property" in S. 6 because such income is defined in S. 9. 1940 I.T.R. 563=21 Pat.L.T. 897=20 Pat. 13=1940 Pat. 633 (S.B.). Mineral leases must be regarded as leases and not as sales of coal, the annual payments of royalty in such case must be regarded as a rent in the hands of the assessee. They were therefore assessable to income-tax as they constitute "income from other sources." 20 Pat. 13=(S.B.). A sale may be made for a price which could properly be regarded as a capital receipt and therefore not assessable to income-tax. Such a transaction would amount to the exchange of one form of capital for another. The consideration for such a sale, however, need not be in the form of capital. A vendor might secure by the terms of the sale an income for himself, and such would undoubtedly be assessable to income-tax. 20 Pat. 13 (S.B.).

Cl. (iv).—Contributions made entirely by members to a Mutual Insurance Company are not assessable. *See* 56 B. 119=135 I.C. 813=33 Bom.L.R. 1581=1932 B. 104. *See also* 55 B. 637=33 Bom.L.R. 807=1931 B. 448; 1936 A.L. J. 1085=1936 A. 764; 1941 I.T.R. 627.

Cl. (vi).—Employee's gratuity—Termination of service on insolvency of employer—Payment of gratuity by stranger dot taxable. 12 R. 477=1934 R. 377 (S.B.). Income from *Jalkart* which were included in the assets of the estate at the time of Permanent Settlement is not liable to assessment to income tax. Such income does not fall under the term "other sources." 53 C. 524=1926 C. 819; 54 C. 863=31 C.W.N. 765=1927 C. 432 (F.B.) (Case-law fully discussed.) Foreign firm lending to resident firm, *see* 30 Bom.L.R. 1172. Where the assessee has taken land on lease and has erected on a part thereof temporary houses and shops which are let out on rent and has let out the rest to squatters on rent, the income derived from such rents comes under S. 6 (*vi*) and must be assessed as income from "other 'sources" 1930 A.L.J. 643=1930 A. 288. Where the income-tax authorities concede, whether rightly or wrongly, that the income of a Chamber of Commerce, which is a mutual concern, derived from its members in the shape of a certain fixed amount on each transaction registered in the Chamber, is not income from business, such income is not taxable as income from "other sources" within the meaning of S. 6 (*vi*) of the Act. If these payments are not income from business, it is difficult to see from what "other source" a mutual concern can derive profits. 1936 A.L.J. 1085=1936 A. 764.

Secs. 6 and 7.—A relationship of employer and employee or of principal and agent is essential before a payment from one party to another can be salary within the meaning of Ss. 6 (*i*) and 7 of the Income-tax Act. A restrictive covenant whereby a person undertakes for consideration to abstain from doing a particular act or from following a particular course of conduct, is something quite outside an ordinary contract of employment, and the amount so paid as consideration under such a covenant cannot be held to be "salary" under S. 6 (*i*) or

Salaries.

7. (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits [1][* * *] in lieu ef, or in addition to, any salary or wages,

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LEG. REF.

[1] Words "received by him" were omitted by S. 8 of Act VII of 1939.

NOTES.

S. 7 of the Act. Nor would it fall under S. 6 (*iv*) or S. 10 of the Act. The amount is not received as the direct consequence of any actual business transacted. On the other hand it is the direct consequence of no business being transacted. To fall under the head business in S. 6 (*iv*) of the Act, an amount must be the direct result of profits or gains accruing from particular business actually carried on by the assessee. When the object of the transaction in pursuance of which the amount is paid is not to secure an income to the assessee, the amount cannot also fall under Cl. (*vi*) of S. 6 or S. 12. The fact that the payment is spread over a number of years would not make it income, because a capital payment is not any the less a capital payment because it is to be paid in equal instalments over a period of years. If the object of the agreement is not the production of an income to the assessee, it is not income within the meaning of S. 12. 1941 I.T.R. 642. As to allowance for bad debts *see* 1941 Rang.L.R. 529=1941 Rang. 185 (S.B.) and notes under *See infra.*

Secs. 6 and 7 : MAINTENANCE CHARGE—NATURE.—Where by the decree of a Court, the assessee's step-mother has a charge not only on the son's zamindari property from which his agricultural income was derived but also on all his other sources of income included in the assessment, the assessee's liability to his step-mother is not of the same kind as his liability to provide for his wives and daughter. The case was not one of a charge created by the assessee for the payment of debts which he has voluntarily incurred and the liability to his step-mother does not fall within any of the exemptions or allowances allowed under Ss. 7 and 12. 60 I.A. 196=60 C. 1029=1933 P.C. 145=65 M.L.J. 285 (P.C.). *See also* 10 O.W.N. 1003=1933 O. 475; 57 C. 918=1930 C. 741.

Secs. 6 (i) (iv) and (vi), 7, 10 and 12—Applicability—Payment of fixed sum annually for several years by one to another in consideration of latter undertaking not to do particular act or business not taxable as salary or business profits or otherwise. *See* 1941 I.T.R. 642=I.L.R. (1941) Kar. 512=1942 Sind 53.

Secs. 6 and 12.—TRANSFER OF ENTIRE PROPERTYBY ASSESSEE—TRANSFEREE TO PAY OFF DEBTS AND ANNUITY TO TRANSFEROR—ANNUITY IF TAXABLE.—The assessee was the owner of a landed estate known as the "nine annas Tikaraj Raj." He had contracted heavy debts. He executed a deed by which he transferred his entire interest in that estate to the transferee. The consideration for the transfer was the payment by the transferee of the transferor's debts amounting to a considerable sum, the further payment by her of the expenses of the marriage of the daughter of the transferor and life annuity of Rs. 2,40,000. It was contended by the assessee that the life annuity payments must be considered as payment by instalments of a capital purchase sum and secondly, that the payment as derived from the estate and therefore exempt from taxation under S. 12 as agricultural income. *Held,* (1) that an owner of capital might exchange it for an income which was taxable, or for another form of capital which was not taxable and the question whether what was obtained in exchange should be considered as taxable depended upon the nature of the transaction in the particular case. (Per *Full Bench*) (2) that the annuity cannot be considered as "revenue derived from land which he used for agricultural purposes." (*By majority,* (3) that in spite of the use of the word annuity) the sum in question was not capital but was income and was so taxable, and it was immaterial that it was the "price" of the property transferred. (*Foley* v. *Fletcher,* 3 H. and N. 769; *Minister of National Revenue* v. *Spooner,* (1933) A. C. 684; *Secretary of State* v. *Scobble,* (1903) A.C. 209, Expl. 13 P. 661=15 P.L.T. 325=1934 P. 384 (F.B.).

Secs. 6 and 24.—The maintenance management and running in races of race horses by an assessee, and his betting, do not in law constitute the 'business,' 'profession,' 'vocation' or 'occupation of the assessee, nor any part of such 'business', 'profession', 'vocation,' or 'occupation' and the receipts by the assessee from the said sources or any of them, would not, if a profit had been derived therefrom have in law, constituted income, profits or gains of the assessee from 'other sources' within the meaning of S. 6 (vi) of the Income-tax Act (1922); and accordingly, the assessee is not entitled under S. 24 of the Act to set off any loss of profits or gains in any year of assessment in respect of the said maintenance, management and running of his race horses or in respect of betting, against his income, profits or gains in the year under any other head of assessment. I.L.R. (1940) All. 274=1940 A.L.J. 129=1940 All. 154 (F.B.) *See also* 53 L.W. 196=1941 Mad. 249=(1941) 1 M.L.J. 103 (F.B.).

Secs. 7 to 12 ; TAXABLE INCOME—EXECUTORS SPENDING AMOUNTS OUT OF INCOME—EXEMPTION.—Where the executors made payments for the *shradh* expenses and for the cost of probate, out of the income of the estate coming into their hands as executors and in pursuance of obligations imposed on them by the testator, it is simply a case in which the executors having received the whole of the income of the estate apply a portion in a particular way pursuant to the direction of the testator and as such no allowance could be made in respect thereof in computing the taxable income. 65 I.A. 150=I.L.R. (1938) 2 Cal. 214=40 Bom.L.R. 780=42 C.W.N. 537=47 L.W. 614=1938 A.L.J. 261=1938 P.C. 118=(1938) 1 M.L.J. 704 (P.C.).

Sec. 7 (1).—Scope of. 6 Pat.L.T. 47=4 P. 210=1925 P. 281; 40 C.W.N. 827; 1935 L. 978. A sum paid to an employee as gratuity not by the employer but by a stranger who was inte-

[1][which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown], a local authority, a company, or any other public body or association, or [2][any private employer; and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received.

Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly, necessarily and exclusively in the performance of his duties];

Provided [3][further] that the tax shall not be payable in respect of any sum [4][deducted from the salary payable by or on behalf of the Crown to any individual, being a sum deducted in accordance with the conditions of his service], for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one-sixth of the salary:

LEG. REF.

[1] Substituted for "which are paid by or on behalf of any private employer" by Act VII of 1939.

[2] Substituted for "by or on behalf of any private employer" by *ivid.*

[3] Inserted by Act *ibid.*

[4] Substituted for "deducted under the authority of Government from the salary of any individual" by A.O., 1937.

NOTES.

rested in the employer out of charitable motives is not chargeable under the head "salaries" in S. 7 of the Act, because it is not paid by the employer or any one on behalf of the employer. 12 R. 477=1934 R. 377 (F.B.). "Income" in the Income-tax Act connotes a periodical monetary return coming in with some sort of regularity from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Where the assessee, after the termination of an agency, is granted by his employer a certain periodical sum of money during the lifetime of the assessee and in the event of his death before expiry of five years from the date of the termination of the agency payment is to be made to his son for the unexpired period of five years, for the services rendered during the agency, provided he does not enter into a competitive business, the periodical sum of money fall clearly within the purview of S. 7, Income-tax Act, and as such taxable income, unless the assessee is able to bring his case within one of the exemptions contained in S. 4, Cl. (3) of the Act. 31 S.L.R. 432=171 I.C. 375=1937 Sind 234. As to assessment of income-tax on salaries, *see* 1 R. 335=1924 R. 30. The annual allowance received at London from a fund by the Lord Bishop of Lucknow as such is a salary within the meaning of S. 7 (1). 1931 A.L.J. 1107=1932 A. 151. A transfer by the trustees of the shares to the employee at the termination of his employment is not a payment perquisite or profits thereunder received by the employee in addition to his salary or wages, which are paid by or on behalf of the company within the meaning of S. 7. 11 R. 70=1933 R. 22. The interest paid by a company on the contributions which the company makes to the Provident Fund is a perquisite in addition to the salary or wages of the employees of the company. It is a sum that accrues to the members of the Provident Fund because they are under a contract of service with the company and as such it falls within the ambit of the term "salaries" in S. 7 (1). But unless and until the salary has been received by the employee and has been paid by the company to him, such salary is not assessable to income-tax. When therefore the interest of the company's own contributions to the Provident Fund is paid by the company and received by the employee, the sum so paid is "salary" within the meaning of that term as used in S. 7 (1). 1933 R. 45 =11 R. 172 (F.B.). "Salary" meaning of. *See* 1941 I.T.R. 642. Company—Provident Fund —Contributions by employee and company— Payment to employee on retirement of total amount in Fund. *Held*, that the payment which the assessee received was not merely deferred salary but was a payment in the nature of a capital bonus paid to a faithful employee of long standing, the assessee was therefore not liable to tax on the amounts received by him. 1940 I.T.R. 85. On this section, *see also* 62 I.A. 207=69 M.L.J. 190 (P.C.). *See* now Ss. 58-D to 58-G, *infra*.

Secs. 7, 18 and 60: SALARY OF GOVERNMENT SERVANT—DATE ON WHICH IT BECOMES ASSESSABLE—POSTPONEMENT IN RECEIPT OF SALARY—EFFECT.—Upon a true construction of S. 7 (1) read with Ss. 18 (2) and 60 (2), Income-tax Act, salary is not assessable to income-tax until it has been paid to and received by the employee, the scheme of the Act being to levy income-tax not upon potential but actual profits. An assessee, a Government servant, requested the head of his office to pay him his February salary on 1st April. instead of on 1st March. The head of the office drew the salary in March and paid it to the assessee on 1st April as requested. The Income-tax Officer included the salary for February in the year's assessment on the ground that as it was drawn in March it must be regarded as having been paid in that month, because it was held by the head of the office in trust or bailment for the assessee until it was actually paid to the latter. *Held*, that the head of the office in the circumstances of the case could not be regarded as a bailee or trustee.

[1][Provided further that where tax is deductible at the source under section 18, the assessee shall not be called upon to pay the tax himself unless he has received the salary without such deduction] :

[2][*Explanation* [3][1].—The right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub-section.]

[4][*Explanation* 2.—A payment due to or received by an assessee from an employer or former employer or from a provident or other fund at or in connection with the termination of his employment, whether or not the employment is then terminated or to be terminated, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purposes of this sub-section, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services :

Provided that nothing herein contained shall render liable to income-tax any payment from a provident fund to which the Provident Funds Act, 1925, applies, or any payment from a recognised provident fund within the meaning of Chapter IXA if such payment is exempted from payment of income-tax under the provisions of Chapter IXA, or any payment from an approved superannuation fund within the meaning of Chapter IXB made on the death of a beneficiary or in lieu of or in commutation of an annuity, or by way of refund of contributions on the death of a beneficiary or on his leaving the employment in connection with which the fund is established.]

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India [5][by or on behalf of the Crown] or by a local authority established [6][in the exercise of the powers of the Crown Representative or the Central Government in that behalf].

Interest on securities.

8. The tax shall be payable by an assessee under the head " Interest on securities " in respect of the interest receivable by him on any security of the [7][Central Government] or of a Provincial Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company :

LEG. REF.

[1] Inserted by S. 8 of Act VII of 1939.

[2] Added by S. 2 of Act XV of 1923.

[3] Original explanation was numbered " 1 " by S. 8 of Act VII of 1939.

[4] Added by Act VII of 1939.

[5] Substituted for " by Government " by A.O., 1937.

[6] Substituted for the words " by the Governor General in Council " by A.O., 1937.

[7] Substituted for the words "Government of Iddia" by A.O., 1939.

NOTES.

The obligation to pay a certain sum of money to the assessee could not make him a bailee, for bailment could be of specific property only. He was clearly not acting as the assessee's agent in drawing the salary for February, for he had not been authorized by the assessee either to draw the February salary in March or to keep it on the assessee's behalf. In these circumstances the February salary received by the assessee in April could not be included in year's assessment. 1937 Lah. 878.

Sec. 8. INTEREST ON SECURITIES.—*See* 6 P. 29=100 I.C. 897=8 Pat.L.T. 359=1927 P. 133; 1937 L. 435. Section not retrospective. 54 I.A. 421=1927 P.C. 242=53 M.L.J. 819 (P.C.). Money paid by way of commission to banker for collecting interest on securities not liable to be deducted. 9 P. 139=1929 P. 419. Where the assessee purchases Government securities and pays to the vendor the cost of these securities and the interest due from the last date on which interest was paid to the vendor up to the date on which the assessee purchases these securities, he cannot claim that this interest should be allowed as an admissible deduction from the interest drawn by him subsequently on these securities. The interest on Government securities does not accrue from day to day but accrues on certain specified dates. It cannot, therefore, be said to have accrued to the vendors of these securities at all, since they sold those securities to the assessees before any interest accrued on them. 9 P. 194=1930 P. 33 (S.B.). On this section, *see also* 1937 Lah. 435; 41 C.W.N. 905.

Sec. 8 (as amended by Burma Adaptation of Laws Order 1937): OBJECT AND SCOPE OF.—S. 8 is intended to point to the law by which any future issues of securities by the Government of India shall be governed. It is not retrospective and does not affect the exemption from liability to tax of a loan which was issued by the Government of India years ago having regard to the Government of Burma

[1][Provided that no income-tax shall be payable under this section by the assessee in respect of any sum deducted from such interest by way of commission by a banker realizing such interest on behalf of the assessee] [2][or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, unless in respect of interest which is so chargeable tax has been paid or deducted under section 18, or unless there is a person in British India who may be appointed an agent under section 43 in respect of such interest];

Provided [4][further] that no income-tax shall be payable on the interest receivable on any security of the [4][Central Government] issued or declared to be income-tax free:

Provided further that the income-tax payable on the interest receivable on any security of a Provincial Government issued income-tax free shall be payable by the Provincial Government.

LEG. REF.

[1] Inserted by S. 3 of Act XVIII of 1933.

[2] Added by S. 9 of Act VII of 1939.

[3] Inserted by S. 3 of Act XVIII of 1933.

[4] Substituted for the words "Government of India" by A.O. 1937.

NOTES.

Act and Cl. 10, Burma Adaptation of Law Order. 1940 Rang.L.R. 435=1940 I.T.R. 264=1940 Rang. 123 (S.B.).

Sec. 8, Proviso 2: SCOPE AND EFFECT OF.—Even if an assessee company in obedience to the direction of the Income-tax department and under protest accepted certain figures as interest on tax free securities, and inserted it in their return, they are free to challenge it in appeal within the time allowed. I.L.R. (1941) Kar. 191=193 I.C. 714=1941 Sind 17. The mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in R. 25. Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities given by the proviso to S. 8, Income-tax Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the whole of the interest of their tax free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules. I.L.R. (1941) Kar. 191=193 I.C. 714=1941 Sind 17.

Secs. 8 and 9: SPECIAL ACT CREATING TRUST—BALANCE AFTER DEFRAYING EXPENSES TO BE PAID OVER TO BARONET—IF "OWNED" OR "RECEIVED" BY TRUSTEES—LIABILITY TO TAX.—By Act IV of 1913, for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, appellants were incorporated as trustees for executing the trusts. By S. 6 the Corporation was to pay out of the income from the properties all rates and taxes and sundry other outgoings. By S. 7 the Corporation was required to form two funds, called the Sinking Fund, and the Repair Fund, and to carry annually thereto respectively, out of the income of properties, certain sums calculated on percentages of capital sums there specified. By S. 8 the residue of the income was to be paid to the Baronet for the time being, if of full age, for his own absolute use and benefit. *Held*, that, so far as concerns the money which the appellants employ in maintaining the Sinking Fund and the Repair Fund and in defraying outgoings, they are not exempt from liability to pay tax. [(1921) 1 A.C. 65, Ref.] 61 I.A. 290 =58 B. 317=1934 P.C. 116=66 M.L.J. 634 (P.C.).

Secs. 8 and 10.—The objects of the Madras Provincial Co-operative Bank were (i) to collect funds for financing Co-operative Societies, (ii) * * * * (iii) to purchase and sell Government Promissory Notes, and (iv) to carry on general business in banking. Its income was derived, *inter alia*, from interest on investments in Government securities. It was contended for the assessee that the purchase and sale of Government Promissory Notes having been found by the Income-tax authority to be a part of its business, the interest derived therefrom constituted "the profits of a Co-operative Society exempted from income-tax by the Notification"—of the Government of India, dated the 25th August, 1925. *Held*, that the word "profits" as subject of taxation, was distinct from, and did not include, interest on Government securities and that such interest was not exempted from income-tax under the Notification. 1933 M. 489=37 L.W. 758=64 M.L.J. 640=56 M. 837 (F.B.).

Secs. 8 and 12; INCOME OF AN IMPARTIBLE ESTATE—NATURE OF.—The income of an impartible estate is not income of the undivided family but is the income of the present holder notwithstanding that he has sons from whom he is not divided. Unity of ownership, unaccompanied by joint possession on the part of the sons or any other right of possession would not seem to affect the character in which the income is received. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable. It cannot be held that the respective chances of each

Property.

9. (1) The tax shall be payable by an assessee [1][under the head "Income from Property"] in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of [2][any business, profession or vocation carried on by him the profits of which are assessable to tax,] subject to the following allowances, namely :—

LEG. REF.

[1] Substituted for " under the head 'property' by S. 10 of Act VII of 1939.

[2] Substituted for the words " his business," by Act VII of 1939.

NOTES.

son to succeed by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and then or on behalf of a Hindu family of which he and they are some of the male members. 1941 P.C. 120=(1941) 2 M.L.J. 972 (P.C.).

Sec. 9 (1).—S. 9 (1) which deals with assessment under the head "property" in respect of the *bona fide* annual value of buildings does not apply to property in a foreign country. 1933 M.W.N. 1362=65 M.L.J. 849 (F.B.). Where the whole of the income of an assessee, who is the sole surviving coparcener of a Hindu joint family, is derived from immovable property, but under a decree of Court the income is made subject to certain maintenance allowances in favour of widows in the family, such maintenance allowances are a charge on the property, the property being declared to belong to the assessee as residuary legatee subject to the payment of the allowances by way of maintenance. Though these charges do not fall under S. 9 of the Act and cannot be deducted under that section, yet, the real income of the assessee which is liable to tax is the income subject to the deductions in respect of the charges. Therefore the assessee ought to be assessed not to the full amount of the income derivable from the immovable property, but to that income less the amounts payable for maintenance allowances. I.L.R. (1939) Bom.L.R. 445=41 Bom.L.R. 652=1939 Bom. 362. In order to come within the provision of S. 9 (1), the person who owns the building need not also be the owner of land upon which it stands. An assessee who takes on long lease a parcel of land from Government and erects buildings thereon with their permission and is entitled under the term of the said lease to remove the buildings within a stipulated period on the termination of the said lease is assessable in respect of the annual value of the buildings under S. 9 of the Act. 151 I.C. 879 (2)=1934 M. 670 (F.B.). S. 9 is inapplicable to a case where the assessees have only a limited interest of a lessee for 50 years. 34 C.W.N. 327=1930 C. 1 (F.B.). Before an assessee can be taxed as an "owner" under S. 9 of the Act it must be decided that he is in fact the owner of the property in question, and this decision rests with the Income-tax Officer. The mere existence of a dispute as to title, even where a suit has been filed, cannot of itself hold up an assessment and the Income-tax Officer has power to decide if the assessee is the owner of the property without waiting for the determination of the suit. I.L.R. (1937) 2 Cal. 358= 1937 Cal. 583. "Owner"—Two persons joining together and purchasing property and making profits—Liability to assessment as owners—Minority of one does not affect liability to tax. 39 Bom.L.R. 910=1938 Bom. 41=I.L.R. (1937) Bom. 830. *Beaumont, C. J.*—The language of S. 9 (1) does seem to involve that the assessee must be the owner of the property from which the income is derived, but in order to bring the section into conformity with the general scheme of the Act, the words "of which he is the owner" have to be read as meaning "of which annual value" he is the owner. I.L.R. (1939) Bom. 284. But *see* (1941) 2 M.L.J. 972 (P.C.) *contra. Rangnekar, J.*—A departure from a strict grammatical construction of S. 9 is not unjustified, because the whole object of the Act is to tax the income of the subject where it is found. If the income is found with a beneficiary, then the latter is primarily liable to be taxed; but if the income is formed with the trustee, then the trustee is the person who is liable. I.L.R. (1939) Bom. 284=41 Bom.L.R. 232=1939 Bom. 195. Where certain bungalows of a Rajah were kept ready for occupation they cannot escape assessment though in fact it so happened in any one year that they were not lived in by the Rajah or his guests or officers. 22 L.W. 822. Business premises, (as) shops, officers, godowns, etc., if "house property." *See* 11 L.B.R. 781= 67 I.C. 711. Company acquiring lands and building and letting the same for rent—Income assessable under the category "property" and not "business." 113 I.C. 848=3 I.T.C. 23. A loss incurred by a firm by standing surety for another firm is not loss incurred forming a deduction under the Act. 92 I.C. 249=1926 L. 168. When property vests in the Official Assignee under the provisions of the Presidency Towns Insolvency Act, he becomes the owner of the property within the meaning of S. 9 of Income-tax Act. Consequently, the Official Assignee becomes liable to assessment to income-tax in respect of the income derived from the said property in his hands. 41 C.W.N. 683=I.L.R. (1937) 2 Cal. 192. "Owners"—Meaning of—*Wakf* property—*Mutwalli*—If owner—Liability to be taxed in respect of income of wakf property. *Held*, (1) that though the properties were validly given as *wakf*, they then may not be held for charitable religious purposes; (2) that the *mutwallis* constituted an association of individuals within the meaning of S. 3 of the Income-tax Act; (3) that they were not, however, "owners" of the properties within the meaning of S. 9 of the Act; (4) that they could not therefore be assessed as regards the income of the *wakf* properties under S. 9; (5) that according to law the Income-tax authorities were bound to assess, so far as the income of the *wakf* properties was concerned, directly the bene-

(*i*) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one-sixth of such value ;

(*ii*) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one-sixth of such value ;

(*iii*) the amount of any annual premium paid to insure the property against risk of damage or destruction ;

[1][(*iv*) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge ; where the property is subject to an annual charge not being a capital charge, the amount of such charge ; where the property is subject to a ground rent, the amount of such ground rent ; and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital :

Provided that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under this Act, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43] ;

(*v*) any sums paid on account of land revenue in respect of the property ;

(*vi*) in respect of collection charges, a sum not exceeding the prescribed maximum ;

LEG. REF.

[1] Substituted by Act VII of 1939.

NOTES.

ficiaries mentioned in the *wakf* deed. *See* I.L.R. (1939) Bom. 284=41 Bom.L.R. 232=1939 Bom. 195.

Sec. 9, (1) (iv).—The property belonging to an estate subject to the rule of primogeniture is still the property of the family and not the sole property of the manager for the time being for the purposes of super-tax. In *computing income of the head of an impartible family governed by the law of primogeniture, the allowances paid to junior members thereof should be deducted.* They cannot be deemed to be part of the income of the family. They are the separate property of the junior members on which they can be separately assessed. 14 L. 255=1933 L. 284. The words 'property of which he is the owner' in S. 9 (1) are not to be read as meaning 'of which annual value he is the owner'. However difficult it may be in some cases to apply the simple and ordinary phrase 'owner of property' to the facts of each case, it is not permissible to substitute a phrase which is of dubious and noticeably different meaning. Again the distinction between property owned by an individual Hindu and property owned by a Hindu undivided family must be made by applying the Hindu Law. It cannot be said that because the statute to be interpreted is an Income-tax Act broader or more general notions of ownership than the Hindu Law affords are to determine the matter. The Act is an Indian Act and the distinction takes its meaning from the Hindu Law. Property though impartible may be the ancestral property of a joint family, and in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara. Though the co-ownership of the junior member may be 'in a sense' only, carrying no present right to joint possession, if the question be whether the Hindu undivided family or the present holder is owner of the estate the answer of the Hindu Law is that it is the joint family property. The present holder cannot therefore be charged in respect of it under S. 9 of the Income-tax. 54 L.W. 635=1941 P.C. 120=(1941) 2 M.L.J. 972 (P.C.). A Hindu undivided family is a single unit for the purpose of income-tax matters and in the case of assessment of a Hindu undivided family S. 9 (1) (*iv*) of the Income-tax Act can be applied only when the property, *i.e.*, the property which constituted the taxable property of the undivided Hindu family is subject to a mortgage. The word 'mortgage' in S. 9 (1) (*iv*) must, when a Hindu undivided family is being assessed as such in respect of the income under S. 9, be taken to refer only to a mortgage by the Hindu undivided family as such and cannot include a mortgage by some individual member or members of his or their shares of such property. Interest paid or payable in respect of a mortgage by some members of the undivided family of their shares in the family property cannot therefore be allowed to be deducted in computing the profits of the property in assessing the undivided family to income-tax. 63 C. 1157. The deposit with the creditors of title-deeds relating to property for the purpose of borrowing money for the purchase and extension of property does not constitute a charge on

[1][(*vii*) in respect of vacancies, that part of [2][the annual value] which is proportional to the period during which the property is wholly unoccupied or, where the property is let out in parts, that portion of [2][the annual value] appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied ;]

[3][* * * * *]

(2) For the purposes of this section, the expression " annual value " shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year :

LEG. REF.

[1] Substituted by S. 10 of Act VII of 1939.

[2] Substituted for " the net annual value, after deducting the foregoing allowances " by S. 5 of Act XL of 1940.

[3] Omitted by S. 10 of Act VII of 1939.

NOTES.

the property within the meaning of S. 9 (1), Cl. (*iv*) of the Act. 1932 A. 451. *See also* 63 C 1157.

Sec. 9 (1) (vii).—'*Vacancy*' cannot mean or include occupation. Consequently where an impecunious tenant fails to pay the rent, the house cannot be treated as not having been let at all. Nor can unrealised or unrealisable rent be treated as rent which did not accrue. 32 P.L.R. 418=1931 L. 656. The provision in S. 9 (1), paragraph (*vii*) is intended to apply primarily only to those cases in which the house in question is not in the occupation of the owner but is habitually let to tenants and the *vacancies* referred to are vacancies between the different tenancies. It may also be applied to cases where a house though not let is dismantled and shut up by the owner but it has no application to a house kept always furnished and ready for occupation by the owner but never in fact used by him at all. Such a house may be unused but it cannot be called 'vacant'. 1931 L. 656. "*Vacancy*" meaning of. *See* 49 M. 22=1926 M. 287=50 M.L.J. 63.

Sub-Sec. (2): "ANNUAL VALUE".—Annual value in S. 9 (2) does not mean only annual money benefit derivable from property but, the sum for which the property might reasonably be expected to let from year to year. In estimating the sum for which the property might reasonably be expected to let from year to year, the amount paid by the tenant on account of the Municipal house-tax should be included, that is, should be treated as part of the rent payable by the tenant to the landlord. 17 L. 494=1936 L. 762 (F.B.). The sum for which the property might reasonably be expected to let from year to year is a hypothetical sum into which rates as such do not enter at all and from which they are not to be deducted. But if and so far as the actual bargain made by the parties is considered as evidence of the amount which a hypothetical tenant would give or the landlord reasonably expect to get is the figure which represents the *whole* of the consideration exacted by the landlord for the right to use and occupy the property—comprising not merely the rent paid by the tenant as such, but also the tax paid to the corporation by the tenant. 36 C.W.N. 1144=1932 C. 886 (S.B.) (1930 L. 320, Diss.). The owner's share of Municipal tax payable under this Municipal Act, is not a tenant's tax. It is a liability of the owner and if under the agreement it is paid off by the tenant, it represents part of the consideration received by the landlord and has got to be included in the computation of the annual value of the premises. 36 C.W.N. 1144=1932 C. 886 (S.B.). *See also* 1929 L. 503. The phrase "annual value" whether in Income-tax Acts or wherever else it appears with rating or taxation means the same thing, *i.e.*, "the sum at which the property may reasonably be expected to let from year to year." The annual value of a house means the annual money benefit derivable from it by the owner. 131 I. C. 193. Per *Addison, J.*—What the landlord has been able to collect for past year is a fair measure of what the property may reasonably be expected to let from year to year. 131 I.C. 193. Per *Dalip Singh, J.*—The sum for which the property might reasonably be expected to let from year to year is a notional amount and has nothing to do with the rent actually received by the owner. A good way of arriving at the notional sum would be the correct average of the rents paid for similar and similarly situated buildings in any given area. The sum for which the property might reasonably be expected to let from year to year does not mean the sum that the most grasping landlord can secure from the most necessitous tenant but is the sum which might reasonably be expected to be paid for that building from year to year regard being had to the rents paid for similar and similarly situated buildings in that locality. If circumstances make it impossible or inconvenient to apply this method, other factors may be taken into consideration. One of the more important considerations is the length of time for which the landlord had been able to shift the burden to the tenants of the taxation. A long time might well lead to the inference that the notional rent included that amount of the tax. *Held*, by the majority of the Full Bench (*Addison, J.*, dissenting) that the "annual value" of the property for purposes of S. 9 of the Act does not include sums paid by tenants to the owner on account of Municipal house-tax. 131 I.C. 193=1931 L. 320. Per *Tek Chand, J.*—The question in such cases does not admit of a general answer. The provisions of the Municipal Act in force in a particular locality and the relevant notification under which the taxes levied have an important bearing on the decision in question. Per *Addison, J.*—The question is one of fact and not of law, namely, what as a fact was the sum for which the property might reasonably be expected to let from year to year. 131 I.C. 193=1931 L. 320 (2)

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent. of the total income of the owner.

[1][(3) Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this section shall be included in his total income.]

Buisness.

10. (1) The tax shall be payable by an assessee under the head [2][" Profits and gains of business, profession or vocation "] in respect of the profit or gains of any [3][business, profession or vocation] carried on by him.

LEG. REF.

[1] Added by Act VII of 1939.

[2] Substituted for " Business " by S. 11 of Act VII of 1939.

[3] Substituted for " business " by Act VII of 1939.

NOTES.

(F.B.). The income and profits from immovable property are to be ascertained by finding out the sum for which the property might reasonably be expected to let from year to year. Where the immovable property consists of a number of market-stalls, this is to be done by ascertaining the annual value of each of the stalls which in the aggregate make up the property to be assessed. In determining what that annual value is, the Income-tax Officer must have regard to the facts of the particular case under enquiry; one of such factors is the actual daily rent of each of the stalls. 9 R. 154=1931 R. 99 (S.B.). In computing the notional annual value of a house which is not in fact let, the *cost of collecting the rent* if the house was let cannot be deducted from that notional value; because even in the case of a house which is in fact let, the collecting charges may not be deducted unless they have actually been incurred and in that case the sum which may be deducted is limited to a sum "not exceeding the prescribed maximum." 10 P. 261=1931 P. 233. The house-tax is not a part of the rent of the annual income accruing from the house property to the landlord, but is a mere liability of the landlord incidental to his owning the property which he lets out to the tenants on rent. 30 P.L.R. 429=1929 L. 503=140 I.C. 1=1932 C. 886 (S.B.); 131 I.C. 193=1931 L. 320 (F.B.). Urban immovable property tax under Bombay Finance Act, if tax on income. 42 Bom.L.R. 10 (F.B.). *See also* 1926 M. 368=50 M.L.J. 176 (F.B.). (Professional tax not to be deducted from taxable income).

Sec. 9 (2), proviso: "RESIDENCE"—BUILDING OWNED BY COMPANY AND PARTLY USED FOR OFFICERS AND PARTLY LET OUT TO MEMBERS.—The word " residence" in S. 9 (2), proviso, bears the ordinary meaning, *i.e.*, the place where a human being eats, drinks and sleeps or where his family and servants eat, drink or sleep, or where there is some permanence or continuance of such eating, drinking and sleeping. It does not bear the extended meaning, which it bears in the case of a company, namely, the place where the company keeps house and does business. There is no justification for applying the word to a fictional person, such as that of a limited liability company. Consequently, a building owned by a Stock Exchange Association, which is partly occupied by its offices, and partly let out to its members for their business, but not used by them for their residence, does not constitute "residence" under the proviso to S. 9 (2). 39 C.W.N. 327=62 C. 547.

PRACTICE AND PROCEDURE.—In estimating or arriving at a decision as to the *annual value of building*, the Income-tax Officer is entitled to take into account the actual sum expended in the erection of the building. The *finding of the Income-tax Officer is one of fact* with which the High Court cannot interfere. 146 I.C. 550 (1)=1933 L. 829. No mandamus to be issued when the amount involved is very small. 146 I.C. 551=1933 L. 822.

Secs. 9 and 12—Where the assessee having taken land on a long lease under which the land together with the buildings thereon will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, whether the tax payable by the assessee in respect of the rents is to be determined in accordance with S. 9 or with S. 12. 144 I.C. 344=37 C.W.N. 881=1933 P.C. 180=65 M.L.J. 247=55 A. 452=60 I.A. 307 (P.C.) *See also* 1934 M. 670 (F.B.).

Secs. 9 (1) and 14.—Property of which he is the owner in S. 9 (1)—Meaning of—Income of impartible estate held by member of joint Hindu family—How chargeable. I.L.R. (1941) Kar. (P.C.) 155=1941 P.C. 120=1942 M.W.N. 4=74 C.L.J. 508=44 Bom.L.R. 196=(1941) 2 M.L.J. 972 (P.C.) cited under S. 9 *supra*.

Sec. 10: BUSINESS—MEANING.—*See* 41 C.W.N. 46=I.L.R. (1937) 2 Cal. 36. Carrying on business can exist only when there is a succession of acts and the performance of a single act apart from special circumstances is not enough even though it may result in gains or profits. 57 B. 651=35 Bom.L.R. 914=1933 B. 422. *See also* 1935 L. 53. S. 10 of the Act deals only with businesses which are being carried on and not businesses which have ceased to be carried on. A company can carry on several distinct and separate businesses and it must always be a question of fact whether those businesses are separate or so interlocked with the main chief business of the company as to be really one business. If separate businesses

NOTES.

are carried on during the year of account, the profits and gains of each of them separately will have to be arrived under S. 10 (1) and (2) of the Act after making the allowances given in sub-S. (2) ; and the loss, if any, in any one or more of the businesses would under S. 24 of the Act, be set-off against the profits and gains of the more successful businesses arrived at in the same way and the aggregate income computed. But an assessee company cannot adopt this course when the businesses in which the losses are incurred have ceased to be carried on in the year of account. 1935 M. 330=68 M.L.J. 379=58 M. 433 (F.B.). The members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade, such as a measurer of merchandise and pay for these facilities. They combine as a Chamber and provide these facilities for themselves as members of that Chamber and they pay more than is actually necessary for the provision of these services. *Held*, the measurement fees and charges realized by the Karachi Chamber of Commerce from its members are not taxable income. They are not profit on trade within the meaning of S. 2 (4) and S. 10 of the Act, but are savings. The fact that the office of public measurer serves not only members of the Chamber but members of the public as well or that the members are incorporated as a Chamber under the Companies Act, does not destroy the mutual basis of the members dealing with the Chamber. 1939 I.T.R. 575=1939 Sind 308. Association of merchants formed for protecting and promoting interests of members trading in grains and seeds —Opening of Produce Exchange Department and clearing house—Charging of fees from members—Income from sale of samples received for qualitative analysis and penalties levied for trading in breach of rules not taxable as profits and gains of business. 1939 I.T.R. 594.

"INCOME" AND "PROFITS"—DISTINCTION.—52 M. 64=1929 M. 387=56 M.L.J 481 (F.B.). Term "profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company is to be regarded as dealing in house property by letting out for premium and rent in the course of and for purpose of its business, the money value of the extent to which at the end of the year it betters its position by such means will be assessable as profit. If its position is bettered by other means from causes not directly connected with the business of the company, the enhanced value though realised is not part of the profits of the business. Everything depends on what the business is. 34 C. W.N. 327=1930 C. 1 (F.B.). Debt discharged by consideration other than cash. True value of consideration must be looked to. 9 P. 240 =1930 P. 81 (S.B.). S. 10 deals solely with the profits or gains of any business carried on by the assessee. It does not refer to profits or gains generally from whatsoever source derived. 26 N.L.R. 75=1930 N. 183. Sums received by a firm, in the nature of a *solatium*, for the compulsory cessation of certain agency contracts, are not " income, profits or gains " arising from business *carried on* by them and they are consequently not liable to be assessed to income-tax. 59 I.A. 206=59 C. 1343=1932 P.C. 138=63 M.L.J. 124 (P.C.). *See also* 1941 I.T.R. 642 (business "profits or income," what are). Where there is no Hindu joint family but still on account of the minority of sharers, the sharers have all to be looked after by a common guardian and the business is carried on with the properties of the tenants-in-common put together with the advantages of such condition the Crown can assess the person carrying on the business under S. 10 (1). 55 M. 891=1932 M. 378=62 M.L.J. 600 (F.B.). In order that a *payment in kind* may be taxable income, it is essential that what is received in kind should be the equivalent of cash or should be money's worth. 60 I.A. 146=12 P. 318= 64 M.L.J. 612 (P.C.). Assessee having more than one business can set-off expenses incurred in re-starting business which has to be stopped on account of cyclone as against profits and gains in other business. 1935 M.W.N. 1208= 69 M.L.J. 876 (F.B.).

A DEBTOR WHO GIVES HIS CREDITOR A PROMISSORY NOTE FOR THE SUM HE OWES CAN IN NO SENSE BE SAID TO PAY HIS CREDITOR.—He merely gives him a document or voucher of debt possessing certain legal attributes. So far as such promissory note is concerned, the assessee does not receive payment of any taxable income from his debtor or indeed any payment at all. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.).

APPROPRIATION OF PAYMENT TO INTEREST—OPTION OF TAX-PAYER.—An assessee took over from the debtor in satisfaction of a loan six items of property movable and immovable amounting in all to Rs. 20,74,973. Assuming that these six items might be treated as moneys worth, it was contended that the sum which far exceeded the total amount of interest due on the loan must be treated as applicable in the first place to the discharge of the debtor's liability for interest. *Held*. that the basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest bearing capital outstanding, was gone. Moreover, if the question were one between the debtor and the creditor (*i.e.*, assessee), the assessee might to the last moment appropriate the above mentioned amount to capital account, for in a question of the revenue the tax payer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.).

FOREIGN REMITTANCE—CAPITAL OR PROFITS.—There is no *praesumptio juris* that a sum received from a foreign partnership is remitted out of the profits of that business. Where a firm was assessed to income-tax in respect of certain sums received from a foreign business and both the Income-tax Officer and the Assistant Commissioner held that the sums were the assessee's share of profits. *Held*, that a further reference to the High Court on that question was not maintainable. 11 R. 397=1933 R. 217.

PAYMENT OF ARREARS OF ROYALTY.—Where an assessee agreed to take a colliery business on the representation that it was free from encumbrances which had accrued due prior to his getting possession. *Held*, that he could not deduct the amount so paid from his income,

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60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.).

Loss of Capital.—The assessee who was carrying on business in piecegoods accepted deposits from various peoples for the purpose of that business and paid interest on those deposits which were used in his piecegoods business. He had, however, no money-lending business. As a result of a dacoity committed in his premises one night, a sum of Rs. 14,400 was lost, and it was claimed that this sum should be deducted in computing the profits and gains under S. 10 (1), Income-tax Act. *Held*, that the amount in question was neither the stock-in-trade nor expenditure necessary for the carrying on of the 'business' of the assessee or for earning the receipts, but was clearly a loss of capital and was not deductible. 1935 L. 53. As to what is capital expenditure, *see* 62 C. 87=39 C.W.N. 70.

Isolated speculative venture—Profits from.—Assessee who was a landowner and money-lender and had an interest in certain cotton mills purchased in Court auction the right, title and interest of a certain person in some legacies which were the subject of litigation. After a protracted litigation extending over several years, he was able to realise a sum of some money in respect of the legacies, which was far in excess of the purchase-money paid by him. That excess receipt was sought to be assessed to income-tax. *Held*, that the transaction could not be described as an adventure or concern in the nature of trade, but it was an isolated transaction in no way connected with any other trade or business activities of the assessee, and that consequently the amount of excessive receipt was not clearly assessable to income-tax. 68 M.L.J. 222=58 M. 363=1935 M. 387 (F.B.).

Bad debts and time-barred debts.—The presumption that a debt barred by time is *prima facie* bad is rebuttable by evidence according to the circumstances of the case. A debt becomes actually bad when it becomes irrecoverable and not when it is merely time-barred. It may become bad even before it is time-barred, when it becomes quite irrecoverable by the circumstances of the debtor. (1932 P.C. 178, Ref.) 13 P. 101=1934 P. 46. *See also* 1939 I.T.R. 149; 1938 Pat. 577; 1938 Cal. 636.

What are Proper Deductions.—Money embezzled by the clerk of the assessee is a deduction in computing the income or profits of the business; so also the boarding expenses of servants and their transit charges are items of deduction. 4 P. 385=1925 P. 408. *Cf.* 59 M.L.J. 403. A loss whether by embezzlement or whether by theft is not one of the allowances which is allowable to the assessee under S. 10. 17 Pat. 102=19 Pat.L.T. 176=1938 Pat. 159. An assessee is entitled to deduct the freight charges, etc., from the market value at the ports, provided the charges are shown in the accounts as having been incurred. The deductions can be allowed in the following year if the charges are then shown. 1931 L. 759. Firm carrying on business in partnership with other firms—Losses if a deduction—Expenses on accountants and lawyers can be deducted. 45 M.L.J. 711=1924 M. 205. The Burma Railways Co. are the owners for the Railway system and all its premises for the purpose of S. 9 (2) of the Income-tax Act (VII of 1918), but they are owners not by reason of their being partners with the Secretary of State for India. 64 I.C. 801=11 L.B.R. 33. Body of trustees carrying on business—Liability to income-tax. 1930 L. 929. It would be still more difficult to hold that the profits or gains include profits or gains of a member of the firm which carried on the business. 1930 N. 183. The amount of *interest* due on a mortgage debt but not actually paid is an allowable item of expenditure under head "house property income" under the section. 54 C. 630=31 C.W.N. 557=1927 C. 553. The mere fact that the debtor of an assessee has made an entry in his books showing a credit to the assessee for the amount of interest due in the accounting period does not necessarily mean that the amount had been received or realised by the assessee and does not justify income-tax assessment. In order to justify the assessment, there must be a clear finding based on some evidence that the amount was realized or received in some form by the assessee in the accounting period. A presumption by itself does not justify assessment. 15 L. 486=1934 L. 408. But *see* 13 R. 243=1935 R. 171 (S.B.). Where the debtor executed a fresh promissory note for interest due on a prior debt and both in the interest account of the creditor and in the account which they kept, relating to the debts of their respective debtors, the interest in question was shown as having been received by the assessees during the year of account, and it was so stated in the profit and loss account of the firm. *Held*, that in effect what happens in such cases is that the assessees are content to stay their hands in connexion with the recovery of the loan and interest under the old transaction in consideration of the obligation undertaken by the debtors under the new promissory note which consists of the interest due under the old loan which is capitalised for the purpose of the new transaction. In other words, the assessees were investing the old interest as capital in the new loan. Hence such amount was interest upon loans that had accrued to the assessees in the accounting year, and as such was assessable to income-tax for the year. 13 R. 243=1935 R. 171 (S.B.). But *see also* 15 L. 486=1934 L. 408. Banking business at places within British India and at places outside British India—Money borrowed at head office, part of the borrowing remitted to a place outside British India and used as capital there—Interest paid not allowable as a deduction, 27 L.W. 432=54 M.L.J. 436 (F.B.). *See also* 1932 M. 573=63 M.L.J. 227 (F.B.). Capital borrowed in British India for foreign business—Interest paid in British India towards same—When can be deducted. 1930 L. 982. Where a company acquires lands and building and lets the same for rent the income arising therefrom is assessable under the category of "profits" and not "Business". 32 C.W.N. 413. Loss on "Thavanai" system—Interest on—Deductibility. 115 I.C. 485=1929 M. 34. *See also* 135 I.C.

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810=1932 B. 94=33 Bom.L.R. 1587. Borrowed capital used for a separate branch of the business—Failure of this branch of the business and loss of amount—Assessment for the year following the year of loss—Interest paid on borrowed capital during the year of assessment, deduction of. *See* 55 M.L.J. 600=52 M. 296 (F.B.). Assessee financing an appeal—Additional sum received by him on appeal being successful—Liability to assessment. 1935 A.L.J. 405=1935 A. 415. Assessee paying part of profits to third party under agreement—Right to deduct out of taxable income. 37 Bom.L.R. 126=1935 B. 197. *See also* 148 I.C. 681=1934 R. 172. Advance of loan to enable borrower to sell property—Agreement to pay portion of consideration—Effect—Such portion not assessable. *See* 11 R. 454. Business profits—Company managing railway on behalf of Secretary of State—Computation of profits—Deduction of guaranteed interest—Interest on borrowed capital. 49 C. 815=27 C.W.N. 34. Where a partner as partner lends money beyond the initial capital to the partnership at an agreed rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the "previous year" should be deducted in computing the profits or gains of the partnership within the meaning of S. 10 (2) (*iii*). *See also* 8 R. 277; 12 L. 88=1930 L. 738 (2). Losses suffered by an assessee as a member of a company or firm are to be taken into account in fixing the amount of his taxable income. 1924 N. 153. Under Act VII of 1918, share of a partner's loss in an unregistered firm of which he is a partner can be deducted from his other income for purposes of income-tax. 80 I.C. 362. Business profits—Assessment based on income of the previous year—*Deduction for obsolete machinery.* 48 B. 389=26 Bom.L.R. 312. *Deduction for depreciation—Rice-mill* factory lease of—Owner to bear loss due to wear and tear—Deduction if allowable. *See* 50 M. 529. *See also* 1940 Mad. 366=(1940) 1 M.L.J. 319 (F. B.); I.L.R. (1938) Bom. 374=40 Bom.L.R. 343=1938 Bom. 241 (S.B.); I.L.R. (1937) Bom. 821=39 Bom.L.R. 903=1937 Bom. 493. The machinery, plant and buildings on which an allowance for *depreciation is claimed should be used in the business of the Company.* Where the machinery, etc., were used by the constituent firms and they had obtained allowances in respect of depreciation, *held*, that the main company was not entitled to claim a deduction once again. 32 P.L.R. 335=1931 L. 376. As to deductions on account of depreciation of machinery, *see also* 56 B. 129=34 Bom.L.R. 104=1932 B. 216. The expression "*used for the purposes of the business*" in S. 10 (2) (*iv*) means used for such purposes during the accounting year and consequently the allowance for depreciation under S. 10 (2) (*vii*) is inadmissible in respect of buildings, machinery, plant, etc., remaining idle and not actually used by the assessee in his business during the account year. Likewise the obsolescence allowance under S. 10 (2) (*vii*) can be claimed only in respect of machinery or plant actually discarded in the accounting year. 3 I.T.C. 73. Profits—Computation of—Depreciation in the value of securities held by a bank. 46 B. 567=24 Bom.L.R. 118. Minimum *royalty* of a mining lease is rent and is exempted even if paid in arrears. 9 P. 240=1930 P. 81 (S.B.). As to payment of *royalty, see* 128 I.C. 273=1932 M. 437=63 M.L.J. 11 (S.B.); 133 I.C. 38=10 P. 275=1931 P. 264. *See also* 160 I.C. 611=1936 P. 267. *Tax on companies* levied under S. 92 of the Madras District Municipalities Act (V of 1920), can be deducted as a business allowance under S. 10, sub-sec. (2), Cl. (9) of the Indian Income-tax Act in calculating the profits of a company. 81 I.C. 454=47 M. 667=47 M.L.J. 160. Business resulting in loss—Depreciation can be added on to loss sustained. 26 N.L.R. 75=122 I.C. 689=1930 N. 183. "*Obsolete allowance*"—Circumstances justifying grant—Machine discarded and sold as out of repair—Claim for allowance. 26 A.L.J. 1319=114 I.C. 897=1929 A. 70. Machinery sold as not obsolete—Loss sustained by sale—Deduction from annual profits—Assessee's right to. 1924 M. 455=79 I.C. 603=46 M.L.J. 42. Where a company is purchased as a going concern by another firm, the latter company is entitled to the deduction of depreciation allowance in respect of machinery, buildings, etc., to which the former was entitled to claim under S. 10 (2) (*vi*) of the Indian Income-tax Act, such claim not being personal to the old company. 56 M.L.J. 451 (F.B.). *Held, further*, that the calculation of depreciation allowance must be made on the original cost of the machinery, etc., and not on the value at which the succeeding company purchased. 1929 M. 453=56 M.L.J. 451 (F.B.). *See also* 56 B. 129=34 Bom.L.R. 104=1932 B. 216. Depreciation on buildings and machinery can be set-off against gains and profits accrued to the owner of those buildings and machinery from any sources such as rental from house property during the year in question. 116 I.C. 547=1929 L. 556; 53 M. 702=58 M.L.J. 46 (F.B.). The word "obsolete" in S. 10 (2) must be taken to include cases of unfitness from whatever cause. The question whether the total destruction of machinery which renders it unfit for the purpose it was originally intended for, entitles the owner to claim deduction from income-tax is a question on which a reference can be made under S. 66. 20 L.W. 859=1925 M. 157=85 I.C. 478. The question whether a particular machinery has become obsolete is one of fact. 35 C.W.N. 314 (13 I.C. 205, Rel. on). Where the business of an oil mill was closed down for the reason that the machinery being old and worn out and could not be worked at a profit in the face of competition, *held*, that the assessee would not claim obsolescence allowance as provided in S. 10 (2). 35 C.W.N. 314 (50 M.L.J. 157, Ref. to.)

BUSINESS PROFITS—DEDUCTION—INTEREST TAKEN BY PARTNERS.—*See* 46 A. 1=21 A.L.J. 703. The question whether there has been an advance of capital by particular partners, or *bona fide* borrowing of money by the firm in which the lender happens to be a partner must be treated as one of fact in each case. 46 All. 1=21 A.L.J. 703; 1933 Sind 192. There is nothing in law to prevent a partnership starting business without capital, and there is nothing to prevent a partner or partners in such a case lending to the partnership money which

NOTES.

would bear interest deductable under S. 10 (2) (*iii*) of the Income-tax Act. Where the instrument of partnership contains a provision to the effect that the net profits of the business after deducting all working expenses and interest paid or payable on capital whether belonging to the partners or depositors or others from whom moneys might have been borrowed shall be divided between the two partners in certain proportion, and it is found that the partners have advanced amounts to the firm by way of loans, the amounts paid as interest to the partners cannot be treated as profits of the firm and liable to assessment, but must be allowed as deductions under S. 10 (2) (*iii*) of the Act. The fact that there is not instrument to evidence the loans, on which a suit might be based, is immaterial, as it is not necessary that there should be an instrument to evidence a loan. 1939 I.T.R. 662. The Act exempts from the assessment the allowance made to the assessee under S. 9 (2) on account of the annual value of business premises owned and occupied by him. 43 A. 139=58 I.C. 836 (F.B.).

WHAT ARE NOT PROPER DEDUCTIONS.—Remittances from abroad to a firm are presumed to be profits, rather than capital until the contrary is shown by assessee. 49 M. 465=24 L.W. 343=1926 M. 767=51 M.L.J. 138. Loss incurred by the assessee due to theft by persons unconnected with his business cannot be said to be incidental to the business of a money-lender. It cannot, therefore, be deducted in computing his taxable profits; cases of embezzlement by employees stand on a different footing. 1930 M. 808=59 M.L.J. 403 (F.B.). Compensation received by a company as agent of a business concern for determination of the agency, is a receipt arising from business and consequently if income it would be taxable under S. 10 as being an income from business or at least under S. 12 as being income from other sources. The circumstances that it is casual or non-recurring does not exempt it from taxation under S. 4 (3) (*vii*). 58 C. 1153=35 C.W.N. 361=1931 C. 676. Assessee claiming deduction of amounts paid as *road cess* in computing profits of colliery assessable to a tax—*Cess "a local rate"*. 89 I.C. 789=29 C.W.N. 923; 91 I.C. 476=1926 P. 109. Purchasing of property—Expenditure incurred for taking delivery—If deductible. 9 P. 48. Mortgagee purchasing mortgaged property in execution of his decree—Another person claiming share therein—Mortgagee depositing security to safeguard the interest of such person—Amount so deposited—Deduction of in computation. 1929 P. 476=9 P. 48. Assignment of mortgage decree in favour of assessee—Assessee in part consideration giving zarpeshi thika lease to assignor for limited period—Interest in respect of zarpeshgi lease not deductible. 1938 Pat. 567. Purchase of decree—Execution of handnote for part of price—Zarpeshgi lease for term for balance—Arrangement to wipe off principal and interest within term—Interest on decree—It can be set-off against interest on Zarpeshgi amount in shape of rents and profits. 1939 I.T.R. 260. Where a property is purchased by an assessee in execution of a mortgage decree against his debtor, the amount or which the assessee bids at the execution sale must ordinarily be taken to be its market value. It is, however, open to the Income-tax Department, if there is anything before it, to hold that the property was worth either more or less than the price which the assessee bids for it. But in order to hold that the property is worth more than the price fetched at the public sale, the department must have in its possession some tangible evidence. 1942 Pat. 65=1941 I. T. R. 474. Assessee carrying on money-lending business and owning immovable property—Advance of money on mortgage of property—Property subsequently purchased by assessee—Assessee selling off property for lesser amount and showing it for first time in subsequent year's account as item of money-lending business—No right to claim a credit for loss. *Held*, that on the facts, the Income-tax Officer was justified in inferring that the assessee had purchased outright and that having treated it as his own property along with his other immovable property, it was not open to him to treat the purchase as a part of his money-lending business transaction and claim credit for the loss he sustained by the resale of the property many years after its purchase. 180 I.C. 823=1939 Sind 61. Where remittances have been made by an assessee from a foreign state (Penang) into British India out of profits available for remittance, and such remittances are not in anticipation of profits having been actually earned more than sufficient to cover the remittances, the incurring of losses by the assessee in his foreign business subsequently in the same accounting period cannot change the character of the remittances so as to exclude them from assessment at profits, though such losses were sufficient to wipe out these profits. 1941 I.T.R. 663=54 L.W. 707=1941 Mad. 928=(1941) 2 M.L.J. 890 (F.B.). In the case of income derived from a *royalty of collieries, local rates and cesses* paid under the Jharia Water Supply Act or Mining Settlement Act do not form permissive deductions as they are in no sense expenses incurred for the making of the income. 4 P. 752; 3 P. 295=83 I.C. 920. As to payment of *royalty, see* 1932 M. 437=63 M.L.J. 11 (S.B.). *Royalties* for preparing bricks are assessable to income-tax. 10 P. 275=1931 P. 264; 130 I.C. 43=1931 P. 15. Deduction on account of payment of road cess. *See* 53 C. 76=1926 C. 396. Business profits—Isolated transaction—Casual profits—*Profit through brokerage and* profits arising from *wagering contracts* entered into in the course of business are liable to income-tax. 23 A.L.J. 63=47 A. 368. Payments to be made in certain proportion out of the profits on the capital advanced for the purpose of the business cannot be treated as expenditure incurred solely for the purpose of earning such profits or gains within the meaning of Cl. (*ix*) of sub-S. (2) of S. 10. 49 B. 362=27 Bom.L.R. 219. The *annuity paid by the assessee as maintenance allowance* to his step-mother in pursuance of a consent decree is not deductible in computing the tax payable by him. It is not covered by any of the exceptions enumerated by the Act. 57 C. 918=1930 C. 641. *See also* 143 I.C. 145=1933 P.C. 145 (P.C.). Question whether expenditure incurred in

(2) Such profits or gains shall be computed after making the following allowances, namely :—

NOTES.

renewing parts of motor-car is capital expenditure is one of evidence—But deduction for loss caused by total damage to car owned by a motor-car company is a question of importance —Reference to High Court. 85 I.C. 478=1925 M. 157. The *commission paid by a company to underwriters* for raising fresh capital is not an expenditure solely incurred with the object of earning profits for the company's business and therefore is not within the scope of S. 9 (2) (*x*) [now S. 10 (2) (*ix*) of the Income-tax Act]. 45 B. 1306=23 Bom.L.R. 576. When a question arises whether certain payments made by a company to its directors by way of remuneration for their services as provided in the Articles of Association are expenditure incurred solely for the purpose of earning profits or gains, the fact that the Articles of Association provide for payment of those sums is not conclusive that those sums are such expenditure ; and the fact that the sums allotted have been paid and passed by the auditors is also not conclusive. The Income-tax authorities are entitled to look at the resolution, the accounts and the Articles of Association, but are not bound by them. They can go behind the accounts and ascertain for themselves whether or not the payments made were reasonable sums by way of remuneration and they can consider what payments are made for similar services in similar businesses and allow deductions which they consider proper and reasonable. 40 C.W.N. 833. As the profits accrue to the assessee at the date when the sale to him becomes absolute the expenses incurred by the assessee subsequent to that date for taking delivery of possession and effecting mutations must be entirely ignored. 10 Pat.L.T. 729= 1929 P. 476 (F.B.). An assessee is not entitled to deduct an expenditure (adat, interest, etc.) not actually incurred by him before the close of the account year and a deduction can be claimed only if the expenditure is actually incurred or the liability incurred is satisfied before the close of the year. 1929 N. 243. Firm dissolved—Assets and liabilities divided up between assessee and other partner—Assessee carrying on business himself—Certain debts falling to assessee's share of assets—Assessee accepting smaller sums and writing off balance as irrecoverable—Losses, not allowable against income, profits and gains of new firm. 1941 Cal. 142=1941 I.T.R. 408.

PROFITS EARNED ABROAD.—The section contains no hint that part of the profits will be exempted, although they arise or are received in British India, because they have been "earned" elsewhere. 59 C. 1226=36 C.W.N. 563=1932 C. 626.

PAYMENT IN KIND—WHETHER TAXABLE.—In order that a payment in kind may be taxable income, it is essential that what is received in kind should be the equivalent of cash or should be money's worth. 60 I.A. 146=12 P. 318= 64 M.L.J. 612 (P.C.).

PAYMENT OF ARREARS OF ROYALTY.—Where an assessee agreed to take a colliery business on the representation that it was free from encumbrances which had accrued due prior to his getting possession, *held*, that he could not deduct the amount so paid from his income. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.).

CAPITAL AND REVENUE EXPENDITURE—DISTINCTION.—*See* 46 C.W.N. 6. When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is very good reason—in the absence of special circumstances leading to the contrary— for treating such an expenditure as properly attributable not to revenue but to capital. If the money is spent for purposes of the trade, and the expenditure would, if successful, produce a capital asset or an asset of an enduring character, which is of a capital nature, it is equally a capital expenditure if the expenditure is unsuccessful. The question whether the expenditure is a capital or a revenue payment is not to be tested by seeing whether it can be shown to be productive. Nor is the fact that what is produced by the expenditure is impalpable or intangible or incalculable any ustification for holding that it must be treated as of a revenue nature. And when the payment in fact creates advantages of an enduring nature, it must be properly treated as capital and not as revenue, and therefore it cannot be charged against the profits for purposes of assessment to income-tax. 1939 I.T.R. 92. *See also* 41 C. W.N. 46=1933 Cal. 777=60 C. 840.

Sec. 10 (2).—Unless an expenditure can be brought under the clauses of sub-S. (2) of sec. 10 of the Act, it cannot be allowed as a deduction in computing the profits from the business. 40 C.W.N. 833. There is no presumption that a property standing in the name of a married Hindu lady does in fact belong to her husband. The ordinary presumption of law is that the apparent state of affairs is real unless the contrary is proved. Where the payment of royalty to the assessee's wife is proved to the satisfaction of the Income-tax Officer or the Assistant Commissioner, the assessee is entitled to a deduction of the amount in the absence of evidence that the lady was a benamidar of her husband. The absence of evidence one way or the other does not under the law justify the Income-tax Officer or the Assistant Commissioner in drawing an inference that the lady was a benamidar. 160 I.C. 611= 1936 P. 267. A payment by the assessee out of profits and conditional on profits being earned cannot be treated as rent. Nor can such payment be described as a payment made to earn profits. Moneys so paid by the assessee cannot, therefore, be deducted either under Cl. (*i*) or under Cl. (*ix*) of sub-S. (2) of S. 10 of the Act. I.L.R. (1938) Lah. 426=40 P.L.R. 228=1938 Lah. 530.

RIGHT TO DEDUCTIONS—BURDEN OF PROOF.— It is a well settled principle that if any deduction is claimed, it is for the assessee to prove that that deduction is legally allowable to him. If he fails to do so, the amount so claimed is liable to be assessed. I.L.R. (1938) Lah 426=

(*i*) any rent paid for the premises in which such [1][business, profession or vocation] is carried on, provided that when any substantial part of the premises is used as a dwelling-house by the assessee, the allowance under this clause shall be such sum as the Income-tax Officer may determine having regard to the [2][proportional annual value of the part] so used :

(*ii*) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dewelling house, a proportional part only of such amount shall be allowed ;

(*iii*) in respect of capital borrowed for the purposes of the [1][business, profession or vocation,] [3][* * * *] the amount of the interest paid :

[4][Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is payable without Birtish India, not being interest on a loan issued for public subscription before the 1st day of

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LEG. REF.

[1] Substituted for the word "business" by S. 11 of Act VII of 1939.

[2] Substituted for "proportional part," by Act VII of 1939.

[3] The words "where the payment of interest thereon is not in any way dependent on the earning of profits" omitted by Act VII of 1939.

[4] Proviso added by Act VII of 1939.

NOTES.

40 P.L.R. 228=1928 Lah. 530.

Sec. 10 (2) (iii).—A finance company, which as part of its business, invested money in various parts of the world, borrowed in India a sum of thirty-two lacs of rupees, and invested it in foreign securities. The company claimed to deduct from their taxable profits in British India the interest on the borrowed amount notwithstanding the facts that the borrowed money was employed outside British India and that the profits derived therefrom were not brought within British India and therefore did not attract income-tax in India. *Held*, that an allowance cannot be made under S. 10 (2) (*iii*) in respect of interest on capital borrowed for the purpose of the business—that business should be one that earns or is capable of earning taxable profits, or at least one which is so carried on that taxable profits may be earned, whether in fact profits are earned or not. 56 B. 92=33 Bom.L.R. 1587=1932 B. 94. Sale of its shares and investments by a bank in order to meet withdrawals by depositors is a normal step in carrying on the banking business. It is an act done in "what is truly the carrying on" of the banking business and consequently the profits arising from such sales are assessable to income-tax as profits of the banking business. In such a case in order to prove that profits made on sale of investments by the bank are taxable it is not necessary to prove that the bank carries on a separate or severable business of buying and selling investments. 66 I.A. 464 =52 L.W. 926=1940 I.T.R. 635=(1941) 1 M.L.J. 130=1940 P.C. 230 (P.C.). A *debtor who gives his creditor a promissory note for the sum he owes* can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far as such promissory note is concerned the assessee does not receive payment of any taxable income from his debtor or indeed any payment at all. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.). There is nothing in sub-Cl. (3), S. 10, to suggest that *interest paid on the initial capital* invested in a firm cannot be the subject-matter of an allowance. Where therefore a capitalist partner advances money to the firm on condition that interest would be paid to him, whether the business of the firm results in profit or not and is in no way made dependent on the profit if any earned, the firm is entitled to claim an allowance for the interest paid on such capital. It is immaterial whether such capital was advanced as initial capital or subsequently. There is no distinction between capital borrowed and capital contributed. Capital contributed by a capitalist partner is capital borrowed from him by the firm. 1933 S. 192. *See also* 1939 I.T.R. 662; 46 All. 1=21 A.L.J. 703. The Madura Hindu Permanent Fund was incorporated as a limited company under the Companies Act, 1882. Its objects were stated to be (*a*) to enable persons to save money; (*b*) to invest their savings in landed property and Government Promissory Notes; (*c*) to secure loans at favourable rates of interest and to grant loans on sound securities. The capital of the Fund was contributed by two classes of subscribers at the rate of Re. 1 per mensem per share, the A class subscriber for 45 months, the B class subscriber for 84 months. At the end of the period, the former was paid off Rs. 50, the latter Rs. 102-8-0 and the account was closed. The amount so paid to the subscribers in excess of their subscriptions was called "guaranteed interest" which the Fund claimed to be entitled to deduct from its income in computing its taxable profits. It was assumed for the purpose of the reference that the transactions of the fund were confined to its members though the rules provided for loans also to non-subscribers and to registered Co-operative Societies. *Held*, (*i*) that the ruling in *Styles*' case had no application to the case and the guaranteed interest was part of the profits; but (*ii*) that in view of the explanation to S. 10 (2) (*iii*) the recurring subscriptions should be deemed borrowing of capital, the interest whereon, not being in any way dependent in the earning of profits, could be deducted under S. 10 (2) (*iii*). (47 M. 1 and 3 I.T.C. 385, Disc.) 56 M. 415=1933 M. 347=64 M.L.J. 260 (F.B.). When money is borrowed, which would probably not have been borrowed

April, 1938, except interest on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent in British India who may be assessed under section 43 or, in the case of a firm for any interest paid to a partner of the firm] ;

Explanation.—Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause :

NOTES.

had not the assessee's own capital been invested in an income producing business, the interest paid on such borrowing is not deductible under S. 10 (2) (*iii*) from the income of that business. 161 I.C. 681=38 P.L.R. 402=1936 L. 595. *See also* 1941 I.T.R. 358. S. 10 (2) (*iii*) makes a distinct departure from English law which provides that interest on capital employed in business is not an allowable deduction. Interest paid to a partner on capital borrowed from him is an allowable deduction from the profits earned under S. 10 (2) (*iii*). 163 I.C. 275=1936 S. 68. Agricultural income is totally excluded from the operation of the Income-tax Act and the sources of income enumerated in S. 6 cannot include agricultural income. S. 10, therefore, applies to "business" assessable under the Act and the "allowance" referred to in sub-S. (2) of S. 10 cannot apply to agricultural income but only to interest paid in respect of capital borrowed for the purposes of the "business" assessable under S. 6 of the Act. Therefore, the money borrowed by the assessees for the purpose of paying land revenue cannot be exempted from income-tax under the provisions of S. 10 (2) (*iii*). 38 P.L.R. 402=1936 L. 595. Where an assessee raises capital in British India to invest it outside British India, the interest he has to pay is an expense incurred in connexion with his outside investment, and he is not entitled to deduct such interest from his income in British India, the said income comprising or including interest income paid to him on fixed deposit by the same bank. 1936 L. 1001. In the absence of any express provision in the Act, an assessee is not to be deprived of the advantages conferred by exemptions such as S. 10 (2) (*iii*) of the Act because the capital benefiting therefrom by means of permissible deductions happens to produce a non-taxable income. Where a person carrying business as a money-lender borrows money for his money-lending business, lends it out to constituents, and is obliged in the course of business to receive agricultural lands in repayment of his debts from such constituents, he is entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as is represented by the agricultural lands got in under S. 10 (2) (*iii*) of the Act, in computing the profits and gains of the banking business for the year of account. The assessee is also entitled to a deduction in respect of the establishment and other charges, such as for managing and cultivating the lands got and the amount spent for obtaining conveyances. 1937 M. 393=(1937) 1 M.L.J. 351 (F.B.). *See also* 69 M.L.J. 474 (P.C.).

Sec. 10 (2) Expl. APPLICABILITY—CONDITIONS —"RECURRING."—In order to satisfy the requirements of the explanation to S. 10 (2) (*iii*) there must be recurring subscription paid periodically and the assessee must be a mutual benefit society. "Recuring" means a happening again and again—not that which occurs only once. Where the shares are paid in one lump sum, and the assessee is an ordinary banking concern whose transactions are not confined to their members only the allowance under S. 10 (2) (*iii*) cannot be permissible. 58 M. 8=1934 M. 653 (2)=67 M.L.J. 532 (F.B.). R. 31 of the Income-tax Act clearly applies to the business of a dividing (Insurance) society; when the Memorandum of Association and the Rules of the company show it to be a dividing society, the fact that part of the policy monies are divided among the subscribers cannot make it a mutual benefit society, especially when there is no mutuality between the shareholders of the company, the assessee and the policy holders, the shareholders and policy holders being two separate entities. It cannot be said that the business of the company is no business within S. 10 so as to exempt it as a mutual benefit society. R. 31 of the Income-tax Rules would apply to the company and it can be assessed under that rule. (1939) 1 I.T.R. 341=1939 Sind 301. *See also* 1939 I.T.R. 575=1939 Sind 308. Before there can be mutuality between an Association and its members, the services must be supplied by the Association to its members as such services for which the members themselves pay from which payments any surplus is saving and not profits or gains. The nature of the services or the purpose of the Association is not the test. The nature of the Association is the test. 1939 I.T.R. 575=1939 Sind 308. A company was floated with members subscribing its capital by way of share. The main source of income was the interest on the loans advanced to the shareholder members. It also derived interest on its securities, etc. In giving the return, the fund did not show the interest derived from the loans to the shareholders as its income. Question was if that income was assessable. *Held*, the fund though a registered company was in fact a Mutual Benefit Fund Society and that income was not assessable; in enacting the Explanation to S. 10 (2) and (3) of the Income-tax Act, the Legislature must have intended to recognise the existence of such Mutual Benefit Society like one in question. 176 I.C. 374=47 L.W. 28=1938 Mad. 57 (F.B.). *See also* I.L.R. (1939) Kar. 779=1939 Sind 293 (Dividing Insurance Co.) A fund which was a company registered under the Indian Companies Act, made considerable profits out of lending money to non-members, and was, on that ground, held to be a banking concern and not a Mutual Benefit Society as it claimed to be, subsequently it altered its memorandum and articles of association. Under the altered articles, a person who wanted a loan had to become (*iv*) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks, or stores used for the purposes of the [1][business, profession or vocation], the amount of any premium paid ;

(*v*) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof ;

(*vi*) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent [2][, where the assets are ships other than ships ordinarily plying on inland waters] to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed [3][and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed] :

LEG. REF.

[1] Substituted for " business " by S. 11 of Act VII of 1939.

[2] Inserted by S. 11 of Act VII of 1939 as amended by Act XII of 1940.

[3] Added by Act VII of 1939.

NOTES.

a member, but he could become a member by paying a sum of one rupee for a share which he could withdraw at the end of two years. The membership in many cases was merely nominal; the large profits which the company (fund) made by way of interest on loans granted to those taking one rupee shares were distributed to its real shareholders and the nominal members who had taken one rupee shares invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. These members by borrowing from the company made for it large profits in which they were not allowed to share. *Held*, (1) that the company was not a Mutual Benefit Society in spite of the altered memorandum and articles of association but was a banking concern, and its income was therefore taxable; (2) that as there was no payment of interest to shareholders or subscribers on the capital subscribed by them, and as the company only paid dividends to its members, which were dependent on the earning of profits, the company was not entitled to claim a deduction in respect of these sums under S. 10 (2) (iii) of the Act, the sums so paid not being in the nature of interest on borrowed capital. I.L.R. (1938) Mad. 183=47 L.W. 24=1938 Mad. 148=(1938) 1 M.L.J. 130 (F.B.).

Sec. 10 (2) (vi).—The words "original cost" refer to the genuine original cost to the assessee and not to that paid by the predecessor in business of the assessee. 13 Pat.L.T. 618 (56 B. 129, Foll.). *See also* 159 I.C. 545=69 M.L.J. 879 (P.C.). The original cost of any particular asset, is entirely a question of fact, and like any other question of fact depends upon the evidence produced to prove the same. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of S. 10 (2) (*vi*) the original cost is the amount shown in the document. Where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets, it is open to the Income-tax Authorities to refuse to accept that price and to ascertain what the true value is. 52 L.W. 78=1940 Mad. 602=(1940)2 M.L.J. 95 (F.B.). Where a business, which had gone into liquidation is taken over by the assessee for the purpose of running it, for a certain price, and he has to advance various sums of money to the liquidators and to invest capital he cannot claim to include the losses incurred in previous years or the interest on the sums advanced to the liquidators or the interest on the capital invested by him in the working of the business in determining the "original cost" to the assessee of the machinery and buildings, when these items do not form part of the consideration for the sale in his favour. These cannot be deemed to be a part of the consideration for the sale and therefore cannot be taken into account in determining "the original cost" to him, But sums spent by him in making additions to buildings and machinery must be taken into account in calculating the depreciation to which he would be entitled. (1939) I.T.R. 374. The word "assessee" in S. 10 (2) of the Income-tax Act, in the case of an assessment under S. 26 (2), based on the profits of a predecessor, must refer to such predecessor. The word "assessee" cannot in such a case be interpreted as meaning the person by whom the income-tax assessed is actually payable. The successor is for the purposes of assessment under S. 26 (2) to be assumed as his predecessor with respect to the previous year and the profits have to be computed on this assumption. For the purposes of notional assessment under S. 20 (2), the assessee must be deemed to be his predecessor in the business and allowance for depreciation must be made on that basis. 1939 I.T.R. 374. *See also* 40 Bom.L.R. 343=I.L.R. (1938) Bom. 374 =1938 Bom. 241. The word "assessee" in S. 10 (2) (*vi*) must be read with the definition in S. 2 (2) in its ordinary and natural meaning as meaning the person by whom income-tax is payable. *Rangnekar, J.*—Where the Court is concerned with a hypothetical assessment in the very first year of a successor taking over a business from his predecessor, apart from the fact that the words "original cost" would be inappropriate, it would be difficult to hold that depreciation should be allowed on the original cost to the successor and not on the original cost to the predecessor. I.L.R. (1938) Bom. 374=174 I.C. 905=10 R.B. 502=40 Bom.L.R. 343=1938 Bom. 241 (S.B.). *See also* 45 C.W.N. 681. It is not intended by the legislature that no allowance should be made for depreciation of "buildings,

Provided that—

(*a*) the prescribed particulars have been duly furnished ;

(*b*) where full effect cannot be given to any such allowance in any year [1][not being a year which ended prior to the 1st day of April, 1939,] owing to there

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LEG. REF.

[1] Inserted by S. 11 of Act VII of 1939.

NOTES.

machinery, plant or furniture" belonging to the assessee merely because the assessee had acquired title to the property by bequest and not by purchase. The intention of the legislature in using the words "the original cost thereof to the assessee," is that the owner to be assessed should not receive an allowance for depreciation based on a capital value of the property higher than or different from the value of the property to the assessee at the time when he originally acquired it. If the assessee purchased the property the best evidence of the value of the property, to the assessee would be the price that he paid for it, but where the assessee acquires the property otherwise than by purchase (*e.g.*, by bequest) "the original cost thereof to the assessee's means, and is, the real value of the property at the time when the assessee acquired it less the expenditure (probate charges actually paid) necessary for the purpose of completing the title. *Semble*: the word 'assessee' in S. 10 (2) (*vi*) means the assessee as defined in S. 2 (2) of the Act. 11 R. 514=1933 R. 348 (S.B.). *See also* (1940) 2 M.L.J. 95 (F.B.); 1939 I.T.R. 160; 45 C.W.N. 681; 1938 Bom. 241. The letting of a jute press at a rent is as much a business as the letting of a ship to freight or the letting of a motor car or any other kind of machine, or machinery for hire. The fact that the lessor originally intended to work the press himself is immaterial. The lessees are liable only for repairs and not for depreciation, and in no circumstances could they claim an allowance for depreciation under S. 10 (2) (*vi*) because the buildings, machinery' etc., mentioned in that sub-section must be the property of the owner assessee and hence the owner assessee is entitled to claim allowance for depreciation in respect of buildings, machinery, etc., leased. (1926 M. 1032, Rel. on; 1 I.T.C. 50 and 1928 C. 456, Dist.) 1935 C. 344=62 C. 804=156 I.C. 394. An assessee who succeeds to a business in the middle of the previous year is entitled to have the current depreciation allowance permissible under S. 10 (2) (*vi*) of the Income-tax Act computed on the original costs of the assets of such business to his predecessor only with regard to that portion of the previous year prior to the succession, and not for the whole of the previous year. For the post-succession period, current depreciation should be computed on the costs of the assets to the assessee, that is to say, on the basis of the price paid for the assets by him. 1941 I.T.R. 539=45 C.W.N. 681; 1941 I.T.R. 568. *See also* 40 Bom.L.R. 343=I.L.R. (1938) Bom. 374=1938 B. 241. To entitle an assessee to claim an allowance under S. 10 (2) (*vi*) of the Income-tax Act on account of depreciation of buildings, machinery, plant, etc., "used for the purpose of the business," it is not necessary that there should have been an actual working of the machinery in the year of account. The word "used" may be given a wider meaning so as to embrace passive as well as active user. When machinery is kept ready for use at any moment in a factory under an express contract from which taxable profits are earned, the machinery can be said to be used for the purpose of the business which earns the profits, though it is not actually worked. If the contribution of the assessee to the business in question is the obligation to keep his machinery ready for actual use at any moment, and if the profits of the assessee during the year of assessment could not have been earned except by his maintaining his factory and machinery in good working order, that involves the user of the machinery and the factory, entitling the assessee to claim deduction under S. 10 (2) (*vi*). I.L.R. (1937) Bom. 821=39 Bom.L.R. 903=1937 Bom. 493.

Secs. 10 (2) (vi) proviso (a)—Claim to depreciation—Duty to give particulars—Effect of failure to give particulars. Where an assessee claims an allowance in respect of depreciation, he must give the particulars required by proviso (*a*) to S. 10 (2) (*vi*) if he does not do so, the Income-tax authorities would be justified in rejecting the claim for allowance. I.L.R. (1939) Mad. 397=43 L.W. 305=1939 Mad. 357=(1939) 1 M.L.J. 402.

Secs. 10 (2) (vi), 14, 19 and 20.—The Income-tax Act is concerned with securing revenue to Government, and there can be nothing in it which would justify a company in retaining for itself income-tax in respect of its shares with no obligation to pass the amount on to Government. In the case of a company the tax has to be paid by the company direct and not on behalf of the shareholders. The provisions of S. 20 of the Act, which are no doubt mandatory, only apply where the company is liable to tax. A company is assessed to income-tax on its profits and pays the tax direct. There is no express provision in the Act enabling a company which has paid tax to deduct from dividends the amount of such tax. But since income-tax has to be discharged out of profits before any distribution can be made, where tax has been paid, the company must apportion the burden amongst the different classes of shareholders, according to their legal rights, S. 20 recognises a right in the company to deduct tax where tax has been or will be paid on the profits distributed. But where no income-tax is payable by the company there is no burden to adjust, and the company is not therefore entitled to make any deduction in respect of income-tax from the dividends paid. I.L.R. (1940) Bom. 165=42 Bom.L.R. 57=1940 Bom. 97 (F.B.).

Secs. 10 (2) (vi), proviso (b) and 26 (2)—Accumulated unabsorbed depreciation allow being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, [1][then subject to the provisions of clause (*a*) of the proviso to sub-section (2) of section 24], the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years ; and

(*c*) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be ;

[2][(*vii*) in respect of any machinery or plant which has been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its scrap value :

Provided that such amount is actually written off in the books of the assessee:

Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place ;]

[3][[4](*viii*) in respect of animals which have been used for the purposes of the [5][business, profession or vocation] otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses or animals] ;

LEG. REF.

[1] Inserted by Act XXIII of 1941.

[2] Substituted by S. 11 of Act VII of 1939.

[3] This clause was originally inserted as Cl. (*vii*) (*a*) by S. 2 of Act III of 1928.

[4] Original cls. (*viia*), (*viii*) and (*viiia*) renumbered bas (*viii*) (*ix*) and, (*x*) respectively by Act VII of 1939.

[5] Substituted for the word "business" by Act VII of 1939.

NOTES.

ance of owner of business—If available to successor. The depreciation allowance to which an owner of business is entitled to under S. 10 (2) (*vi*) being a deduction permitted to him in respect of wear and tear of his plant and machinery based on its cost to him, against the profits he may make when carrying on his business, is a statutory privilege personal to him so long as he carries on his business. When he ceases to pay income-tax on his business profits through ceasing to carry on his business, the permission to deduct ceases; it is not a right which passes to his successor under the Act, nor is it a right which he can transfer by agreement. S. 26 (2) of the Act says nothing as to any right of the successor to take advantage of the unabsorbed depreciation his predecessor might have been entitled to. Its effect is simply to provide that as regards the year of assessment, where a succession has occurred in the ownership of the business in the previous year, the successor is made liable to pay income-tax for that year on the total profits actually earned by the business during the previous year (*i.e.*) the one in which the succession occurred —whether earned under tne predecessor or the successor. 1941 I.T.R. 539=45 C.W.N. 681. The right to set-off past depreciation undet S. 10 (2) (*vi*), proviso (*b*) of the Act, only exissr in the person who continues to derive profits in respect of the business concerned. 1940 Bom. 169. *Kania, J.*—The right to claim depreciation is not a personal right of the party who has parted with the ownership of the property in respect of which depreciation is to be assumed. I.L.R. (1940) Bom. 287=42 Bom.L.R. 120=1940 Bom. 169.

Sec. 10 (2) (vii).—The question whether a particular machinery has become obsolete is one of fact. 58 C. 985=35 C.W.N 314=1931 C. 599. Where the business of an oil mill was closed down for the reason that the machinery being old and worn out, and could not be worked at a profit in the face of competition, *held*, that the assessee could not claim obsolescence allowance as provided for in S. 10 (2) (*vii*). 58 C. 985=1931 C. 599 (50 M.L.J. 157, Ref. to).

Sec. 10 (2) (viii-a).—*See* 1937 M. 300=(1937) 1 M.L.J. 182 (F.B.); 41 C.W.N. 46. S. 10 (2) (viii-*a*) of the Income-tax Act does not deal with employees of any particular class nor contemplates the exclusion of any class; the business of a company or a corporation does not become an agreement to share profits unless the expenditure incurred in remunerating them falls outside the scope of Cl. (*ix*) of S. 10 (2), as being either capital expenditure or not incurred for the purpose of earning profits or gains. The taxable profits or really net profits can only be discovered when every outlay has been provided for including expenditure out of income which has been incurred solely for the purpose of earning the profits or gains. Where an outlay incurred in earning the profits of an assesse company is the remuneration payable to the secretaries, treasurers and managers of that

[1][(*ix*) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the [2][business, profiession or vocation] :

LEG. REF.

[1] *See* foot note 4, p. 2942.

[2] Substituted for "business" by Act 7 of 1939.

NOTES.

company, and it is not disputed that the assessee could not earn profits or gains without secretaries, treasurers or managers, such expenditure has to be deducted from the profits and gains. It is necessary to scrutinize with care the sense in which the word "profits" or even the phrase "net profits" is employed. A sum which is to be regarded as "net profits" for the purpose of ascertaining the remuneration of the agents of a firm or the secretaries, treasurers and managers of a company, is only "net profits" in the different sense of being taxable when such remuneration can be classed as outside the scope of expenditure from income which is incurred solely for the purpose of earning profits. 1941 Rang. L.R. 181=1941 Rang. 145=1941 I.T.R. 155. *Dunkley, J.*—When there is an agreement between the assessee corporation and the secretaries, treasurers and managers under which before ascertaining the divisible profits of the assessee at all, the secretaries, treasurers and managers are to receive upon a particular conventional basis a commission as remuneration for their services, there is no agreement for division of profits, because in order that it can be held to be an agreement for division of profits, there must be a sort of joint venture and there must be one single profit fund for all purposes, not two profit funds to be ascertained for different purposes. Where there is one profit fund which has to be ascertained for the purpose of calculating the remuneration of the secretaries, treasurers and managers, and another and quite distinct profit fund to be ascertained (after the remuneration of the said employees has been fixed) for the purpose of calculating the profits, divisible among the shareholders, there is no case for divisoin of profits. In the second, the sum payable as such remuneration must of necessity appear as an expenditure or a "revenue charge". Such remuneration is clearly an expenditure incurred by the assessee solely for the purpose of earning such profits or gains, within Cl. (*x*) of S. 10 (2) of the Income-tax Act. *Basil Blagden, J.*—In arriving at his "profits or gains," *i.e.*, assessable income, the subject is entitled to deduct from his gross revenue, among other things, expenditure solely incurred for the purpose of earning profits or gains; and no method of computing that expenditure can make its deduction unlawful. 1941 Rang.L.R. 181=195 I.C. 523=1941 Rang. 145 (F.B.).

Sec 10 (2) (ix).—*See* 167 I.C. 864=45 L. W. 184=1937 M. 300=(1937) 1 M.L.J. 128 (F.B.); 1937 R. 257 (S.B.). The expression "such profits or gains" in Cl. (*ix*) of S. 10 (2) does not include "agricultural income" and consequently when the business of an assessee comprises both agricultural income, as defined, in the Act, and other (taxable) income, the assessee is not entitled, under S. 10 (2) (*ix*), to deduct from such other income the expenditure incurred for the special purpose of earning the agricultural income. 1938 Rang.L.R. 346=175 I.C. 287=1938 Rang. 151 (S.B.).

PRINCIPLE OF SUB-SECTION.—It is not possible to lay down any hard and fast rule or to enunciate a rigid and scientific principle which can be applied as a criterion for determining whether a particular expenditure is capital expenditure or not. The question is one of fact. But the question whether a particular sum is or is not a permissible item of deduction is one of law or at any rate one of mixed law and fact. If it is found that the expenditure in question is or is not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade the finding will be one of fact, when there is evidence to support that finding, it will not be subject to review by the High Court. 62 C. 87=39 C.W.N. 70. Expenses incurred in defending suit, if deductible. 1942 I.T.R. 95; 16 L. 479=37 P.L.R. 749. *See also* I.L.R. (1941) Cal. J72=46 C.W.N. 6. When a limited company carrying on the business of editing and publishing a newspaper spends money to defend its editor and printer on a charge of contempt of Court brought against them for publishing an article in its paper. *Held*, such expenditure could not be called as one incurred solely for purpose of earning such profits or gain and cannot be exempted. 74 I.C. 817=1938 Cal. 241 (S.B.). *See also* 1940 I.T.R. 52. Managing agent of company arranging with stranger for loan to finance company—Agreement assigning portion of commission to lender in consideration of lender financing company—Portion of commission assigned is deductible. 183 I.C. 780=41 Bom.L.R. 362=1939 Bom. 283. Construction—Money-lending business—Suit against money-lender for damages for breach of agreement to take over management of company and to finance—Dismissal of suit—Costs incurred by assessee in defending suit—Claim to deduction of proper. 1940 I.T.R. 52.

ILLUSTRATIVE CASES.—The share of profits allowed to participating policy-holders is conditional on profits being earned and cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract income-tax at that point, and the revenue is not concerned with the subsequent application of the profits. The share of profits so allotted to participating policy-holders is not, therefore, a permissible deduction. [(1886) 10 A.C. 438 and 54 M.691 (P.C.) Rel. on.] 61 I.A. 41=15 L. 224=1934 P.C. 45=66 M.L.J. 931 (P.C.). *See also* 1936 L. 872. An assessee carried on two businesses one of selling goods in his own shop and the other of selling goods on commission. In an accounting year while submitting a return, through mistake, he entered some items in his shop business which in fact fell under his commission business, where he would have been

NOTES.

exempted from tax in respect of those items. In the subsequent year he sought to deduct those items from his income. *Held*, that the proper remedy for the assessee was to move the income-tax authorities and to show to their satisfaction the mistake he had made and to claim a refund for that year and not to ask for its deduction in the current year. 17 Pat. 102=174 I.C. 580=19 Pat.L.T. 176=1938 Pat. 197. A suit for arrears of rent and royalty was brought by the superior landlord, and the assessees were joined as one of the defendants in the suit as assignees of the original grantees of the mining leases. They successfully defended the suit and incurred a considerable sum as costs which they contended was deductible from the income, profits and gains under S. 10 (2) (*ix*) *Held*, that the costs incurred was not an expenditure allowable against profits under S. 10 (2) (*ix*) inasmuch as the assessee's defence in the suit had nothing to do with the earning of any profits or gains in the year previous to assessment or in any year at all prior to the year of assessment, and the suit was fought and the expenditure was incurred to prevent a liability for rent and royalty arising in the future. Per *Pankridge, J.*—The expenditure was of a capital nature and as such was not an allowance within S. 10 (2) (*ix*) of the Income-tax Act. I.L.R. (1941) 1 Cal. 572=1941 I.T.R. 573=46 C.W.N. 6. Where the assessee entered into an agreement with the Government for the excavation of lime shells in certain Government lands, and for the exclusive privilege of excavating chunam shells, he agreed to pay a sum of money in twelve equal quarterly instalments payable in advance, the portion of such an amount falling within the year of account payable by the assessee was not deductible in computing the income derived from the excavation and sale of lime, being a capital expenditure. The payment was not made in order to carry on an already existing business and to earn a profis out of it. The payment to be made was merely for the purpose of starting that particular venture. Any expenditure made thereafter would of course be deductible. But this was an initial expenditure without which the assessee could not even have begun winning shells. 1934 M. 617 (2)=67 M.L.J. 350 (F.B.). *See also* 1939 I.T.R. 652. Per *Aston, A. J. C.*—No doubt *expenditure in the nature of charily or presents* can never be deducted in the case of a business, if the gifts are of a voluntary nature; but gifts given to employees may be deducted when they are given as perquisites in return for services which they have rendered, even though such gifts may not be legally claimable by employee. 145 I.C. 202=1933 S. 145. Per *Rupchand, A. J. C.*—In order to bring *Christmas presents* within the purview of Cl. (9), S. 10, there must be sufficient material before the Income-tax authorities to enable them to hold that the expenditure had been incurred solely for the purpose of earning profits. Such presents are in certain kinds of business, specially when made by non-Christians, necessary for the purpose of securing business and therefore al egitimate item to be considered. 1933 S. 145. Where a company has brought out its agents, with a view to running their own business by their own staff, by means of a payment, the payment made out of circulating capital is a revenue payment and not a capital expenditure, and is properly deductible by the assessees when arriving at their profits for the purpose of income-tax, as a payment made out of circulating or floating capital, and not resulting in the acquisition of anything by way of a new asset or addition to the fixed capital and not capital expenditure. 62 C. 87=39 C.W.N. 70. A company carrying on a hotel business in Madras and Octacamund and empowered under its Articles of Association to lease its buildings, leased its premises in Ootacamund along with the furniture and fittings to a firm for the purpose of running a hotel, and claimed depreciation on the buildings and furniture leased to the firm. *Held*, that the letting of the premises was part of the business of the company and it was therefore entitled to an allowance for depreciation in respect of the buildings and furniture under S. 10 (2) (*vi*) of the Income-tax Act. I.L.R. (1940) Mad. 178=51 L.W. 222=1940 Mad. 366=(1940) 1 M.L.J. 319 (F.B.). A claim with regard to *sums spent on furniture for office* cannot be allowed as it is in the nature of capital expenditure. 145 I.C. 202=1933 S. 145. A payment, the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. A company carrying on the business of communication by wireless entered into an agreement with the Communications Company which was carrying on business of communication by cable. It was agreed between them that the Communications Company was to deliver all plant and machinery belonging to them to the Wireless Company, on the Wireless Company agreeing to carry on the business of the Communications Company in India in conjunction with its wireless business. Is was also agreed that the Wireless Company was to give one-half of the net profits of each year in consideration of the use of plant and the business given to it. The consideration money was not described in the agreement as rent for the use of plant. The agreement did not also contain several of the clauses which a lease of a plant of such character would naturally contain. The Income-tax Officer assessed the Wireless Company on the total income derived from the business and securities without making any allowance for the one-half profits which were paid by the Wireless Company to the Communications Company under the agreement. *Held*, that it was impossible to presume or infer that the half share of profits was being paid only as rent, or as a similar payment, in consideration merely of the use of plant. The sum was in truth made payable as part of the consideration in respect of a number of different advantages which the Wireless Company derived from the agreement. The *agreement as a whole was much more like one for a joint adventure for a term of years* between the Wireless Company and the Communications Company than one for a lease for that period. The consideration money was not therefore allowable to be deducted for the purpose of

NOTES.

income-tax under S. 10 (2) (*ix*), as it was not in the nature of expenditure solely incurred for the purpose of making or earning 'income, profit or gains'. 41 C.W.N. 869=I.L.R. (1937) Bom. 591=39 Bom.L.R. 1025=1937 P.C. 189 (P.C.). Where a private company consisted of only two shareholders, who were also the sole directors, and where a very large sum was claimed to be deducted as fees for the directors, *held*, (*i*) that the mere production of a resolution fixing the remuneration of the directors and vouchers for payment did not preclude further enquiry by the Commissioner and entitle the company to the deduction claimed; (*ii*) that having regard to the complete identity of the persons interested as shareholders in fixing the fees and of the persons to whom the fees were to be paid, and to the refusal of the directors to allow themselves to be examined as to how the amount was fixed, the company had failed to discharge the onus cast on them; and (*iii*) that the Magistrate was justified in holding it not proved that the amount was exclusively incurred in the production of the assessable income. 139 I.C. 649=63 M.L.J. 920 (P.C.). Whether a sum is received on capital or revenue account depends or may depend on the character of the business of the payer and upon other factors related thereto. The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the Income-tax authorities are entitled to tax once at least on every payment. Where the assessees paid to their agents in 1928 a certain amount as compensation for the loss of their office as agents to the assessees and the payment came to be considered by the Income-tax authorities in 1929-30 and in that year the assessee put forward the payment as a permissible deduction from their gross profits. *Held*, that the claim should be allowed. 37 C.W.N. 430=60 C. 840=1933 C. 777. *See also* 41 C.W.N. 46. In the case of brick field, which was very similar to that of a quarry or mine, the proprietor of the land or the lessee was not a mere purchaser of raw materials—in which case the assessee would be entitled to a deduction of the price of such materials from the total income realised by the sale of the bricks during the year—but was a person who had acquired certain rights in the land,and the amount invested by him must therefore be treated as capital expenditure within the meaning of S. 10 (2) (*ix*) of the Income-tax Act, and therefore the assessee was not entitled to deduct the amount claimed as expenditure incurred solely for the purpose of earning such profits or gains under S. 10 (2) (*ix*), otherwise as a depreciation in the value of the land. I.L. R. 1937 All. 908=1937 A.L.J. 827=1937 All. 708 (S.B.). Money paid by firm in respect of shell contract for excavation of shells under Government property for three years—Amount payable in three instalments and described as "annual lease amount" is capital expenditure or revenue expenditure. 45 L.W. 184=I.L.R. (1937) Mad. 792=1937 Mad. 300=(1937) 1 M.L.J. 182 (F.B.). The assessee, carrying on business in chanks and chank beads, acquired from certain zamindars the exclusive right to collect conch shells from certain conch beds belonging to those zamindars, for a period of years, the consideration fixed for the grant of the right being payable in instalments. The assessee claimed that the moneys paid by him in instalments were in the nature of expenses which he was entitled to deduct under S. 10 (2) (ix) of the Income-tax Act, for the purpose of arriving at his assessable income. *Held*, that the sums paid by the assessee for the right to collect conch shells (the means of obtaining the material for his business and not the material itself), were expenses of a capital nature and were not therefore permissible deduction. 1939 I.T.R. 652. *See also* 67 M. L. J. 550. Contribution to Employees' Provident Fund by a bank—If entitled to deduction. *See* 49 M. 910; I.L.R. (1941) Nag. 240. Provident Fund started by company—Part contributed by deductions of employees' salary —Part contributed by company—Provident Fund subsequently transferred to trustees—There was no obligation on the company to make periodical payments to the trustees—Deductions from salaries or contributions by company not actually paid to trustees—Trustees having power to call on the company to make up shortage of its liabilities—Company held not entitled to deduct from their income sums merely carried forward as a book liability in favour of employees or trustees—Cash payments however could be deducted—Actual payment to employee was not necessary—Actual payment to trustees so as to lose proprietary right of control was sufficient. 7 R. 608=1929 R. 193 (S.B.). Mutual Insurance Company—Contributions entirely by members—Provision for division of profits among certain members—Effect of—Assessability. *See* 56 B. 119=33 Bom.L.R. 1581=1932 B. 104; 55 B. 637=33 Bom.L.R. 807=1931 B. 448. Payment of profits to working partners. 1927 M. 1053=54 M. L. J. 219 (F. B.). Where the assessee firm entered into a partnership with another firm and in that partnership sustained loss, the loss must be treated as the loss suffered by the assessee firm and must be allowed in the course of assessment. Even if the bigger partnership was illegal, the assessee firm is entitled to have the loss sustained by it in the larger partnership taken into account in computing its income for the year in question. Legality or illegality of transaction culminating in profit or loss is foreign to the scope of an enquiry into the income of an individual or of a firm for the purpose of taxing the same. 1939 A.L.J. 419 =I.L.R. (1939) All. 690=1939 All. 341 (F.B.). Loan advanced by partner to partnership business—Interest paid thereon must be deducted in computing the profits of the firm. *See* 55 M.L.J. 416 (F.B.). *See also* 46 All. 1; 1939 I. T. R. 662. [Case, before the Act was amended in 1939. *See* the amendment.] Dissolution of partnership — Payment towards defunct business—Capital loss not payment

NOTES.

of interest on capital. *See* 55 M. 818=1932 M. 375=62 M.L.J. 638 (F.B.). Assessee paying money to get out competition in business—Capital expenditure—Liability to income-tax. 3 I. T. C. 44. Company—Agreement to pay royalty to Government otherwise than as shareholder—Expenditure incurred for business—Same whether assessable to income-tax. 26 A.L.J. 1329=1929 A. 118. Where an assessee purchases a property mortgaged to him, he is not entitled to deduct from the profits arising out of the sale, expenses incurred for taking delivery of possession of the property or for getting mutation effected. 60 I.A. 133=12 P. 305=64 M.L.J. 544 (P.C.). The assessee had obtained a mortgage decree. A minor sued the assessee for a declaration that his share, *i.e.*, 1|8th in the mortgaged property, was not affected by the decree obtained by the assessee. Pending the decision in the suit, the mortgagee deposited a certain amount, *i.e.*, 1|8th of the purchase-money at which the property was purchased by him in sale, held in execution of his decree. The case was decided only more than two years after the purchase. *Held,* that the assessee was to be assessed on the whole of the purchase-money as being the income in the year of purchase and that it was not permissible for him to deduct from such amount the amount deposited in computing the assessee's profits or gains for the year following the year of purchase. 60 I.A. 133=12 P. 305=1933 P.C. 101=64 M.L.J. 544 (P.C.). If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it cannot be said that the annual payments are made solely for the purpose of earning the profits of the business. It would make no difference that the annual sum should be made payable out of a particular receipt of the business, irrespective of the earning of any profit from the business as a whole. No deduction therefore can be claimed in respect of income-tax for the payment of such amount. 168 I. C. 173=1937 P. C. 139=(1937) 2 M. L. J. 763 (P. C.). Where an assessee, a resident of British India, carries on a money-lending business out of British India and receives profits therefrom in British India, in computing profits for purpose of assessment, allowance must be made for the loss incurred on exchange, as such loss is not a loss of capital but a loss incurred solely for the purpose of earning such profits. 1937 Rang.L.R. 185=170 I. C. 91=1937 Rang. 257 (S.B.). Assessee firm advancing large sums of money to contractor—Accounts between parties settled and certain amount found to be due—Debtor agreeing to make payments by cheques recovered from Government—Debtor absconding without making full payment—Right to allowance for loss. 165 I.C. 367. Sale of mills to limited company—Price paid to vendors by allotment of shares in the Company—Contract to under-write portion of allotted shares—Under-writer borrowing from Bank for taking the shares—Vendors guaranteeing loan to under-writer—Vendors doing business as agents of the limited company as well as other mills—Recovery of loan from guarantors—Alleged loss therefrom, if claimable as a business expense of the guarantors—If capital expenditure. 3 I.T.C. 83. Capital expenditure or revenue expenditure—Money paid by firm in respect of shell contract for excavation of shells under Government property for three years—Amount payable in three instalments and described as "annual lease amount"—Capital expenditure not revenue expenditure. 1937 M. 300=(1937) 1 M.L.J. 182 (F.B.). *See also* 1939 I.T.R. 92.

BAD DEBT—DEBT—WHEN BECOMES BAD—QUESTION OF FACT.—It is purely a question of fact as to when a debt becomes bad. The onus of proving that a debt has become bad and when it has become bad is on the assessee. 1941 I.T.R. 222. *See also* 1940 I.T.R. 69. Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. In order to permit of deduction the loss must be in the nature of a commercial or professional loss which means a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned. 1941 Rang. L.R. 529=1941 I.T.R. 339=1941 Rang. 185 (S.B.). Debt—When becomes bad or irrecoverable — Insolvency of debtor—If debt becomes irrecoverable at once—Date on which it becomes bad. 1941 I.T.R. 202. It is not possible to argue that merely because a debtor had become insolvent therefore the debt was irrecoverable or to what extent it was so irrecoverable. This would be a matter which would turn on a variety of circumstances which would include the amount of property at the disposal of the insolvent, the skill with which the sale was conducted, which in the case of official auctions might be presumed, and on circumstances which nobody could entirely foresee in the future, such as the presence of bidders and the amount of property which could be attached and sold in insolvency proceedings which again might be a varying factor. The market value of a debt in 1933 could not be determined by the amount received as divided in 1936. 1941 I.T.R. 202. *See also* 67 I.A. 71=44 C.W.N. 373=1940 P.C. 33=(1940) 1 M.L.J. 180 (P.C.). Bad debts — Assessee holding two mortgages over same property—Amount due on 1st mortgage exceeding value of property mortgaged—Assessee suing on 1st mortgage and claiming only amount of value of property and giving up second mortgage—Claim to deduct amount of second mortgage as bad debt is sustainable. The substance

[1][[2][(*x*)] any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission :

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

(*a*) the pay of the employee and the conditions of his service ;

(*b*) the profits of the [3][business, profession or vocation] for the year in question ; and

(*c*) the general practice in similar [4][businesses, professions or vocations] ;

[5][(*xi*) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad

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LEG. REF.

[1] This was orginally inserted as clause (viii) (a) by S. 2 of Act XXIII of 1930.

[2] See footnoto 4, p. 2942.

[3] Substituted for “ business ” by Act VII of 1939.

[4] Substituted for “ businesses,” by Act VII of 1939.

[5] Inserted by Act VII of 1939.

NOTES.

of the matter as distinguished from the strict legal position cannot be regarded in revenue cases. 53 L.W. 738=1941 Mad. 492=(1941) 1 M.L.J. 776 (F.B.). In 1930 the assessee with a number of other co-creditors seized the property of the debtor and paid themselves to the extent of 8 annas in the rupee. This transaction released the debtor from all further liability. The assessee prepared his account on the mercantile system. In the year of assessment the assessee claimed to deduct Rs. 1,600 which remained unpaid, from the total assessable income as a bad debt. It was found however that subsequent to the year 1930, the assessee did not make return of interest on this debt. *Held,* that the debt ceased to be a liability in the year 1930 and become a bad debt from the point of view of the assessee in that year and hence the assessee subsequently in the year of assessment was not entitled to treat the sum of Rs. 1,600 as a bad debt and claim deduction thereof. 1938 Pat. 577. *A* and *B* who carried on a joint business separated and divided between themselves the assets and liabilities of the joint business. Thereafter each carried on his separate business which had nothing to do with the former joint business. *B* during a year of assessment claimed that an outstanding debt assigned to him in partition with *A* was irrecoverable and hence should be exempted. *Held,* that the loss claimed was in the nature of a capital loss and hence could not be exempted. 1938 Cal. 636. Bad debts—Question as to—Decision on not *res judicata*—Claim to deduction on bad debts disallowed as premature—Claim in succeeding year—Decision that debts had become bad long before—Legal—Finding of fact not to be interfered by High Court. 1941 Pat. 527=194 I.C. 464. Where the book-debts taken over by an assessee turn out to be irrecoverable the loss incurred by the assessee is a capital loss and not a trading loss. The determination of this matter is entirely a question of law once the facts have been ascertained. 1941 I.T.R. 685=1941 Rang. 273 (S.B.).

BAD DEBT—ONUS OF PROOF.—A claim to any of the allowances mentioned in S. 10 (2) is a claim which the assessee must prove. The same is true of a claim to deduct a bad debt. 35 C.W.N. 589=58 C. 1446=1931 C. 683 (S.B.). *See also* 16 L. 416 =1935 L. 539; 162 I.C. 629=1936 L. 441; 13 P. 101=151 I.C. 858=1934 P. 46; 56 B. 457=34 Bom.L.R. 1235=1932 B. 609; 59 I.A. 290=1932 P.C. 178=64 M.L.J. 861 (P.C.). Where the assessee claim deduction of an amount as bad debt he must produce satisfactory evidence (1) of the nature and character of the debts, (2) that they were really and justly due to the assessee firm, and (3) that they became bad in the year of account. If the debt is in respect of another business, the assessee cannot claim deduction of the same as bad debt. 58 C. 1446 (S.B.). *“Expenditure incurred solely for the purpose of earning such profits”*: A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. 58 I.A. 239=54 M. 691=61 M.L.J. 251 (P.C.). Deposit by money-lending firm to become organising agents of an oil importing company—Insolvency of latter firm—Amount due to money-lending firm could not be deducted from their profits. *held,* that the character of the expenditure which the assessee sought to bring within Cl. (*ix*) of S. 10 (2) must be determined with reference to the business of the organising agents in which they engaged since December, 1930. They were entering upon a business different in character from that of money-lenders. The deposit was exacted as a condition of the assessee being given an agency which they hoped to manage profitably. The purpose of being permitted to engage in such a business must be considered to be a purpose of securing an enduring benefit of a capital nature and the deposit could not, upon a true view of the terms of the agreement and the circumstances of the case, be regarded as an expenditure made in the course of carrying on an existing agency or any other business. 67 I.

and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee :

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year] ;

[1][(*xii*) any expenditure [2][(not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation] ;

[3][* * * * * * *]

[4][(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (*iv*), clause (*v*), clause (*vi*) or clause (*vii*) of sub-section (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (*ix*) or clause (*xii*) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains ; and nothing in clause (*xii*) of sub-section (2) shall be deemed to authorise—

(*a*) any allowance in respect of a payment which is chargeable under the head 'Salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18 ; or

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LEG. REF.

[1] Original cl. (*ix*) was re-numbered (*xii*) by Act VII of 1939.

[2] Substituted for the brackets and words "(not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains" by Act VII of 1939.

[3] The proviso was omitted by Act VII of 1939.

[4] Sub-Ss. (3), (4), (5), (6) and (7) substituted for sub-section (3) by Act VII of 1939.

NOTES.

A. 71=I.L.R. (1940) Nag. 341=51 L.W. 129=44 C.W.N. 373=42 Bom.L.R. 323=1940 P.C. 33=(1940) 1 M.L.J. 180 (P.C.). Preference shares—Dividends payable at seven and half per cent. subject to tax—No tax payable by company—Right to deduct tax at standard rate from dividend payable. I. L. R. (1940) Bom. 165=42 Bom. L. R. 57=1940 Bom. 97 (F. B.). Assessee speculating in cotton incurring losses in forward contracts—Suit against assessee in respect of such losses—Litigation expenses incurred by assessee in suit—Suit ultimately ending in compromise decree—Right to claim deduction of litigation expenses. 1942 I.T.R. 95. The sum of money allocated by a Life Insurance Company for distribution amongst the participating policy-holders must be considered to be a portion of the profits of the company and as such assessable to income-tax and not an expenditure incurred solely for earning the profits within the meaning of S. 10 (2) (*ix*). 132 I.C. 861=1931 L. 739. Per *Bhide, J.*—The "profits of a business" mean that the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned and the net proceeds must be taken to be the basis for the assessment of income-tax irrespectively of their subsequent application or allocation. 132 I.C. 861=1931 L. 739. *See also* 163 I.C. 629=1936 L. 441. If a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of profits, the salaries could be allowed as a deduction. The dual capacity of a partner *cum* employee, though suspicious, is possible and to the extent that the person is in truth an employee, the salary is deductible from the profits of the partnership. (1 I.T.C. 176, held stated too broadly and 4 I.T.C. 171, Ref.) 32 P.L.R. 656=1931 L. 341. *See also* 139 I.C. 290=1932 N. 65.

Sec. 10 (3): CAPITAL ADVANCED BY PARTNER—INTEREST PAYABLE IRRESPECTIVE OF PROFITS — DEDUCTION OF — PERMISSIBILITY.— There is nothing in sub-cl. (3), S. 10, to suggest that interest paid on the initial capital invested in a firm cannot be the subject-matter of an allowance. Where therefore a capitalist partner advances money to the firm on condition that interest would be paid to him, whether the business of the firm results in profit or not and is in no way made dependent on the profits, if any, earned, the

(b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm ; or,

(c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the Head 'Salaries.'

(5) In sub-section (2) 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section ; 'plaint' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation ; and 'written down value' means—

(a) in the case of assets acquired in the previous year, the actual cost to the assessee ;

[1][(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886, was in force] :

Provided that where the provisions of the proviso to sub-section (2) of section 26 are applicable, the actual cost to the assessee referred to in clauses [2][(a) and (b)] shall be the actual cost to the person succeeded in the business, profession or vocation :

[3][* * * * * *]

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

(7) Notwithstanding anything to the contrary contained in section 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.]

11. *Professional earnings.—Omitted by S. 12 of the Indian Income-tax (Amendment Act (VII of 1939).*

Other sources.

12. (1) The tax shall be payable by an assessee under the head [4]["Income from other sources"] in respect of income, profits and gains of every kind [5][which may be included in his total income] (if not included under any of the preceding heads).

LEG. REF.

[1] New Cl. (b) substituted for old cls. (b) an (c) by Act XXIII of 1941.

[2] Substituted by Act XXIII of 1941.

[3] Second proviso omitted by Act XXIII of 1941. The omitted proviso ran as follows :—

"Provided further that there shall not be so deducted from the actual cost any depreciation allowance or part of any depreciation allowance which was due for a year which ended prior to the 1st day of April, 1939, but to which full effect was not given owing to the absence of profits or gains chargeable for that year, or owing to the profits or gains so chargeable being less than the allowance.

[4] Substituted for "Other sources" by S. 13 of Act VII of 1939.

[5] Substituted for "and from every source hich this Act applies," by *ibid.*

NOTES.

firm is entitled to claim an allowance for the interest paid on such capital. It is immaterial whether such capital was advanced as initial capital or subsequently there is no distinction between capital borrowed and capital contributed. Capital contributed by a capitalist partner is capital borrowed from him by the firm. 144 I.C. 353=1933 S. 192.

Sec. 12.—Expenses directed by testator to be paid by executor for performance of his Addya Sradh and for obtaining probate of will not exempt from taxation. 40 C. W.N. 827. The allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. There is no justification for deducting from the profits and gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred many years before. 60 I.A. 307=55 A. 452=65 M.L.J. 247=1933 P.C. 180 (P.C.).

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, [1][provided that no allowance shall be made on account of—

(a) any personal expenses of the assessee, or

(b) any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, or not being interest on which tax has been paid or from which tax has been deducted under section 18, or

(c) any payment which is chargeable under the head 'Salaries,' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18.]

[2][(3) Where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provision of clauses (iv) (v), (vi) and (vii) of sub-section (2) of section 10.]

[3][(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v) and (vi) of sub-section (2) of section 10 in respect of such buildings.]

Managing Agency Commission.

[4][12A. Where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency commission with a third party or parties, the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement.]

LEG. REF.

[1] Substituted for "provided that no allowance shall be made on account of any personal expenses of the assessee" by S. 13 of Act VII of 1939.

[2] Added by *ibid.*

[3] Added by Act XXIII of 1941.

[4] Inserted by Act VII of 1939.

NOTES.

The expression *"other sources"* in S. 12 of the Act means sources other than the preceeding five heads as specified in S. 6. When there is a specific head for interest on securities the residuary S. 12 cannot be called in aid. 10 P.L.T. 424=1929 P. 419 =9 P. 139. The profits by a resident in France having a branch or agent in British India, which are received and retained in France, are not liable to income-tax in British India. 44 M.L.J. 290=46 M. 360= 1923 M. 422.

"OTHER SOURCES."—*See* 54 C. 863=31 C. W.N. 765=45 C.L.J. 323=1927 C. 432 (F.B.); 1941 I.T.R. 642; 53 C. 524=44 C.L.J. 427; 6 P. 29=1927 P. 133. If there be any earlier legislation or a treaty between the Sovereign power and the subject for special exemption from future taxation, followed by the introduction by the Sovereign power at a later date of legislation which admittedly, but for the claim to the earlier exemption, applies to and includes the person who was originally exempted, it follows that by necessary implication the later statute repeals the earlier statute or other Act under which the exemption is claimed. Where certain income of a Raja taxable as "other sources" and not coming under any of the exemptions specified in the Act was taxed, but the Raja claimed exemption by virtue of a treatly negotiated between his ancestors and the East India Company, which provided for exemption from all future taxation. *Held,* that the Income-tax Act, by imposing the tax on all persons in British India without specified exception, by necessary implication, repealed the provision of earlier exemption and hence the income was taxable. 15 P. 792=18 Pat.L. T. 169=1937 P. 1. Receipt of salami not to be treated as an assessable income. 34 C.W.N. 327=50 C.L.J. 375=1930 C. 1 (F.B.). Scope — Employee's gratuity—Employer's insolvency—Payment of stranger —Assessability—Not taxable. 12 R. 477= 1930 R. 377. As to payment of *royalties, see* 146 I.C. 747=1933 P.C. 211=38 L.W. 621 (P.C.). Compensation received by a company as agent of a business concern for determination of the agency is a receipt arising from business and consequently if income it would be taxable under S. 10 as being an income from business or at least under S. 12 as being income from other sources. The circumstances that it is casual or non-recur-

13. Income, profits and gains shall be computed, for the purposes of section 10 [1][* * *] and 12, in accordance with the method of accounting regularly employed by the assessee :

Method of accounting.

LEG. REF.

[1] The "figures" "11" were omitted by S. 15, VII of 1939.

NOTES.

ring does not exempt it from taxation. 58 C. 1153=35 C.W.N. 361=1931 C. 676. Per *Mohamad Noor, J.*—Annuities have not been expressly taxed except as salary and before an annuity can be taxed, it must be shown to come within the purview of "income, profits or gains" as mentioned in S. 12, Income-tax Act. 13 P. 661=1934 P. 384 (F.B.). *See also* 69 M. L. J. 190 (P.C.). The income derived from a zemindari is assessable after making allowance for the jama assessed and paid. 57 I.A. 228=34 C.W.N. 1017=1930 P.C. 209 (P. C.). Where an impartible zemindari is held exclusively by the eldest son of each successive Raja and the younger sons are settled with some mauzas in the zemindari in lieu of maintenance, which the Raja was under obligation to provide, the grant being resumable at the will of the Raja, unless he parts with it, the income of the mauza by way of royalty is income assessable to income-tax as part of Raja's income, irrespective of whether such income reaches him or not. [5 C. 256; *Mersey Docks and Harbour Board* v. *Lucas,* 8 A.C. 891; *Sowery* v. *Harbour Mooring Commissioner of Kings Lyon,* 2 Tax Cases 201 and *Hudson* v. *Gribble,* (1903) 1 K.B. 517, Ref.]. 130 I.C. 43=1931 P. 15; 60 I.A. 196=60 C. 1029=1933 P. C. 145=65 M. L. J. 285 (P. C.). *"Expenditure incurred solely for the purpose of making or earning such income."* See 11 P. 47=1932 P. 102 (Salary of receiver and manager appointed to manage zemindari estate if and how far can be deducted as expenditure incurred for earning income). (*Ibid.*) It is not a correct proposition of the law that, as soon as a property is mortgaged the realisations from that property no longer wholly belong to its owner, the mortgagor; nor is it correct to say that a portion of the rents and profits legally belongs to the mortgagee on account of interest and that the balance, if any, alone belongs to the mortgagor. In an assessment of *busti* lands under S. 12 of the Income-tax Act, the income is not to be computed after deducting the interest on the mortgages on such properties from the gross realisations in cases where the mortgages have not been made for purposes of the said properties, but for raising a loan for some other purposes of the assessee. The interest payable in respect of the mortgage cannot in such a case, by any stretch of language, be accurately described as expenditure incurred solely for the purpose of earning the income which is derived from the *busti* lands: 63 C. 1157=1937 Cal. 369.

PRIVATE VENTURE—LOAN ADVANCED TO GET SPECIFIC AMOUNT—WHETHER AMOUNTS TO PROFITS OF BUSINESS.—The assessee, who was a tin mine owner and worker, lent certain sums of money to *W* to enable him to work a tin area. Subsequently, he again advanced a loan to *W* in order to enable the latter to do certain work and sell the mine and *W* executed an agreement by which he agreed to pay the assessee a third of the consideration which might be realised by the sale. *Held,* that the transaction was a private venture and not part of the assessee's business and was a receipt of a casual nature under S. 4 (*iii*) (7) and not profits or gains under S. 10 or S. 12. 11 R. 454.

Sec. 13.—Wholly arbitrary assessment by Income-tax Officer is not justified by the section. 7 L. 201=1926 L. 161. The basis and the manner of computation under S. 13 of the Income-tax Act have to be obviously judicial and legal, and not arbitrary or capricious. "Local reputation" can hardly be said to be a judicial basis or legal basis under S. 13, and an assessment which is based entirely on local reputation of the conditions of the business during the year is vitiated, and cannot be said to be based on evidence on which the Income-tax Department is empowered to act and is not in accordance with the provisions of S. 13. 1939 I.T.R. 607. *See also* 1936 All. 286. Accounts suspicious and unreliable—Absence of vouchers for purchases, suspicious entries and suppression of proceeds of retail sales—Accounts disregarded and profits estimated on basis of average profits made by other dealers in similar business and on income of previous years—If justified and legal. 1939 I.T.R. 647. If an assessee does not choose to make an honest statement of account, so that the amounts of profits may be strictly determined, he cannot complain if a random assessment is made upon him. 7 R. 281=1929 R. 102. Decision of the Income-tax Officer as to *method of* accounting, Finality of. *See* 94 I.C. 128=1926 L. 446. Per *Sulaiman, C. J. and Niamatullah, J.*—The Assistant Commissioner is not authorised under S. 13 of the Income-tax Act or otherwise to make private enquiries and to take the result of such enquiries into account in making the assessment under S. 13. Per *Bajpai, J., contra.*—The Assistant Commissioner is authorised under S. 13 and also otherwise to make private enquiries, but he is not permitted to take the result of such enquiries into account in making the assessment, without giving an opportunity to the assessee to meet them. 58 A. 200=1936 A. 286 (S.B.). *See also* 1939 I.T.R. 607. S. 13 relates merely to the method of accounting, and under this section, though the Income-tax Officer may adopt a method of accounting which he

NOTES.

prefers where the assessee has no regular or proper method, he cannot reject the assessee's books. Nor can the books of the assessee be rejected merely because they do not relate to his foreign business also. I.L.R. (1939) Mad. 397=181 I.C. 97=1939 Mad. 357=(1939) 1 M.L.J. 402. The fact that the Income-tax Officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains, does not exempt his computation from examination on appeal, and if it appears that he has adopted a wrong method, the assessment may be set aside. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.). In order to compute the income in a particular year, the Income-tax Officer was entitled to take into account both the interest entered for that year by transference from deposit register and the interest actually received in that year. [(1914) A.C. 1001. Ref.] 60 I.A. 146=64 M.L.J. 612 (P.C.). The provisions of S. 13 to the effect that income, profits or gains shall be computed in accordance with the method of accounting regularly employed by the assessees do not imply that the assessees must necessarily adopt the financial year as the account period or must adopt a method which would avoid two dates of the 31st March falling within one accounting period. 164 I.C. 316=1936 L. 546. Where an assessee keeps his books on a cash basis and the officer accepts that basis the calculation must be based on actual receipt in the year of computation. 1930 A.L.J. 549=1936 A. 279. It is perfectly open to an assessee to change a method of accounting which he has regularly employed for some years at any period in any particular. There is nothing in the section to prevent him from so doing. He can thus change from a mercantile basis to a cash basis, provided that the change is not merely for a casual period. If a change is made, it must be at some definite moment of time and must be in good faith. 38 Bom.L.R. 934=1936 B. 397. S. 13 of the Income-tax Act relates to a method of accounting regularly employed by the assessee for his own purposes and does not relate to a method of making up the statutory return for assessment to income-tax. The section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom. It is not a correct view of the section to say that the Income-tax Officer in *prima facie* entitled to accept the profits shown by the accounts where there is a method of accounting regularly empoyed by the assessee, it is the duty of that officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on that question. 65 I.A. 1=1 L.R. (1938) Bom. 239=42 C.W.N. 194=40 Bom.L.R. 227=1938 P.C. 1=(1938) 1 M.L.J. 1 (P.C.). When the income-tax authorities had once adopted the method of assessing interest on the accrued or mercantile basis, it would not be open to them to turn round and adopt a cash basis when the interest was subsequently realised by the assessee, so as to get over the period of limitation prescribed by S. 34. Per *Manohar Lal, J.*—What the law required the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly adopts for his purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account regularly kept by the assessee, it would then be open to the Income-tax Department to disbelieve the accounts and to proceed in any way they choose by acting under the proviso to S. 13, but on exercising a judicial discretion. 185 I.C. 83=1939 I.T.R. 522. An assessee is, no doubt, at liberty to adopt any system of account that he likes, but it must be one that clearly reflects his income in respect of the fixed period of the "previous year" and one regularly adopted by him for the purposes of his business. Under the mercantile system, entries are made in the accounts on the date, not of receipt of expenditure of money, but on the date of transaction irrespective of the date on payment; ordinarily as soon as the transaction is entered in account books, the assessee can be said to have received the sum, whether it is actually realized or not. Where, therefore, after entering such transaction, an assessee credits that sum to suspense account, because he is not hopeful of recovering that sum. *Held,* that this crediting to the suspense account is not based on any regularly system and as such the sum credited to suspense account cannot be excluded in computing income-tax that is taxable. 168 I.C. 18 Lah. 306=1937 L. 338 (F.B.). Where the assessee, a building contractor has been maintaining accounts on the mercantile system of accounting, he is liable to be assessed on the profits shown in the accounts even though a portion of the amount spent by him in making the constructions has not been realised. 1939 I.T.R. 513. Where the creditor does not allocate the sum between principal and interest but records it in a general ledger as suspense, the assessing officer is justified in the absence of any evidence of appropriation to interest, wherein a particular payment did not exceed the amount due in respect of interest, in assuming that the ordinary course of business had been followed and treating it as interest. 9 P. 240=1930 P. 81 (S.B.). Where an assessee receives payment in respect of mortgage decree, but he does not credit the

NOTES.

amount towards outstanding interest due to him, the Income-tax Officer is entitled to treat the amount as first applicable to the outstanding interest and assess on that amount. 60 I.A. 146=12 P. 318=64 M. L.J. 612 (P.C.). When a mortgagee purchases at auction under a decree of the Court the property which was the subject of the mortgage, he can be said to have received the equivalent of the interest due on his mortgage. (1929 P. 476, Ref.) 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P. C.). Where a method of accounting is accepted by the Income-tax Officer in one transaction, he cannot object to the same method, in similar other transactions. 1928 N. 102. Stock valued at cost price—Market price less in year of assessment—Assessee not claiming loss on that head—Cost price should be considered. 12 P. 318. It is unjust that, in treating the book income as the actual income, the losses which would have been deducted if the book income had been treated as the actual income in a particular year by the assessee, should not be deducted. That being so, the assessee is entitled to deduct from his estimated income the actual losses that may have been suffered in a particular year and the amount of irrecoverable debts that should have been discovered and could have been discovered in a particular year. 1929 A. 819=124 I.C. 467. The procedure of the assessing authority is a judicial one and he ought to act on evidence. But where money is brought into cash account, he has the right to require a satisfactory explanation of how and why it came in; and in the absence of a satisfactory explanation or if he receives an explanation which he cannot believe, the assessing officer is entitled to regard the account as unsatisfactory. If he finds that a moneylender is in the habit of showing in his books that loans carrying interest have been repaid without interest or that a loan secured by a note has been renewed by a new note without any provision for interest, he is at liberty to consider the accounts unsatisfactory. 1937 Lah. 919. In the case of an assessment under the Income-tax Act, the only person who has knowledge of all facts in regard to the maintenance of accounts is the assessee himself. The burden in the first instance is always on him to establish that accounts asked for are not maintained, and his attempt to prove that point may always be met by reliance on circumstances indicating that the evidence given or led by him cannot be relied upon. The Income-tax Officer is entitled to disbelieve improbable statements and to ask for something more to be produced by the assessee which will satisfy him and the appellate authority that the accounts demanded are not, in fact maintained. 1941 I.T.R. 225=1941 Oudh 279. *See also* 1937 Lah. 721.

LANDS TAKEN OVER IN LIQUIDATION OF DEBTS DUE TO ASSESSEE—PROFIT AND GAIN, HOW COMPUTED.—No doubt the value of the land taken over in liquidation of debts due to the assessee as set out in the assessee's books of account may be treated as *prima facie* evidence of its true value, and the assessee normally would have no cause of complaint if the income-tax authorities accepted for income-tax purposes the value which the assessee himself had put upon his assets in his books of account. But in every case, it is incumbent upon the Income-tax Officer to ascertain, as a matter of fact, what are the real profits and gains of the business in the accounting year. Thus, if the estimated value of the lands in the accounting year is greater than the principal sum than was lent, the income-tax authorities will be entitled to treat the balance, after deducting an amount equivalent to the loan, as representing profits and gains accruing from the transaction, and to assess the same as income chargeable with income-tax. But if the estimated value of the lands is less than the amount of the principal sum that has been lent, no tax will be chargeable in the accounting year in which the lands are transferred, although it may be that the estimated value of the lands in that year exceeds the amount due to the assessee in respect of interest on the loan. But as the assessment is made upon the footing that the transaction has been completed during the accounting year, the assessee is not entitled to have the value of the lands reassessed in any other accounting year except that in which the lands are sold by him, and until the sale takes place the final adjustment of the assessment must necessarily remain in suspense. 12 R. 483=1934 R. 274 (S.B.).

UUREALISED DECREE—ENTRY IN INTEREST KHATA—ITEM NOT TAXABLE.—Unrealized decree entered in the interest *khata,* the amount of which has not been received in fact is not taxable income for the purpose of assessment. There is nothing in S. 2 (15) or of S. 16 of the Act, which would imply that the total income is to include an amount which had been decreed but not received. 1935 A.L.J. 374=1935 A. 378. Bad debt—Personal decree obtained in 1928—Appeal dismissed in 1931—Amount due on personal decree—Whether can be claimed to be bad debt during accounting period of 1932-33. 163 I.C. 629=1936 L. 441.

FRESH PROMISSORY NOTE ISSUED BY DEBTOR FOR OLD DEBT INTEREST.—Where the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtor and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors, and the creditors have accepted the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years were content that, the

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

NOTES.

interest accruing in this manner should be assessed to income-tax, it cannot be said that, in these circumstances, there were no materials before the Income-tax Officer which would justify him in concluding that these sums represented interest liable to assessment, which the assessee has regarded as being liquidated by delivery of fresh promissory note. In such cases, if the assessees want to escape assessment for such interest, they should so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due uuder the old loan. 13 R. 231=1935 R. 109.

Sec. 13: PROVISO.—No burden is imposed on the Income-tax authorities to prove by 'positive evidence' that the accounts are unreliable or that the figure at which they assess is the correct figure. In the first place, the question of unreliability of accounts is a question of fact and primarily falls for the determination of the Income-tax authorities alone. If, therefore, it is once decided by them that the accounts are fictitious or unreliable, their finding cannot be disturbed, unless of course it is altogether capricious and injudical. Secondly the Income-tax Officer cannot be fixed with the knowledge of the state of the assessee's account and cannot subsequently be expected to lead evidence to prove the assessee's transactions for the accounting year. It cannot be denied that there must be some material before the Income-tax Officer on which to base his estimate, but no hard and fast rule can be laid down by any Court to define what sort of material is required on which his estimate can be founded. The law nowhere contemplates that the Income-tax Officer is a party to the case in the sense in which an ordinary party to a civil litigation is, and he cannot be expected to be in possession of such evidence as would be required from an ordinary litigant to refute the case of his adversary. 39 P.L.R. 1028=1937 Lah. 721. *See also* 1941 Oudh 279. Under S. 13, proviso of the Income-tax Act the Income-tax Officer is the sole judge on the question of the possibility of deducing the income from the method of accounting employed by the assessee, and if the principle of applying a flat rate is not objected to, its reasonableness cannot be made the subject of a reference to the High Court under S. 66 (3). 1939 I.T.R. 151. The language of the proviso to S. 13 makes it clear that discretion is vested in the Income-tax Officer; but obviously it was not the intention of the Legislature that such discretion should be arbitrary. What the Court has to consider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of accounts; if he did exercise his judgment and did not act arbitrarily, then having regard to the language of the proviso, his discretion cannot be interfered with. I.L.R. (1940) All. 805 =1941 A.L.J. 79=1941 All. 24. No doubt the Income-tax Officer is the sole arbiter for determining under the proviso to S. 13 of the Act how the profits are to be computed. But it is a question of law, into which the High Court is entitled to inquire, whether there is any evidence on which the Income-tax Officer could come to the decision that the method of accounting adopted by the assessee is such that the gains could not be computed except by the arbitrary method contemplated by the proviso. If there was no evidence to justify the Income-tax Officer's rejection of that method of accounting, the assessment should be made under first part of S. 13, and not under the proviso. When there is no other reason except the fact of reduced profit to justify the assumption that profits cannot properly be deduced, from a method of accounting which admittedly has been regularly employed by the assessee and has been accepted in the past, the use of the proviso to S. 13 for the purpose of introduction of an arbitrary manner of computing the profits is not justified. 1934 L. 876. Under S. 13 of the Income-tax Act, the Income-tax Officer has a discretion to accept or reject the assessees' books. If he rejects them, as he is entitled to do and if the principle of flat rate thereby becomes applicable, the amount of such rate is entirely in the discretion of such officer. The mere fact that a high rate of profits has been applied by the department will not by itself warrant the High Court in directing the Commissioner to state a case. 1938 A.L.J. 507=1938 All. 367. When an Income-tax Officer is acting under the proviso to S. 13 of the Income-tax Act, he must remember that his judgment must be properly exercised. It is misleading to describe this duty of the Income-tax Officer as a discretionary power. The application of a flat rate is not always proper when a truer state of income can be ascertained. 1938 N.L.J. 172=1938 Nag. 485. Where operating under the proviso to S. 13, the Income-tax Officer in dealing with a money-lending firm, arrives at an income based upon an ascertainment of the average interest percentage on the whole capital, it cannot be said that it is an arbitrary way, or a mere guess work. Nor is there anything vindictive, capricious or

NOTES.

unfair in what the officer has done. 1940 Nag. 88=1939 I.T.R. 613=1939 N. L. J. 553. An assessee has no option of declaring debts bad. Whether a debt is a bad debt and when it becomes bad are questions of fact to be determined in case of dispute not by the assessee but by the appropriate tribunal upon a consideration of all relevant and admissible evidence. The decision of the Income-tax Officer on the question whether a debt is bad or irrecoverable operates only for the particular year under assessment and it would be open to the assessee to repeat his claim in respect of any particular debt in any subsequent year, provided the debt had not been recovered in the interval. 16 L. 416=1935 L. 589. *See also* 163 I.C. 629=1936 L. 441. An assessee whose business was to sell gold and silver was served with notices under S. 22 (4) and S. 23 (2) of the Act and the assessee's munib was specifically questioned in respect to the profits from the gold and silver transactions. The Income-tax Officer applied proviso to S. 13 in respect of transactions in gold alone. *Held,* that the Income-tax authorities were justified without giving any other kind of notice to the assessee, in applying the proviso to S. 13 in respect to transactions in gold while accepting the books of account in respect to transactions in silver. I.L.R. (1940) All. 805=1941 A.L.J. 79=1941 All. 24.

INCOME ON PROMISSORY NOTES—TAXATION—BASIS.—Whether the Assistant Commissioner is justified in taxing the income on promissory notes, bonds and mortgage deeds on the basis of interest accrued on the total amount invested in such promissory notes, bonds and mortgage-deeds, and not on the basis of interest actually realised by the assessee during the accounting period is a question of law. 149 I.C. 976 (1)=1934 L. 43.

ASSESSMENT UNDER S. 13—QUESTION OF LAW, IF ARISES.—A finding by the Income-tax Officer and the Assistant Commissioner that no regular method of accounting had been employed by the assessee and that the method employed was defective is a decision on a question of fact. When the Income-tax Officer makes an assessment under the proviso to S. 13 of the Income-tax Act, it may be shown that he has proceeded on a wrong basis of law; it cannot be said that in every case a question of law; arises as to whether the assessment under the proviso to the section is legal or not. 36 Bom.L.R. 818=1934 B. 378. Where the method of accounting is one regularly employed by the petitioner assessee, the proviso to S. 13 does not come into operation. 1930 L. 197. Proviso does not apply where genuineness of account is doubtful. S. 23 (2) applies in such a case. 7 L. 138=1926 L. 201. An Income-tax Officer does not appear to be empowered by S. 13 to dispense with a notice under S. 23 (2) of the Income-tax Act. 10 L. 833=1930 L. 277. It is only where the accounts were kept by the assessee in such a form that the income, profits and gains could not properly be deduced therefrom, that the proviso to S. 13 applies and the Income-tax Officer is bound to make the computation upon such basis and in such manner as he might determine. 138 I. C. 214=1932 L. 178. *See also* 1935 L. 840=162 I.C. 995. Once it is established that no method of accounting has been regularly employed or that the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom, the proviso to S. 13 comes into operation and the Income-tax Officer becomes the sole arbiter of the basis on which they shall be computed. Where a colliery proprietor had invested the money in mortgages and loans and had kept regular and proper accounts of his income from the colliery and had not kept any account of his income from his investment in mortgages and loans, *held,* that the Income-tax Officer was justified in making an assessment of his income under the proviso to S. 13. 132 I.C. 523=1931 L. 432. Where the method of accounting regularly employed by the assessee is the so-called mercantile system of accountancy or book profit system, it is upon that basis alone that he is to be assessed to income-tax under S. 13 of the Income-tax Act. Under this system, entries are made in the account on the date not of the receipt of money or expenditure of money but on the date of the transactions irrespective of the date of cash payment. A profit and loss account prepared on this basis is accepted as evidence of the assessee's income and assessment is made accordingly. If any part of these "book profit" is later on found to have become irrecoverable, it is deducted from the assessment as a bad debt. 36 P.L.R. 199. Where the principle of assessment at a flat rate is not contested, its amount must be for the Income-tax Officer to determine. 144 I.C. 686=1933 P.C. 198 (2) (P.C.). Procedure of Income-tax Officer must in all cases be governed by judicial considerations. Hearsay evidence is no basis for assessment. 94 I. C. 156=1926 L. 233. Interest due, but not collected is not assessable. 1926 N. 241 (1927 M. 841, Dist.). When the opening and closing stocks of a business are both under-valued, the real profits of the company (for the purposes of assessing income-tax and super-tax under the Income-tax Act) for a particular year cannot be ascertained by merely raising the valuation of the closing stock without taking into consideration the similar under-valuation of the opening stock. (52 B. 669, affirmed.) 57 I.A. 21=54 B. 213=58 M.L.J. 204 (P. C.). Where the computation of income, profits and gains for a particular year has been made under the provisions of S. 13 upon such basis and in such manner as the Income-tax Officer may determine, the as-

Exemptions of a general nature.

14. (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

NOTES.

sessee is entitled to show that income, profits and gains included in the assessment for a subsequent year were included in that computation, and it is a question of fact to be decided on the evidence in each particular case. 7 R. 644=1929 R. 248 (F.B.).

Secs. 13 and 23 (3): RELATIVE SCOPE AND INTER-DEPENDENCE OF.—S. 13 of the Income-tax Act cannot be divorced entirely from S. 23 (3) because it is only in an inquiry under S. 23 (3) that S. 13 can operate. There is no conflict or divorce between Ss. 13 and 23 (3). In proper cases the two sections work together. But the proviso to S. 13 does not have reference to the manner in which information is obtained either by private inquiries or otherwise. It relates to the manner in which material before an Income-tax Officer shall be used. I.L.R. (1940) Kar. 309=1940 Sind 92. S. 23 is concerned with assessment and S. 13 with computation. It is not quite correct to say that an assessment should be made under the proviso to S. 13 when the assessee's books are found unreliable and rejected, though it must, in such circumstances, be in accordance with a computation made under the proviso to S. 13. 1939 I.T.R. 515. All that S. 13 really says is that if the method of accounting employed by the assessee is one which does not properly disclose the income, profits and gains of the assessee, the Income-tax Officer can adopt his own method. But in doing so he must have reference to the accounts before him as S. 13 does not contemplate the rejection of the accounts. S. 13 adds nothing to, and takes nothing away from S. 23 (3). I.L.R. (1939) Mad. 404=1939 Mad. 371=(1939) 1 M.L.J. 451. Where no return has been made at all or if a return has been made and the notice given has not been complied with, then S. 23 (4) applies and the Income-tax Officer has to make the assessment to the best of his judgment. But where there has been a return and the notice has been complied with and it is found that the books which are put forward to support the return are unreliable, then one goes to S. 13. S. 13 is not an assessment but a computation section. The proviso to S. 13 gives the Income-tax Officer as wide, if not wider, powers than he is given under S. 23 (4) and it is not unreasonable, because S. 23 (4) applies to a case where the assessee does nothing, whereas the proviso applies where the assessee does something positively false. 1939 I.T.R. 613=1939 N.L.J. 553=1940 Nag. 48.

Sec. 14.—[*See also* notes under S. 4, *supra.*]

Cl. (1): APPLICABILITY—CONDITIONS.—The income of an impartible Raj in the hands of the holder is to be assessed on the footing that the income is the income of individual and not of an undivided family for purposes of assessment to income-tax. 19 Pat.L.T. 858=1938 P.W.N. 801=1938 Pat. 611. S. 14 (1) can apply only if two conditions are made out. The assessee should establish that he is a member of a Hindu undivided family and further that the sum in question has been received by him as such. The relation of cause and effect must exist between the position of the assessee as a member of a Hindu undivided family and the receipt by him of the sum which is a question for the purpose of assessment. If a person who is a member of a Hindu undivided family receives an allowance not because he is such a member but wholly apart from that position, S. 14 (1) does not apply. 149 I.C. 306=1934 A. 818. *See also* 1936 M. 67=70 M. L. J. 13 (F. B.). The Income-tax Act clearly contemplates that, in the case of members of a joint Hindu family, the unit of taxation shall be the family itself and not each individual member, *i.e.*, the entire joint income of the members of the family is taxable only in the hands of the family, and no part of it is taxable in the hands of the individual coparceners. This provides the clue to the meaning of the words "as a member of a Hindu undivided family" occurring in S. 14 (1) of the Act. S. 14 (1) exempts from taxation in the hands of a member of a family income which is liable to taxation in the hands of the family, whether it has been so taxed or not. In this view of the matter, the burden is on the assessee to show that the sum in respect of which he claims exemption is assessable in the hands of the family. *Quaere.*—Whether an allowance paid to a member of an undivided family and not exempted from assessment under S. 14 (1) may not be exempted on some other ground. 14 P. 785=16 Pat.L.T. 351=1935 P. 342 (S.B.). A sum of money received as maintenance by an assessee, entitled, as the brother of the last Zamindar, to receive maintenance out of an ancestral impartible estate is a sum received by him as a member of a Hindu undivided family within the meaning of Cl. (1) of S. 14 of the Income-tax Act, and as such exempt from taxation. 57 M. 1023=1934 M. 608=67 M.L.J. 306 (F.B.). *See also* 14 P. 313=1935 P. 8. Income personally derived by an assessee as a member of a joint family is not taxable under S. 14 of the Act. 3 P. 664=1924 P. 644. *See also* 2 Pat.L.R. 122 (Cr.). As to income derived by assessee as a member of a joint family, *see also* 88 I.C. 1014=1924 P. 644; 5 P. 20=1926 P. 256. The property belonging to an estate subject to the rule of primogeniture is still the property of the family and not the sole property of the manager for the time being for the purposes of super-tax. In comput-

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family governed by the law of primogeniture, the allowances paid to junior members ing income of the head of an impartible thereof should be deducted. They cannot be deemed to be part of the income of the family. They are the separate property of the junior members on which they can be separately assessed. 141 I.C. 415=1933 L. 284. The widow of a deceased coparcener is a member of the undivided family of her husband. Maintenance and arrears of maintenance received by the widow of a deceased member of an undivided family is exempt from taxation under S. 14 (1). 1932 M. 773=63 M.L.J. 542 (F. B.). When a member of a Hindu undivided family receives a grant by way of maintenance from the head of the family, it is not necessarily received "as a member of the family." 14 P. 313=1935 P. 8. A person to be a member of an 'undivided Hindu family' under S. 14 (1), need not have a vested interest in the family property. Hence a mother may be a member of such an undivided Hindu family and when she by virtue of her right to receive maintenance from her son, receives it from him or his estate, tax is not payable on it. The fact that provision had been made in a will for the payment of this maintenance, would not affect the question. 1940 O.W. N. 853=1941 O. 22=16 Luck. 159. Hindu undivided family consisting of two brothers—Death of one—Widow of latter relinquishing life estate in favour of surviving coparcener in consideration of receiving monthly payment as maintenance—Amount received is not received as a member of Hindu undivided family. 1940 I.T.R. 404. The widow of a Hindu coparcenary though not herself a member of the coparcenary body, may nevertheless be a member of the undivided Hindu family. Where in settlement of disputes between such a widow and the other members, a sum is agreed to be paid to her monthly as maintenance for her life, and subsequently there is a disruption of the joint family, the widow thereafter continues to be a member of a Hindu undivided family with each of the entities into which the family disrupted, irrespective of whether any such entity consisted of one male member or of several male members. Upon this view she will be exempted from payment of income-tax under S. 14 (1). I.L.R. (1941) All. 43=1940 A.L.J. 848=1941 All. 83. *See also* 16 Luck. 159=1941 Oudh 22=1940 O. W. N. 853. The expression "Hindu undivided family" occurring in the Income-tax Act connotes a family restricted to the coparcenary, *i.e.*, a family having coparcenary interest in income or property and not a joint family consisting of several members living together, irrespective of the existence or non-existence of any co-parcenary property. A Hindu cannot be considered to be a member of a coparcenary when he has no sons, and when the other members of the family living with him are only females. Even when there are male members who can be coparceners with him, there must be ancestral or joint property or property thrown into the common stock, before there can be a coparcenary or Hindu undivided family as contemplated by the Income-tax Act. The income from property which is neither ancestral nor thrown into the common stock, but which has been treated as separate property by the members of the family concerned cannot be regarded as the income of a Hindu undivided family for purposes of income-tax. A statement by a member of a Hindu family in an affidavit filed by him in assessment proceedings that certain property is joint cannot be taken to be an irrevocable declaration *ipso facto* creating a coparcenary as between him and the other members, so as to entitle the members to claim assessment as a Hindu undivided family. 40 C. W. N. 517. An assessee claiming exemption under S. 14 (1) of the Income-tax Act should establish that he is a member of a Hindu undivided family and further that the sum in question has been received by him as such. *See also* 1934 All. 818; 1935 Pat. 342 cited under S. 4, *supra*. A junior member of a joint family possessed of impartible raj is a member of a Hindu undivided family within the meaning of S. 14 (1), as the custom of impartibility does not supersede the general law so far as his status is concerned, though his rights to demand partition and to participate in the income of the estate is taken away. If such a member is assessed to income-tax on the amount of the maintenance received by him from the holder of the impartible raj, the question for consideration is whether the allowance received by him is a payment made to him as a member of the family. If the sum be considered to be in the nature of a gift, pure and simple, it cannot be characterised as income received by a member of a Hindu undivided family as such. If the assessee is, by custom applicable to the estate, entitled to be maintained, with the revenue of the estate, and if the allowance fixed for him is in satisfaction of his right to be so maintained he should be considered to have received it as a member of a Hindu undivided family. A junior member claiming to be entitled -to maintenance must establish a custom to that effect. In the case of a younger son, his right of maintenance has been so often asserted and recognized that a Court is entitled to presume that such a right exists. The presumption however is not conclusive but can be rebutted by the Income-tax department. 149 I.C. 306=1934 A. 818; 14 P. 785=1935 P. 342 (S.B.). There is a distinction between a customary impartible estate and an estate granted by the Crown subject to descent by primogeniture. While blending may be possible in the former, it is not so in the case of the latter. What S. 14 (1), Income-tax Act, contemplates is that the receipt should be from the joint in-

[1][(2) The tax shall not be payable by an assessee—

(*a*) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (*b*) of sub-section (1) of section 16 on which the tax has already been paid by the firm ; or

(*b*) if a member of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association] or

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LEG. REF.

[1] Substituted by S. 16 of Act VII of 1939.

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come of the family and not otherwise. The unfailing test for the applicability of S. 14 (1), is to determine whether the allowance would cease if the assessee ceased to be a member of the undivided family, if any. 1937 Lah. 905. Joint Hindu family—Proof of separation—Individual assessment of members to income-tax. 33 C.W.N. 1190 =1930 C. 178.

EXEMPTION UNDER S. 14 (1)—BURDEN OF PROOF.—S. 14 (1) merely relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family. It does not relieve him from the necessity of showing that the sum received is a part of income, or property, in which he had a vested right as a member of a Hindu undivided family. 14 P. 313=1935 P. 8. *See also* 14 P. 785=16 Pat.L.T. 351=1935 P. 342 (S.B.).

Sec. 14 (2).—The phrase "where the profits and gains of the company have been assessed to income-tax," must be given its ordinary and natural meaning and cannot be read to include all the profits or gains of the company whether assessable or not or the total profits or gains; and consequently where a company whose profits are found to include specified sums to which in accordance with S. 4 of the Act, did not apply and the said company has been assessed in respect of profits to which the Act did apply, such proportion of dividends as the specified sum bears to the aggregate of all profits distributed among shareholders does not become chargeable to tax in the hands of a shareholder, but is exempted from taxation to ordinary income-tax in accordance with S. 14 (2). 63 I.A. 359=1936 P.C. 219= 71 M.L.J. 405 (P.C.). *See also* I.L.R. (1940) All. 795=1941 All. 15. According to the plain meaning of S. 14 (2) (*a*) of the Income-tax Act, when there has been an assessment on the profits or gains of a company, even though the dividends received by the shareholder are in fact to some extent paid out of profits or gains in the hands of the company which are free from taxation. the whole of the sum received by the assessee as shareholder, by way of dividends, is exempt from taxation. The section cannot be construed as meaning or implying that the whole income of the company must be assessed or made chargeable to income-tax in order that the protection under it may be availed of by the assessee shareholder receiving the dividend. 62 C. 133=39 C. W.N. 253. Where a husband and wife formed a partnership and the husband took some extra rights in himself of taking new partners and each of them was entitled to take in new partners after the death of the other, *held*, that a partnership was legally formed. 25 Bom.L.R. 1225=1924 B. 182. A partner might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm. 139 I.C. 290=1932 N. 65. *See also* 134 I.C. 198=1931 L. 341. In order to bring into play S. 14 (2) (*b*) it must be shown by the assessee that any income in his hands has already been assessed to income-tax in the hands of the firm of which he happened to be a partner. 1941 All. 15 =1940 A.L.J. 729. The profits of the registered firm should be ascertained as a whole before the assessment is made upon individual partners. But there is nothing in the Act to say that the firm is to be assessed first, still less the assessment on the firm is to operate as a sort of estoppel in favour of the individual partners. 58 C. 1204=35 C.W.N. 534=1931 C. 686 (S.B.), When part of the profits of a registered firm have escaped assessment, assessment can be made under S. 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceedings under the said section against the firm itself in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time-barred. 58 C. 1204.

Secs. 14 (2) and 16.—Construction and scope—"Previous year"—Assessee deriving income from different businesses—Different accounting periods—If can be fixed—Income derived after termination of previous year—If to be included in return and if assessable. 60 B. 679=38 Bom.L.R. 450=1936 B. 225. Income—Computation of—Money received by assessee under father's will out of income of estate is to be included in income. 1940 I.T.R. 80.

Secs. 14, 20 and 48: CONSTRUCTION AND SCOPE.—It may be that there are inconsistencies between S. 14 and what is implied in Ss. 20 and 48. But that cannot entitle the Court to modify or add to the plain

[1][(*c*) in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee, or are assessable under section 42].

Exemption in the case of life insurances.

15. (1) The tax shall not be payable [2][in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee] or as a contribution to any Provident Fund to which the Provident Funds Act, [3][1925] applies [4][* * * *.]

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub-section (1) any sums paid to effect an insurance on the life of any male member of the family or of the wife of any such member.

(3) The aggregate of any sums exempted under the section shall not, together with any sums exempted under the [5][second proviso] to sub-section (1) of section 7 [6][and any sums exempted under sub-section (1) of section 58F], exceed [7][in the case of an individual, one-sixth of the total income of the assessee, or six thousand rupees, whichever is less, and in the case of a Hindu undivided family, one-sixth of the total income of the assessee, or twelve thousand rupees, whichever is less].

Exemptions and exclusions determining the total income.

16. [8][(1) In computing the total income of an assessee—

(*a*) any sums exempted under the second proviso to sub-section (1) of section 7, the second and third provisos to section 8, sub-section (2) of section 14 and section 15 shall be included;

(*b*) when the assessee is a partner of a firm, then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year :

Provided that if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of section 24 ;

(*c*) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement

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LEG. REF.

[1] Added by Act XXIII of 1941.

[2] Substituted for the original words by S. 17, *ibid.*

[3] Substituted for the figures " 1897," by *ibid.*

[4] The words " or to any Provident Fund which complies with the provisions of the Provident Insurance Societies Act, 1912, or has been exempted from the provisions of that Act " omitted by S. 5 of Act XI of 1924.

[7] Substituted for " proviso " by S. 17 of Act VII of 1939.

[6] Inserted by S. 3 of Act XII of 1929.

[7] Substituted for " one-sixth of the total income of the assessee " by S. 17 of Act VII of 1939.

[8] Sub-Ss. (1) and (2) substituted by S. 18, *ibid*

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words of S. 14, by reference to the supposed implications of Ss. 20 and 48. 62 C. 133 =39 C.W.N. 253.

Sec. 16: TOTAL INCOME—MEANING—UNREALISED DECREE.—*See* 1935 A.L.J. 374 =1935 A. 378. The scheme of the income-tax is that there is to be a statement of the total income of the assessee from which is to be deducted, for the purpose of assessing income-tax, but not of super-tax, nor the purpose of any graduation of income-tax by reference to total income, the amounts of interest on tax free securities and of dividends and shares of profits already taxed. 61 I.A. 209=58 B. 317=66 M.L.J. 643 (P.C.). There is no warrant for holding that unless a minor is admitted to the benefits of a partnership without any contribution to the assets, S. 16 (3) (*a*) (*ii*) (as amended by the Amending Act of 1937) has no application. There is nothing in the section which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets. The section can only be construed in accordance with the words used in it. 54 L.W. 732=1941 Mad. 924=(1941) 2 M.L.J. 891 (S.B.).

of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponer, shall be deemed to be income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponer or transferor, or in any way gives the settlor, disponer or transferor a right to reassume power directly or indirectly over the income or assets :

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settlor or disponer' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made :

Provided further that this clause shall not apply to any income arising to any person by virtue of the settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponer derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him.

(1) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, [1][and shall be increased to such amount as would, if income-tax (but not super-tax) at the rate applicable to the total income of a company for the financial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited, or distributed, were deducted therefrom, be equal to the amount of the dividend :]

Provided that when any portion of the profits and gains of the company out of which such dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed was not liable to income-tax in the hands of the company, [1][the increase to be made] under this section shall be calculated upon only such proportion of the dividend as the amount of the profits and gains of the company liable to income-tax bears to the total profits and gains of the company].

[2][(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(*a*) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband

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LEG. REF.

[1] Substituted by Act XXIII of 1941.

[2] Added by S. 2 of Act IV of 1937.

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Sec. 16 (1) (c) (as amended in 1939): APPLICABILITY.—It is the law in force at the time of assessment which governs the assessment and not the law as it was during the year in which the income was earned. Hence the income of the year 1938-1939, accrued before the Amendment Act came into force, and derived from assets comprised in revocable instruments of trust and settlement deeds executed by the assessee in favour of his daughters in April, 1933, before the Amendment Act has to be deemed to be the income of the assessee under revocable transfers of assets as contemplated by S. 16 (1) (*c*) of the Income-tax Act, as amended by Act VII of 1939. 1942 I.T.R. 1=55 L.W. 15=(1942) 1 M.L.J. 16 (S.B.) *See also* 1941 Pat. 599

Sec. 16 (3) (iii).—S. 16 (3) (*iii*), as amended in 1937, is not directed towards transactions between husband and wife and in no way invalidates such transactions. The otherwise than for adquate consideration or in connection with an agreement to live apart; or

(*iv*) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual [1][otherwise than for adequate consideration]; and

(*b*) so much of the income of any [2][person or association of persons] [3][* * * * *] as arises from assets transferred [4][otherwise than for adequate consideration to the person or association] by such individual [5][for the benefit of his wife or a minor child or both].

Determination of tax payable in certain special cases.

[6][17. (1) Where a person is not resident in British India, and is a British subject as defined in [7][section 27] of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma [8][or a native State of a Tribal area,] the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income; and in the case of any other non-resident person, the income-tax payable by him or on his behalf on his total income shall be at the maximum rate and the super-tax payable thereon shall be an amount bearing to the total amount of super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income.

LEG. REF.

[1] Inserted, by S. 18 of Act VII of 1939.

[2] Substituted for "association of individuals," by *ibid.*

[3] The words "consisting" such individual and his wife" omitted by *ibid.*

[4] Substituted for "to the association," by *ibid.*

[5] Added by *ibid.*

[6] Substituted by S. 19, *ibid.*

[7] Substituted for the word and figures "section 17" by Act XXXIV of 1939.

[8] Inserted by Act XXIII of 1941.

NOTES.

transactions are assumed to be valid, and the income arising from the transferred assets is the income not of the husband but of the wife who received the assets from the husband by transfer. The section in no way affects the validity of the transfer, but only provides a method by which the income of the property transferred is to be assessed, and it provides that such income will be included in the husband's income for purposes of taxation and will not be taxed separately. 20 Pat. 202=21 Pat.L.T. 1096 =1940 P.W.N. 1016=1941 Pat. 59 (F.B.). There is no reason why S. 16 (3) (*iii*) should not be held to apply to a wife's income arising from assets transferred to her by her husband before the Amending Act of 1937 came into force. The sub-section is to have effect in respect of any income chargeable to income-tax for any year subsequent to that date. The wording of the sub-section is wide enough to cover not only income from assets transferred by a husband to his wife after the passing of the Act but also income arising from such assets transferred before the passing of the Act. 20 Pat. 202 (F.B.). *See also* (1942) 1 M. L. J. 16. Where an assessee who is proceeded under S. 16 (3) (*a*) (iii) in respect of the income of his wife, makes no effect to prove that moneys appearing in his wife's account in his books, have come from other sources than himself, it is open to the Income-tax authorities to infer that the moneys were received by her from her husband otherwise than for adequate consideration and treat the interest thereon as part of the assessee's (husband's) income for purposes of S. 16 (3) (*a*) (iii). There is no natural presumption in the case of the assets of a married Hindu lady that they are transferred to her by her husband out of love or affection. It is not an uncommon thing for a husband to put money in the name of his wife without ever intending to give it to her. 1942 I.T.R. 71=55 L.W. 75=(1942) 1 M.L.J. 164.

Sec. 16 (3) (iii) (as amended by Act IV of 1937), S. 16 (3) (iii) and S. 17: APPLICABILITY—TRANSFER BY HUSBAND TO WIFE ON ACCOUNT OF NATURAL LOVE AND AFFECTION.—The word "consideration in S. 17 (3) (*iii*) of the Income-tax Act, as amended in 1937, is used in its legal sense, and must be given a meaning similar to that which it has in the Contract Act. A transfer by a husband to his wife on account of natural love and affection only without any monetary consideration passing from the wife to her husband, cannot be held to be a transfer for consideration; and in any case it is not a transfer for "adequate consideration" within the meaning of S. 17 (3) (*iii*). Transfers by a husband to his wife of assets otherwise than for adequate consideration cover all transfers in the nature of gifts or transfers made purely on the ground of natural love

(2) Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm, if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super-tax payable by the assessee shall be an amount bearing to the total amount of the income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income.]

[1][(3) Where there is included in the total income of any assessee any income exempted from tax under clause (*c*) of sub-section (2) of section 14, the super-tax payable by the assessee shall be an amount bearing to the total amount of the super-tax which would have been payable on the total income had no part of it been so exempted the same proportion as the total income less the portion so exempted bears to the total income.

(4) Where any income exempted from tax under clause (*c*) of sub-section (2) of section 14 which has been taken into account under sub-section (2) or sub-section (3) of this section as part of the total income of an assessee for the purpose of determining the income-tax or super-tax payable by him is in a subsequent year brought into or received in British India by the assessee and becomes chargeable with tax accordingly, the tax including super-tax payable by the assessee on his total income of that subsequent year shall be—

(*a*) the amount which bears to the total amount of the tax including super-tax which would have been payable on his total income as reduced by the amount of the income so brought into or received in British India had such reduced income been his total income the same proportion as his total income bears to such reduced income, or

(*b*) the amount which bears to the total amount of the tax including super-tax which would have been payable on the amount of the income so brought into or received in British India had such income been his total income the same proportion as his total income bears to the amount of the income so brought into or recieved in British India,

whichever is the greater.]

CHAPTER IV.

DEDUCTIONS AND ASSESSMENT.

Payment by deduction at source.

18. [2][* * * * *]

(2) Any person responsible for paying any income chargeable under the

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LEG. REF.

[1] Sub-S. (3) and (4) of S. 17 added by Ac XXIII of 1941.

[1] Sub-s. (1) omitted by S. 7 of Act XVIII of 1933.

NOTES.

and affection; and a transfer on the ground of natural love and affection falls under S. 16 (3) (*iii*). 20 Pat. 202=21 Pat.L.T. 1096=1941 Pat. 59 (F.B.).

Secs. 16 (3) and 26-A: APPLICATION FOR REGISTRATION — REFUSAL.—*Held*, that there was evidence in this case to justify the finding of the Income-tax authorities that the alleged partnership was not a genuine partnership, and the order refusing registration was therefore justified. Per *Beaumont, C.J.*—That the partnership deed was one prepared only to avoid "proper taxation" would not be a good ground for refusing to register. Any one is entitled so to conduct his affairs within the law as to avoid the incidence of taxation, and if a man finds that he will suffer less in taxation, and if a man finds that he will suffer less in taxation, by carrying on business in partnership with his mother rather than his wife, he is entitled to select his mother. But the partnership must be genuine partnership. *Kania, J.* If any subject could so manage his affairs as to pay the least tax which he might be liable for, he may do so provided the whole action is within the law,. I.L.R. (1941) Bom. 384=43 Bom.L.R. 258=1941 Bom. 205.

Sec. 18 (2).—*See also* notes under S. 7.] The deduction of income-tax from salaries under S. 18 at the time of the payment of the salary must be made at the rate applicable to the estimated income for the year of assessment. 83 I.C. 20=1924 R. 30. *See also* 1 R. 335.

head " Salaries " shall, at the time of payment, deduct income-tax [1][and super-tax] on the amount payable [2][at a rate representing the average of the rates applicable to the estimated total income of the assessee under this head] :

Provided that such person may, at the time of making any deduction, increase or reduce the amount to be deducted under this sub-section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct.

[3][(2*A*) Notwithstanding anything hereinbefore contained for the purpose of making the deduction under sub-section (2), there shall be included in the amount payable any income chargeable under the head " Salaries " which is payable to the assessee out of India by or [4][on behalf of the Crown], and the value in rupees of such income shall be calculated at the prescribed rate of exchange].

[5][(2*B*) Any person responsible for paying any income chargeable under the head " Salaries " to a person not resident in British India shall at the time of payment deduct income-tax at the maximum rate and also super-tax at the rate or rates applicable to the estimated income of the assessee under this head.]

(3) The person responsible for paying any income chargeable under the head " Interest on securities " shall, [6][unless otherwise prescribed in the case of any security of the [7][Central Government], at the time of payment, deduct income-tax [6][but not super-tax] on the amount of the interest payable at the maximum rate :

[8][Provided that where the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total income [5][or the total world income] of a recipient will be less than the minimum liable to income-tax or will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income [9][referred to in this sub-section or in sub-section (2*B*), as the case may be,] to such recipient shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be.

[5][(3*A*) Any person responsible for paying to a person not resident in British India any interest not being 'Interest on Securities,' or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate.]

[10][Provided that where the person so payable is a British subject as defined in section 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, and the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total world income of such person will be less than the minimum liable to income-tax or that his total income will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income referred to in this sub-section shall, until such certificate is cancelled

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LEG. REF.

[1] Substituted for " but not super-tax " by S. 20 of Act VII of 1939.

[2] Substituted for " at the rate applicable to the estimated income of the assessee under this head,", *ibid.*

[3] Added by S. 2 of Act XVI of 1925.

[4] Substituted for " on behalf of Government " by A.O., 1937.

[5] Inserted by S. 20 of Act VII of 1939.

[6] Inserted by S. 7 of Act XVIII of 1933.

[7] Substituted for " Government of India " by A.O., 1937.

[8] This proviso and sub-sections (3*A*) to (3*D*) since renumbered (3*B*) to (3*E*) were inserted by S. 7 of Act XVIII of 1933.

[9] These words, brackets, figure and letter were substituted for the words " herein referred to," by Act VII of 1939.

[10] Added by S. 6 of Act XL of 1940.

by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be :

Provided further that nothing in this sub-section shall apply to any payment made in the course of transactions in respect of which the person responsible for making the payment is deemed under the first proviso to section 43 not to be an agent of the payee.]

[1][(3*B*) Where the Income-tax Officer has reason to believe that the [2][total world income] of any person residing out of British India to whom any interest not being " Interest on Securities " [3][or any other sum chargeable under this Act] is payable, will in any year exceed the maximum amount which is not chargeable with super-tax under the law for the time being in force, he may, by order in writing require the person responsible for [4][making such payments] such person to deduct at the time of payment [5][* *] super-tax at the rates determined by the Income-tax Officer to be applicable to the [2][total world income] of such person in that year.

[1][(3*C*)] Where the person responsible for paying any interest not being " Interest on Securities " [3][or any other sum chargeable under this Act] to any person [6][makes to that person in any year payments] exceeding in the aggregate the maximum amount which is not chargeable with super-tax under the law for the time being in force, the person responsible for [4][making such payments], shall, if he has not reason to believe that the recipient is resident in British India, and no order under [7][sub-section (3*B*)] has been received in respect of such recipient, deduct at the time of payment [8][* * * *] super-tax on the amount by which [9][the total amount of such payments] exceeds the maximum amount not chargeable with super-tax at the rate applicable to such excess.

[1][(3*D*)] Where the Income-tax Officer has reason to believe that any person, who is a shareholder in a company, is resident out of British India and that the [2][total world income] of such person will in any year exceed the maximum amount which is not chargeable to super-tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super-tax at such rate as the Income-tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year.

[1][(3*E*)] If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company[10][(increased in accordance with the provisions of sub-section (2) of section 16)] exceeds the maximum amount of the total income of a person which is not chargeable to super-tax under the law for the time being in force, and the principal officer of the company has no reason to believe that the shareholder is resident in British India,and no order under [11][sub-section (3*D*)] has been received in respect of such shareholder by the principal officer from the Income-tax Officer, the principal officer shall at the time of payment deduct super-tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends [10][(increased as aforesaid)] constituted the whole total income of the shareholder.]

LEG. REF.

[1] Sub-Ss. (3*A*), (3*B*), (3*C*) and (3*D*) were respectively re-numbered (3*B*), (3*C*) (3*D*) and (3*E*) by S. 20 of Act VII of 1939.

[2] Substituted for " total income," *ibid.*

[3] Inserted by S. 20, *ibid.*

[4] Substituted for " paying such interest," *ibid.*

[5] The words " income-tax and " omitted by *ibid.*

[6] Substituted for " pays to that person in any year an amount of such interest," *ibid.*

[7] Substituted for the word, brackets, figure and letter " sub-section (3*A*) " by *ibid.*

[8] The words " income-tax on the total amount of such interest at the rate appropriate to such total, and " omitted by *ibid.*

[9] Substituted for " such total," *ibid.*

[10] Substituted by Act XXIII of 1941.

[11] Substituted for the word brackets, figures and letter " sub-section (3*C*) ", by Act VII of 1939.

(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

(5) Any deduction made in accordance with the provisions of this section [1][and any sum by which a dividend has been increased under sub-section (2) of section 16] shall be treated as a payment of income-tax [2][or super-tax] on behalf of the person from whose income the deduction was made, or of the owner of the security [1][or of the shareholder], as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act:

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund :

[3][Provided further that where such person or owner is a person whose income is included under the provisions of [4][clause (*c*) of sub-section (1) or sub-section (3) of section 16, section 44D, or section 44E] in the total income of another person [5][such other person] shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year.]

(6) All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to the credit of the [6][Central Government] or as the [7][Central Board of Revenue] directs.

(7) If any such person does not deduct [8][or after deducting fails to pay] the tax as required by [9][or under] this section, [10][he, and in the cases specified in sub-sections (3*D*) and (3*E*) the company of which he is the principal officer] shall, without prejudice to any other consequences which [10][he or it] may incur, be deemed to be [11][as assessee] in default in respect of the tax :

[12][Provided that the Income-tax Officer shall not make a direction under sub-section (1) of section 46 for the recovery of any penalty from such person unless satisfied that such person has wilfully failed to deduct and pay the tax.]

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery.

(9) Every person deducting income-tax [2][or super-tax] in accordance with the provisions of [13][sub-sections (3), (3*A*), (3*B*), (3*C*), [14][3*D* or 3*E*]], shall, [15][at the time of payment of the sum from which tax has been deducted], furnish to the person to whom [16][such payment is made] a certificate to the effect that income-tax [2][or super-tax] has been deducted, and specifying the amount so deducted, the rate at which the tax has been deducted, and such other particulars as may be prescribed.

Payment in other cases.

[17][19. In the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, and in any case where income-tax has not

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LEG. REF.

[1] Inserted by S. 20 of Act VII of 1939.

[2] Inserted by S. 7 of Act XVIII of 1933.

[3] Added by S. 3 of Act IV of 1937.

[4] These words, brackets, letters and figures were substituted for the words, brackets and figures "sub-section (3) of section 16" by S. 20 of Act VII of 1939.

[5] Substituted for "that person", by *ibid.*

[6] Substituted for "Government of India" by A.O., 1937.

[7] Substituted for "Board of Inland Revenue" by S. 4 and Sch. of Act IV of 1924.

[8] Substituted for "and pay" by S. 20 of Act VII of 1939.

[9] Inserted by S. 7 of Act XVIII of 1933.

[10] Substituted for "he" by S. 20 of Act VII 1939.

[11] Substituted for "personally" by S. 7 of Act XVIII of 1933.

[12] Added by *ibid.*

[13] Substituted for the word, brackets and figure "sub-section (3)", by *ibid.*

[14] Substituted for the word, brackets, figure and letter "or (3*D*)" by S. 20 of Act VII of 1939.

[15] Substituted for "at the time of payments of interest or dividends" by *ibid.*

[16] Substituted for "the interest is paid" by S. 2 and Sch. I of Act XII of 1935.

[17] Substituted by S. 21 of Act VII of 1939.

NOTES.

Sec. 18 (5).—*See* 41 C.W.N. 905. (Life Assurance business—Credit for deductions of tax made at sources).

been deducted in accordance with the provisions of section 18, income-tax shall be payable by the assessee direct.]

Supply of information regarding dividends.

[1][19A. The principal officer of every company shall, on or before the 15th day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and of the addresses, as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate dividends exceeding such amount as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such share holder.]

Certificate by company to shareholders receiving dividends.

20. The principal officer of every company shall, at the time of distribution of dividends, furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed, and specifying such other particulars as may be prescribed.

Supply of information regarding interest.

[2][20A. The person responsible for paying any interest not being "Interest on securities" shall, on or before the fifteenth day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and addresses of all persons to whom during the previous financial year he has paid interest or aggregate interest exceeding such amount not being less than [3][four hundred] rupees as may be prescribed in this behalf, together with the amount paid to each such person].

Annual return.

21. The prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare, and, within thirty days from the 31st day of March in each year, deliver or cause to be delivered to the Income-tax Officer in the prescribed form [4][and verified in the prescribed manner] a return in writing showing—

(*a*) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received [5][or to whom was due] during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head "Salaries" of such amount as may be prescribed;

(*b*) the amount of the income so received [5][or so due] by each such person, and the time or times at which the same was paid [6][or due, as the case may be];

(*c*) the amount deducted in respect of income-tax [5][and super-tax] from the income of each such person.

Return of income.

22. [7][(1) The Income-tax Officer shall, on or before the 1st day of May, in each year, give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish, within such period not being less than sixty days as may be specified in the notice, a return, in the pres-

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LEG. REF.

[1] Inserted by S. 2 of Act XXIV of 1926.

[2] Inserted by S. 9 of Act XVIII of 1933.

[3] Substituted for "one thousand" by S. 22 of Act VII of 1939.

[4] These words were inserted by S. 23, *ibid.*

[5] Inserted by S. 23 by Act VII of 1939.

[6] Added by *ibid.*

[7] Substituted by S. 24 of Act VII of 1939.

NOTES.

Sec. 20: CERTIFICATES—VALIDITY FOR PURPOSES OF REFUND.—Certificates under S. 20 signed by the principal officer in the United Kingdom of such companies can be regarded as valid certificates for the purposes of S. 48 (1) of the Act and refund granted on their production. 55 B. 734=33 Bom.L.R. 776=1931 B. 420.

Sec. 22 (1): FOREIGN INSURANCE COMPANY—FAILURE TO MAKE RETURN—PROCEcribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year :

Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons.]

(2) In the case of any person [1][* * * *] whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer [2][may serve] a notice upon him requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income [3][and total world income] during the previous year :

[4][Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return.]

LEG. REF.

[1] Words "other than a company" omitted by S. 24 of Act VII of 1939.

[2] Substituted for "shall serve," by *ibid.*

[3] Inserted by *ibid.*

[4] Added by *ibid.*

NOTES.

DURE.—Where an Insurance Company (not incorporated in British India) has failed to make a return of the total income under S. 22 (1), the Income-tax Officer is justified in applying R. 35 of the Income-tax Rules made under S. 59 of the Act. To apply that rule, he has first of all to find out what is the total income, profits or gains of the assessee company. Where for the purpose the officer had no other reliable data except a triennial valuation, he is entitled to assume that the profits for the year in question could be the average annual profits shown in the triennial valuation after deducting the premiums paid on participating policies. 55 B. 637=33 Bom.L.R. 807=1931 B. 448. Besides owning a firm at Benares the two partners had an interest in numerous firms bearing the same name and carrying on business at different parts of the country. In the year of account it was found that the firm made no profits but the firms in which the partners were interested made considerable profits. The question having been raised whether the firm could be assessed in respect of those profits, *held,* that the partners were members of the other firms only in their individual capacity, the firm itself being incapable of being a partner and that the assessment of the firm with reference to the profits of the other firm did not arise. 1932 A.L.J. 999. *See also* 62 C. 133=39 C.W.N. 253. The assessee is entitled to have two 'previous years', one for the head office and one for the branches, but in his assessment he must add the results of the two, each year, and make his return on this basis. He cannot accumulate the results of two years of the branches and account for them in one year's results of the main office. 1937 L. 308.

Sec. 22 (2).—[*See also* notes under S. 23.] Where an assessee received a notice from the Income-tax Officer under S. 22 (2) requiring him to make a return in the prescribed form and verified in the prescribed manner, setting forth his total income during the previous year, and the assessee does neither fill the form, nor verify such form in the prescribed manner but instead writes a letter intimating his non-liability to be taxed under the Act, it must be taken that he has failed to make a return under S. 22 (2) within the meaning of S. 23 (4). 133 I.C. 753=1931 P. 306 (F.B.). Where an assessee failed to make a return of his income under S. 22 (2) of the Act and some time later died, an assessment on his estate made by the Income-tax Officer under S. 23 (4) "to the best of his judgment" is illegal. 55 B. 312=33 Bom.L.R. 388=1931 B. 333. The Income-tax Officer issued by means of registered post acknowledgment due a notice under S. 22 (2). The notice was delivered by the postal peon to the assessee's son who was found to be a minor and possessed of ordinary intelligence. The son was living with his father and when on previous occasions notices had to be served on the assessee they were taken delivery by his son. *Held,* that in proper circumstances a minor son might be an agent of his father and that the service of the notice was good service. 54 A. 548=1932 A. 374. A notice under S. 22 (2) was issued to the assessee who was an undivided Hindu family and in that notice, as in all such notices, the assessee was required to submit a return and four capacities were indicated one above the other and the notice went to the assessee without any one of these capacities having been scored out. The assessee was in no doubt as to which capacity of his was under investigation. He had been assessed in previous years as an undivided Hindu family and he submitted his return as an undivided undivided Hindu family, and without scoring out any of the four capacities. *Held,* that the notice issued by the department could not be said to be invalid or

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may

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NOTES.

illegal. 1940 A.L.J. 843=I.L.R. (1940) All. 841=1940 All. 537. Where the Income-tax Officer issues a notice in case which is beyond his jurisdiction, the amount being over Rs. 40,000, and in which, as per Government notification, the notice is to be issued by the Assistant Commissioner, such notice is illegal and the return does not become due in consequence thereof. 139 I.C. 290=1932 N. 65. Where an assessee in a verified return declared he had no income from a particular source, if the authorities disbelieve it, the onus lies on them to prove there was income from that source and what it was. 50 C. 907=1924 C. 337. The service of notice under the Act need not be personal. It can be made on the authorised or recognised agent of the assessee. In the case of a recognised agent carrying on business in the name of the principal, an authority to accept notices being incidental to the business can be implied. 10 P. 441=1931 P. 282. Where an assessee's return is made before assessment, it is a return made in due time under S. 22 (3) and before such a return can be disregarded, the assessee is entitled to a reasonable opportunity to produce any evidence upon which he might rely in support of the return. 134 I.C. 1275=1931 C. 729 (S.B.). A return which by S. 22 (3) is to be deemed to be a return made in due time cannot be treated as still born because of a previous failure to comply with a notice under S. 22 (4). 1931 C. 729 (S.B.). Where the question was whether the assessee was prevented by sufficient cause from making the return required by S. 22, *held*, that the question was one of mixed law and fact and that the question of law should be answered only on the facts as determined by the Commissioner. 1930 A.L.J. 78=1930 A. 209.

FIRM—LIABILITY TO ASSESSMENT—OBJECT OF ENACTMENT.—The object of the Income-tax Act in treating the firm in addition to the individual partners as itself a subject liable to assessment is not to differentiate in respect of the ultimate liability to tax, between the partners in a firm and the sole owner of a business or assessee. The method of double assessment is employed in the case of firms as a device in the nature of taxation at the source which is employed to collect upon salaries and interest on securities. The object of the double assessment to tax in the case of partners and their firm is not to get it often but to get it early and to make sure of getting it. 58 C. 1204=35 C.W.N. 534=1931 C. 686 (S.B.).

Secs. 22 (2) and (3).—A return furnished after the assessment order is made but before the service of the demand notice is not a valid return. 38 P.L.R. 848=1936 L. 468.

Sec. 22 (2) and (4).—*See* 9 P.L.T. 653=1928 P. 529 (F.B.). Under S. 22 (2) of the Act the Income-tax Officer is bound to give the proposed assessee at least 30 days' time within which to file a return. Where the minimum is denied, the notice is entirely illegal. The fact that subsequently a further extension of time is granted will not cure the defect that initially lay in the notice issued. 1930 A.L.J. 78=1930 A. 209. *See also* 1935 Lah. 201. Officer of an asessee's principal place of business has jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business, even though he has submitted a return, produced accounts, and otherwise complied with all the requirements of the law before the Income-tax Officer of the place where he has such a branch business. 1930 A.L.J. 1=1930 A. 49 (F.B.). Where a person is carrying on business at different places, it is not incumbent on the Income-tax Officer of the principal place of business where an assessee is assessed to income-tax, to issue separate notices under S. 22 (2) requiring returns in respect of the income of each oranch of the assessee's branches. 1930 A. 49 (F. B.). The Income-tax Officer is entitled to require the assessee to produce the books of his foreign business. Where an Income-tax Officer calls upon an assessee to produce account books which ordinarily would be in his possession and control, the assessee has got to show that he is incapable of producing them. If they would not ordinarily be in his possession and control, the onus would then lie on the Officer to show the assessee could produce them but has failed to do so. 1930 M. 763=59 M.L.J. 220 (F.B.). The assessee was called upon by a notice under S. 22 (2) to submit a return which he did but the return did not bear such verification as is required by the Income-tax Act nor did it bear the signature of the assessee. Subsequently the Income-tax Officer issued another notice under S. 22 (4) directing the assessee to produce his accounts. He did not produce the accounts and the Income-tax Officer made an assessment to the best of his judgment under S. 23 (4). *Held*, that no questions of law could possibly arise on the findings of fact arrived at by the Income-tax Officer: 1934 A. 929. Where the return under S. 22 (2) did not bear verification or the signature of the assessee: *Held*, that there was no proper return and the Income-tax Officer could impose best judgment assessment under S. 23 (4). 56 A. 418=1934 A.L.J. 47=1934 A. 930.

furnish a return or a revised return, as the case may be, at any time before the assessment is made. [1][* * * * * *]

(4) The Income-tax Officer may serve [3* * * *] on any person [2][who has made a return under sub-section (1) or] upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require :

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

LEG. REF.

[1] The words "any and return so made shall be deemed to be a return made in due time under this sectoin" omitted, by Sec. 24 of Act VII of 1939.

[2] The words "on the principal officer of any company or" omitted *kibid.*

[3] These words were inserted. *ibid.*

NOTES.

Sec. 22 (3): SCOPE AND APPLICABILITY.—S. 22 (3) is intended to enable a person who has made a return, to correct a wrong statement or supply an omission discovered in the return subsequent to its submission. It does not apply to a person who has made a false return knowing it to be false. 1939 I.T.R. 613=1939 N.L.J. 553.

Sec. 22 (3).—"Return"—What amounts to. 1929 Cr. C. 647=1929 A. 919. *See also* 155 I.C. 180=1935 O. 305; 1940 Nag. 88=188 I.C. 69; 1928 L. 729=120 I.C. 435. There is nothing in Cl. (3) which says that any offence committed with respect to a return made under Cl. (2) must be condoned if the revised return be true. All that Cl. (3) provides is that this return would be treated as a return made in due time, provided it is made before an assessment has been made. 1929 A. 919. Although an assessee is late in filing his return nevertheless, if he does file it before the assessment is actually made the return has to be considered and dealt with although out of time. 139 I.C. 593=1932 C. 410 (S.B.). Duty of Income-tax Officer—Right to make private visit to assessee's place of business and act upon the result—Right of assessee to be heard in answer. 158 I.C. 959=16 P. L.T. 429=1935 P. 423 (S.B.).

INCOME-TAX RULES, R. 35—PROCEDURE UNDER—WHEN PERMISSIBLE.—Where the assessee is unable to provide particulars on which assessment can be made and if the commissioners has no more reliable data, he can resort to S. 35, even though the data are not procurable for no fault of the assessee. 57 B. 519=35 Bom.L.R. 896=1933 B. 427.

Sec. 22 (4) is very wide and gives the Income-tax Officer very wide powers. 101 I.C. 321=1927 L. 5. An Income-tax Officer is entitled to call for documents which in his opinion would furnish him with relevant material for assessment of tax. The word "require" in S. 22 (4) really means require as a piece of relevant evidence. It does not mean that he should ask for documents which he does not think to be relevant at all. Where the Income-tax Officer directed an assessee to produce his account books in order to make an assessment for the year 1929 to 1930 and the assessee produced some books but not those of the year 1925 to 1926. *Held,* that the book for the year 1925 to 1926, was not "required" within the meaning of S. 22 (4). 53 A. 451=1931 A.L.J. 345=1931 A. 417. *See also* 167 I.C. 793=1937 P.C. 133 (P.C.). The contention that the Income-tax Officer cannot issue a notice under S. 22 (4) after the assessee submits his return, that it is only after the assessee has been called upon to furnish a return and before he was actually furnished a return that the Income-tax Officer can issue a notice under S. 22 (4) is not sound, for it is open to an Income-tax Officer to issue a notice under S. 22 (4) at any time after he has called upon the assessee to furnish a return. 1933 A. 541. *See also* 1934 N. 183. There is no provision in the Act by which Income-tax Officer can enforce production of account books if assessee firm declines to comply with the notice. 7 L. 104=1926 L. 326. It is clear that S. 22 (4) relates only to accounts and documents which are in the possession or under the control of the person making the return. The legislature could not have intended to impose a penalty on a person for non-production of dcuments which he does not control. *Kania, J.*—There is no justification in law to call upon one friend to produce the books of another under S. 22 (4) and then in default to make the party called upon liable under S. 23 (4). 40 Bom.L.R. 1222. S. 22 (4), Income-tax Act, no doubt standing by itself is uncontrolled by any time-limit. But a time-limit is imposed by the four words "having made a return", as used in S. 23 (4). 1930 A.L.J. 1=1930 A. 49 (F.B.). Accounts or documents can be called for by the Income-tax Officer under S. 22 (4) after issue of notice and before the filing of the return. After the

[1][(5) The prescribed form of the returns referred to in sub-sections (1) and (2), shall, in the case of an assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal place wherein he carries on the business, profession or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof.]

Assessment.

23. (1) If the Income-tax Officer is satisfied [2][without requiring the presence of the assessee or the production by him of any evidence] that a return made under section 22 is correct and complete he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

LEG. REF.

[1] This sub-section wos added by sec. 24 of Act VII of 1939.

[2] Thesa words were inserted by sec. 25. *ibid*

NOTES.

filing of the return, Ss. 23 (2), 23 (3) and 37 give ample powers to the Income-tax Officer to call for whatever documents he requires. The failure to comply with any of the notices under these sections does not authorise the Income-tax Officer to make a summary assessment to the best of his judgment under Cl. (4) of S. 23. 8 P. L.T. 686=1927 P. 390. *See contra* 7 R. 26=1929 R. 38 (F.B.); 8 R. 587; 52 M. 194=1929 M. 60=56 M.L.J. 141 (F.B.). Where an assessment of super-tax has been completed as if the assessee were a Hindu undivided family and it is subsequently held that the assessee is an individual, if the original assessment was in the absence of a return made under S. 23 (4) and the assessee in answer to a notice under Ss. 22 (4) and 34 files a return disclosing a lesser income than that taken in the original assessment the Income-tax Officer can reopen the assessment and determine the assessee's income *de novo*. 1931 A.L.J. 1109=1932 A. 83. A notice under S. 22 (4) for producing the account books of the assessee by him, issued after he has submitted a return of his income, is valid. 1932 C. 411=139 I.C. 599 (S.B.).

PROCEDURE.—Per *Curiam*.—"It is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires an opinion. He may then if he likes give his own opinion on the case. 1927 P. 390. The combined notice under Ss. 22 (4) and 23 (2) is not illegal. 1934 N. 183. The issue of a notice under Ss. 22 (4) and 23 (2) presupposes the existence of a valid return having been made. 1934 N. 183.

Secs. 22 (4) and 23 (4): CALLING OF EVIDENCE FOR INQUIRY—POWER OF INCOME-TAX OFFICER.—It is the requirement of the Income-tax Officer which is to be satisfied by the assessee under sub-S. (4) of S. 22 and not what the assessee thinks the Income-tax Officer should, in the circumstances of the case have required. In other words the final arbiter of what is required is the Income-tax Officer and not the assessee. It would therefore be entirely for the Income-tax authorities to determine what evidence they consider relevant for the purposes of their enquiry and to contend that a certain piece of evidence which they considered to be relevant was not relevant at all to the matter at issue would be in a way to encroach upon their domain. Similarly, if an Income-tax Officer calls for all the previous accounts relating to the various businesses conducted by the assessee, but the assessee withholds some of them and the Income-tax Officer utilizes the accounts produced by the assessee in making his estimate, it cannot be argued that those accounts which were not produced by the assessee were not required for the purpose of the assessment. The withholding of some of the account books which the assessee had been called upon to produce amounts therefore to a non-compliance with the terms of the notice issued under sub-S. (4) of S. 22 and entails all the penalties laid down in sub-S. (4) of S. 23. (53 A. 451, Dist.; 52 M. 194 (F. B.), Rel. on.) I.L.R. 1938 Lah. 551= 1938 Lah. 551. *See also* 1938 Rang. 287.

Secs. 22 and 25-A: QUAERE.—Whether, where notices have been issued to the individual members of the family as such, it is open to the Income-tax Officer without issuing a new notice to the Hindu joint family through its manager or any adult member of the family to charge the income received by the individuals as income of the joint Hindu family. *See* 1937 Lah. 897=5 I.T.R. 548.

Secs. 22 and 63 (2).—If the Income-tax Officer comes to the conclusion that separate individual to whom he had issued notice was really a member of a Hindu joint family, a fresh notice may be issued to Hindu joint family through the person whom he considers to be its manager or through any other adult member of the family as provided in S. 63 (2). 1937 Lah. 897.

Sec. 23 (1).—[*See also* Notes under S. 13 *supra*] S. 23 deals with matters of *assessment* and not with *'computation* of the

(2) If the Income-tax Officer [1][is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 22 is correct and complete, he shall serve on such person], a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

LEG. REF.

[1] Substituted for the original words by S. 25 of Act VII of 1939.

NOTES.

income, profits and gains for the purposes of Ss. 10, 11 and 12'. It deals with *'return'* and not primarily with accounts. If the return is 'correct and complete' then the income-tax officer has to 'assess the total income of the assessee' and determine the sum payable by him 'on the basis of such return'. He is bound to do this and he has no option to do anything else. 1938 N. L.J. 172=1938 Nag. 485. When once the Income-tax Officer has made the assessment under S. 23 (1), that assessment is settled. On the general principles of law governing estoppels, neither the subject nor the Crown ought to be at liberty to go behind the amount of profits and gains when once determined by any competent authority. The assessment once made according to the provisions of the Income-tax Act can only be re-opened in accordance with the provisions of the Act. 177 I.C. 255=1938 Cal. 557 (S.B.). *See also* 1937 Lah. 721. Ordinarily and apart from the two cases coming within the purview of S. 34 of the Income-tax Act, 1922, *viz.*, (1) where income has escaped assessment in any year, and (2) where income has been assessed at too low a rate in any year, there is no time-limit prescribed or necessarily implied, in the Act within which an assessment must be made or completed, and an assessment made after the expiry of the tax year is valid. *Semble.* Even in the two cases to which S. 34 applies, if a notice is served within one year after the expiry of the tax year, the subsequent assessment or re-assessment may be made at any time and not necessarily within the year following the tax year. 61 I.A. 10=61 C. 285=38 C.W.N. 319=66 M.L.J. 121 (P.C.). The mere fact that a certain income has not suffered tax because of a device adopted by the assessee would not enable the department to assess the same in subsequent years when the device becomes apparent to the department. It is only, when according to a particular system adopted by the assessee, allocations are made not in the year when the amount is received but in later years that the income so allocated can be said to be the income liable to be considered in the assessment year. 163 I.C. 324=1936 A. L.J. 549=1936 A. 279. Notice under S. 22 served in proper time and assessment made—Assessment subsequently set aside by High Court—Fresh assessment in accordance with High Court order, but more than one year after the expiry of the tax year, not barred by limitation. 1936 A. 279. In order to be valid, a demand for super-tax should be made within a reasonable time of the assessment for income-tax. Two years and four months or thereabouts is a wholly unreasonable time. 1934 S. 46=28 S.L.R. 174.

Sec. 23 (2): Notice.—Where a notice under S. 23 (2) was issued to the assessee when the original return was filed a fresh notice under S. 23 (2) is not essential after the assessee had submitted an application to the Income-tax Officer mentioning certain omissions. I.L.R. (1940) All. 841=1940 A.L.J. 843=1940 All. 537. When an assessee has made a return which he knows is a *bona fide* return and in which he has put in his total income to the best of his then information, there might yet be some omission on his part due to some cause or other. To such and similar cases S. 23 (2) would apply but not to a case of deliberate omission to furnish particulars available with the assessee. 1933 A.L.J. 49=1933 A. 197. When an Income-tax Officer is not satisfied with a return made under S. 22, he has under S. 23 (2) to serve on the assessee a notice to produce evidence on a specified date. 29 C.W.N. 591=88 I.C. 404. The issue of a notice under S. 23 (2) is mandatory under certain circumstances. When the Income-tax Officer has reason to believe that the return filed by the assessee is incorrect or incomplete, and if he is not satisfied with the correctness of the assessee's return, the law requires that he shall serve a notice under S. 23 (2) which then becomes imperative. The Income-tax Officer cannot proceed to make the best judgment assessment on the ground that there has been failure to comply with notice under S. 22 (4) because if a valid notice under S. 23 (4) is issued, the assessee might remove suspicious of the officer and satify him that his return is correct and complete. I.L.R. (1937) All. 834=1937 A. L. J. 957=1937 All. 770. Under S. 23 (2), there are three alternatives provided, and it is the privilege of the assessee to choose any of those alternatives. They are for the benefit of the assessee who has to choose as to which of the options he will exercise. The law did not intend to give that option to the Income-tax Department, and it is not for the Income-tax Officer to decide which of the alternatives he will give to the assessee. If for example he requires only the attendance of the assessee, the latter would lose the valuable right of producing the evidence in sup-

NOTES.

port of the return and removing the doubts of the officer. Therefore if the Income-tax Officer in sending a notice under S. 23 (2) scores out the words "or to produce, or to cause to be there produced any evidence on which such person may rely in support of the return" from the printed notice containing all the three alternatives, the notice is irregular and illegal. I. L. R. (1937) All. 834=1937 A.L.J. 957=1937 All. 770. Reasonable notice should be given to the assessee before proceeding under Cl. (4). Whether a given time is reasonable time is a question of fact. 134 I.C. 1275=1931 C. 729 (S.B.). As to meaning of "return", *see* 1928 L. 729; 120 I.C. 435. Where an assessee applies for adjournment by post or by telegram of an enquiry in respect of which he has been required by a notice under S. 23 (2) of the Indian Income-tax Act to produce evidence and the Income-tax Officer grants an adjournment, the letter or the telegram intimating the fact of the adjournment to the assessee is not a notice under S. 23 (2), or a requisition within the meaning of S. 63 of the Act. 1930 M. 113 =58 M.L.J. 10 (F.B.).

Sec. 23 (2) (4): PROCEDURE.—Proceedings of Income-tax Officer are of a judicial nature and he must proceed on judicial principles. 7 L. 201=1926 L. 161; 94 I.C. 156 =1926 L. 233. Where the assessees were never given an opportunity to contest and disprove the allegation that they were members of a joint Hindu family and were liable to be taxed jointly. *Held*, that the procedure was wrong and the assessment was invalid. 52 A. 991=1930 A.L.J. 1548= 1931 A. 23. The plea that certain shares have been divided between the members of a joint Hindu family must be raised at the time of making an assessment under S. 23 and it cannot be raised for the first time on appeal against the assessment. 56 A. 504 =1934 A. 217. Value to be attached to account books produced by assessee. 7 L. 201. Proceedings under Ch. IV of the Act (Assessment Proceedings) are judicial proceedings in the colloquial sense only and are not judicial proceedings in the strictly scientific sense of the term, so as to raise questions in appeal to some higher tribunal as to whether the authority making the assessment has decided against the weight of evidence, or decided a fact of which there is no evidence or has disregarded evidence which ought to have been taken into account. 3 I.T.C. 48. Where the Income-tax Officer found that some of the books of the assessees were not clear as regards the income derived by the owners thereof and assessed the income at a certain figure without stating what was the basis of his computation. *Held*, that the assessment was illegal. 52 A. 991=1933 A.L.J. 1548=1931 A. 23. *See also* 1930 L. 605; 7 R. 669; 8 R. 203. Although in a previous year of assessment, a decision is arrived at after investigation and inquiry that certain deductions ought to be made, it is still open to the Income-tax authorities to reopen the question in a subsequent year of assessment, if fresh facts come to light which on investigation entitle the Income-tax Officer to come to a different conclusion from that of his predecessors. The Income-tax Officers are to be guided by principles of natural justice and cannot arbitrarily change the assessment. 1930 L. 605. *See also* 1930 M. 209=58 M.L.J. 260 (F.B.); 1933 O. 396. The order of an Income-tax Officer in a particular year allowing the salaries of two of the partners as business deductions does not bind his successors in a subsequent year. 134 I.C. 198=1931 L. 341. In an ordinary case, particulars in respect of which and the ground on which the Income-tax Officer thinks that the statement was either not genuine or complete ought to be given in a notice, especially in cases where the objection is that the accounts are incomplete. But where the finding is that the accounts of the assessee in previous years as well as in the current year were not genuine but merely cooked for income-tax purposes, the Income-tax Officer is under no obligation either in law or in common fairness to set out all the reasons which led him to come to such a conclusion. 7 R. 281=1929 R. 102. 'Evidence'- If confined to direct evidence—Omission of transactions from account books—Rejection of such books by Income-tax Officer—If justified. 40 P.L.R. 585=1938 Lah. 209. (*See also* 60 I.A. 146=12 Pat. 318 P.C.). Where the Income-tax Officer makes an assessment to the best of his judgment under S. 23 (4) of the Act he must do so according to rules of reason and justce and state in his order the materials or reasons on which his judgment is founded. 7 R. 669. *See also* 8 R. 203. Per *Sulaiman, C.J.*—In a proceeding under S. 23 (3) there can be no objection in the Income-tax Officer or the Assistant Commissioner acting upon the assessment for the previous year if no better evidence is forthcoming, even though that assessment might have been made to the best of his judgment under S. 23 (4). The fact that during the previous year the income was assessed on a certain figure is certainly some evidence on which he can proceed, even independently of any presumption of continuity. If the assessee fails to produce satisfactory evidence, he fails to displace the previous year's estimate, which is certainly admissible against him. 58 A. 200=1936 A. 286 (S. B.). In every case before an *ex parte* assessment is made under S. 23 (4), the Income-tax Officer must invariably conduct such "local" inquiry to ascertain the income of the proposed assessee for the "previous year" as the circumstances of the case may warrant and he must place on the record "a note of the details and results of his inquiry" in order that the Commissioner of Income-tax under S. 33

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

NOTES.

or the High Court under S. 66 (2) or (3) may be in a position to see that the assessment "was according to the rules of reason and justice and not arbitrary". [1931 R. 194, Diss. From; 1931 L. 87 (F.B.), Foll.] 1934 N. 183 (2). Per *Sulaiman, C.J.*—Enquiries made by the Income-tax Officer from the people of the district, after proceedings under S. 23 (3) had started, of which no notice had been given to the assessee, are illegal, and not authorised by sub-S. (3). Similarly enquiries made by the Assistant Commissioner during the hearing of the appeal behind the back of the assessee are not justified by the provisions of sub-S. (3) and the result of such private enquiries should not be made the basis of any assessment. 58 A. 200=1936 A. 286 (S. B.).

Secs. 22 (4) and 23 (2) and (4): SERVICE OF NOTICE.—*See also* 31 L.W. 160=1930 M. 127. Notice may be served under S. 23 (2) on any member of the firm as provided for in S. 63 (2) of the Act. It is not necessary that notice should be served only on the member of the firm who made the return. 48 M. 602=49 M.L.J. 124. (*See also* notes under S. 63, *infra.*) 8 P. 877=1930 P. 127. Where the Income-tax Officer issued a combined notice under Ss. 22 (4) and 23 (2), requiring the assessee to produce the accounts and the notice was served on the *gumasta* of the assessee, *held,* there was sufficient compliance with the law as to notice. The word "person" clearly includes a firm as provided by the General Clauses Act, 1897, and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorised by S. 63 (2) will be a proper service. 48 M. 602=49 M.L.J. 124. A combined notice was served upon the assessee under S. 22 (4) to produce accounts and under S. 23 (2) either to attend or to produce or cause to be produced any evidence in support of his return. A certain date was fixed. The assessee obtained an adjournment until a certain date. On the adjourned date the assessee applied for further adjournment on ground of illness. The Income-tax Officer refused the application and proceeded *ex parte* under S. 23 (4) to make the assessment to the best of his judgment. *Held,* that the officer was not bound to announce before hand how he proposed to deal with an application for an adjournment. The assessee had already obtained one adjournment until a certain date. It was his duty, if he desired a further adjournment, to apply on a date earlier than the adjourned date. The assessee in fact delayed his application for further adjournment until the very day appointed for compliance with the orders. Even if this could be said to be a case of exercising a judicial discretion there was no ground for suggesting that it was wrongly exercised. (31 N.L.R. 32, Rev.) 41 C.W.N. 719=1937 P.C. 133=(1937) 2 M.L.J. 43 (P.C.).

Sec. 23 (3) and (4).—*See .also* Notes under S. 13 *supra*). Under S. 23 (3) of the Income-tax Act, if the account books of the assessee are found to be unrealiable and are rejected, and the assessee fails to produce evidence on which the Income-tax Officer can make a proper assessment of the assessee's income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession. He can call witnesses and make his own inquiries, and when he has material on which he can assess he must consider it and make an assessment to the best of his judgment. The only difference between such an assessment under S. 23 (3) and an assessment under S. 23 (4) is that the Act contemplates a more summary method when the Income-tax Officer is acting under S. 23 (4). I.L.R. (1939) Mad. 404=1939 Mad. 371=(1939) 1 M.L.J. 45. In making an assessment under S. 23 (3), there is nothing in the Act which requirees the Income-tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order but natural justice requires that he **should draw the assessee's** attention to any such material and give him a reasonable opportunity to meet the case arising therefrom before making his order. Further an order under S. 23 (3) is appealable, and hence it should contain with sufficient precision the materials on which the assessment is based so that the appellate authority may form a just opinion on the fairness of the assessment. The assessee is, however, not entitled to demand copies of the confidential statements in the possession of the Income-tax Officer or to demand that his informants should be called by the Income-tax Officer, so that they may be cross-examined by the assessee, and the Income-tax Officer is not a Court in the usual meaning of the term, when he is holding an inquiry under S. 23 (3). Under S. 37, he has merely certain powers of a Civil Court for the purposes of Ch. IV. S. 23 (3) is not exhaustive, and there is implicit in the section in its context, the power to collect and act on other "evidence" in a wide sense of the term; it is not necessary to invoke the proviso to S. 13 of the

(4) [1][If any person fails to make the return required by any notice given under sub-section (2) of section 22 and has not made a return or a revised return under sub-section (3) of the same section] or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment [2][and determine the sum payable by the assessee on the basis of such assessment] [3][and, [4][in the case of a firm, may refuse to register it or may cancel its registration if it is already registered]] :

LEG. REF.

[1] Substituted for the original wards by sec. 25 of Act VII of 1939.

[2] These words were inserted, *ibid.*

[3] Original words were added by S. 3 of Act XXI of 1930.

[4] Substituted for the words " in the case of a registered firm, may cancel its registration " by S. 25 of Act VII of 1939.

NOTES.

Act for that purpose for that section and the proviso thereto relate to the method of accounting and that alone, though the word "method" has to be given a broad and reasonable construction, 1940 Sind 92; I.L.R. (1939) Mad. 404=1939 Mad. 371=(1939) 1 M.L.J. 451. Where the account books of the assessee were rejected by the Income-tax Officer and he proceeded to assess him at a flat rate to which method of assessment, the assessee objected throughout the proceedings. *Held*, the case was a proper one for reference under S. 66 of the Act. 39 P.L.R. 563=1937 Lah. 397. Even after the issue of a notice, which is contemplated by S. 23 (3) an assessment can be made under S. 23 (4) if there has been a default in complying with a notice under S. 22 (4) or S. 23 (2) and it is not necessary that the assessment must be made under S. 23 (3) of the Act. 1940 A.L.J. 843=I.L.R. (1940) All. 841=1940 All. 537. Pursuant to a notice under S. 22 (4), the assessee produced his accounts to which no exception was taken. But the books included a suspense account in which entries were made purporting to relate to certain sums deposited and withdrawn by various persons not, however, described specifically. The assessee was unable to identify those persons and the Income-tax Officer, not being satisfied with the entries and the exulanation, refused to accept the return and made an estimated assessment under S. 23 (4). *Held*, that from the mere inability of the assessee to identify the depositors, it did not follow that the whole accounts were either false or incomplete. If the officer had been of opinion that the transactions in suspense accounts were not temporary deposits but loan transactions resulting in profits to the assessees, he might have included such profits under S. 23 (3) in the assessment made by him. But there were no materials to justify the Income-tax Officer in disregarding the return *in toto* and making the assessment under S. 23 (4). 10 R. 92=1932 R. 52 (S.B.). *See also* 39 P.L.R. 1028=1937 Lah. 721.

"TOTAL INCOME".—Income derived from the dividend paid by a company registereed in England but doing business in India cannot be reckoned as part of his total income where the assessee is not resident in India and the item has already paid income-tax when in the hands of the company. 55 B. 734=33 Bom.L.R. 776=1931 B. 420.

Sec. 23 (4).—Even if the power to determine the tax payable by the tax-payer be not given expressly by the directions to "make the assessment", such power is plainly implied, reading the section as a whole. 65 I.A. 236=I.L.R. 1938 Bom. 487 =42 C.W.N. 873=1938 P.C. 175=(1938) 2 M.L.J. 115 (P.C.). The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, vindictively or capriciously because be must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess work in the matter it must be honest guess work. In that sense too, the assessment must be to some extent arbitrary. S. 23 (4) places the officer in the position of a person whose decision as to amount is final and subject to no appeal, but where decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by S. 33. There is no justification in the language of the Act for holding that an assessment made by an officer under S. 23 (4) without conducting a local inquiry and without recording the details and results of that inquiry, cannot have been made to the best of his judgment within the meaning of the section. [1931 R. 194 (F.B.), Appr.; 1937 P.C. 133=(1937) 2 M. L.J. 43 (P.C.). *See also* 1938 Lah. 867. There is no foundation for the suggestion that because an earlier Income-tax Officer was disposed to fasten on one parti-

NOTES.

cular default and said that he might possibly accept the explanation given in regard to others, it means that when a recommencement of the whole proceedings, has been directed the subsequent revenue officers are to bind themselves to the obvious facts when the case is taken up again. 177 I.C. 125=1938 Rang. 287. Where the assessee makes a return in the prescribed form but under head five shows the profits or income as ::about Rs. " and none of the details required under note five are given. Income-tax authorities can treat the return as no return at all and can ultimately make the assessment under S. 23 (5), particolarly when the assessee does not declare the period to which the income declared relates. [1928 R. 108 (F.B.) Foll.] 159 I.C. 646=1935 L. 858. The word "assessment'' in S. 23 (4) means determining the total taxable income and the sum payable on it. A notice can be validly issued under S. 29 when the Income-tax Officer has made a best judgment assessment under S. 23 (4). 56 A. 418=1934 A.L.J. 47=3 A.W.R. 290 =1934 A. 930. An assessment in default is a very serious thing; and unless it is open to the Court to insist that notices under Ss. 23 (2) and 22 (4) are given so as to afford reasonable opportunity to an assessee to comply with their requirements, the honest and diligent tax-payer will have no security for fair treatment and no remedy in the absence of fair treatment. Where a notice is received at 3 P.M. on 18th of a month requiring the assessee to produce any evidence on which he might rely in support of his return on the 19th, the notice is not such a reasonable notice as law requires affording the assessee proper opportunity to comply with its return. 134 I.C. 1275=1931 C. 729 (S.B.). Before the Income-tax Officer can obtain jurisdiction to assess summarily under S. 23 (4), it is not necessary that there must be a failure in each of the cases mentioned in S. 23 (4). 133 I.C. 753=1931 P. 306 (F.B.). Where an assessee received a notice from the Income-tax Officer under S. 22 requiring him to make a return in the prescribed form and verified in the prescribed manner setting forth his total income during the previous year and the assessee does neither fill the form, nor verify such form in the prescribed manner but instead writes a letter intimating his non-liability to be taxed under the Act, it must be taken that he has failed to make a return under S. 22 (2) within the meaning of S. 23 (4). 133 I.C. 753=1931 P. 306 (F.B.). Where the return under S. 22 (2) did not bear verification or the signature of the assessee, there is no proper return and the Income-tax Officer could impose best judgment assessmeent under S. 23 (4). 56 A. 418=1934 A.L.J. 47=1934 A. 930. A partial default in complying with notices issued under S. 22 (4) or S. 23 (2) involves the same consequences under S. 23 (4) of the Act as a total default. 38 P. L.R. 812=1936 L. 489. Where the Income-tax Officer comes to the conclusion that the assessee has been withholding books of account which are not produced in accordance with a notice under S. 22 (4), he is entitled to make an assessment to the best of his judgment under S. 23 (4). More so when other documents have been withheld by the assessee and there has been deliberate misrepresentation on his part to the Income-tax Authorities. 1936 L. 750. *See also* 1938 Lah. 551=40 P.L.R. 52I. A return which deliberately failed to comply with the rule contained in S. 22 (2) that the return was to be of the total income of the assessee is no return at all within the meaning of S. 22 (2). So where an assessee who had four branches sent in a return which did not mention two of them and the omission was not corrected in spite of time granted for it, the Income-tax Officer is entitled to make an assessment to the best of his judgment under S. 23 (4). 1933 A.L.J. 49=1933 A. 197. Assessee attending Income-tax Office with his evidence in obedience to notice issued under S. 23 (2)—Income-tax Officer not accepting the evidence as conclusive does not bring that case under sub-S. (4). The assessees were asked by the Income-tax Officer by notice under S. 22 (4) to produce their books of account on the date fixed in the notice. They entered appearance but produced no account books. An adjournment was given to enable the parties to produce the evidence in their possession. On the date fixed for hearing, on the officer requesting them to produce the evidence, the parties turned round saying that they had no evidence. They did not make any affidavit in support of their statement, not did they try to convince the officer in any other way of the truth of their statement. *Heldl*, that there was no compliance with all the terms of the notice and that the assessment under that provision of law was valid. 9 P. 172=1930 P. 14. Notice under S. 22 (2) read with S. 34 to partner of firm. The assessee stating that he was only the sleeping partner of the firm and that he knew nothing of its income or profits, the Income-tax Office can make assessment under S. 23 (4). 1933 L. 290 (1928 L. 429, Foll.) The mere fact of the denial of the existence of the account book did not absolve the assessee if it is found upon the evidence that the books were really in existence, and that the assessment under S. 23 (4) is consequently valid. 8 P. 877. Even when assessee denies the existence of accounts or documents, the Income-tax Office can presume the existence of such accounts or documents. 1930 A.L.J. 1=1930 A. 49 (F.B.). If an assessee has

NOTES.

books and does not produce them he can be assessed in default under S. 23 (4), whatever other evidence he might choose to put forward in support of his return. Other evidence, in the absence of the books, can hardly satisfy a reasonable man. But it was never intended by the Act that failure to produce books, prior to the filing of a return, should deprive the assessee of his right to have the return duty and properly inquired into. A return, which by S. 22 (3), is to be deemed to be a return made in due time cannot be treated stillborn because of a previous failure to comply with a notice under S. 22 (4). 134 I.C. 1275 =1931 C. 729 (S.B.). Where the assessee does not produce any vouchers or any other material which may enable a detailed check of his account books, the value of the account books produced by the assessee is, therefore, no higher than his mere word. 1936 L. 856. Where the books of account of the assessee did not give a complete and correct version of the actual business, and though the Income-tax Officer accepted them to a certain extent, he added a certain sum to represent the amount of omissions. *Held*, that, in making an assessment, the Income-tax Officer should proceed on judicial principles, but as in the case under consideration there was evidence before him to show that books could not be relied upon, his inclusion of certain sum for omission was justifiable. 1936 L. 836. In a case in which an assessee has duly filed a return of the "preious year" and has also on receipt of a notice under S. 23 (2) produced evidence in support of the return including some but not all of his account books, and the Income-tax Officer is not satisfied with such evidence, he can at that stage issue a notice under S. 22 (4) calling upon the assessee to produce his complete account books for the "previous year" and for three years prior thereto, and on the assessee's failure to do so, assess him under S. 23 (4). 12 L. 129=1931 L. 87 (F.B.). Per *Tek Chand and Dalip Singh, JJ.*—"The legislature should take the earliest opportunity of reviewing the position and, if possible, of redrafting and re-arranging the same. This seems all the more necessary as the interpretation which the Court has felt bound to put on these sections is likely to work a great injustice in some cases". 12 L. 129. In making the "assessment to the best of judgment" under S. 23 (4), the Income-tax Officer does not possess absolutely arbitrary authority to assess at any figure he likes, and the Income-tax Officer though not bound by strict judicial principles, should be guided by the rules of justice, equity and good conscience. 12 L. 129. *See also* 7 R. 669; 8 R. 203; 1933 O. 396. But *see* 9 R. 281 *contra*. The expression "to the best of his judgment" seems nothing more than "as best as he can". It is incorrect to say that Income-tax Officer must exercise a "judicial discretion" in making the assessment. A judicial discretion presupposes that power has been confided to the tribunal to act or refrain from acting in a particular way in certain proved or admitted circumstances, whereas under the section if the the assessee has not chosen to state an account, the officer shall make an assessment and he has no discretion in the matter. 9 R. 281=1931 R. 194 (F.B.). *See also* 132 I.C. 564; 159 I.C. 606=1935 L. 858. Though a Taxing Officer is not entitled to make a guess without evidence, still when the assessee does not give correct returns, the Taxing Officer's estimate holds good unless, the assessee displaces it by adducing evidence. 60 I.A. 146=12 P. 318=1933 P.C. 108=64 M.L.J. 612 (P.C.). Where an assessee failed to make a return of his income under S. 22 (2) of the Act and some time later died, an assessment on his estate made by the Income-tax Officer under S. 23 (4) "to the best of his judgment" is illegal. Per *Beaumont, C.J.*—"In construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the Statute". 55 B. 312=1931 B. 333=33 Bom.L.R. 388; 6 P.L.T. 555 =1925 P. 694. "The Income-tax Officer is empowered to call upon the assessee (whether or not he has made a return) to produce such documents and accounts as he may require within the period specified in the notice requiring their prodoction. Sub-S. (4) of S. 22 prevents the Income-tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years prior to the accounting period. There is, however, no such limitation upon the power to call for documents". 26 A.L.J. 340=108 I.C. 234= 1928 A. 283. Once an assessment has been made to the best of the Income-tax Officer's judgment on a net income under S. 23 (4) of the Act it follows that all expenses incidental to the business must be asumed to have been taken into consideration in arriving at the net income assessed. Such an assessment is final, conclusive and not open to appeal. 1932 L. 396=136 I.C. 706. In respect of an assessee who has submitted a return of his income under S. 22 (2), a notice issued under S. 22 (4) is valid so as to justify an assessment under S. 23 (4) in the event of non-compliance of the terms of the notice. 31 L.W. 160=1930 M. 127 (S.B.). *Also* 52 M. 194=56 M.L.J. 141

NOTES.

(F.B.). Where the Income-tax Officer issued a notice to a certain firm under S. 22 (4) calling upon them to produce the books of the particular branch and the firm did not produce the books stating that they kept no books at that branch but the Income-tax Officer did not believe the statement and decided for reasons stated by him that the assessees had such books at that branch, that they had failed to comply with the terms of the notice and he further made an assessment under S. 23 (4), *held,* that the Income-tax Officer acted quite properly in making the assessment under S. 23 (4). 8 R. 587=1931 R. 53. Where the assessee has deliberately withheld the *pakki rokar* and the ledger, the Income-tax Officer is justified in refusing to allow the assessee to produce *kachchi rokar* which would be of no value as evidence and to pass order under S. 23 (4). 10 L. 691=1929 L. 173. The failure to produce books of account required by the authorities by a notice under S. 34 entails the same consequence as in the case of a failure to make a return under S. 22 and the Income-tax Officer is entitled in such a case to make the assessment under S. 23 (4). 34 C.W.N. 1093. The Income-tax Department should not as a rule take a stand on a technical ground under S. 23 (4) where there is substantial compliance with the requisition of notice under S. 22 (4). 9 P. 172=1930 P. 14. Where the Income-tax Officer called on the assessee to produce his account books and the assessee produced some books but not those of an earlier year and thereupon the officer made an assessment under S. 23 (4) even though the books produced gave the necessary data, *held,* that the books of the earlier year were not really required within the meaning of S. 22 (4) and that the assessment should under the circumstances be made under Cl. (3) and not under Cl. (4) of S. 23. 53 A. 451=1931 A. 417. It is the duty of an assessee to keep and present his accounts to show the actual income made by him. If he fails to do this he must put up with the estimate by the officers made with the best of his ability, though it is true that the officer is not entitled to make a guess without evidence. 9 P. 240=1930 P. 81 (F.B.). Where the accounts or docoments or evidence produced by the assessee do not furnish sufficient material for an assessment and in particular if they so far from revealing the income intentionally falsify the income, it is open to the Income-tax Officer to make an assessment under S. 23 (4), for the assessee has failed to comply with all the terms of the notice. The question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further, whether the evidence before the Income-tax Offiser is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact. 137 I.C. 732=1932 O. 164. Where the books of account of the assessee are not produced and the Assistant Commissioner makes an assessment to the best of his judgment, if the enhancement is based on materials from which he could reasonably conclude, though only on a rough estimate that the income is of a certain specified amount, such an enhancement is legal. But if on the other hand the enhancement is wholly arbitrary and based on no material, it would be illegal. 7 R. 635. Although a summary assessment was higher than that of the previous year which was based on the returns submitted by the assessee, if it is based on some evidence, it cannot be said it is arbitrary and so illegal. 1932 P. 166=140 I.C. 712. But *see also* 9 R. 281. An Income-tax Officer of the principal place of business is not bound to accept the report of the Income-tax Officer of a place where assessee is carrying on a branch business, nor is he bound to refer the matter back to the latter officer for further enquiry. The former can assess the assessee according to his judgment under S. 23 (4). 1930 A.L.J. 1=1930 49 (F.B.) Per *Mokerji, J.*—"It is the ordinary privilege of a subject that he shall not be taxed on his income without a proper investigation. It is open to the assessee to prove what his income is before he is assessed on the income. If it had been the intention of the legislature that the mere word of the Taxing Officer should be final, one should find a clear indication of that in the language of the statute. 1930 A. 49 (F.B.). Where the Income-tax Officer does not get proper material on which to find out the true income of an assessee it is in the interests of the State to guess the income of the assessee. The assessee cannot complain that he has been over-taxed if owing to his own failure the officer is not able to do justice towards him. But where the proper materials are before the Officer, he should utilise them and make an assessment under S. 23 (3) which is liable to be re-examined in appeal. When an assessment is made more or less on matters which have been guessed out, there cannot be a proper appeal. There would be no sense in substituting the Income-tax Officer's "guess" by the superior officer's "guess". It is on this principle that an appeal is shut out in the case of "best judgment assessment". 53 A. 451=1931 A.L.J. 345=1931 A. 417. Assessee filing statement of income—Maintainability of appeal to income-tax authorities—Fine for gross under-statement of income. *See* 1927 M. 49=24 L.W. 771. Where a notice issued under Ss. 22 (4) and 23 (2) of the Income-tax Act was not complied with and an assessment was made under S. 23 (4), *Held,* that no appeal lies from the order of assessment. 9 P. 172=10 Pat.L.T. 769=1930 P. 14. An appeal is shut out under S. 30 not by way of punishment to the assessee, but it is shut out because there are no materials which can be properly placed before an appellate Income-tax Officer. On reading, therefore, the two Ss. 22 and 23, it is abundantly clear that a right to make an assessment to the best of the officer's judgment cannot be made after an enquiry has been started so as to shut out an appeal simply because at any time after the enquiry has been started, the assessee fails to produce an account as asked for. 1930 A.L.J. 1=1930 A. 49 (F.B.). But *see* 12 L. 129 (F.B.), cited *supra*. In the case of an assessment under S. 23 (4), the only question of law that could arise is whether there were any materials upon which the Income-tax Officer concerned could find that there was no sufficient cause excusing the assessee from complying with the requirements of law as prescribed by S. 27. In cases of this kind the giving of positive evidence by the department about facts which are within the special knowledge of the opposite party is almost out of question, and the materials which come within the description of circumstantial evidence or general probabilities which would justify a presumption under S. 114 of the Evidence Act, are materials upon which the Court can come to a finding just as properly as it could upon positive evidence. 1941 O.W.N. 757=1941 Oudh 445. *See also* I.L.R. (1941) All. 1=1941 A.L.J. 12=1940 All. 530. The jurisdirtion exercised by the High Court under the Income-tax Act is a special jurisdiction and is consequently circumscribed within the limits specified in the statute. The power of revising, reviewing or interfering in any other manner with an assessment made under S. 23 (4) being nowhere conferred upon the High Court expressly or impliedly by the Act, no such power can be exercised merely by virtue of the general inherent jurisdiction of the High Court, if any. I.L.R. (1938) Lah. 477=40 P.L.R. 308=1938 Lah. 545.

STATING CASE TO HIGH COURT.—A point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made to the best of his judgment by the Income-tax Officer, so as to make it the subject of a reference to and decision by the High Court under S. 66 (2) or (3). 1934 N. 183. *See also* 1941 A.L.J. 12=I.L.R. (1941) All. 1=1940 All. 530; A.I.R. 1940 O. 362. When a person without being called upon under S. 22 (2) to furnish a return of his income for the previous year, voluntaril files a return of such income in the prescribed form and duly verified in the prescribed manner, the question whether the return voluntarily filed is a valid return or not is an important question of law and it is necessary to state the case to the High Court. 10 L. 773=31 Punj.L.R. 23=1929 L. 246 (2). An assessee whose return is disbelieved and who is summarily taxed without being given notice under S. 23 (2) can apply to the High Court to have a case stated under S. 66 (2), as the question raised challenges the very foundation of the assessment. 29 C.W.N. 23=1925 C. 173. If an assessee disputes in his statement the authority of the Income-tax Department to adopt a flat rate, then a question of law may arise for consideration of High Court as to whether in the absence of other reliable data as to income of an assessee from a certain source an Income-tax Officer is justified in making an assessment based on a formula deduced by taking a certain percentage of the gross turnover as representing a fair margin of profit. But if assessee admits that he has nothing to say if some percentage is adopted to find out income from a particular source, it is not open to him to urge merely the question of the reasonableness of the extent of the percentage adopted. 1929 N. 243. Assessee called upon to attend and produce evidence—Assessment under S. 13 (proviso)—Appeal rejected—Application to Commissioner to state a case rejected—Application to High Court. 6 Pat.L.T. 555=1925 P. 694. Although the Act does not specifically provide for *granting adjournments* to comply with the terms of the notice served on the assessees under Ss. 22 (4) and 23 (2), in practice, adjournments are generally allowed for sufficient cause on the principle of justice, equity and good conscience. If therefore for any reason, a prayer for adjournment has to be refused a definite order, either oral or written, must be passed by the officer and communicated to the assessee or his agent, when he is present, before proceeding with the drastic action of summarily assessing him under S. 23 (4). Failure on the part of the Income-tax Officer in observing the aforesaid elementary principle of judicial procedure does considerably detract from the technical legality of the summary assessment order recorded by him against the non-applicant. [1930 M. 113 (S.B.), Rel. on.] 1934 N. 183 (2). When there is ample evidence upon which the Income-tax Officer can find that there was no sufficient cause preventing the assessee from producing account books requisitioned under S. 22 (2) and it appears upon that ground he had refused to cancel the assessment made under S. 23 (4) and his order is upheld by the Assistant Commissioner on appeal for the same reason, there is no question of law arising under the circumstances for the purposes of S. 66 (2). 9 R. 21=1931 R. 97. *See also* 1932 O. 164. The question whether an assessment made by the Income-tax Officer under S. 23 (4) is valid or not is

NOTES.

not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31 and such a question cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissiontr to state a case. [6 R. 21; 8 R. 209; 8 P. 203; 7 R. 659, Overr.] 9 R. 281=1931 R. 194 (F.B.); 1934 A.L.J. 274=1934 A. 559. But *see* 133 I.C. 753=1931 P. 306 (F.B.) holding that the Commissioner may be required to state a case raising the question of law whether or not the facts established are such as to bring the case within the ambit of proviso to S. 30 (1). Where a notice was duly served on the assessee under S. 22 (4) but he failed to produce some of the accounts and thereupon the Income-tax Officer made an assessment under S. 23 (4) and subsequently he refused to cancel the assessment at the instance of the assessee holding that there was no sufficient cause for the non-production of the accounts and the same order was affirmed by the Assistant Commissioner on appeal. *Held*, that the questions regarding the validity of the notice and the propriety of the assessment did not arise in the appeal and that there was no room for a reference to be made to the High Court. 9 R. 25=1931 R. 98. Assessee producing evidence in support of return—Evidence rejected by the Income-tax Officer and assessment on estimate from personal inspection—Determination of assessable income if a question of law. 3 I.T.C. 48. Appeal on the ground that assessee was not in British India—Dismissal of—Reference to High Court: *See* 9 L. 464=1928 L. 864.

FRESH NOTICE.—The issue of a fresh notice under S. 34 does not do away with a previous assessment under S. 23 (4). 1931 A. L.J. 1109=1932 A. 83.

APPEAL.—An Assistant Commissioner should bear the assessee or his counsel and should then decide whether the case really fell under S. 23 (4). He should not merely scrutinize the memorandum of appeal and the assessment order of the Income-tax Officer behind the back of the assessee or his counsel and dismiss the appeal on the ground that it is not allowable. 54 A. 496=1932 A. 390. *See also* 101 I.C. 321=1927 L. 5; 133 I.C. 753=1931 P. 306 (F.B.). A person who has been assessed under S. 23 (4), is not entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. Proviso to S. 30 (1) is bar to such an appeal. [10 L. 596 (F.B.), Foll.] 133 I.C. 753=1931 P. 306 (F.B.).

Secs. 23 (4) and 27.—Under S. 23 (4), the fact of failure to comply with the notice under S. 22 (4) makes it compulsory on the officer to make an assessment; and under S. 27 unless the officer is satisfied that the assessee had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with that notice, the assessment must stand. That he had sufficient cause for not complying with another notice is irrelevant. 41 C.W.N. 719=1937 P.C. 133=(1937) 2 M.L.J. 43 (P.C.).

Secs. 23 (4), 30—34 and 35: FINAL ASSESSMENT UNDER S. 23 (4)—WHEN CAN BE REOPENED—POWERS OF COMMISSIONER.—It is true that the Act nowhere imposes any limit of time within which an assessment under provisions of Ss. 23 and 29 is to be made and that the service of the notice of demand can therefore be made at any time. But it is not true that after a final assessment under those sections has been made, the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time. When once a final assessment is arrived at, it cannot be reopened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those sections. It is quite impossible to suppose that the Income-tax Officer may in every kind of circumstance and after any lapse of time make fresh assessment or issue fresh notices of demand; or that the Commissioner can direct him to do so. The Commissioner's powers under S. 33 can only be exercised subject to the provisions of the Act, of which the provisions in Ss. 34 and 35 are in this respect of the greatest importance. Where therefore an assessment is made under S. 23 (4) of a registered firm assessing it only to income tax, the assesment is final in respect of income-tax and super-tax. If on the discovery of a mistake the registration is cancelled by the Commissioner under S. 33, the order assessing the firm to super-tax more than one ear after final assessment under S. 23 (4) is beyond the powers of Income-tax Officer. 65 I.A. 236=I.L.R. (1938) Bom. 487=42 C.W.N. 873=1938 O.W.N. 621=1938 P.C. 175=(1938) 2 M. L.J. 115 (P.C.). Where an assessment has been made, not in form only but in fact, not ostensibly but actually and in good faith, under S. 23 (4) of the Act, and where the Assistant Commissioner, upon consideration of the facts, has found that the assessment was properly so made, the proviso to S. 30 bars an appeal; and the order of the Assistant Commissioner rejecting the appeal is not an order under S. 31 inasmuch as he has not "disposed of" the appeal. Hence there can be no question of law referable to the High Court under sub-S. (2) or sub-S. (3) of S. 66. 1940 All. 530.

Secs. 23 and 33: PROFITS EARNED BEFORE YEAR OF ACCOUNT—ASSESSMENT—POWER OF INCOME-TAX AUTHORITIES—PROCEDURE.—The Income-tax authorities are not entitled in law to include in the assessment in respect of a particular year of accounts, profits,

[1][Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.]

[2][(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4) as the case may be,—

(*a*) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined :

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24 :

Provided further that when any of such partners is a person not resident in British India, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm ; and

(*b*) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (*a*) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm.]

[3][(6) Whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners.]

Power to assess individual members of certain companies.

[4][23-A. [5]* * * * *]

[6][(1)] [6][Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting [7]* * * * * are less than sixty per cent. of the assessable income of the company of that previous year, [8][as reduced by the amount of income-tax and super-tax payable by the company

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LEG. REF.

[1] Proviso added by S. 3 of Act XXI of 1930.

[2] Sub-section added by S. 25 of Act VII of 1939.

[3] Sub-s. (6) of S. 23 added by Act XXIII of 1941.

[4] Inserted by S. 4 of Act XXI of 1930.

[5] Original sub-S. (1) omitted by S. 26 of Act VII of 1939.

[6] Original sub-section (2) re-numbered (1) and this portion substituted, *ibid.*

[7] The words "increased by any income-tax payable thereon" were omitted by S. 7 of Act XL of 1940).

[8] Inserted by *ibid.*

NOTES.

secret or otherwise, which had been earned before that year of account, even in assessing a firm under S. 26 (2). If they do, they are not acting in accordance with law. The proper way to assess such profits or income is to take action under S. 34 with a view to collect tax on income which had escaped assessments. 1942 I.T.R. 64 =55 L.W. 87=(1942) 1 M.L.J. 158.

Sec. 23-A (2) : ASSESSMENT UNDER—CONDITIONS—EXPRESS FINDING AS TO INTENTION TO EVADE TAXATION—IF ESSENTIAL.—Before an Income-tax Officer can assess the shareholders of a Company under S. 23-A (2) of the Income-tax Act on accumulated or undistributed profits of the Company, he has to be satisfied (1) that the profits of the Company have been allowed to accumulate beyond the existing and contingent needs of the Company, or that a reasonable part of the profits, having regard to the said needs have not been distributed to its members, and (2) that such accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits so accumulated or not distributed. Both these conditions, which are questions of fact, must be satisfied before the members of a company can be assessed to income-tax on their in respect thereof] he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes [1][and reduced by the amount of income-tax and super-tax payable by the company in respect thereof] shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income :

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company, together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the word 'sixty per cent.' [2]* * * * the words ' one hundred per cent. [2]* * * * were substituted :

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five per cent. of the assessable income of the company [1][as reduced by the amount of income-tax and super-tax payable by the company in respect thereof], unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent. of the assessable income of the company of the previous year concerned [1][as reduced by the amount of income-tax and super-tax payable by the company in respect thereof]];

[3][Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.]

Ecplanation.—For the purpose of this sub-section,—

[4]* * * * * * *

[5]* a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits] carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public.

[6]* * * * * * *

[7][(2)] The [8][Inspecting] Assistant Commissioner shall not give his approval to any order proposed to be passed by the Income-tax Officer under this

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LEG. REF.

[1] These words inserted by Act XI of 1940.

[2] The words " of the assessable income " omitted by S. 7 of Act XL of 1940.

[3] Proviso substituted by S. 26 of Act VII of 1939.

[4] Cl. (*a*) omitted, *ibid.*

[5] The brackets and letter " (*b*) " were omitted by *ibid.*

[6] Cls. (*c*) and (*d*) omitted by S. 26 of Act VII of 1939.

[7] Original sub-section (3) was re-numbered (2) by *ibid.*

[8] Ths word was inserted, by *ibid.*

NOTES.

shares in the accumulated or undistributed profits. It is not, however, necessary that there should be an express finding that the accumulation was made for the purpose of evading taxation. Such a finding can be implied. 1935 M. 1005=69 M.L.J. 577 (F.B.).

section until he has given the [1][* * *] company concerned an opportunity of being heard.

[2][(3)] [3](i) [* * * * *)

(*ii*) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of [4][sub-section (1)] the tax payable in respect thereof shall be recoverable from the company, [5][if it cannot be recovered from such member.] [[6]* * * *]

(*iii*) Where tax is recoverable from a company [7][* * * *] under this sub-section, a notice of demand shall be served upon it in the prescribed form showing the sum so payable, and such company [8][* * *] shall be deemed to be the assessee in respect of such sum, for the purposes of Chapter VI.

[9][(4)] Where tax has been paid in respect of any undistributed profits and gains of a company under this section, and such profits and gains are subsequently distributed in any year. the proportionate share therein of any member of the company shall be excluded in computing his total income of that year.

[10][(5) When a company is a shareholder deemed under sub-section (1) to have received a dividend, the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purpose also of the application of that sub-section to distributions of profits by that company.]

Set off of loss in computing aggregate income.

24. (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year :

[11][Provided that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (*b*) of sub-section (5) of section 23 in the manner applicable to a registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm ; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section] ;

LEG. REF.

[1] The words "firm, association or" were omitted, by Act VII of 1939.

[2] Original sub-section (4) was re-numbered (3), *ibid.*

[3] Sub-cl. (*i*) was omitted, by *ibid.*

[4] Substituted for the word brackets, and figure "sub-section (2)," by *ibid.*

[5] Substituted for the words "and may be recovered from such member," by *ibid.*

[6] Original words were omitted by *ibid.*

[7] The words "firm or other association" omitted by *ibid.*

[8] The words "firm or association" were omitted by *ibid.*

[9] Original sub-section (5) was re-numbered (4), by *ibid.*

[10] Sub-section added by S. 26 of Act VII of 1939.

[11] Proviso added by S. 27 of Act VII of 1939.

NOTES.

Sec. 24.—Scope of section. 55 M. 818= 62 M.L.J. 638 (F.B.). The word "assessee" has not been used in S. 24 in the strict sense of a person by whom income-tax is payable but means and signifies the person against whom assessment proceedings have been started and who has been asked to give a return of his total income during the previous year under S. 22 (2). 182 I.C. 270= 1939 Cal. 196 (S.B.). Applicability of section—Condition of set-off—Company having several businesses—Losses in some which have ceased to exist—If can be set off against —Profits or gains of others. 68 M.L.J. 379 (F.B.). Where the assessee paid certain commission to his Banker for realising interest on Government securities on his behalf, *held*, that such payment could not constitute "loss" of profits or gains in the sense the expression has been used in S. 24. 9 Pat. 139=1929 P. 419. Althought the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable. But they must be bad debts incurred in that particular year. For the purpose of computing yearly profits and gains, each year is a separate self-contained period of time, in regard to which

NOTES.

profits earned or losses sustained before its commencement are irrelevant. It thus follows that a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining the profits of that year, because the loss had not been sustained in that year. 59 I.A. 290=1932 P.C. 178=63 M.L.J. 861 (P.C.). [1929 N. 50. Reversed. *See also* notes under S. 10, Cl. (2) (*ix*)]. So long as there is any ray of hope left to recover a debt, however dim it may be, and so long as a debt is in the process of realization, it cannot be said that it has become irrecoverable and hence bad. 168 I.C. 549=1937 L. 338 (F.B.). Upon a dissolution of partnership, a partner's share of the losses for several preceding years cannot be accumulated and thrown into the scale against the income of another partner for a particular year. No principle of writing off bad debts could justify such a course, whether in the year following the dissolution or, in some subsequent year in which the partner's insolvency has crystalized. The "bad debt" would not, if good, have come in to swell the taxable profits of the other partners. Hence where the assessee is made to bear an ex-partner's share of loss in another partnership business by reason of the ex-partner's inability to meet it and the assessee transfers such loss to his own business and treats it as a bad debt, he is not entitled to set-off such amount against the income, profits or gains as loss in his business within the meaning of S. 24. It cannot be considered as a bad debt made by the assessee in the course of his business. [1934 M. 557 (S.B.), Affirm.] 63 I.A. 233=71 M.L.J. 772 (P.C.). A debt due from a limited company can be treated as irrecoverable and a bad debt for the purposes of income-tax, and as a business loss under S. 24 of the Income-tax Act, even when the debtor company is not actually wound up or has not ceased to be a going concern. The question is one of fact to be decided on the relevant facts of the particular case. 61 I.A. 318=58 B. 579=67 M.L.J 213 (P.C.). Debt due from a joint-stock company cannot be said, to be a bad debt, so long as the company is carrying on business as a going concern. *See* 56 B. 457=34 Bom.L.R. 1235=1932 B. 609. Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the *ipso dixit* of any one else. The assessee has no option of declaring a debt as bad. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad; neither is a debt which is not statute barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact, to be determined after consideration of all relevant circumstances. 59 I.A. 290=1932 P.C. 178=64 M.L.J. 861 (P.C.). *See also* 1941 I.T.R. 635; 1933 S. 148. Purchase of shares—Price exceeding face value paid—Excess is no loss. 1930 A.L.J. 26=1929 A. 919. If a person carries on two or more distinct businesses, the profits or losses of all of them are to be added together and the aggregate so arrived at represents his "profits or gains" under the head "business". If the net result of this calculation shows a loss, such loss may under S. 24 be set off against the profits or gains derived by the assessee from other heads of income in that year. 11 L. 38=1929 L. 556. Where a person carries on two different trades, he is entitled to set-off for purposes of income-tax the losses incurred by him in respect of one against the profit made by him in the other. But for this principle to apply, the condition precedent is that both businesses should be alive during the current year. A dead business's losses cannot be set off against a living business's gains. 168 I.C. 549=1937 L. 338 (F.B.). *See also* 1935 L. 896; 1934 M. 557=67 M.L.J. 236 (F.B.). In the case of a registered firm it is the firm and not the partner that is the assessee in respect of the profits and gains of the business of the firm. It is only under S. 24 (2) that a partner is allowed to set off against the profits which the partner is liable to pay income-tax a proportion of the loss incurred by the firm. He is not entitled to set off the loss in the business of the firm against the profits in other business carried on by him. (47 M. 660, Disappr.) 29 N.L.R. 75=1930 N. 183. *See also* 1935 L. 896. Loss incurred in transaction which is not part of business is not deductible from profits. 1936 L. 872. *See also* 68 M.L.J. 379 (F.B.). Firm of partners doing business in shares—Stock of shares always valued at cost—Dissolution of firm at end of accounting year—Shares allotted to partners at market value prevailing on date of dissolution—Difference, if can be claimed as loss. 187 I.C. 722=1939 Cal. 559. *See also* 1937 Lah. 814. Actual losses incurred must be proved—Mere showing figures of purchase and sale is not sufficient. 117 I.C. 217=1929 N. 153. Burden of proving losses is on assessee who alleges them—Opening balance must be shown. 1929 N. 153. The expression "loss of profits or gains" in S. 24 (2) must mean loss on the year's working. When the general principles on which profits or gains of a business are computed are utilized to ascertain the result of the year's working and the calculation shows

NOTES.

that there has been a loss, that is a loss of profits or gains. 26 N.L.R. 75=1930 N. 183. S. 24 should be read in as liberal a manner as possible. Where there is a *bona fide* loss, a man can always set it off against his income, profits or gains under the same head, and in exceptional cases where the loss is so heavy that it more than counterbalances the whole of the profits under that head of income in order that the assessee may obtain his full relief. *Held*, that the amount of rent of a certain property which was occupied by a tenant who in spite of the efforts of the assessee (landlord) persisted in making default and which amount the landlord in a subsequent litigation had to forego in order to secure the eviction of the tenant, is not liable to be taken into account as the income of the assessee in arriving at the total sum on which the assessment is to be made. 132 I.C. 1=32 P.L.R. 418=1931 L. 656. Salt trade—Deposit of securities for deferring payment—System of deferred payment abolished—Assessee selling securities and incurring loss—Right to set-off. 165 I.C. 617=1936 L. 452. Assessee having business in Bombay and Rangoon—Assessment in 1937-1938—Loss in Rangoon business—Claim to set-off—Rangoon ceasing to be part of British India after 31st March, 1937 does not deprive assessee of right to set off—Facts to be taken into account as in previous year. 1940 I.T.R. 1. Assessee having three shops—One stopped in accounting year—Losses in same made up of bad debts interest and miscellaneous items of expenses—Right to set-off against profits of other shops—Bad debts—When to be wiped out. 1941 I.T.R. 635.

LAND PURCHASED BY COPARCENARY IN PARTITION—LAND ALLOTTED TO ASSESSEE—SUBSEQUENT SALE—LOSS CANNOT BE CLAIMED AS SET-OFF.—A land was purchased in 1920 by the coparcenary of which the assessee was a member, in partnership with a stranger to the coparcenary. In 1924, in a partition between the coparceners this property was allotted to assessee. He sold it in 1928. The assessee claimed that he was entitled to deduct from his income the loss which he had sustained, *i.e.*, the difference between the price at which the land was purchased in 1920 and the price at which it was sold in 1928. *Held*, that the purchase was an investment of capital in land and not a purchase made for the purpose of business in buying and selling land and when it came to the assessee it formed part of his capital. The assessee was not therefore entitled to claim the loss as set-off. 1933 S. 145=145 I.C. 202.

LOSS SUSTAINED OWING TO PARTNER'S DEFAULT—DEDUCTION OF.—The mere absence in the Act of a provision for loss in respect of a time-barred debt is no ground for disallowing it; but whether such loss could be claimed in any particular year or not is a question of fact depending upon the circumstances of each case. Where, therefore, an assessee is being taxed personally, it is open to him to say that on a settlement of accounts of the old partnership he treated the amount due by a partner as a loan made by him personally to that partner and that the loss which he consequently sustained on account of the failure of such partner to pay back loan is a loss which he is entitled to claim credit for in assessing the profit which he has made in respect of all kinds of business carried on by him in the year of assessment. This is permissible to him under S. 24. (1932 P.C. 178, Rel. on.) 1933 S. 148=27 S.L.R. 243.

Sec. 24 and 26.—*See* 1937 S. 201. Whether a firm is registered or unregistered, partnership does not obstruct or defeat the right of a partner to an adjustment on account of his share of loss in the firm, whether the set-off be against other profits under the same head of income within the meaning of S. 6 of the Act or under a different head. So long as the set-off is of the share of the loss made by the firm in the year of account, the adjustment does not involve the taking of any general or other account between the partners, or indeed any examination of the accounts of the individual partners in the books of the firm. 63 I.A. 238=59 M. 716=71 M.L.J. 772 (P.C.). S. 24 of the Income-tax Act which enables an assessee to set-off the loss of profits under any head mentioned in S. 6, against the profits received under any other head can only apply in a case falling under S. 26 (2) to the successor who is the only assessee. Under S. 26 (2), it is peremptory that where there has been succession to a business it is the successor, and not the predecessor who is to be assessed. Whether by doing so one or the other is deprived of an advantage which he would otherwise have enjoyed under S. 24 is irrelevant. S. 24 does not apply by any means to every assessment; it only applies where there is a profit under one head and a loss under another.

Kania, J.—S. 24 assumes that the assessee is liable to be assessed under the particular head in respect of which he has suffered loss. On transferring a business, the transferor ceases to be an assessee who is liable to be assessed under that head, and S. 24 in terms will not apply to him as regards the business which is assessed. I.L.R. (1940) Bom. 287=188 I.C. 706=42 Bom.L.R. 120=1940 Bom. 169.

Secs. 24 and 66 (3).—Assessee claiming that certain bad debt should not be included in assessment—Income-tax Officer disallowing claim on ground that it had not been

[1][(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head ' Profits and gains of business profession or vocation,' and the loss cannot be wholly set off under sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business profession or vocation for that year ; and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year and so on ; but no loss shall be so carried forward for more than six years, and a loss arising in the previous years for the assessment for the years ending on the 31st day of March, 1940, the 31st day of March, 1941, the 31st day of March, 1942, the 31st day of March, 1943, and the 31st day of March, 1944, respectively, shall be carried forward only for one, two, three, four and five years, respectively :

[2][Provided that—

(*a*) where depreciation allowance is, under clause (*b*) of the proviso to clause (*vi*) of sub-section (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section] ;

(*b*) nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitled any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (*b*) of sub-section (5) of section 23 in the manner applicable to a registered firm, to have carried forward and set off against his own income any loss sustained by the firm :

[3][(*c*) where an unregistered firm is assessed as a registered firm under clause (*b*) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm :

[3][(*d*) Where a change has occurred in the constitution of a firm, nothing in this section shall be deemed to entitle the firm to have set off much of the loss proportionate to the share of a retired or deceased partner computed in accordance with the provisions of clause (*b*) of sub-section (1) of section 16 as exceeds his share of profits, if any, of the previous year in the firm or to entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under the said clause (*b*) and where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains.]

(3) When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section.]

Assessment in case of departure from British India.

[4][24A. (1) When it appears to the Income-tax Officer that any person may leave British India during the current financial year, or shortly after its expiry, and that he has no present intention of returning, the Income-tax Officer may proceed to assess him on his total income [5][of the period from the expiry of the last previous year of which the income has been assessed in his hands to the probable date of his departure from British India, or where he has not been previously assessed on his total income of the period up to the probable date of his departure from

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[1] Substituted for the original sub-S. (2), by S. 27 of Act VII of 1939.

[2] Inserted by Act XXIII of 1941.

[3] Subsituted by *ibid.*

[4] Inserted by S. 11 of Act XVIII of 1933.

[5] Substituted for the original words by S. 28 of Act VII of 1939.

NOTES.

shown as irrecoverable in previous year—Propriety—Issue of mandamus to commissioner to state case. *See* 167 I.C. 178.

British India. The assessment shall be made on the total income of each completed previous year included in such period at the rate at which such income would have been charged had it been fully assessed, and as respects the period from the expiry of the last of such completed previous years to the probable date of departure the Income-tax Officer shall estimate the total income of such person during such period and assess it at the rate in force for the financial year in which such assessment is made]:

Provided that nothing herein contained shall authorise an Income-tax Officer to assess any income, profits or gains which have escaped assessment [1][or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act but] in respect of which he is debarred from issuing a notice under section 34.

(2) For the purpose of making an assessment under sub-section (1) the Income-tax Officer may serve a notice upon such person requiring him to furnish, within such time not being less than seven days as may be specified in the notice, a return in the same form and verified in the same manner as a return under sub-section (2) of section 22, setting forth (along with such other particulars as may be provided for in the notice) his total income for each of the completed previous years [2][comprised in the relevant period referred to in the first sentence of] sub-section (1) and his estimated total income for the period from the expiry of the last such completed previous year to the probable date of his departure; and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under sub-section (2) of section 22.]

Tax of deceased person payable by representative.

[3][24B. (1) Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

[4][(2) Where a person died before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with a notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.]:

(3) Where a person died, without having furnished a return which he has been required to furnish under the provisions [2]* * * of section 22, or having furnished a return which the Income-tax Officer has reason to believe to be incorrect or incomplete, the Income-tax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment, and for this purpose may [3][, by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived,] require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of sections 22 and 23 have required from the deceased person.]

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[1] Substituted for the words "or have been assessed at too low a rate," by S. 28 of Act VIII of 1939.

[2] Substituted for the words "comprised in the period first referred to in," by *ibid*.

[3] Inserted by S. 11 of Act XVIII of 1933.

[4] Susbtituted by S. 29 of Act VII of 1939.

[5] The words, brackets, and figure "of sub-section (2)" omitted by *ibid*.

[6] Inserted by *ibid*.

NOTES.

Sec. 24-B.—S. 24-B of the Income-tax Act is not retrospective in operation. 37 Bom. L.R. 112=1935 B. 167. In a case to which S. 25-B of the Income-tax Act applies the estate of a deceased person can be assessed either under sub-S. (2) or sub-S. (3) of S. 24-B; if that is possible there is no occasion to introduce the provisions of S. 34 of the Act. 37 Bom.L.R. 112=1935 B. 167.

Assessment in case of discontinued business.

25. (1) Where any business, profession or vocation [1][on which income-tax was not at any time charged under the provisions of the Indian Income-tax Act, 1918], is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(2) Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such distontinuance within fifteen days thereof, and, where any person fails to give the notice required by this sub-section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance.

(3) Where any business, profession or vocation on which [* * *] tax was at any time charged under the provisions of the Indian Income-tax, Act, 1918, is discontinued, [3][then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable] no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

[4][(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference ;

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[1] Substituted for the words and figures " commenced after the 31st day of March, 1922" by S. 6 of Act XI of 1924.

[2] The words " which was in existence at the commencement of this Act and " omitted by *ibid.*

[3] Inserted by S. 30 of Act VII of 1939.

[4] Sub-Ss.(4) and (5) inserted by *ibid.*

NOTES.

Sec. 25.—Transfer of business from one person to another—Effect. 27 Bom.L.R. 147=50 B. 87=1926 B. 129.

Cl. (3): APPLICABILITY AND SCOPE—ASSESSMENT ON SALARIES IN YEAR IN WHICH THEY ARE EARNED.—S. 25 (3) is intended to prevent a double assessment. It cannot be intended to apply to a case where income-tax is assessed on salaries in the year in which they are earned. If the section were to apply, it would lead to this very strange and unreasonable result: that an assessee who chooses to relinquish his appointment in the 11th month of the year would escape payment of income-tax on the salary earned by him in these 11 months; whereas, if he continued for one month longer, admittedly he would be assessable on his salary in the whole of the 12 months. 1935 M. 953=69 M.L.J. 611 (S.B.). The profits from a profession or vocation mentioned in S. 25 (3) mean the professional earnings which are taxable under S. 11 (*v*). An assessee can only have the benefit of S. 25 (3) if he has been assessed for tax on professional earnings. 69 M.L.J. 611 (S.B.).

[1][Provided that sub-sections (3) and (4) shall not apply—

(*a*) to super-tax except where the income, profits and gains of the business, profession or vocation were assessed to super-tax for the first time either for the year beignning on the 1st day of April, 1920, or for the year beginning on the 1st day of April, 1921 ;

(*b*) to a business, profession or vocation on which income-tax was at any time charged in the hands of a company under the Indian Income-tax Act, 1886, or on which income-tax would have been charged in the hands of a company for the assessment year ending on the 31st day of March, 1918, if the company having been in existence in that year had also been in existence in the year ending on the 31st day of March, 1917.]

(5) No claim to the relief afforded under sub-section (3) or sub-section (4) shall be entertained unless it is made before the expiry of one year from the date on which the business, profession or vocation was discontinued or the succession took place, as the case may be.]

[2][(6)] Where an assessment is to be made under [3][sub-section (1), sub-section (3), or sub-section (4)], the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

Assessment after partition of a Hindu undivided family.

[4][25A. (1) Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto [5][assessed as] undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied [6][* * * *] that the joint family property has been partitioned among the various members or groups of members in definite portions [7][* *] he shall record an order to that effect :

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[1] Added by Act XXIII of 1941.

[2] Original sub-S. (4) re-numbered (6) by S. 30 of Act VII of 1939.

[3] Substituted for the words, brackets and figures " sub-section (1) or sub-section (3)," by *ibid.*

[4] Inserted by S. 4 of Act III of 1928.

[5] Inserted by S. 3 of Act XXII of 1930.

[6] The words " that a separation of members of the family has taken place and " omitted by S. 31 of Act VII of 1939.

[7] The words " before the end of the previous year " omitted by S. 3 of Act XXII of 1930.

NOTES.

Sec. 25-A: SCOPE AND APPLICABILITY.—S. 25-A of the Income-tax Act contemplates an actual partition by metes and bounds of the joint family property. 1934 L. 942. *Contra* S. 25-A does not demand a partition by metes and bounds. 31 N.L.R. (Supp.) 233=162 I.C. 554=1936 N. 121. In the case of a partial division of a joint family property S. 25-A has no application. The partition contemplated by the section is not necessarily a partition by metes and bounds. 56 A. 504=1934 A. 217. The language of the section makes it clear that an order declaring separation shall only be passed if (1) the members of the family have separated in status from each other and (2) there has been a partition of all the joint family property. For the purposes of the Income-tax Act members of an undivided Hindu family cannot enter into a partnership in respect of a portion of joint property which they have partitioned among themselves while retaining the status of an undivided family and keeping the rest of the property joint. I.L.R. (1938) All. 638=1938 A.L.J. 610=1938 All. 452. S. 25-A does not of necessity demand a partition by metes and bounds. But it contemplates that there should be firstly a finding by the Income-tax Commissioner that the Hindu joint family as such has disrupted and secondly a finding that the joint family property has been divided among the various members or groups of members in definite portions. And it is not sufficient that a mere disruption of the Hindu family should be proved. There must also be, whether by consent or otherwise, a definite ascertainment of the shares, of the different members composing the Hindu family. 154 I.C. 191=1935 L. 81 (S.B.). Under S. 25-A of the Income-tax Act, the Income-tax Officer has a discretion to conduct an inquiry

Provided that no such order shall be recorded until notices of te inquiry have been served on all the members of the family.

(2) Where such an order has been passed, [1][or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation,] the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no [2][* *] partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23:

LEG. REF.

[1] Inserted by S. 31 of Act VII of 1939.

[2] The words "separation or" were omitted by *ibid.*

NOTES.

in such manner as may seem to him, in his judgment, to be best in the circumstances of the particular case and to hear such evidence, and such evidence only, as he may in his discretion consider it necessary to hear to enable him to come to a decision on the question whether a separation of the members of the family has taken place or not. His decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully, and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under S. 66, because no question of law can arise thereout. 177 I.C. 582=1938 Rang.L.R. 130=1938 Rang. 154. Before persons who have been previously assessed as a Hindu undivided famil can claim to be separately assessed as members of a contractual partnership, they must establish that the joint famly has been dissolved. (57 Cal. 1336, relied on.) 1938 Rang.L.R. 130=1938 Rang. 154. Where a business has permitted itself to be assessed once as a joint family business, under Cl. (3) of S. 25-A, it must be deemed to continue as a joint family business until an order under Cl. (1) of S. 25-A has been made. 1941 O.W.N. 1302=1942 Oudh 108. A mere recital of a prior division of property in a will, even though it be a registered one, is no evidence of division and cannot confer title. And such a document cannot be deemed by itself to be evidence of a disruption of a Hindu undivided family within the meaning of S. 25-A. 1933 L. 815. The dissolution or existence of a joint Hindu family depends on the intention of the members thereof and is a question of fact. It is therefore open to the Income-tax Officer to decide on the facts whether the intention to dissolve is present or absent. 1933 L. 827. When persons claim to constitute a partnership firm for the registration of which they make an application, the Income-tax Officer may call upon them to prove by evidence that they are what they claim to be before he proceeds further with the application and it is consequently open to him to find against declarations contained in a partnership deed and reiterated by the parties before him that a Hindu joint family still exists. 33 P.L.R. 947=1932 L. 575. Although the income earned in a certain year forms the material out of which the assessment is made, it is the making of the assessment and the date thereof that determines the applicability of the law and procedure governing such assessment. S. 25-A therefore applies to a case where the section is passed before the commencement of the year in which the assessment takes place, even though it may not have been passed when the income under assessment was earned. 138 I.C. 187=1932 L. 575. The Income-tax Officer is not ordinarily bound by the correctness of any previous orders passed by him; but when the Income-tax Officer has passed an order under S. 25-A (1) clearly finding after an enquiry that there has been a separation among the members of a Hindu joint family, he is precluded by sub-S. (3) of S. 25-A from making any fresh enquiry into the question of separation or jointness. The power to go behind the prior order is expressly withdrawn by sub-S. (3) of S. 25-A. 31 N.L.R. (Supp.) 233=1936 N. 121. But *see also* 1936 L. 836. Question of partition—Wrong decision by Income-tax Officer can be corrected in subsequent year. 1936 L. 836. Merely because the Income-tax Officer accepts the allegation of the assessee that there has been a partition in a certain year, he is not debarred from considering the truth about fact of partition in the next year. The fact that assessee's allegation has been accepted in the previous year may possibly alter the burden of proof. 1933 L. 815. **Hindu joint family—Assessment of head of family —Plea of partition not raised before Income-**

Provided that all the [1][members and groups of members whose joint family property has been partitioned] shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.]

LEG. REF.

[1] Substituted for the words "separated members and groups of members." by Act VII of 1939.

NOTES.

tax Officer cannot be allowed to be raised for the first time in appeal before the Assistant Commissioner. 131 I.C. 639=1931 L. 601. Hindu joint family constituting itself into company with specific shares to members including mother—Effect—Members of such company owning foreign business and having personal khatas—Loan to company standing in name of mother—Equalization of credit amounts in personal khatas, accumulation of interest by mother and remittance of cash and goods by foreign businesses to company and *vice versa*—Inference of joint status not justified. 1937 Lah. 897.

Secs. 25-A and 26. : APPLICABILITY—S. 25-A covers a case of joint Hindu family in which there has been a disruption and consequent partition but no continuance of the business either by the members of the joint Hindu family on contractual basis or by some of them alone or jointly with others or even by strangers. Where the business has been discontinued S. 25-A will apply but where it is continued S. 26 will apply. In cases under S. 26 the shares of partners are not to be included in the assessment on the family. 167 I.C. 936=1937 L. 172 (S. B.). Where on the breaking of a joint family, the separated members immediately form themselves into a firm, S. 26 will come into operation, and the assessment on the firm should be made under that section and not under S. 25-A of the Act. 1935 L. 681.

SCOPE AND APPLICABILITY—HINDU UNDIVIDED FAMILY—IF CAN BE SUCCEEDED BY LIMITED COMPANY.—So far as the scheme of the Income-tax Act goes each section deals only with the matters specified therein and goes no further, and each section completely covers the matter with which it deals. S. 25-A applies only to those cases where the question involved is one of pure and simple disruption of a Hindu undivided family unattended by conversion, or transformation into a new entity. In the same manner, S. 26 is intended to meet completely those cases which are specified in sub-Ss. (1) and (2) thereof, respectively, in whatever way the situation envisaged there may arise. If, therefore, in the place of a Hindu undivided family, which is a person, a new firm is constituted or a new company brought into existence, which again is a person, it cannot be urged that the provisions of sub-S. (1) or sub-S. (2), as the case may be, are not attracted, simply because there exists a section which expressly deals with the disruption of a Hindu undivided family. A Hindu undivided family and a firm or a limited company are mutually exclusive and cannot co-exist. Accordingly, without disruption the conversion of a Hindu undivided family into a firm or a company in its entirety is unconceivable and so long as it remains undivided, the question of succession to it as a whole by another entity does not arise. But as it is possible under the income-tax law that a person conducting several businesses may be succeeded in a particular business which is divisible from the other businesses of his, a Hindu undivided as a person can in the matter of such business be succeeded by a company to that extent. The assessment on the successor is to be made under S. 26 (2) of the Act as if he had been carrying on the business, profession or vocation, throughout the previous year and as if he had received the whole of the profits for that year. 18 Lah. 325=39 P.L.R. 934=1937 Lah. 830.

Secs. 25-A and 26-A: JOINT HINDU FAMILY—NOT "FIRM".—The very definition of a "firm" involves the idea of contractual relationship between several persons and when the finding of fact of the Income-tax Officer is that there is no contractual relationship between these persons but the relationship between them is that of joint Hindu family relationship based on status and not on contract there is no firm in existence which he could possibly register under the provisions of S. 26-A. 1933 L. 827. Under S. 25-A the Income-tax Officer does not inquire into a question of separation or disruption of the family, notional or otherwise; he has to inquire into the question of whether the joint family property has in fact been divided. Where an application under S. 26-A for registration of a joint Hindu family as a firm was filed, and the assessees nowhere suggested that joint family existed alongside the new partnership, and there was no evidence that the family was divided. *Held*, the Income-tax, Officer was right in coming to the conclusion that the partnership transaction was not a genuine one. 164 I.C. 799=1936 P. 476.

Secs. 25-A and 66 (3).—The questions whether S. 25-A requires actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under S. 25-A, and whether a finding of the Income-tax Officer is supported by any evidence, are questions of law. 1933 L. 952.

Secs. 25-A, 26 and 26-A.—*See* 18 L. 325.

RIGHT OF ASSESSEE TO ADJUDICATION OF QUESTION AS TO WHETHER NEW FIRM HAS BEEN

[1][(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family.]

Change in constitution of a firm.

[2][26. (1) Where, at the time of making an assessment under section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, [3][the assessment shall be made on the firm as constituted] at the time of making the assessment :

LEG. REF.

[1] Added by S. 3 of Act XXII of 1930.

[2] Substituted by S. 5 of Act III of 1928.

[3] Substituted for the original words by S. 32 of Act VII of 1939.

NOTES.

CONSTITUTED.—The assessee is entitled to an adjudication of the question whether a new firm has been constituted so as to attract the operation of S. 26 and he could not be deprived of this legal right, merely on the ground that an adjudication on this question would tend to affect the decision of the Income-tax Officer under S. 26-A against which no appeal is competent. S. 25-A no doubt deals within assessment after partition of an undivided family, but it does not exclude the possibilty of the members so separated to constitute themselves into a firm so as to bring their case within the ambit of S. 26. 1935 L. 275=156 I.C. 833; 18 L. 325. The assessees who were a joint Hindu family consisting of a father and his seven sons and who were hitherto assessed as an undivided family, separated during the year of account, and shortly thereafter the father and his seven sons formed themselves into a firm and applied to the Income-tax Officer to register the firm under S. 26-A of the Income-tax Act, and to make the assessment under S. 26 (2). *Held,* (1) that there had been no succession within the meaning of S. 26 (2) of the Act, and the Income-tax Officer was therefore not bound to register the firm under S. 26-A and to assess under S. 26 (2); (2) that the Income-tax Officer was bound to make the assessment under S. 25-A (2) of the total income received by the joint family as such and to hold each member liable for his proportionate share of the tax so assessed. 40 Bom.L.R. 452=1938 Bom. 350.

Sec. 26 (1) and (2).—*Derbyshire, C.J.*—S. 26 (1) contemplates a business which continues in existence both during the period of the predecessor and during the period of the successor. When there is no such business in existence continuously during the life of the predecessor and of the successor, S. 26 (1) can have no application. The provision in S. 26 (2) as regards succession in business is designed merely with a view to preserve, in a proper case where there is a succession, a measure upon which the successor may be assessed in the first year of his proprietorship of the business, and that is at the root of the nenessity for there being a real continuity of the business. The object being to measure the income of the successor by the past history of the business, it is essential that there should be a very close identity between the business in the former proprietirship and the business in the present proprietorship. There can be no succession under S. 26 (2) to a part only of the business. 41 C.W.N. 132=I.L.R. (1937) 2 Cal. 7. The words "*change in the constitution of a firm*" mean a change in its partners or personal but not a change in the proportion in which the partners divided the profits. 177 I.C. 192=1938 Cal. 562. It is open to any person to reduce the incidence of his income-tax in any legitimate way, and the mere fact that a reconstitution of the firm has reduced the incidence of the tax is by itself no evidence that the reconstitution is not real. At the time of the reconstitution of a firm, the new capital was not introduced. Nor was there the valuation of assets. After registration had been refused the firm reverted to its old constitution. *Held,* that there were not sufficient grounds for supposing that the reconstitution was a bogus arrangement. 178 I.C. 404=40 P.L.R. 639=1938 Lah. 194.

Costello, J.—There cannot, generally speaking, be a succession to a part of a business; but that does not imply that if what is succeeded to is not the same extent of trade or even does not include a particular line or set of customers, it necessarily follows that there cannot be a succession to the trade or business. The word "succession" does cover any case of transfer by one trader to another of the right to that benefit which arises from connection and reputation. If the business is one business throughout, even though in one year it operates at more places than one, whereas in the succeeding year it operates only in one of those places, the matter certainly falls within the purview of S. 26 (1), even if it cannot be said that there is a succession. A mere change in the composition or constitution of the firm is within the contemplation of S. 26 (1). 41 C. W. N. 132.

Panckridge, J.—Under S. 26 (2), it is not necessary to determine to whom the good will, the marks and the firm name legally belong. The important thing is that new firm does in fact use them in their business, and each one is a factor, to be taken into account in deciding whether that business was one, in respect of which the new firm should be regarded as the successor of the old. The

[1][Provided that the income, profits and gains of the previous year shall, for the purpose of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year were entitled to receive the same :

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment.]

[2][(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year :

LEG. REF.

[1] Added by S. 32 of Act VII of 1939.

[2] Substituted by *ibid.*

NOTES.

successor to a business, profession, or vocation is under a statutory liability imposed by S. 26 (2) in respect of the profits earned in the previous year by the person he succeeds. The fact that the business was carried on in two places in the previous year and in one of those places only in the succeeding year does not of itself make the business carried on during the second season a different business from that carried on in the first season. The question depends ultimately on the identity of the business carried on by the assessee with the business to which he is said to have succeeded; and the admissions and conduct of the assessee with regard to the business are of the greatest assistance in arriving at a decision on the point. The fact that no tangible assets have passed from the old firm to the new appears to be matter of very little importance. S. 26 (1) has only application when a change occurs in the constitution of a firm or a firm is newly constituted during the currency of a partnership; the sub-section has no application where the new or succeeding firm comes into existence after the term of the former partnership has come to an end owing to effluxion of time. 41 C. W.N. 132=I.L.R. (1937) 2 Cal. 7.

Per *Mukherjea, J.*—The process of assessment begins with the service of notice under S. 22 (2)1 and it continues until some order of assessment is made. If therefore after aforesaid notice has been received by the assessee and before filing a return he dies, and is succeeded by a person it would be competent to the Income-tax Officer to find, if the evidence justified the finding, that the person on whom notice was served had carried on a business and was succeeded in that capacity by another person. 182 I.C. 270=1939 Cal. 196 (S.B.) . The object of S. 26 (2) is to assess the successor on the profits of the business, which he is deemed constructively to carry on during the previous year. The language of the section itself shows that the assessment is based on the assumption that the successor received the entire profits of previous year. **S. 26 (2) has therefore no** application, when there is loss in the year of accounting in the business in respect to which succession has taken place, and there are no profits for which the successor could be taxed. 182 I.C. 270=1939 Cal. 196 (F.B.); *see also* 45 C.W.N. 681.

Sec. 26 (2): MEANING OF TERMS—"BUSINESS."—"Business" in S. 26 (2) is not business in the abstract, but business in concrete. 138 I.C. 673=1932 S. 189. The words "any business" in S. 26 do not mean each and every business carried on by the former owner of a business. Where a company owning several businesses transfers one business to another company, the latter company is successor to the former and is assessable in respect of that business. 55 M. 832=1932 M. 434=63 M.L.J. 15 (S.B.). The expression "where at the time of making an assessment under S. 23" merely means "when the time comes to make an assessment." 12 P. 5 =1933 P. 123. The plain meaning of the words "succeeded in such capacity by another person" is that if there is a business, profession or occupation which was formerly carried on by a person and that property has now been taken directly by another person who continues the business, the transference of ownership whether it be by operation of law or *inter vivos* is a succession. The real test of whether there has been a succession or not is to be decided by an examination of the business. Where a business was continued after a change of ownership, *held*, that there was a succession to a business. 12 P. 5=14 Pat. L. T. 171=1933 P. 123. *See also* 138 I.C. 673=1932 S. 189; 168 I.C. 209=1937 Rang. 102 (S.B.). Money-lending business by joint family—Partition—Business recommended by some of the members—No "succession". 11 R. 501 =148 I.C. 594=1934 R. 13 (S.B.). The requisites of "succession" under S. 26 (2) of the Income-tax Act are: (1) there must be a business in existence prior to the date of an assessment being made; and (2) on the date of the making of the assessment it must be carried on by a person different to the person who carried it on prior to the date of the assessment, that is to say, the business must be the same but the person carrying it on must be different. What the section requires is that it should be the same business and not business of the same nature,

NOTES.

Where certain persons have for several years possessed the monopoly of supplying labour to the Port Trust, not jointly, but under different contracts, and finding that their monopoly is about to come to an end owing to the adoption by the Port Trust of the policy of inviting tender, and in order to secure continuity for their business they enter into a partnership and put in their tender for the contract, and being successful, find themselves in a position to continue the business without a break, it is not correct to say that to continue to supply labour to the Port Trust as before, or that what they do after that date is the same business. The prior business of the partners must be deemed to come to an end on the constitution of the partnership and thereafter a new and separate partnership is started to carry on a business of the same nature. There is consequently no "succession" within the meaning of S. 26 (2). 1937 M. 316=(1937) 1 M.L.J. 619 (F.B.). *See also* 32 S.L.R. 203=1938 Sind 33. Transfer of agency by one agent to another). *See also* 1939 Sind. 318; 1941 Rang.L.R. 45=1940 Rang. 281. The word "assessment" is not confined to the definite act of making an order of assessment. Where a notice has been given under S. 22 (2) to a person to furnish within the time specified a return in the prescribed form, the process of assessment has begun and continues until some order of assessment is made. The words at the time of making the "assessment" in S. 26 (2) therefore mean in the course of the process of assessment. Where, at the date of his death, a person carrying on business has been served with a notice under S. 22 (2) and the time for furnishing the return had not expired and no return had been made, a person who succeeds to that business is taxable under S. 26 (2). 61 I.A. 312=13 P. 607 =67 M. L. J. 422 (P.C.). S. 26 (2) operates not merely to fix the liability to pay tax but governs also the process of computation of the tax. "Assessment" in the Act is used in two senses the process of determining the amount of profit or loss and the process of levying tax but if there is nothing repugnant in the context, the word refers to the former. *Quaere*:—Whether S. 26 (2) applies to a foreign business. I.L.R. (1939) Mad. 269=49 L.W. 399= 1939 Mad. 376=(1939) 1 M.L.J. 482 (F. B.). *See also* 1939 Cal. 196. The Income-tax Act has to be construed as a whole and the definition in the assessment under S. 26 (2) based on the profits of a predecessor in business, refer to such predecessor. I.L.R. (1938) Bom 374=40 Bom.L.R. 343=1938 Bom. 241 (S. B.); 1940 I.T.R. 7. S. 26 of the Act is applicable in the case of foreign firms whose profits are brought into British India and are taxable under S. 4 (2) of the Act. 1929 M. 769=57 M.L.J. 300 (F.B.). Successor is not bound to pay in respect of the predecessor any tax which the predecessor would not have been liable to pay. 47 A. 715=88 I.C. 239. "Succession" in S. 26 (2). There can be "succession" to a person without there being succession to that person's business. Succession to a person is not the same thing as succession to that person's business. A person may be succeeded by another in a business in the sense that it is the same sort of business, although not the same business. 138 I.C. 673=1932 S. 189. The real test to determine whether there is "succession to business" within the meaning of S. 26 (2) of the Act, is the identity of the two businesses and the time intervening between the closing down of the old business and the opening of the new one in its place. The delay is a question of degree and in some cases the delay may mean a cesser of profit-making operations and never any real cessation of the business at all. But where that time intervening between the two businesses is so great that "succession to old business" cannot be inferred, there is no 'succession to business' within the meaning of S. 26 (2) of the Act. 1937 Rang.L.R. 26=1937 R. 102 (S.B.). "Succession"—Meaning of—Transfer of agency business in motor cars from one firm to another—Transferee—Assessment as successor—If justified—Principles. 1939 Sind 318. In order that a person should be held to have "succeeded" within the meaning of S. 26 (2), it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. 1940 I.T.R. 531=1940 Rang. 281 (S.B.). Accumulated unabsorbed depreciation allowance of owner of business—If available to successor. *See* 45 C.W.N. 681. Successor in business—Assessment of—Computation of profits—Right to depreciation of previous years. *See* 1939 I.T.R. 374. Where any change occurs in the constitution of a firm, for example, where a registered firm succeeds to the business of an undivided Hindu family as in this case, the assessment should be made on the firm as constituted at the time of making the assessment, that is, on the registered firm in this case. 49 A. 611 =25 A.L.J. 366. On this section, *see also* 32 C.W.N. 287=54 M.L.J. 1 (P.C.). The legal effect of the disruption of a family is to be determined according to the facts of each case. The business of a family can continue in spite of its disruption. The question really is whether the business was discontinued or not in consequence of the breaking up of the family. 117 I.C. 228 =1929 L. 461 (2). An assessed firm had a branch or agency operating at Ipoh in Federated Malay States. There had beee an older firm there but this was wound up and the assets in the shape of outstandings divided between the partners. Part of these assets fell to the share of the partners in the assessed firm and were shown as credit in its general balance. During the year for which the firm was assessed, Ipoh branch remitted

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid.]

NOTES.

Rs. 1,20,000 in all to British India. Income-tax Department acting upon the presumption that to the extent profits were made at Ipoh this remittance was composed of these and declined to accept the contention that the remittance was derived from realization of the old firm's outstandings and so was mainly capital. The assessed firm did not prove by means of accounts which were duly examined that the remittances were not composed of profits liable to tax. *Held*, that the assessment was good in law. 1930 M. 104=129 I.C. 654 (S.B.). Firm converted into company on first day of assessment year —Mode of assessment. 163 I.C. 860=1936 L. 510.

EFFECT OF.—S. 26 (2) is evidently intended to secure to Government a tax based on the earnings of a business for a full year notwithstanding the transfer of the business from one person to another before the expiry of the year provided of course that the business is continued by the transferee. If the transferor and the transferee are separately taxed for profits earned by them during the period each of them carries on business, the incident of taxation would be seriously affected; and if the income for the whole year though enjoyed by two different persons is liable to be taxed at the end of the year, it is but proper that the person who is in possession of the business at the end of the year should be made responsible for it leaving it to him to settle the equities between him and the transferor with regard to the apportionment of such taxation. 138 I.C. 673=1932 1932 S. 189.

OBJECT OF SECTION.—S. 26 is designed for the purpose of making somebody assessable to income-tax, and the whole scheme of the Act is not to assess two people at the same time, but is to find somebody who is either properly assessable or more conveniently assessable; and what S. 26 (2) says is that where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed. That is not only a convenient course, but seems to be a just one. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. 55 M. 832=63 M.L.J. 15 (S.B.).

"A PERSON" includes the Secretary of State when engaged in enterprises of a commercial nature. The acquisition by him of a railway in the exercise of the statutory powers vested in him under the Railways Act would nevertheless make him the successor of the company in respect of such railway. 138 I.C. 673=1932 S. 189.

"CAPACITY" EXPLAINED.—By capacity is meant a position enabling one to do something. 138 I.C. 673=1932 S. 189.

ESCAPING ASSESSMENT.—Though it may appear somewhat unreasonable to the Court that a company should escape assessment of tax on a profit which it has admittedly made, yet, if the law, as it stands enables the company to avoid payment of the tax, the Court is bound to give effect to it. Therefore where the Government acquires a private concern whom it pays profit for the previous nine months and keeps to itself profit for the last three months of the year, S. 26 (2) applies to such a case and the company cannot be assessed for the profits given to it by the Government. 138 I.C. 673=1932 S. 189.

TRADING LOSS.—Where at a time when a money-lending firm was reconstituted, the assessees entered in their books of account that certain lands possessed by the old firm had fallen in value and entered the difference as a loss to the business. *Held*, that there was no *trading loss* but only a depreciation of the value of the assets; until property taken in repayment of loans is sold there can be no realised trading loss in respect of such property. 11 R. 462. The proper legal effect of a proved fact is essentially a question of law. Whenever the facts give rise to a consequential question whether there is or is not a "succession" within the meaning of S. 26 (2) a question of law is involved. 1940 I.T.R. 531=1941 Rang.L.R. 45=1940 Rang. 281 (S.B.).

Secs. 26 (2) and 44.—Partnership—Dissolution—One partner continuing business—If "succeeds" to business—Ex-partner —Assessed on sharers of profit—Fresh assessment on 'successor'—Justified. I.L.R. (1941) Mad. 220=53 L.W. 210=A.I.R. 1941 Mad. 255=(1941) 1 M.L.J. 120 (S.B.).

Sec. 26 (2) ,Proviso: APPLICABILITY—REQUISITES—"CANNOT BE FOUND"—MEANING OF.—If cannot be held that a firm which has been dissolved "cannot be found" within the meaning of the proviso to S. 26 (2) of the Income-tax Act, notwithstanding that all the members of the firm are alive and can be found. Before the proviso can be brought into operation, it

Procedure in registration of firms.

[1][26A. (1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

LEG. REF.

[1] Inserted by S. 5 of Act XXI of 1930.

NOTES.

must be established that the person succeeded "cannot be found", that is, he must be dead or has disappeared. The proviso cannot be applied when the person succeeded is alive and his whereabouts are known or can be ascertained. I.L.R. (1941) Mad. 868=54 L.W. 90=1941 Mad. 673=(1941) 2 M.L. J. 152 (F.B.).

Sec. 26-A.—S. 26-A only contemplates the registration of a firm which is constituted under an instrument of a partnership which with clearness states what the individual shares of the partners are. Where on the death of a partner his widow is taken in as a partner and his minor children, three sons and three daughters, are admitted to the benefits of the partnership as a body and not as individuals, and an application is made under S. 26-A of the Act for registration of the new firm, stating that the widow is entitled to a six annas share, though under the deed her share is really only two annas, the remaining four annas being intended for the benefit of the minor children who are admitted to the benefits of the partnership in a body, it cannot be said that the shares of the minors are specified with certainty so as to comply with S. 26-A of the Act. A.I.R. 1942 M. 177=(1942) 1 M. L. J. 18. (S. B.). Where an application is made for renewal of registration of a firm under S. 26-A, the Income-tax Officer is bound under R. 6 of the Rules framed by the Board of Inland Revenue in exercise of the powers conferred by S. 59 of the Act, to renew the certificate from year to year, when such application is made to him accompanied by a certificate signed by one of the partners of the firm that the constitution of the firm as specified in the instrument of partnership remained unaltered. He has no power to decline to renew the certificate of registration unless the firm has in fact altered its constitution since the grant of the prior certificate. Rule is imperative. 31 N.L.R. (Supp.) 233=162 I.C. 554=1936 N. 121. When certain persons make an application as required by S. 26-A the Income-tax authorities are entitled to go behind the deed of partnership produced and to find that the deed is bogus and to refuse to register them as a firm, and if there is evidence on which they could arrive at such a finding, the High Court will not weigh the evidence with a view to decide whether the finding is correct or otherwise. I.L.R. (1940) Nag. 200=1940 Nag. 119. It is open to the Income-tax Officer to suspend orders on an application already presented under S. 26-A by members of a Hindu family until the assessment proceedings are held. If at the time of making the assessment a claim is made under S. 25-A it is the duty of the Income-tax Officer to decide whether there has been a separation of members and a partition of the property within the meaning of sub-S. (1) of that section. If it is found that there has been such separation and partition an order will be passed to that effect, and if it appears that a firm has been constituted by the separated units which have come into existence the Income-tax Officer will proceed under S. 26 and will then register the firm upon an application under S. 26-A. I.L.R. (1938) A. 638=1938 A.L.J. 610=1938 All. 452. Where certain persons make an application in accordance with S. 26-A of the Income-tax Act for registration of their firm, the Income-tax authorities are entitled to go behind the deed of partnership which the applicants produce and to find that the deed is bogus and to refuse to register them as a firm for the purposes of the Income-tax Act. 1939 I.T. R. 625. It is open to the Income-tax authorities to go into evidence, both circumstantial and direct, to determine whether the instrument of partnership is a genuine document or whether it merely embodies a bogus transaction for the purpose of evading the tax. The onus rests on the person who applies for the registration of the firm to prove that a genuine instrument of partnership has been executed and that all the persons named therein are actual persons and not 'dummies'. I.L.R. (1938) Lah. 113=1938 Lah. 105. It is true that no partnership can be registered if any partner under the deed is liable to have a variation of his share. But 'share' does not mean net receipts. It is the basis of computation from which, after other necessary factors are considered, one is going to arrive at them. The law looks to the shares in the partnership business and not to the receipts from it, which may happen in certain contingencies to find their way into the pockets of individual partners. It is a fallacy to say that the individual shares of partners are not "adequately" specified by reason of the fact that their drawings or receipts may be conditioned by effect being given to other stipulation in the partnership deed. Hence where the partnership deed is genuine and the shares of each partner (as a basis for computation and not as a means by themselves of calculating his net receipts) are definite and determinable and the deed definitely specifies these individuals shares and the profits of each current year are shown and credited in accordance with the shares shown

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed ; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.]

Cancellation of assessment when cause is shown.

27. Where an assessee [1][* * * *] within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

LEG. REF.

[1] The words "or, in the case of a company, the principal officer thereof" omitted by S. 33 of Act VII of 1939.

NOTES.

in the partnership deed, the deed is registrable under S. 26-A even though the deed provides that what the partners actually get will depend upon the time which they have devoted to the business or their absence therefrom. 1939 Bom.L.R. 532=1939 Rang. 178. *Beaumont,* C.J.—R. 4 (new) of the Rules under S. 26-A of the Income-tax Act as amended in 1939 does not alter the law as it previously existed; it only makes the true effect of R. 4 clearer than it was under the previous wording. Both under the old and the new rule, it is open to the Income-tax Officer to say that the shares which appear in the deed of partnership produced with an application for registration are not the true shares of the partners and therefore there is no proper application by the requisite firm. If it were shown that one of the partners was only a nominee of a share allotted to him or another for another partner, the deed would not then specify correctly the individual shares. It must specify correctly the individual and beneficial shares. *Kania, J.*—R. 4, as amended in terms, gives power to the Income-tax authorities to inquire and determine whether the deed put forward is genuine and also whether the partnership is constituted as stated in the deed. I.L.R. (1941) Bom. 384=43 Bom.L.R. 258=1941 Bom. 205.

Sec. 26-A and Rr. 2 and 6: Scope—Compliance—Application for registration of firm—Validity—Conditions—Partnership for fixed term—No provision for renewal—Absence of fresh instrument—Application for registration signed by clerk and unaccompanied by certificate of partner to show that constitution of firm was unaltered not valid. 1940 I.T.R. 121. Alleged unregistered gift by Mahomedan assessee and reinvestment in business—Unregistered partnership produced cannot be registered as firm, 1938 Rang. 435. Under S. 26-A the Income-tax Officer is empowered to register only the partnership which is specified in the instrument of partnership which has been put forward or nothing else. If some of the persons constituting the partnership are not competent in law to be partners, the partnership, constituted by the other partners is not the partnership which the assessee seeks to register but another partnership altogether, if indeed there is in existence any partnership at all. It is quite open to the Income-tax Officer to look into the reality of the document relating to the partnership and refuse registration in such circumstances. 41 C.W.N. 629. =I.L.R. (1937) 2 Cal. 160. A firm constituted under a registered deed of partnership of which one member is a firm, is not entitled to be registered as a firm for the purpose of income-tax if the instrument, while specifying the individual share of profits and losses, does not specify the shares *inter se* of the partner firm. Unless the individual shares of the partners are specified in the instrument of partnership, the Income-tax Officer is justified in refusing registration although he has knowledge of it otherwise. The words of S. 26-A do not permit of any elasticity of construction. 1937 M. 316=(1937) 1 M.L.J. 619 (F.B.). The question as to whether the partnership transaction is real or not is purely a question of fact. A mere application under S. 26-A and a decision by Income-tax Officer even in favour of assessee will not conclude the matter. 164 I.C. 799=1936 P. 476.

Sec. 27.—S. 27 is applicable to the cases noted therein. It does not apply to a case where the Assistant Commissioner refuses to admit an appeal *ex parte* without hearing the assessee or his counsel. But even where S. 27 is applicable it is open to the assessee if he has a good case to file an appeal and show that the order under S. 23 (4) was not justified. 1932 A.L.J. 389=1932 A. 930. It would be for the Income-tax Officer to decide whether, on the particular facts of the case sufficient cause has been shown by the assessee for not appearing in time and producing his accounts in time. 1924 M.W.N. 785=1924 M. 880. *See also* 84 I.C. 131; 27 A.L.J. 536=119 I.C. 569 (2); 1930 A.

Penalty for concealment of income or improper distribution of profits.

[1][28. [2][(1) If the Income-tax Officer, the Appellate Assistant Commissioner [3][or the Appellate Tribunal] in the course of any proceedings under this Act, is satisfied that any person—

LEG. REF.

[1] Substituted by S. 6 of Act XXI of 1930.

[2] Substituted by S. 34 of Act VIII of 1939.

[3] Substituted for " or the Commissioner " by S. 86, *ibid.*

NOTES.

L.J. 78=1930 A. 209; 8 R. 209=1930 R. 78. The sufficiency of the cause is a matter for the Income-tax Officer and if he has considered the cause insufficient, it cannot be said, as a point of law, he is not justified in his view. 140 I.C. 712=1932 P. 166. The words "satisfies and was prevented by suffieient cause" being practically indentical with similar words occurring in O. 9, R. 9 and O. 41, R. 19, C.P. Code and S. 5, Limitation Act, they must receive similar interpretation as has been put upon those words in the latter enactments. 1934 S. 183 (2). Where the Income-tax Officer makes an assessment under S. 23 (4), the proviso to S. 30 (1) applies and an appeal to the Assistant Commissioner is barred. The proper remedy for the assessee is to apply to the Income-tax Officer under S. 27 and in the event of the decision going against the assessee to file an appeal. 8 R. 587. When there is ample evidence upon which the Income-tax Officer can find that there was no sufficient cause preventing the assessee from producing account books requisitioned under S. 22 (2) and it appears upon that ground he had refused to cancel the assessment made under S. 23 (4) and his order is upheld by the Assistant Commissioner on appeal for the same reason there is no question of law arising under the circumstances for the purpose of S. 66 (2). 9 R. 21; 9 R. 25. Even if the High Court thinks that the action of the Income-tax Officer is arbitrary and harsh and that the assessment has been made *ex parte* without sufficient materials or justification, it cannot interfere under S. 66 of the Act. 84 I.C. 131=1924 M. 880. In an appeal against the order of the Income-tax Officer refusing to reopen the question of summary assessment, the only question before the Assistant Commissioner is whether the assessment should be reopened, *i.e.*, the order of the Income-tax Officer set aside and where he decides that question in the negative and holds that there is no sufficient cause for reopening the question, he is not obliged to enter into the merits of the assessee's return. The assessment order stands and there is nothing to enquire about. 139 I.C. 593=1932 C. 410 (S.B.). The question of the sufficiency of cause is different from the question of the sufficiency of evidence, since the determination of this sufficiency of cause involves the question whether the judicial discretion has been exercised in a sound and reasonable manner or has been exercised capriciously, arbitrarily or in a judicially unsound manner and, therefore, does involve a question of law. 8 R. 203=1930 R. 33. It is possible as a matter of law for the Income-tax Officer to find as fact that a particular assessee had failed to establish "sufficient cause" or "not reasonable opportunity" within the meaning of S. 27. 38 P.L.R. 812 (2) =1936 L. 489. The illegality of a notice, non-compliance with which has brought about a best judgment assessment under S. 23 (4), can be agitated within the expression "prevented by sufficient cause" under S. 27 of the Act. The assessee has to satisfy the conditions laid down in the section in connection with the particular notice, non-compliance with which has brought about the best judgment assessment. I.L.R. (1937) All. 834=1937 A.L.J. 957=1937 All. 770.

Appeal.—Where the Income-tax Officer makes an assessment under S. 23 (4), the proviso to S. 30 (1) applies and an appeal to the Assistant Commissioner is barred. The proper remedy for the assessee is to apply to the Income-tax Officer under S. 27 and in the event of the decision going against the assessee to file an appeal. 8 R. 587=1931 R. 53.

Reference to High Court.—When there is ample evidence upon which the Income-tax Officer can find that there was no sufficient cause preventing the assessee from producing account books requisitioned under S. 22 (2) and it appears upon that ground he had refused to cancel the assessment made under S. 23 (4) and his order is upheld by the Assistant Commissioner on appeal for the same reason, there is no question of law arising under the circumstances for the purposes of S. 66 (2). 9 R. 21=1931 R. 97. Where a notice was duly served on the assessee not under S. 22 (4) but he failed to produce some of the accounts and thereupon the Income-tax Officer made an assessment under S. 23 (4) and subsequently he refused to cancel the assessment at the instance of the assessee holding that there was no sufficient cause for the non-production of the accounts and the same order was affirmed by the Assistant Commissioner. On appeal, *held,* that the questions regarding validity of the notice and the propriety of the assessment did not arise in the appeal and that there was no room for a reference to be made to the High Court. 9 R. 25=1931 R. 98.

Secs. 27 and 66 (2).—Sufficiency of cause for having *ex parte* assessment reopened under S. 27 of the Income-tax Act is certainly a question of fact dependent on the circumstances of each case. But since its determination essentially depends upon the exercise of judicial discretion, the question (*a*) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(*b*) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub-section (2) of section 23, or

(*c*) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

[1][he or it may direct] that such person shall pay by way of penalty, in the case referred to in clause (*a*), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (*b*) and (*c*), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income :

LEG. REF.

[1] Substituted for the words " he may direct" by S. 86 of Act VII of 1939

NOTES.

whether discretion has or has not been exercised in a sound and reasonable manner in reaching the conclusion invariably involves a question of law. (1930 R. 33; 1930 R. 78, Rel. on.) 1934 N. 183. The question whether an assessee had or had not sufficient cause within the meaning of S. 27 of the Act is ordinarily a question of fact, and no reference with regard to it is competent under S. 66 (2) or (3). 1940 All. 530=I.L.R. (1941) All. 1=1941 A.L.J. 12.

Sec. 28.—Valid reassessment proceedings a condition precedent to imposing penalty. *See* 1927 M.W.N. 611 (F.B.). In proceedings under S. 28, the Income-tax authorities ought to act fairly and reasonably in the circumstances of each case. 12 R. 268=151 I.C. 673=1934 R. 95. The quantum of the penalty within the statutory limit that ought to be imposed is matter of fact and not of law, and is to be determined by the Income-tax authorities, and not by the Court. 12 R. 268=1934 Rang. 95. Where an assessee submits deliberately an incorrect statement of his accounts to the Income-tax Officer, he cannot be said to have discovered his mistake on the day on which he files a corrected statement because at the time when he made his previous return, he knew it was incorrect and he could not at any subsequent time have discovered something which he knew at an earlier time, and so the order of the income-tax authorities imposing a penalty on him under S. 28 is quite correct. Although the later return may for the purposes of assessability to income-tax be treated as a revised return under S. 22 (3), the income-tax authorities are entitled to look at the previous incorrect return and are under S. 28 entitled to inflict a penalty upon the person who has made it. 55 M. 827=1932 M. 433=63 M.L.J. 235. The word 'income' as has been used in the Income-tax Act has a wider sense and it connotes the assessable figure arrived at after accounting for all the legitimate deductions and exemptions and consequently if any assessee furnishes any false particulars about any item which is to be accounted for before the assessable figure is arrived at, he brings himself within the clutches of the law. Hence, an assessee who deliberately claims a false deduction can be penalized under S. 28. 40 P.L.R. 913=1938 Lah. 620. The maximum penalty that can be imposed under S. 28 (1) is a sum representing the difference between the tax on the income declared by the assessees and the tax on the income ascertained under the Income-tax Act in respect of which the assessment has been made. 11 R. 75, Foll.) 12 R. 268=1934 Rang. 95. The maximum penalty which can be imposed under S. 28 (1), Income-tax Act, is determined by ascertaining the difference between the amount of the tax on the income set out in the false return and that on the income on which the assessment has been made. But the questions whether a penalty ought to be imposed and, if so the amount thereof, are matters which are (subject to Ss. 30 to 32) within the discretion of the Income-tax Officer; and upon these matters the assessee is entitled to be heard under S. 28 (3). 12 R. 470=1934 R. 354 (S.B.). The Assistant Commissioner of Income-tax has no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under S. 28 of the Act. 1931 A.L.J. 414=1931 A. 401. S. 28 of the Act must be strictly construed. There is no word in the section regarding super-tax. Therefore the Income-tax Officer has no jurisdiction to impose a penalty in the matter of super-tax. 53-A. 445=1931 A.L.J. 336=1931 A. 421. In an inquiry under S. 28 as to whether penalty should be imposed, evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no no penalty ought to be imposed, or that the

Provided that—

(*a*) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of section 22 ;

(*b*) where a person has failed to comply with a notice under sub-section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees;

(*c*) no penalty shall be imposed under this sub-section upon any person assessable under section 42 as the agent of a person not resident in British India for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under section 34 has been served on him.]

[1][(*d*) when the person liable to penalty is a registered firm, or an unregistered firm treated under section 23 (5) (*b*) as a registered firm, so that the amount of the income-tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (*b*) and (*c*), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm.]

(2) If the Income-tax Officer, the [2][Appellate Assistant Commissioner] [3][or the Appellate Tribunal], in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount, [4][he or it may direct] that such partner shall, [5][in addition to the income-tax and super-tax, if any, payable by him] pay by way of penalty a sum [6][not exceeding one and a half times the amount of income-tax and super-tax] which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income ; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

LEG. REF.

[1] Added by S. 8 of Act XL of 1940.

[2] Substituted for " Assistant Commissioner " by S. 34 of Act VII of 1939.

[3] Substituted for " or the Commissioner " by S. 86, *ibid.*

[4] Substituted for the words " he may direct," by *ibid.*

[5] Substituted for the words " in addition to the income-tax paybale by him," by S. 34, *ibid.*

[6] Substituted for the words " not exceeding the amount of income-tax" by *ibid.*

NOTES.

the maximum prescribed under S. 28, and the Income-tax Officer is not justified in refusing to admit evidence of the income that in truth accrued in the course of the assessment year. 11 R. 75=1935 R. 30 (F.B.). The Commissioner, in deciding whether the imposition of the penalty by the Assistant Commissioner is illegal, cannot reimpose the penalty himself, and thereby validate the very order which was challenged in appeal before him. For the same reason the Commissioner is precluded from imposing the penalty when an application is preferred to him under S. 66 (2) of the Act praying that he may refer to the High Court the question of validity of the imposition of the penalty by the Assistant Commissioner. No penalty can be imposed under S. 28 of the Act unless a notice is served on the assessee to show cause against the imposition of such a penalty. 1936 L. 585. Once the Income-tax Officer starts proceedings under sub-S. (1) of S. 28 within the time prescribed there,

(5) An [1][Appellate Assistant Commissioner] [2][or the Appellate Tribunal on making] an order under sub-section (1) or section (2), shall forthwith send a copy of the same to the Income-tax Officer.

[3][(6) The Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner.]

Notice of demand.

[4][29. When any tax or penalty is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax or penalty a notice of demand in the prescribed form specifying the sum so payable.]

Appeal against assessment under this Act.

30. (1) Any assessee objecting to the amount [5][of income assessed under section 23 or section 27, or the amount of loss computed under section 24 or the amount of tax determined under section 23 or section 27], or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer

NOTES.

he is empowered to make an order imposing a penalty under that sub-section, even after the assessment order has been finally made and the tax been paid. 1938 Lah. 749.

"REAL AMOUNT".—The same meaning must be attributed to the term "income" for the purpose of construing the words "real amount" of income and "correct income" in S. 28. 12 R. 268=1934 R. 95. On this section, *see also* 1935 Lah. 585.

Sec. 29.—As to period within which notice demanding income-tax should be issued, *see* 1925 P.H.C.C. 217=1925 P. 581. Where there is a perfectly good assessment order the fact that a mistaken notice was sent to the assessee in no way prevents a proper notice being sent when the mistake is discovered. 139 I.C. 593=1932 C. 410 (S.B.). Service of notice—Service on person authorised to receive postal articles under letter of authorization is sufficient—Person discharged from service but letter of authority not cancelled—Effect—Service on such person is good in law. 1941 I.T.R. 193. The word *"assessment"* in S. 23 (4) means determining the total taxable income and the sum payable on it. A notice can be validly issued under S. 29 when the Income-tax Officer has made a best judgment assessment under S. 23 (4). 56 A. 418=1934 A. 930.

Sec. 30.—Where the Income-tax Officer makes an assessment under S. 23 (4), the proviso to S. 30 (1) applies and an appeal to the Assistant Commissioner is barred. The proper remedy for the assessee is to apply to the Income-tax Officer under S. 27 and in the event of the decision going against the assessee to file an appeal. 8 R. 587=1931 R. 53. *See* 27 Bom.L.R. 400 =1925 B. 257. S. 30 deals with appeals against assessments, and as soon as the Assistant Commissioner finds that the assessment is validly made under S. 23 (4), the proviso to S. 30 (1) comes into operation, and it is in pursuance of that proviso that the Assistant Commissioner refuses to admit the appeal; and as soon as the Assistant Commissioner refuses to admit the appeal, he cannot thereafter take any action under S. 28 (3) by issuing a notice to the assessee regarding penalty. 1936 L. 585. There is nothing in the Act to warrant the suggestion that a wrong order passed by an Income-tax Officer as a preliminary to his passing an order under S. 23 of the Act may not be made a ground of appeal when appealing against the final order of assessment, unless a separate appeal or application for view, where no appeal is allowed, has been successfully filed against such order. As a matter of fact, the tendency of the legislature has always been to prevent appeals against interim orders, leaving it open to the party aggrieved to challenge such orders when appealing against the final order. 1930 S. 301. The clause "denying his liability to be assessed" in S. 30, Cl. (1), is wide enough to cover a case of an assessee who denies his liability to be declared as an agent under S. 43. 140 I.C. 490=1932 N. 152. The Assistant Commissioner is right in so far as examining the case as to satisfy himself whether the appeal before him is competent. Without examining the record to some extent he cannot be in a position to find whether the assessment is under S. 23 (4) and whether an appeal lay. And the order of the Assistant Commissioner to the effect that no appeal lay does not amount to an order dismissing an appeal under S. 31. 1933 A. 541=1933 A.L.J. 1474.

RIGHT OF APPEAL—EXTENT OF.—No appeal would lie against an order refusing to register a firm made prior to the amendment of the Income-tax Act by Act XVIII of 1933 which afforded a right of appeal subsequent only to 11—9—1933. 1940 I.T.R. 421=1940 Sind 214. An order under

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[1] Substituted for "Assistant Commissioner" by S. 34 of Act VII of 1939.

[2] Substituted for "or a Commissioner, who has made" by S. 86, *ibid.*

[3] Added by S. 34, *ibid.*

[4] Substituted by S. 35, *ibid.*

[5] Substituted for the words and figures "or rate at which he is assessed under section 23 or section 27" by S. 36, *ibid.*

[1][to register a firm under section 26A or] to make a fresh assessment under section 27, or [2][objecting] to any order [3* *] under sub-section (2) of section 25 [4][or section 25A] [2][or sub-section (2) of section 26] or section 28, made by an Income-tax Officer [5][objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of section 44E or sub-section (5) of section 44F or sub-section (1) of section 46, or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48, 49, or 49F, or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee, being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of section 23A], may appeal to the [6][Appellate Assistant Commissioner] against the assessment or against such refusal or order :

[7][Provided that no appeal shall lie against an order under sub-section (1) of section 46 unless the tax has been paid :

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income :

Provided further that a shareholder in a company in respect of which an order under section 23A has been passed by an Income-tax Officer, may not in respect of matters determined by such order appeal against the assessment of his own total income.]

LEG. REF.

[1] Inserted by S. 12 of Act XVIII of 1933.

[2] Inserted by S. 36 of Act VII of 1939.

[3] The words "against him" omitted by *ibed.*

[4] Inserted by S. 4 of Act XXII of 1930.

[5] These words, brackets, figures and letters inserted by Act VII of 1939.

[6] Substituted for "Assistant Commissioner" by S. 36, *ibid.*

[7] Substituted, by *ibid.*

NOTES.

S. 26-A refusing to register a firm was not appealable before the 11th September, 1933, on which date S. 30 (1), as amended by the Amending Act XVIII of 1933, came into force. A proceeding under S. 26-A is a proceeding different from proceedings under S. 23 of the Act; hence an order under S. 26-A not being made in a proceeding which is an essential part of another proceeding in respect of which appeal was specially provided by S. 30 (1) was not appealable on that ground also. (1940) Kar. 299. S. 30 provides for appeals against certain specific orders and it necessarily follows that orders passed under sections which are not mentioned in S. 30, are not appealable and are therefore final in the sense that they cannot be re-opened at any subsequent stage. The Income-tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. 164 I.C. 1018=1936 L. 621. An individual partner may appeal from the assessment of the firm of which he is a partner; but he cannot, in an appeal from an order assessing him personally ask for a re-determination of the question of the assessment of the firm and the income which has come to his share according to that assessment. 1941 I.T.R. 190. An assessee is not competent to withdraw an appeal presented by him under S. 30. I.L.R. (1938) Lah. 359=1938 Lah. 741.

Sec. 30 (1), Proviso: EFFECT.—The proviso to S. 30 (1) has not the effect of taking away a right of appeal in cases where the assessee does not challenge the assessment levied on him under S. 23, Cl. (4), but only challenges his liability to be taxed in a different capacity from that possessed by him and more so when such a capacity has been duly recognised by the Income-tax Officer. Even if the proviso be open to a double construction, the proviso should be so interpreted as to exclude an appeal only in respect of an assessment levied under S. 23, Cl. (4) and not to an appeal of this nature. 28 S.L.R. 174=1934 S. 46. *See also* 1940 I.T.R. 421=1940 Sind 214; 15 Luck 132=1940 Oudh 52 (denial of liability before Income-tax Officer, if pre-requisite to right of appeal). Proviso—Scope and effect—Refusal of Income-tax Officer to make fresh assessment under S. 27—Appealability—Effect of cancellation of order of assessment under S. 23 (4). 116 I.C. 479 =1929 R. 8. A person who has been assessed under S. 23 (4) is not entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. Proviso to S. 30 (1) is bar to such an appeal. 133 I.C. 753=1931 P. 306 (F.B.). Where an appeal is incompetent, the mere fact that the

(2) The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to [1][or of the order in writing notifying the amount of toatl income on which the determination under sub-section (5) of section 23 was based and the apportionment thereof between the several partners or of the loss computed under section 24] [2][or of the intimation of the refusal [3][to pass an order under sub-section (1) section 25A, or] to register a firm under section 26A] or of the date of the refusal to make a fresh assessment under section 27, [4][or of the intimation of an order under sub-section (1) of section 23A or under section 48, 49 or 49F], as the case may be; but the [5][Appellate Assistant Commissioner] may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

LEG. REF.

[1] Inserted by Act XXIII of 1941.

[2] Inserted by S. 12 of Act XVIII of 1933.

[3] Inserted by S. 2 and Sch. I of Act XX of 1937.

[4] Inserted by S. 36 of Act VII f 1939.

[5] Substituted words "Assistant Commissioner" by S. 37, *ibid*,

NOTES.

Assistant Commissioner in dismissing the appeal does not say that it is incompetent does not amount to an entertainment of the appeal so as to make the order appealable. 132 I.C. 857=1930 L. 1014. Mere fact that assessment purports to have been made under S. 23 (4) does not shut out appeal but it must be shown that circumstances of the case bring it within Income-tax Act, S. 23 (4). 10 L. 596=1929 L. 593 (F.B.). *See also* 65 I.A. 236=1938 P.C. 175=(1938) 2 M.L.J. 115 (P.C.). Person assessed under S. 23 (4) is not entitled to appeal on the ground that he was not liable to be assessed under the Act. 10 L. 596 (F. B.). Whether the Income-tax Officer legally proceeded to assess the petitioner under S. 23 (4) is a question of law and no appeal lies to the Assistant Commissioner. 100 I.C. 774=1927 L. 288; 1940 Sind 214.

Sec. 30 (2).—The use of the word "ordinarily" means that there is nothing to prevent authorities from entertaining an appeal preferred after 30 days. 31 C.W.N. 630=1927 C. 518. On this section, *see also* 9 L. 464=1928 L. 864. Appeal filed beyond time—Effect of rejection—Statement of case under S. 66 (2) cannot be ordered by High Court. 155 I.C. 124=1935 A. 572. Under S. 30 (2), an Assistant Commissioner has no authority to admit a new matter raised in the form of an additional ground of appeal, after an appeal has once been admitted, whether within the period prescribed therefor, or after its expiry. All that he can do under this enabling provision is to admit an appeal for the first time, even if it is presented after the period prescribed therefor. 18 Lah. 325=39 P.L.R. 934=1937 Lah. 830. There is no rule of limitation prescribed for filing additional grounds of appeal. Such grounds date back to the date of the original appeal, of which, when admitted, they become a part. If, therefore, the original appeal is filed within the prescribed period of limitation, the additional grounds can be filed at any time before the appeal is decided, and the Assistant Commissioner can admit them in the exercise of his discretion. If he exercises his discretion in refusing to admit the additional grounds in an improper manner, the discretion is open to correction. If the objection raised in the additional grounds goes to the root of the assessment and questions the principle on which it is based by the Income-tax Officer, the Assistant Commissioner would be exercising his discretion erroneously in declining to admit them on the ground that they are filed after the period prescribed for the filing of the appeal. 1937 O.W.N. 634=1937 Oudh 416.

Secs. 30 and 23 (4): NOTICE ON PARTNER OF FIRM IN PATIALA UNDER S. 22 (2)—PARTNER DENYING KNOWLEDGE OF PROFITS—ACCOUNT BOOKS NOT PRODUCED—ASSESSMENT—APPEAL.—A firm carried on business in Patiala territory. Some of the members of the firm resided in British India at Kaithal, The Income-tax Officer issued a notice to one of them under S. 22 (2) read with S. 34. The assessee stated that he was only the sleeping partner of the firm and that he knew nothing of its income or profits. He was directed to obtain accounts and information from his partner in Patiala territory and though the time for making the return was extended by the Income-tax Officer on two separate occasions, the partner finally intimated that neither the accounts nor the information sought was available. The Income-tax Officer thereupon made assessment under S. 23 (4). The partner preferred appeal under S. 30. *Held*, that the case was properly treated as one of "no return" and no appeal was competent against the order under S. 30. (1928 L. 729, Foll.) 1933 L. 290. (*See* Amendment Act XVIII of 1933).

PRACTICE.—Plea not raised before the Income-tax Officer cannot be raised before the Assistant Commissioner in appeal. 131 I.C. 639=1931 L. 601.

Sec. 30, 26-A and 66.—Under S. 30 before it was amended in November, 1933, it is not open to the Commissioner to refer to the High Court under S. 66 a question

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

Hearing of appeal.

31. (1) The [1][Appellate Assistant Commissioner] shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing.

LEG. REF.

[1] Substituted for the words "Assistant Commissioner" by S. 37 of Act VII of 1939.

NOTES.

arising out of a refusal to register a firm under S. 26-A, because the order is at that time, not appealable under S. 30, and therefore final. 164 I.C. 1018=1936 L. 621. Prior to the amendment of S. 30 (1) of the Income-tax Act in November, 1933, there was no right of appeal from the refusal on a firm under the provisions of S. 26-A of the Act. 63 C. 395.

Secs. 30 64 (3) and 66: DECISION AS TO PLACE OF ASSESSMENT—APPEAL—HIGH COURT CAN DEAL WITH QUESTION UNDER S. 66. Where an assessee questions the jurisdiction of the Income-tax Officer of a particular place to deal with his assessment and the place of assessment is decided under the provisions of S. 64 (3) of the Act, after obtaining an affidavit from the party as to his objections and after the necessary correspondence with the Income-tax authorities concerned, and the Income-tax Officer proceeds to make an assessment, the plea of jurisdiction cannot be raised before the Assistant Commissioner on appeal under S. 30, and the High Court cannot deal with the question under S. 66 of the Act. In such a case it cannot be said that the proviso to S. 64 (3) has been ignored, for the proviso only requires that the assessee should have had an opportunity of representing his views and not that he should have been formally heard on his objection. The filing of the affidavit represented the views of the assessee and he need not be heard after the department had come to a decision on the point. I.L.R. (1940) All. 785=1940 A.L.J. 855=1941 All. 129.

Sec. 31.—The Assistant Commissioner must state facts and give reasons for his findings. Where he omits to do so he fails to perform his duty properly. 10 L. 833=1930 L. 277. Where no appeal lies under S. 31 no reference lies under S. 66 (2). 1932 A.L.J. 576=1932 A. 642. An appellant in income-tax cases has no higher right in adducing fresh evidence in appeal than he would have in a civil case under O. 41, R. 27, C.P. Code. Where the accounts were not produced before the Assistant Commissioner and they were sought to be filed before the Commissioner in appeal but were rejected, *held,* that the Commissioner did not err in law in refusing to admit those accounts at the hearing of the appeal. Under S. 31 proviso it is not necessary to give notice that the Assistant Commissioner proposes to enhance the assessment to any particular figure or to disclose the materials on which the enhancement is about to be made. Consequently, the Assistant Commissioner cannot be said to have acted illegally in enhancing the assessment without previously disclosing the materials on which he based the enhanced assessment. 7 R. 635=122 I.C. 898=1930 R. 4. *See also* 1937 O.W.N. 634=1937 O. 416; 1940 All. 530. The question whether an assessment made by the Income-tax Officer under S. 23 (4) is valid or not is a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31 and such a question cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. (6 R. 21; 8 R. 209; 8 R. 203; 7 R. 669, Overr.) 9 R. 281=1931 R. 194 (F.B.). An application by an assessee under S. 27 was rejected by the Income-tax Officer and the assessee filed an appeal under S. 30 (1) to the Assistant Commissioner, rightly or wrongly, who decided it on merits. *Held,* that the decision of the Assistant Commissioner was an order under S. 31 for purposes of applying to the Commissioner to make reference to the High Court. (1929 R. 8, Ref.) 1933 O. 396. Where the Assistant Commissioner hears the appeal of the assessee and passes an appellate order under S. 31 dismissing the appeal, the requirements of S. 66 (2) are satisfied whether the Assistant Commissioner has jurisdiction or not. 28 S.L.R. 174=1934 S. 46.

Secs. 31 and 32.—Where an appeal has been actually preferred to the appellate authority and where it has been disposed of by such authority, the order passed in such a proceeding may without straining the actual words of the section be regarded as an order under S. 31 or S. 32 as the case may be even though no appeal might have been in fact competent. (9 C. 100. Foll.) 133 I.C. 753=1931 P. 306 (F.B.).

Secs. 31 and 34.—Per *Panckridge, J.*—Where an assessee rightly objects to an assessment or re-assessment under S. 34 on the ground that the proceedings are bad on the face of them, the powers of the Assistant Commissioner on appeal cannot extend to enhancing an assessment, which the Income-tax Officer had no jurisdiction to make and must be limited to annulling it as made without jurisdiction. I. L. R. (1937) 2 Cal. 540=41 C.W.N. 905. No doubt S. 31 empowers an Assistant Commissioner of Income-tax in general terms to enhance an assessment, but that power cannot be exercised irrespective of the limitations imposed

(2) The [1][Appellate Assistant Commissioner] may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer.

[2][(2*A*) The Appellate Assistant Comimssioner may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable]

(3) In disposing of an appeal the [1][Appellate Assistant Commissioner] may, in the case of an order of assessment,—

(*a*) confirm, reduce, enhance or annul the assessment, [3][* * *] or,

(*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the [1][Appellate Assistant Commissioner] may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment [4][and determine where necessary the amount of tax payable on the basis of such fresh assessment], [5][or, in the case of an order refusing [6][to register a firm under section 26A or] to make a fresh assessment under section 27,

(*c*) confirm such order or cancel it and direct the Income-tax Officer [7][to register the firm or to make a fresh assessment, as the case may be]], or, in the case of an order under sub-section (2) of [8][section 25, or sub-section (1) of section 23A, or sub-section (2) of section 26 or section 48, 49 or 49F],

[9][(*d*)] confirm, cancel or vary such order,

[10][or, in the case of an order under sub-section (1) of section 25A,

(*e*) confirm such order or cancel it and either direct the Income-tax Officer to make further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25A,

or, in the case of an order under section 28 or sub-section (6) of section 44E or sub-section (5) of section 44F or sub-section (1) of section 46,

(*f*) confirm or cancel such order or vary it so as either to enhance or reduce the penalty;

or, in the case of an appeal against a computation of loss under section 24,

(*g*) confirm or vary such computation] :

Provided that the [1][Appellate Assistant Commissioner] shall not enhance an assessment [11][or a penalty] unless the appellant has had a reasonable opportunity of showing cause against such enhancement :

[3][Provided further that at the hearing of any appeal against an order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by a representative].

[12][(4) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association

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LEG. REF.

[1] Substituted for "Assistant Commissioner" by S. 37 of Act VII of 1939.

[2] Inserted by *ibid.*

[3] Omitted by Act XXIII of 1941.

[4] Added by Act VII of 1939.

[5] Inserted by S. 5 of Act XXII of 1930.

[6] Inserted by S. 13 of Act XVIII of 1933.

[7] Substituted for "to make a fresh assessment," by *ibid.*

[8] Substituted for the words and figures "section 25 or section 28" by S. 37 of Act VII of 1939.

[9] Cl. (*c*) was re-lettered Cl. (*d*) by S. 5 of Act XXII of 1930.

[10] Inserted by S. 37 of Act VII of 1939.

[11] Added by *ibid.*

[12] Added by Act XXIII of 1941.

NOTES.

by S. 34. The Assistant Commissioner is not, therefore, legally competent to add a new item of income, after the expiry of the limitation prescribed in S. 34, when an appeal against an assessment is pending before him. Nor is he competent to set aside the assessment made under S. 34 and direct the Income-tax Officer to make a fresh assessment including a fresh item of income after the period of limitation prescribed in S. 34 has expired. I.L.R. (1938) Lah. 359=1938 Lah. 741.

Secs. 31 and 66.—Where the assessee does not raise a point before the original taxing officer, but raises it before the As-of persons is ordered to be made, the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.

(5) The Appellate Assistant Commissioner shall, on the conclusion of the appeal, communicate the orders passed by him to the assessee and to the Commissioner.]

32. *Appeals against orders of Appellate Assistant Commissioner. Omitted by S.* 87 *of the Indian Income-tax* (*Amendment Act*, 1939) (*VII of* 1939).

Appeals against orders of Appellate Assistant Commissioner.

[1][33. (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within sixty days of the date [2][on which such order is communicated to him].

LEG. REF.

[1] Substituted for the original section by S. 88 of Act VII of 1939.

[2] Substituted by Act XXIII of 1941.

NOTES.

sistant Commissioner in appeal from the order of assessment, the latter is perfectly justified in refusing to allow it to be raised, when it involves the production and hearing of fresh evidence. The High Court will not interfere with the discretion of the Income-tax authorities in refusing permission to the assessee to adduce fresh evidence. 59 M. 263=1936 M. 776=71 M.L.J. 35 (F. B.). *See also* 62 C. 1011. An order confirming an assessment within the meaning of S. 31 of the Act means an order having reference to the assessment and affirming it. Where an appeal is dismissed by the Assistant Commissioner of Income-tax on the ground that it is barred by limitation, without even considering the question of assessment, the order of dismissal is not an order confirming the assessment under S. 31, for the purposes of S. 66 (2) of the Income-tax Act. S. 66 (2) does not apply to such a case and the High Court cannot direct the Commissioner to state a case. 155 I. C. 124=1935 A.L.J. 845=1935 All. 572.

Sec. 32 (1).—Assistant Commissioner—Powers of—Appeal limited to subject-matter of assessment. 4 P. 385=6 Pat.L.T. 166. Appeal—Limitation — Application for copy not properly stamped and not accompanied by a proper authority to apply for copy—Not proper—Time taken by such application cannot be deducted from period of limitation. 11 P. 40=1932 P. 103. An application for copy of an order passed by the Assistant Commissioner of Income-tax falls within paragraph 5 of Art. 1 (*a*) of Sch. II of the Court-Fees Act and requires a Court-fee of two annas. 11 P. 40=1932 P. 103. When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer reduces the amount of income under one head but increases the amount under another, the net result, however, being a reduction both of the total income assessed and the tax, it is not an order "enhancing the assessment," though it may involve an enhancement of a particular item of income and no appeal lies to the Commissioner under S. 32 against that order. 36 L.W. 868=63 M.L.J. 805 (F.B.).

Secs. 32 and 33.—Where the assessee files an appeal from the order of assessment by the Income-tax Officer the Commissioner can take action under S. 33 and proceed to enhance the assessment after having disposed of the assessee's appeal under S. 32 but the exercise of the powers of review under S. 33 would, however, be subject to the limitation provided in S. 34. The Commissioner when dealing with the appeal under S. 32 can pass orders only with respect to the subject-matter of the appeal, and cannot *suo motu* proceed to enhance an assessment which he has the power to do under S. 33 of the Act. If the Commissioner calls, for the record of a case after disposing of the appeal preferred to him against the order of an Assistant Commissioner he would be exercising powers of review in respect of proceedings which have been taken by an authority subordinate to him and not in respect of proceedings taken by himself as a Court of appeal. 38 P.L.R. 1107=1936 L. 897.

Sec. 33: REVIEW.—Income-tax Commissioner's powers under S. 33 are subject to limitations imposed by S. 35. 8 L. 354=1927 L. 248. For purposes of re-assessment proceedings, S. 33 is subject to the provisions of S. 34. 1927 M. W. N. 611 (F.B.). During the pendency of an application under S. 66 (2) the Commissioner can exercise his power of review under S. 33. 7 R. 644=1929 R. 248 (F.B.). Where a Commissioner reviews his decision under S. 33 of the Income-tax Act and issues supplemental demand he must give a sufficient and reasonable opportunity to the assessee to be heard. 5 Pat.L.T. 609=3 P. 661. *See also* 30 C.W.N. 831=1926 C. 998. Review — Supplemental demand — Notice to assessee. 88 I.C. 1014=1924 P. 644. It is incorrect to say that if the Commissioner sees fit to hold the proceedings before the Assistant Commissioner *ultra vires* and a nullity, the High Court has no power to inquire into the validity of the Commissioner's orders, since the quashing of the proceedings before the Assistant Commissioner results

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made [1][within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner].

[2][(2*A*) The Tribunal may admit an appeal after the expiry of the sixtd days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period.]

(3) An appeal to the Appellate Tribunal shall be in the prescribed form any shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fre of one hundred rupees.

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

(5) Save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final.]

LEG. REF.

[1] Substituted by Act XXIII of 1941.

[2] Inserted by *ibid.*

NOTES.

in the absence of any order which the High Court can inquire into. The ultimate authority on the question whether the proceedings before the Assistant Commissioner were *ultra vires* or not is the High Court and not the Commissioner. 1933 S. 158=145 I.C. 145. It is competent for a Civil Court to make a declaration that the registration of the partnership instrument was null and void, and this course may be taken by the Court notwithstanding any concurrent remedy in that behalf, under the Income-tax Act, that may be open to the plaintiff and therefore notwithstanding the fact that the plaintiff applied as assessee to the Commissioner of Income-tax for cancellation of the registration under S. 33 and that the application was rejected, the Court is entitled to make the declaration. 1933 R. 229=11 R. 380. *Quaere..*—When the Commissioner of Income-tax has exercised his powers of revision under S. 33 of the Income-tax Act with reference to one point, whether it is open to him to exercise his powers of revision again in respect of the same order in respect of other points which do not affect the previous one? 1940 I.T.R. 437.

LIMITATION.—Even though no limitation of time is prescribed for interference by way of revision under S. 33, the Court would almost always incline in favour of taking the view that such exercise of power should be within a reasonable time of the proceedings sought to be revised, reasonable time being computed by the Court having regard to all the other provisions of the Act, to the facts of the particular case and the special features, if any, of it. 1927 M.W.N. 611 (F.B.). *See also* 99 I.C. 221. Law point arising in proceedings under S. 33—High Court's power to direct Commissioner to make a statement of the case. *See* 99 I.C. 221. On this section, *see also* 45 M. 977=43 M.L.J. 434; 46 I.C. 285=34 M.L.J. 210; 49 M. 725=51 M.L.J. 650; 54 M.L.J. 298 (F.B.); 9 P. 194=1930 P. 53.

Secs. 33 and 34: ORDER OF INCOME-TAX OFFICER UNDER Ss. 22 AND 34—REMEDY OF AGGRIEVED PARTY.—If the orders of the Income-tax Officer under S. 22 and S. 34 are without jurisdiction, the Act provides the Commissioner with powers of revision under S. 33. If the Commissioner passes an order under S. 33 which the assessee considers prejudicial to him, he can avail himself of the provisions of S. 66 (2) of the Act as amended by Act XVIII of 1933. The contention that an application under S. 66 would entail delay, even if correct, does not justify the assessee in neglecting the remedy provided by the Act and in seeking instead to call in aid the extraordinary powers of the High Court to issue a writ of prohibition against the Income-tax Commissioner. 62 C. 1011.

Secs. 33, 34 and 35: COMMISSIONER'S POWERS.—The Commissioner's powers under S. 33 of the Act are subject to the time limit of one year mentioned in Ss. 34 and 35. Hence where the order of the Income-tax Officer is revised and cancelled by the Commissioner more than a year after it was passed, the cancellation is illegal. 28 S.L.R. 174=149 I.C. 1204=1934 Sind 16.

Secs. 33 and 66: ORDER ARISING UNDER S. 33—COMMISSIONER NOT OBLIGED TO STATE CASE.—There is no express obligation upon the Commissioner to state a case on an order arising under S. 33; nor has the High Court power to order him to do so under S. 45, Specific Relief Act. The Commissioner has a discretionary power vested in him. [7 R. 511, Foll.: 49 M. 725 (S.B.), Diss.] 58 B. 361=36 Bom.L.R. 23=1934 B. 62. *See also* 1939 I.T.R. 506; 1940 I.T.R. 437. The word "prejudicial" in S. 33 need not have the same meaning as in S. 66 (2) of the Act. The word "prejudicial" in S. 33 is obviously used in the narrower sense of a prejudice occasioned to the assessee by the

Power of revision by commissioner.

[1][33-A (1) The Commissioner may of his own motion call for the record of any proceedings under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(c) the order has been made more than one year previously.

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner made within one year from the date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal:

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub-section (2) shall be accompanied by a fee of twenty-five rupees.]

Income escaping assessment.

34. [2][(1)] If [3][in consequence of definite information which has come into his possession the Income-tax Officer discovers that] income, profits or gains chargeable to income-tax [4][have escaped assessment in any year, or have been under-assessed, or have been

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LEG. REF.

[1] Inserted by Act XXIII of 1941.

[2] Original S. 34 re-numbered sub-section (1) by S. 41 of Act VII of 1939.

[3] Substituted for "for any reason'" by *ibid.*

[4] Substituted for "has escaped assessment in any year, or has been assessed at too low a rate" by *ibid.*

NOTES.

order of the Commissioner himself. In S. 66 (2) this reasoning does not apply, because S. 66 (2) deals with the right of the assessee to make an application from such an order while in S. 33 there is no application necessarily before the Commissioner at all. 1940 I.T.R. 437.

Sec. 34.—S. 34 is applicable to assessments to super-tax, and not merely income-tax. I.L.R. (1939) Bom. 445=41 Bom. L.R. 652=1939 Bom. 362. Amending Act of 1923—Effect of — Assessment to super-tax in 19922-1923 for income of 1921-22—Legality of. 79 I.C. 798=1924 M. 485 (2). Applicability of section—Estate of deceased—S. 24-B, if excludes S. 34. *See* 37 Bom. L.R. 112=1935 B. 167.

SCOPE AND APPLICATION.—Section 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year but some portion of the income, profits or gains of such assessee for some reason or other has not been included in the order of assessment. 9 R. 167=1931 R. 101 (S.B.). S. 34 does not apply to cases in which assess-

assessed at too low a rate, or have been the subject of excessive relief under this Act] the Income-tax Officer may, [1][in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years] of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment as the case may be :

[2][Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted.]

[3][(2) No order of assessment under section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (*c*) of sub-section (1) of section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable.]

[4][Provided that nothing contained in the section shall apply to a re-assessment made in pursuance of an order under section 31, section 33, section 66, or section 66-A.]

LEG. REF.

[1] Substituted for "at any time within one year" by 41 of Act VII of 1939.

[2] Proviso added by *ibid.*

[3] Added by *ibid.*

[4] Added by Act XXIII of 1941.

NOTES.

ment proceedings have been duly commenced in the course of the year of assessment although it may be that they have not been completed within that year. 9 R. 167. *See also* 58 C. 909; 61 C. 285 (P.C.) noted *infra*. The Income-tax Officer is not required by S. 34 to convene the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred by the section. To enable him to initiate proceedings under the section, it is enough that he on the information which he has before him and in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment or have been assessed at too low a rate. 67 I.A. 239=I.L.R. (1940) 2 Cal. 215=1940 P.C. 124=(1940) 2 M.L.J. 577 (P.C.). *See also* 1940 I.T.R. 243; 1941 I.T.R. 618; 1938 Cal. 557. S. 34 would also apply to a case in which no notice under S. 22 (2) has been given, and a person who receives no notice under S. 22 (2) does escape assessment, although, through no fault of his own, the process of assessment has never been set in motion. Where the assessment starts with a notice under S. 34, all the relevant portions of the Act apply as effectively as where the assessment starts with a notice under S. 22 (2). A person who receives no notice under S. 22 (2) and who is not all assessed to income-tax in one year may be proceeded against under S. 34 and assessed to income-tax in the following year on the income of the previous year. 39 Bom.L.R. 123. An assessment made under S. 34 which is based not on facts but upon surmises and hypotheses for which there is no sound foundation, cannot be sustained. 14 R. 228 =165 I.C. 3=1936 R. 219 (S.B.). *See also* I.L.R. (1937) Bom. 310=39 Bom.L. R. 123=1937 Bom. 214. Under S. 34, an assessment cannot be reopened merely at the discretion of the Income-tax Officer. He cannot reopen an assessment merely to enquire further into the assessee's books in case something assessable may be found. It is an essential pre-requisite to reopening an assessment that an item of income, profits or gains *has* escaped assessment and the Income-tax Officer cannot give himself jurisdiction by an erroneous finding of fact. 62 C. 1011. Where the assessee company

NOTES.

has succeeded to the business in issue after notice duly served under S. 34 upon the predecessor, the former is liable to be assessed without fresh notice being served upon it under the section. The Income-tax Act does not contemplate any fresh notice to be served upon the successor, inasmuch as the proceedings once started against the predecessor continue against the successor, even if the predecessor has ceased to exist. 18 L. 325. When part of the profits of a registered firm have escaped assessment, assessment can be made under S. 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceeding under the said section against the firm itself in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time barred. 58 C. 1204=35 C.W.N. 534 =1931 C. 686 (S.B.). Partners same in both firms—Remittance of profits by one business to another—Firm escaping assessment—No allocation of profits to individual partners—Assessment of individual partner is valid. 46 L.W. 901=(1937) 2 M.L.J. 928. It is not necessary that there should be an allocation amongst the partners of the profits to constitute receipt of profits. Receipt of the money by the partnerships was a receipt on behalf of the partners. There is nothing in the Income-tax Act which says that a partnership or a firm is to be assessed first. Either the firm itself is liable to be assessed or its individual partners. 46 L.W. 901=(1937) 2 M.L.J. 928 (F.B.). S. 34 is not limited to cases of non-disclosure by the assessee or discovery of new matter by the Income-tax authorities or inadvertence as distinguished from erroneous deliberations on the part of the authorities. It can be applied to put right an assessment by which a deduction has been improperly allowed on the ground that the balance has "escaped assessment". 37 C.W.N. 430=1933 C. 777=60 C. 843. Service within one year of a proper notice on the assessee giving notice of the intention on the part of the Income-tax Officer to re-assess is a condition precedent to any valid re-assessment under S. 34. 54 M.L.J. 298 (F.B.). Re-assessment proceedings should be validly started under S. 34 before a penalty is imposed by the Commissioner under S. 28 and it is only in that sense. S. 34 controls S. 28. 54 M.L.J. 298 (F.B.). Where no machinery existed to make it possible for the income-tax authorities to assess the income during that year, the assessment made subsequently under the section is illegal. 1931 L. 441. Reference on the question whether Hindu joint family had become divided—Jurisdiction of Income-tax Officer to decide. *See* 1927 M.W.N. 591 (F.B.). The failure to produce books of account required by the authorities by a notice under S. 34 entails the same consequence as in the case of a failure to make a return, and the Income-tax Officer is entitled, in such a case to make the assessment under S. 23 (4). 34 C.W.N. 1093. Where the assessee is already assessed under S. 23 (4), it is competent to re-assess him under S. 34 within one year of the original assessment on the ground that his income, profits, or gains chargeable to income-tax had escaped assessment. 10 L. 691=1929 L. 173. The Income-tax Officer has no jurisdiction to revise the assessment for the previous year which has been completed and has become final. 1933 Rang. 350. A subsequent Income-tax Officer cannot go behind and revise the assessment made by his predecessor in the previous year merely because he disagreed with the predecessor's finding as to the amount of the assessable income. 146 I.C. 300=1933 R. 350 (S.B.). *See also* 145 I.C. 145=1933 S. 158; (1938) 2 M.L.J. 115=65 I.A. 236 =I.L.R. 1938 B. 487 (P.C.). Where an assessment of super-tax has been completed as if the assessee were a Hindu undivided family and it is subsequently held that the assessee is an individual, if the original assessment was in the absence of a return made under S. 23 (4) and the assessee in answer to a notice under Ss. 22 (4) and 34 files a return disclosing a lesser income than that taken in the original assessment, the Income-tax Officer can reopen the assessment and determine the assessee's income *de novo*. 1931 A.L.J. 1109=1932 A. 83. In such a case the Income-tax Officer cannot proceed on the footing that any portion of the income has escaped assessment, but he can proceed on the ground that the sum had been assessed at "too low a rate". 1932 A. 83. The Income-tax Officer has jurisdiction to impose a penalty in the matter of income-tax in proceedings for assessment taken under S. 34 of the Act. 53 A. 445=1931 A.L.J. 336=1931 A. 421.

LIMITATION.—"In any year"—Meaning of—Starting point of limitation for notice under S. 34. 61 C. 132=38 C.W.N. 204=1934 C. 515. Notice under S. 22 served in proper time and assessment made—Assessment subsequently set aside by High Court—Fresh assessment in accordance with High Court order, but more than one year after the expiry of the tax year, not barred by limitation. 61 I.A. 10 noted *infra*. Whatever may be the reason for which the Income-tax Officer should fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. 8 L. 354=1927 L. 248. The limitation of one year applies only to the notice. If a notice calling upon the assessees to file a return of the additional income is given within the time therein limited, the rest of the assessment proceedings need not be completed within that time. 34 C.W.N. 1093. *See also* I.L.R. (1939) Mad. 393=1939 Mad. 302=(1939) 1 M.L.J. 371 (F.B.). There is no provision in law for the recovery of taxes on "escaped income" for more than

NOTES.

one year. 1929 A. 919=1930 A.L.J. 26. *See also* 1933 S. 158 as to charging of super-tax against a firm, whose registration was cancelled by the Commissioner. Mortgage—Interest assessed annually on accrual basis—Realization of interest by execution sale by assessee subsequently discovered—Assessment of interest representing escaped income on sash basis—Legality—Change of system to get over limitation not justified. 183 I.C. 83=1939 I.T.R. 522.

"ESCAPED ASSESSMENT".—The expression "has escaped assessment" in S. 34 cannot be read as equivalent to "has not been assessed" nor can income which has already been duly returned (under S. 22) for assessment be said to have "escaped" assessment within the statutory meaning merely because the assessment on income so returned was not made (under S. 23) within the tax year. Income has not "escaped" assessment within the meaning of S. 34 if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof. (58 C. 909, Appr.) 61 I.A. 10=61 C. 285=1934 P.C. 33=66 M.L.J. 121 (P.C.). *See also* 61 C. 132=38 C.W.N. 204=1934 C. 515. *See also* 59 B. 626=37 Bom.L.R. 697=1935 B. 410. *Nazim Ali, J.*—The word "assessment" in S. 34 is not confined to the definite act of assessment, but includes also the process of assessment. It cannot be construed in the narrow sense of being equivalent to "has not been assessed." 1940 I.T. R. 236=1940 Cal. 520. The words "has escaped assessment" in S. 34, is not equivalent to and is not restricted to "has not been assessed." Where an assessee makes a false return and evades liability to pay the tax he certainly escapes assessment, and if the falsehood and fraud perpetrated by him be detected within the time limit prescribed by the section, he can be assessed under S. 34, on the correct income. 31 S. L.R. 452. S. 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year, but some portion of the income, profits or gains of such assessee, for some reason or other, has not been included in the order of assessment; such income is income which has "escaped assessment" in the year, and falls within the ambi of S. 34 of the Act. 14 R. 228=1936 R 219 (S.B.). The Income-tax Officer relying upon the accounts submitted by th assessee firm passed an order of assessment but the Commissioner of Income-tax estimating the income for himself enhanced it without issuing notice within the period of one year. *Held,* that the difference in the estimates of income of the Income-tax Officer and Commissioner was income that had escaped assessment within the meaning of S. 34 and the Commissioner was not entitled to enhance the income without notice to the assessee within the time mentioned in S. 34. 38 P.L.R. 1107=1936 L. 897. The words "for any reason" placed before the expression "escaped assessment" clearly indicate that the Legislature intended to include all those cases which either resulted from mere inadvertence or from conscious misapprehension of the proper situation. There is no justification for confining the meaning of the word "escape" to those cases only which have not come to the notice of the Income-tax Officer at all and excluding those cases where he has applied his mind, but on account of an error of judgment has set any part of the income free from assessment. The idea conveyed by the words "for any reason" is so wide as to make it impossible not to include any case of non-assessment to whichever cause it may be due. 158 I.C. 349=1935 L. 361. *See also* 1940 Cal. 520=191 I.C. 118. It covers not only a case where the Income-tax Officer omitted to consider the question at all, but also a case where on consideration he came to the conclusion, *ex hypothesi* an erroneous conclusion, that the property in question was not assessable. 49 M. 22=1926 M. 287=50 M. L.J. 263. (Per *Full Bench, Dalip Singh, J.* contra). The words "if for any reason the assessment is too low" in S. 34, are wide enough to cover a mistake of law, *e.g.*, where the sole surviving coparcener has been originally assessed as a member of a Hindu joint family according to a decision of the High Court, but subsequently the Privy Council held differently, that in such a case he can be assessed as an individual, such a mistake is covered by S. 34, and a fresh assessment can be made under S. 34. I.L. R. (1939) Bom. 445=41 Bom.L.R. 652=1939 Bom. 362. *See also* 1940 Cal. 520; 1938 Cal. 557 (S.B.); 1940 Cal. 520. The word "escape" has a wide meaning and the words "for any reason" in the beginning of S. 34 appear to widen the interpretation and not to narrow the meaning of the word 'escape". Hence if an item of income is included in the return submitted by an assessee during a tax year but is left unassessed by the Income-tax Officer or if assessed in the first instance, the assessment is cancelled by any appellate or revisional authority, it escapes assessment within the meaning of S. 34 and the assessee can be legally served with a notice within one year of the end of that year. (14 L. 255=141 I.C. 415=1933 L. 284, Overr.) 16 L. 937 =158 I.C. 718=1935 L. 742 (F.B.). The income, profits or gains which the Income-tax Officer is authorised and bound to assess under S. 34 is the income, profits or gains chargeable to income-tax that had escaped assessment in the particular year. It is not open to him to ascertain the whole assessable income of the assessee and then further to ascertain whether some portion of such income had or had escaped assessment. 9 R. 28=132 I.C. 559=1931 R. 333, In a

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proceeding under that section, the Income-tax Officer and after him the Assistant Commissioner are only dealing with the extra income which has not been assessed to income-tax. No jurisdiction is given to either of these officers to make a new assessment for the purpose of taxing the whole of that assessment. It is therefore not open to the Assistant Commissioner on appeal to grant any relief other than setting aside the extra assessment by the Income-tax Officer. 1931 A.L.J. 878. When an assessment has already been made in respect of the previous accounting year under S. 34, the question whether all income which had accrued and had escaped assessment had been assessed to tax or not depends upon the investigation of facts of the case. 1931 C. 761 (S.B.) Per *Rankin, C.J.*—It may be that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. At all events income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof. 35 C.W.N. 310=58 C. 909=1931 C. 545 (S.B.). (Original proceeding against the assessee kept alive on account of a subsequent transfer of proceeding to a special officer being declared invalid). Where income has been assessed in the hands of an assessee to whom it was subsequently found not to belong, the income must be said to have escaped assessment within the meaning of S. 34. 8 L. 354=1927 L. 248. When the Income-tax Officer takes action under S. 34 of the Indian Income-tax Act for the purpose of raising the rate of tax on the ground that the rate originally fixed was too low, he is not bound to reopen the whole assessment and reassess the income, that is to determine afresh the correct taxable income of the assessee, and enquiry need not go beyond the facts on which the raising of the rate depends. 1930 M. 126=58 M.L.J. 23 (F.B.). Where a creditor had, prior to the year of assessment, received a sum of money from a debtor and he transferred the sum to interest account in the assessment year, and such sum was not taxed before nor was it treated as non-taxable, *held*, that it must be treated as interest received in the assessment year and its assessment is not time-barred. 9 P. 240=1930 P. 81 (S.B.).

ESCAPED ASSESSMENT—BURDEN OF PROOF.—Under S. 34, the onus does not lie on the income-tax authorities to satisy the Court upon facts, that income, profits and gains had escaped assessment. The effect of so holding would be that in every case in which proceedings are taken undes S. 34, the assessee would have an appeal on facts. Under S. 34 if the income-tax authorities have not misdirected themselves in law, and there were materials before the income-tax authorities upon which they could find that income, profits and gains had in fact escaped assessment, the High Court will not interfere or disturb the finding of fact at which the income-tax authorities have arrived. (1935 B. 410, Diss.) 14 R. 228=1936 R. 219 (S.B.). *See also* 59 B. 626=37 Bom. L.R. 697=1935 B. 410. It is always open to an assessee under S. 34 to show in any way he can that the income, profits or gains alleged to have escaped assessment have not in truth and in fact escaped and for this purpose it is not true that that income, profits or gains have necessarily escapeed assessment, because they have not been assessed under the right head. But if it is once shown that income has escaped assessment, the assessee cannot under S. 34 resist proceedings to assess it merely by showing that other income, profits or gains have been assessed at too high a figure. 34 C.W.N. 816=1930 C. 627 (F.B.).

NOTICE.—The Income-tax Officer can issue a notice under S. 34 even after an assessment has become final in appeal before the Assistant Commissioner of Income-tax. A notice under the section can be issued without proving by admissible evidence before the issue of such notice that such and such income and such sources have escaped assessment. All that is necessary is that the Income-tax Officer must have reason to believe that income has escaped assessment. 1942 I. T. R. 79. There is no standard form of notice prescribed in S. 34 and all that the section requires is that a notice containing all or any of the requirements which may be included in a notice under S. 22 (2) shall be served. So where the so-called notice was in the form of a letter by the Office but it contained all the details provided for in a notice, the notice must be treated as sufficient and regular in form. 61 C. 132=38 C. W.N. 204=1934 C. 515. It is the Income-tax Officer who is to decide whether income chargeable to tax has escaped assessment; he is the person charged with the duty of taking action under S. 34 where such action ought to be taken. Apart from the assessee no person other than the Income-tax Officer can by reason of S. 54 of the Act have any knowledge of the first assessment and upon what data it was based, and none else is in a position to decide whether income has escaped assessment or not. In deciding whether income has escaped assessment the Income-tax Officer must not act on suspicion or conjecture; he must decide the questions upon a fair and reasonable consideration of such information and materials as were available to him. He need not hold a formal enquiry, but he should indicate to the assessee the nature of the alleged escapement so as to enable him to identify it and explain it if he can. In other words he should give the assessee an opportunity of being heard before he decides against him that income has escaped assessment and proceeds to upset the settled assessment. If the Income-tax Officer is

Rectification of mistake.

35 (1) [7][The Commissioner or [2][Appellate Assistant Commissioner] may, at any time [3][within four years] from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section [4][33A] and] the Income-tax Officer may, at any time [3][within four years] from the date of any [5][assessment order [6][or refund order] passed by him] on his own motion rectify any mistake apparent from the record [of the appeal, revision [8][assessment or refund] as the case may be], and shall within the like period rectify any such mistake which has been [9][brought to his notice by an assessee] :

Provided that no such rectification shall be made, having the effect of enhancing an assessment [10][or reducing a refund] unless [2][the Commissioner, the

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LEG. REF.

[1] Inserted by S. 6 of Act III of 1928.

[2] Substituted for "Assistant Commissioner" by S. 42 of Act VII of 1939.

[3] Substituted for "within one year," by *ibid.*

[4] Substituted by Act XXIII of 1941.

[5] Substituted for "demand made upon an assessee," by Act VII of 1939.

[6] Inserted by S. 3 of Act XII of 1940.

[7] Substituted for "of the assessment" by S. 6 of Act III of 1928.

[8] Substituted for "or assessment" by S. 3 of Act XII of 1940.

[9] Substituted for "brought to his notice by the assessee" by S. 42 of Act VII of 1939.

[10] Inserted by S. 3 of Act XII of 1940.

NOTES.

satisfied with the assessee's explanation there is an end of the matter. On the other hand, if after a fair consideration of all the information and materials before him, including the explanation the assessee has given, or the failure of assessee to give any explanation of the alleged escapement, the Income-tax Officer acting as a responsible man comes to the conclusion that income has escaped assessment he may say so, and once he has so decided he may proceed under S. 34. Coming to a decision after giving an opportunity to the assessee of his being heard is a condition prececent to taking action under S. 34. The Income-tax Officer cannot proceed to act under S. 34 by merely stating that he has 'reason to believe' that income has escaped assessment. 177 I. C. 255=1938 Cal. 557 (S.B.). Where the assessee company has succeeded to the business in issue after notice duly served under S. 34 upon the predecessor, the former is liable to be assessed without fresh notice being served upon it under the section. The Income-tax Act does not contemplate any fresh notice to be served upon the successor, inasmuch as the proceedings once started against the predecessor continue against the successor, even if the predecessor has ceased to exist. 18 Lah. 325=1937 Lah. 830. When a notice under S. 34 has been served on a person and he has made a return in response thereto and then died, the proceedings can be continued by the issue of notices under Ss. 22 (4) and 23 (2) to the successor of such person. It is not necessary that the proceedings against the successor should be started *de novo*. 57 M. 357=1934 M. 63=66 M.L.J. 17 (F.B.). When income has escaped assessment, an assessment can be made under S. 34 on the successor of the person who, if no succession had taken place, would have been liable. Such an assessment is not invalidated by the fact that the succession took place after the close of the year in which he escaped assessment. *See* 57 Mad. 357=66 M.L.J. 17; 1936 Lah. 750. The *issue of a fresh notice* under S. 34 does not do away with the previous assessment under S. 23 (4). 1931 A. L.J. 1109=1932 A. 83. S. 34 itself mentions that notice under S. 34 may contain all or any of the requirements which may be included in notice under S. 22 (2). So when a notice under S. 34 is issued another notice under S. 22 (2) is not necessary. 1936 L. 750.

RE-ASSESSMENT—WHEN CAN BE MADE.—Income in respect of which a final and conclusive assessment has been made cannot be subjected to re-assessment except when the assessment has been fixed at too low a rate either under S. 34, or under any other section of the Income-tax Act. 14 R. 228=1936 R. 219 (S.B.). But *see also* 146 I.C. 300=1933 Rang. 350; 1933 Sind 158.

Secs. 34 and 23 (4).—When once a final assessment is arrived at, it cannot be re-opened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those sections. This evidently implies that even the "best judgment" assessment can be re-opened under S. 34. 1938 Lah. 867. *See also* 1938 P. C. 175=65 I.A. 236.

Secs. 34 and 35.—An assessment cannot be said to become final and conclusive until the time limited for altering the assessment under S. 34 or 35 of the Act has expired; and until such time an assessment may be corrected in a proper case. I.L.R. (1939) Bom. 445=41 Bom.L.R. 652=1939 Bom. 362. Ss. 34 and 35 are not mutually exclusive; and the fact that a mistake might be remedied under S. 35 is no reason why the assessment should not be altered under S. 34, if the case falls within that section. I. L.R. (1939) Bom. 445=41 Bom.L.R. 652 =1939 Bom. 362.

Sec. 35.—Rectification of a mistake which has the effect of enhancing the assessment cannot be made after the expiry of one year from the date of the demand made

[1][Appellate Assistant Commissioner] or the Income-tax Officer as the case may be], has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard :

[2][Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.]

[3][(2) The provisions of sub-section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal.]

[4][(3) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

[4][(4)] Where any such rectification has the effect of enhancing the assessment, [5][or reducing a refund] the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly.

Tax to be calculated to nearest anna.

36. In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded as one anna.

Power to take evidence on oath, etc.

37. The Income-tax Officer, [6][Appellate Assistant Commissioner] [7][, Commissioner and Appellate Tribunal] shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :—

(*a*) enforcing the attendance of any person and examining him on oath or affirmation ;

(*b*) compelling the production of documents ; and

(*c*) issuing commissions for the examination of witnesses, and any proceeding before an Income-tax Officer [6][Appellate Assistant Commissioner] [8][Commissioner or Appellate Tribunal] under this Chapter shall be deemed to be a "judicial proceeding" within the meaning of sections 193 and 228 [9][and for the purposes of section 196] of the Indian Penal Code.

Power to call for information.

38. The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

(1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm, or of the manager or adult male members of the family, as the case may be, and of their addresses ;

(2) require any person whom he has reason to believe to be a trustee, guar-

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LEG. REF.

[1] Substituted for Assistant Commissioner by S. 42 of Act VII of 1939.

[2] Added by S. 42 *ibid*,

[3] Inserted by S. 89, *ibid.*

[4] The original sub-Ss. (2) and (3) were renumbered, *ibid.*

[5] Inserted by S. 3 of Act XII of 1940.

[6] Substituted for "Assistant Commissioner" by S. 43 of Act VII of 1939.

[7] Substituted for the words "and Commissioner" by *ibid*.

[8] Substituted for the words "or Commissioner" by *ibid.*

[9] Inserted by S. 6 of Act XXII of 1930.

NOTES.

by the assessee. 8 L. 357. The fact that the assessee had moved the Commissioner under S. 33 during that period would not make any difference. 8 L. 357=1927 L. 421. Separate returns of five concerns filed to avoid heavy assessment—Notice served—Applicant mixing one more losing concern with the five and applying for reduction—Application is not maintainable. 4 P. 224 =86 I.C. 170. Commissioner's powers under S. 33 is one subject to limitations imposed by S. 35. 8 L. 354=1927 L. 248. On this section, *see also* 1933 S. 158=145 I.C. 145.

Sec. 37.—Section being a penal section must be construed strictly. 31 C. W. N. 956=1927 C. 724. Where a person was convicted and sentenced under S. 196, Penal Code, for an offence committed during the proceeding pursuant to a notice under S. 23 (2) of the Act, *held*, that S. 37 did not contemplate the offence and that the conviction should be quashed. 31 C.W.N. 956.

dian, or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian, or agent, and of their addresses ;

[1][(3)require any assessee to urnish a statement of the names and addresses of all persons to whom he has paid in any year rent, interest, commission, royalty or brokerage, or any annuity not being an annuity taxable under the head ' Salaries,' amounting to more than four hundred rupees, together with particulars of all such payments made.]

Power to inspect the register of members of any company.

39. The Income-tax Officer or Assistant Commissioner, or any person authorised in writing in this behalf by the Income-tax Officer or Assistant Commissioner, may inspect and, if necessary, take copies, or cause copies to be taken, of any register of the members, debenture-holders or mortgagees of any company or of any entry in such register.

CHAPTER V.

LIABILITY IN SPECIAL CASES.

Guardians, trustees and agents.

[2][40. (1) Where the guardian or trustee of any person being a minor, lunatic or idiot (all of which persons are hereinafter in this sub-section included in the term "beneficiary" is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian or trustee, as the case may be, in like manner and to the same amount as it would

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LEG. REF.

[1] Substituted by S. 44 of Act VII of 1939.

[2] S. 40 substituted by Act XXIII of 1941.

NOTES.

Sec. 40.—S. 40 is not a charging section. It is only a machinery section enabling the Income-tax Officer to assess the trustees or guardians as representing their beneficiaries or wards if they so choose. But it is not obligatory for the officer so to do and the section cannot be invoked to prevent him from assessing on other basis. 55 M. 891=1932 M. 378=62 M.L.J. 600 (F. B.). Section 40 was enacted to provide for certain special cases without its affecting in any way the liability to be taxed under the charging sections. It is merely a machinery section and not a charging section and making the trustees liable for beneficiaries in certain cases, where the beneficiaries are difficult or impossible to get at and where the trustee acts as a conduit-pipe for the conveyance of the income to the beneficiaries. It does not affect the charging Ss. 3 and 10 of the Act under which the trustees as an association of individuals, carrying on a business, are liable to be assessed in respect of the gains of the business carried on by them. In fact it is clear that this is the only way that the profits and gains of the business carried on by the trustees can be taxed. S. 40 is not therefore applicable to trustees who are liable under the general provisions of the Act to be assessed. 1930 L. 929. Even apart from S. 40, there may be other cases in which the trustees in receipt of trust income may be chargeable with tax on such income. By Act IV of 1913, for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, appellants were incorporated as trustees for executing the trusts. By S. 6 the corporation was to pay out of the income from the properties all rates and taxes and sundry other outgoings. By S. 7 the corporation was required to form two funds, called the Sinking Fund and the Repair Fund, and to carry annually thereto respectively, out of the income of the properties, certain sums calculated on percentages of capital sums there specified. By S. 8, the residue of the income was to be paid to the Baronet for the time being, if of full age, for his own absolute use and benefit. *Held, that,* so far as concerns the money which the appellants employ in maintaining the Sinking Fund and the Repair Fund and in defraying outgoings, they are not exempt from liability to pay tax. [*William* v. *Singer,* (1921) 1 A.C. 65, Ref.] *Held, also,* that even with reference to the balance of the trust income paid over to the Baronet, it was 'receivable' or 'owned' by the trustees and so rightly assessed. 61 I.A. 209=58 B. 317 =66 M.L.J. 643 (P.C.). *See also* 33 Bom. L.R. 1549.

Secs. 40 and 41: IF EXHAUSTS CATEGORY OF TRUSTEES.—Per *Jai Lal and Skemp, JJ.*—Ss. 40 and 41 do not exhaust the category or description of trustees or other persons respectively who may be in receipt of income as such or on behalf of others and do not limit the operation of S. 3 with regard to others. 16 L. 829=1935 L. 570 (F.B.).

be leviable upon and recoverable from any such beneficiary if of full age or sound mind and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.

(2) Where the trustee or agent of any person not resident in British India and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a beneficiary) is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax, if not levied on the beneficiary direct, may be levied upon and recovered from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.]

Court of Wards, etc.

41. [1][(1)] In the case of income, profits or gains chargeable under this Act which [2][* * * * *] the Courts of Wards, the Administrators-General, the Official Trustees or [3][* *] any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, [4][or any trustee or trustees [5][appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise] (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person], the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager [4][or trustee or trustees], in the like manner and to the same amount as it would be leviable upon and recoverable from [6][the person on whose behalf such income, profits or gains are receivable], and all the provisions of this Act shall apply accordingly :

[7][Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual

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LEG. REF.

[1] Original S. 41 was re-numbered sub-S. (1) by S. 46 of Act VII of 1939.

[2] Words " are received by " were omitted by *ibid.*

[3] Word " by " omitted by *ibid.*

[4] Inserted by *ibid.*

[5] Substituted by Act XXIII of 1941.

[6] Substituted for the words " any person on whose behalf such income, profits or gains are received," by S. 46 of Act VII of 1939.

[7] Added by *ibid.*

NOTES.

Sec. 41: APPLICABILITY—"MANAGER APPOINTED BY COURT".—*K* instituted a suit against *R* for a declaration that he was entitled jointly with *R* to certain properties and also for partition. A consent decree was passed, the terms of settlement providing that both *K* and *R* were each entitled to equal shares in the properties. A partition of the properties was ordered to be effected and Commissioners who were appointed for that purpose were directed to take accounts of the joint estate and divide the properties equally between both of them. Official Receiver was appointed receiver of the properties and was invested with the power of dividing the income of the properties equally between *K* and *R*. The Official Receiver was however subsequently discharged by a consent order which jointly gave liberty to both *K* and *R* to realize the rent of properties on joint receipts and to meet the necessary expenses. The documents of title were kept in joint custody and both were given liberty to invest money which would come to their hands and divide the same equally. Both *K* and *R* while in possession under the above arrangement divided the receipts between themselves in equal shares. The Income-tax Officer assessed *K* in respect of his share in the property presumably including half annual value of the property in the assessable income of *K* under the head 'property'. *K* objected to the assessment invoking the provisions of S. 41. *Held*, that S. 41 did not apply because in the circumstances *K* and *R* were never appointed managers or receivers of the property by or under any order of the Court within the meaning of S. 41 and the Income-tax Officer did not therefore act illegally in assessing *K* in respect of his share in the property. 1939 I.T.R. 394=I.L.R. (1939) 2 Cal. 300=40 C. W. N. 1009=1939 P. C. 163=(1939) 2 M.L.J. 893 (P.C.). To bring a person within S. 41 it is not enough that he should be appointed to "manage" the property, he must manage it "on behalf of another". I.L.R. (1937) 2 Cal. 358=1937 Cal. 583. "Agent"—Meaning of. *See* 67 I.A. 394=(1940) 2 M.L.J. 851 (P.C.); 1939 All. 593; 1938 All. 310.

shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate :

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.]

[1][(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains.]

Non-residents.

42. (1) [2][All income, profits or gains accruing or arising], whether directly or indirectly, through or from any business connection [3][in British India, or through or from any property in British India, or through or from any asset or source of income in British India,

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LEG. REF.

[2] Added by S. 46 of Act VII of 1939..

[2] Substituted for the original words by S. 47, *ibid.*

[3] Substituted for " or property in British India " by *ibid.*

NOTES.

Sec. 42.—The definition of the word 'business' in S. 2 (4) is not exhaustive and does not restrict the meaning of 'business connection' in S. 42 to such definition. All that is necessary is that there should be a business in British India and a connection between a non-resident person or company and that 'business' and that non-resident person or company has earned an income through such connection. 57 B. 519=35 Bom.L.R. 896=1933 B. 427. *See also* 1937 Rang.L.R. 172; 1937 Rang.L.R. 174=1937 Rang. 258 (S.B.). (Business connection, meaning of). 'Property' in S. 42 means something tangible and not a mere chose in action. A person who has advanced a loan is entitled to a mere debt and that is not property. 57 B. 651=35 Bom.L.R. 914. In the case of a non-resident, income which neither accrues nor arises nor is received within British India may be liable to tax under the combined operation of Ss. 3, 4 and 42. Profits made by an Insurance Company outside British India on premiums of participating policies collected and sent by its branches in India by investment outside India are profits or gains which are liable to tax in India. 57 B. 519=35 Bom.L.R. 896=1933 B. 427. Income of non-resident company, when liable for income-tax. 3 R. 614. S. 42 (3) refers only to a person who sells goods purchased by him from any place outside British India, and not to one who sells the produce of his own lands situate outside British India. The clause deals only with "profits" and "gains" and not with income generally. 171 I.C. 1=46 L.W. 247=1937 Mad. 745=(1937) 2 M.L.J. 310 (S.B.).

Secs. 42 and 43.—When two companies are closely associated, that is, there is a business connexion and the two are working in concert as though under one control, and where one company lends money to another on interest, the lender company can be said to be receiving profits or gains taxable under S. 42 (1) and S. 43. 63 I.A. 408=41 C.W.N. 33=1936 P.C. 269 (P.C.). Business connection, what is. *See* 1939 A.L.J. 631=1939 All. 593=I.L.R. (1939) All. 832; 67 I.A. 394=I.L.R. (1941) Mad. 89=(1940) 2 M.L.J. 851=43 Bom. L.R. 132 (P.C.). "Business connection," in Ss. 42 and 43 denotes some element of continuity in the relationship between the person in India who makes the profits and the non-resident who makes the profits and the non-resident who receives them. A single transaction would not fall within the expression. In every case one has to look at the particular facts of the case to see whether it falls within the section. S. 43 is really only machinery for giving effect to S. 42, and the mere appointment of an agent under S. 43 would be of no consequence unless tax can be levied under S. 42. 41 Bom.L.R. 379=1939 Bom. 257. Whether there is business connection under S. 42 depends upon the particular facts of each case. It is not necessary for the purpose of forming a business connection in British India that contracts between the statutory agent and the non-resident should be entered into in British India or that the profits should accrue to the non-resident in British India. 1939 I.T.R. 1. S. 42 provides the method of charging a non-resident and lays down that his profits and gains shall be chargeable to income-tax in the name of the agent and that such 'agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax. According to S. 42 (1) it is the agent alone and not his non-resident principal, that shall for the purposes of the Act, be treated as the assessee (*i.e.*) as the person to whom a notice under S. 22 (2) shall issue and by whom the tax is payable. The word 'shall' in S. 42 (1) shows that the provisions of that section are mandatory and the department is precluded from issuing notices to the principal and from treat-

or through or from any money lent at interest and brought into British India in cash or in kind], shall be deemed to be income accruing or arising within British India, and [1][where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case] such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

[2][Provided that where the person entitled to the income, profits or gains is not resident in British India, the income-tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that] any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come within British India :

[3][Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non-resident person a sum equal to his estimated liability under this sub-section, and in the event of any disagreement between the non-resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount :

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non-resident person.]

LEG. REF.

[1] Substituted for the original words, by S. 47 Act VII of 1939.

[2] Substituted for " Provided that," by *ibid.*

[3] Added by *ibid.*

NOTES.

ing the principal as the assessee except to the limited extent of recovering any arrears of tax. The proviso to S. 42 does not militate against the above view, but it only contemplates the possibility of the assessee, (*i.e.*) the agent not being able to pay the tax and provides the necessary method of recovery. The word 'agent' for the purposes of S. 42 has a wider scope than it has in ordinary use. I.L.R. (1938) All. 432=1938 A.L.J. 341=1938 All. 310. Foreign company lending money to resident company—Intimate business connection between the two companies—Interest forwarded to foreign company—Resident company liable to income-tax on the footing of agency. *See* 30 Bom.L.R. 1172=113 I.C. 593; *see also* 113 I.C. 602; 1939 All. 593. Profits accruing in British India, but earned abroad is assessable. *See* 59 C. 1226=36 C.W.N. 563=1932 C. 626, cited under S. 4, *supra.* The mere fact that a person residing outside British India with accumulated wealth chooses to invest part of it in a loan to a person in British India does not constitute a business. And the fact that the borrower chooses to use the money which he has borrowed for the purposes of his own business does not constitute any business connection so far as relates to the lender. The relationship between the parties is that of debtor and creditor and nothing else and that is not such a business connection as is referred to in S. 42. Hence, the latter cannot be appointed as the agent of the former under S. 43 for assessment. 57 B. 651=35 Bom. L.R. 914=1933 B. 422. A principal can be assessed under S. 42 without the necessity of appointing an agent under the latter part of S. 43. 57 B. 519=35 Bom.L.R. 896=1933 B. 427. An assessee assessed under S. 42 in respect of a business in which the manufacture of a commodity takes place in a foreign country and the sale thereof takes place in British India, is not entitled, in computing the profits and gains of such business, to make a deduction representing the proportion of profits earned by manufacture in the country of origin. 59 C. 1226=1932 C. 626=36 C.W.N. 563. The assessee company was formed for acquiring from an American company and carrying on in a particular area, the American company's business of selling their manufactures. The American company owned all the shares of the assessee company and had complete control over it. The question was if the local company can be deemed to be the agent of the American company so as to be assessed in respect of the profits made by the American company on the sales of its manufactures to the local company. *Held,* that the necessary business connection having been established, the profits and gains in question accrued or arose to the foreign company directly or indirectly through or from a business connection in British India and the assessee company was chargeable for the same. 35 C.W.N. 349=1931 P.C. 42=58 I.A. 42=60 M.L.J. 609 (P.C.). The question as to what is the residence of

(2) Where a person not resident [1][or not ordinarily resident] in British India, [2][* * * *] carries on business with a person resident in British India, and it appears to the Income-tax Officer, [3][* * * *] that owing to the close connection [4][between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident] produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

[5][(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India.]

Agent to include persons created as such.

43. Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

LEG. REF.

[1] Inserted by Act VII of 1939.

[2] Certain words omitted by *ibid.*

[3] The words " or the Assistant Commissioner, as the case may be " omitted by *ibid.*

[4] Substituted for original words by *ibid.*

[5] Substituted y S. b47, *ibid.*

NOTES.

a joint family cannot depend upon the nature of income it gets. It cannot be that the test of residence should be one thing if it is a trading family, and the test of residence some other thing if it gets income from securities, property or other sources. In the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live and may like a company or firm have more than one place of residence. Therefore, the test in 1927 M. 732 cannot apply to what are generally described in decisions as Hindu Law partnerships, *i.e.*, partnerships which are the creatures of Hindu Law and not of the law of contracts. 55 M. 301=63 M.L.J. 22 (S.B.).

Sec. 43.—The word "agent" in S. 43 is not to be used in the same sense as the same word in S. 42 (1). Any person who comes within the terms of S. 43 is put by that section artificially into the position of agent and assessed under S. 42 (1). It is not restricted to agents in actual receipt of the profits and gains. 35 C.W.N. 349=1931 P.C. 42=58 I.A. 42=60 M.L.J. 609 (P.C.). *See also* 57 I.A. 42; 1938 All. 310=1938 A.L.J. 341; 58 M.L.J. 197=1930 P.C. 54 (P.C.). *Held*, by the majority that the section merely defines who may be included as an agent and the agent under the section must be in receipt of income. 49 C. 721=26 C.W.N. 745. The notice is by S. 43 made part of the series of facts which results in the resident being deemed agent by force of the section. The extent of his responsibility if to be agent is another matter. If by notice given in due course under S. 22 (2) the year or years be specified, he has no grievance in point of procedure, and he can make his case upon the merits. Thus the assessment made on an assessee as agent under S. 43 is not rendered illegal by the fact that the notice which the Income-tax Officer served on the assessee under the Proviso to S. 43 did not mention any particular year for which the Income-tax Officer proposed to treat assessee as an agent. 65 I.A. 12=I.L.R. (1938 Lah. 129=42 C.W.N. 417=1938 P.C. 8=(1938) 1 M.L.J. 123 (P.C.). Where an Indian company distributes its Indian profits to shareholders outside British India, the company cannot be deemed to be the agent of the foreign shareholders and assessed as such to super-tax in British India. 49 C. 721. The words "denying his liability to be assessed" under S. 30 (1) are wide enough to cover a case of an assessee who denies his liability to be declared as an agent under S. 43. Therefore an appeal against the order of an Income-tax Officer declaring any person to be an agent of a foreigner is not barred under S. 30 (1). 140 I.C. 490=1932 N. 152. The word 'through' in S. 43 (*c*) cannot be construed as meaning 'from'. 57 Bom. 651=35 Bom. L.R. 914=1933 Bom. 422.

Secs. 43 and 22: NOTICE SERVED ON ASSESSEE AS AGENT OF NON-RESIDENT—QUESTION OF AGENCY—WHEN MUST BE DETERMINED.—It is open to the Income-tax Officer under the Income-tax Act to postpone any final determination of the question of agency until the time comes to make an assessment

[1][Provided that where transactions are carried on in the ordinary course of business through a broker in British India in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first mentioned broker shall not be deemed to be an agent under this sectionr in respect of such transactions :]

Provided [2][further] that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

Liability in case of a discontinued firm or association.

[3][44. Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.]

[4][CHAPTER VA.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING.

Liability to tax of occasional shipping.

44A. The provisions of this Chapter shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this Chapter being referred to as the principal), unless the

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LEG. REF.

[1] Proviso inserted by S. 48, of Act VII of 1939.

[2] Inserted by *ibid.*

[3] Substituted by S. 49 *ibid.*

[4] Chapter VA inserted by S. 3 of Act XXVII of 1923.

NOTES.

under S. 23, as the Act imposes no technical requirement in this connexion. It may be reasonable that an assessee, who is served with a notice under S. 22 (2) as an agent of a non-resident under S. 43, should not be required to render a return of the non-resident's income until it has first been decided that he is his agent; on the other hand, having regard to the circumstances which for this purpose constitute agency, it may well be thought advisable that the information afforded by a return and by books of account produced in support thereof would be available for the purpose of deciding as to agency. The avoidance of delay may also be a consideration. Thus, if the notice under S. 22 is served before the expiry of one year from the financial year, it is a valid initiation of proceedings of the assessee as an agent under S. 43. Proceedings if begun in time are not by the Income-tax Act required to be completed within any time limit. 65 I.A. 12=I.L.R. (1938) Lah. 129=42 C.W.N. 417=1938 P.C. 8=(1938) 1 M.L.J. 123 (P.C.).

Sec. 44.—The object of S. 44 is to enable the tax on the profits of a firm which has been discontinued to be got by the Income-tax authorities and to prevent the avoidance of taxation by the discontinuance of the firm. The words "tax payable" in the section mean "tax that is due to be paid," "tax which the firm or partnership would be liable to pay if it had not been discontinued," or "tax either found to be due already or that will be found to be due in the future." They do not mean "tax payable as the result of an assessment already made upon the firm." The object of the section being clearly to get at the tax on the profits of a firm made before its discontinuance, the Income-tax authorities are perfectly entitled to assess the partners of a discontinued firm jointly and severally in respect of the profits earned by the firm before it was discontinued. 1937 M. 300=(1937) 1 M.L.J. 182=I.L.R. (1937) Mad. 792 (F.B.). Partnership—Dissolution—Retirement of one partner and receipt by him of share of profits—Business continued by other partner—Liability of latter as 'successor' to assessment on such share of profits. *See* I.L.R. (1941) M. 220=1941 I.T.R. 1=(1941) 1 M.L.J. 120 (S.B.).

Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act.

Return of profits and gains.

44B. (1) Before the departure from any port in British India of any ship in respect of which the provisions of this Chapter apply, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the principal, or to any person on his behalf, on account of the carriage of all passengers, livestock or goods shipped at that port since the last arrival of the ship thereat.

(2) On receipt of the return, the Income-tax Officer shall assess the amount referred to in sub-section (1), and for this purpose may call for such accounts or documents as he may require, and one-twentieth of the amount so assessed shall be deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers, livestock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income-tax Officer shall determine the sum payable as tax thereon at the rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-collector, or other officer duly authorised to grant the same, is satisfied that the tax has been duly paid.

Adjustment.

44C. Nothing in this Chapter shall be deemed to prevent a principal from claiming, [1][in the year] following that in which any payment has been made on his behalf under this Chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and, if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him, as the case may be.]

[2][CHAPTER VB.

SPECIAL PROVISIONS RELATING TO AVOIDANCE OF LIABILITY TO INCOME-TAX AND SUPER-TAX.

Avoidance of income-tax by transactions resulting in the transfer of income to persons resident or ordinarily resident abroad.

44D. (1) Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in British India, acquired any rights by virtue or in consequence of which he has within the meaning of this section power to enjoy such income, whether forthwith or in the future, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act.

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in British India, any sum paid or payable by way of a loan or repayment of a loan or any other sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would

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LEG. REF.

[1] Substituted for "in any year" by S. 50 of Act VII of 1939.

[2] Chapter VB inserted by S. 51, *ibid.*

or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be the income of the first-mentioned person for all the purposes of this Act.

(3) Sub-sections (1)and (2) shall not apply if such first-mentioned person shows to the satisfaction of the Income-tax Officer either—

(a) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation ; or

(b) that the transfer and all associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation.

(4) For the purposes of this section, an "associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing whether directly or indirectly any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulations of income arising from any such assets.

(5) A person shall, for the purposes of this section, be deemed to have power to enjoy income of a person not resident, or resident but not ordinarily resident, in British India, if—

(a) the income is in fact so dealt with by any person as to be calculated at some point of time, and, whether in the form of income or not, to enure for the benefit of the first-mentioned person, or

(b) the receipt or accrual of the income operates to increase the value to such first-mentioned person of any assets held by him or for his benefit, or

(c) such first-mentioned person receives or is entitled to receive at any time any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which represent that income, or

(d) such first-mentioned person has power by means of the exercise of any power of appointment or power of revocation or otherwise to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income, or

(e) such first-mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income.

(6) In determining whether a person has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to such person as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits.

(7) For the purposes of this section—

(a) the expression 'assets' includes property or rights of any kind, and the expression 'transfer' in relation to rights includes the creation of those rights ;

(b) the expression 'benefit' includes a payment of any kind ;

(c) references to income of a person not resident or of a person not ordinarily resident in British India shall, where the amount of the income of a company for any year or period has been deemed to have been distributed under sub-section (1) of section 23A, include references to so much of the income of the company for that year or period as is equal to the amount deemed to have been distributed to that person ;

(d) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligation of any other person to whom, those assets, that income or those accumulations are or have been transferred ;

(e) any body corporate incorporated outside British India shall be treated as if it were resident out of British India whether it is so resident or not,

(8) The provisions of this section shall apply for the purposes of assessment to income-tax and super-tax for the year ending on the 31st day of March, 1940, and subsequent years, and shall apply, in relation to transfers of assets and associated operations whether carried out before or after the commencement of the Indian Income-tax (Amendment) Act, 1939.

(9) Where any person has been charged to tax on any income deemed to be his under the provisions of this section, and that income is subsequently received by him, whether as income or in any other form, it shall not again be deemed to form part of his income for the purposes of this Act.

Avoidance of tax by certain transactions in securities.

44E. (1) Where the owner of any securities (in this sub-section and in sub-section (2) referred to as 'the owner') agrees to sell or transfer those securities, and by the same or any collateral agreement—

(*a*) agrees to buy back or re-acquire the securities, or

(*b*) acquires an option, which he subsequently exercises, to buy back or acquire the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable otherwise than by the owner, the interest payable as aforesaid shall, whether it would or would not have been chargeable to tax apart from the provisions of this section, be deemed for all the purposes of this Act to be the income of the owner and not to be the income of any other person.

(2) The references in sub-section (1) to buying back or re-acquiring the securities shall be deemed to include references to buying or acquiring similar securities, so, however, that where similar securities are bought or acquired, the owner shall be under no greater liability to tax than he would have been under if the original securities had been bought back or re-acquired.

(3) Where any person carrying on a business which consists wholly or partly in dealing with securities agrees to buy or acquire any securities, and by the same or any collateral agreement—

(*a*) agrees to sell back or re-transfer the securities, or

(*b*) acquires an option, which he subsequently exercises, to sell back or re-transfer the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable by him, no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business.

(4) Sub-section (3) shall have effect, subject to any necessary modifications, as if references to selling back or re-transferring the securities included references to selling or transferring similar securities.

(5) For the purpose of this section—

(*a*) the expression 'interest' includes a dividend;

(*b*) the expression 'securities' includes stocks and shares;

(*c*) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or the manner in which they can be transferred.

(6) The Income-tax Officer may by notice in writing require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner at any time during the period specified in the notice, such particulars as he considers necessary for the purposes of this section and for the purpose of discovering whether tax has been borne in respect of the interest on all those securities; and, if that person without reasonable excuse fails to comply with the notice, he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like

amount for every day after the infliction of such penalty during which the failure continues.

Avoidance of tax by sales *cum* dividend.

44F. (1) Any person upon whom notice is served by the Income-tax Officer requiring him to furnish a statement of particulars relating to any securities in which, at any time during the period specified in the notice he has had any beneficial interest, and in respect of which, within such period, either no income was received by him, or the income received by him was less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly, shall, whether an assessment to income-tax or super-tax in respect of his total income has or has not been made for the relevant year or years of assessment, furnish such a statement and such particulars in the form and within the time (not being less than twenty-eight days) required by the notice.

(2) If it appears to the Income-tax Officer by reference to all the circumstances in relation to the securities of any such person (including circumstances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such securities) that such person has thereby avoided or would avoid more than ten per cent. of the amount of the income-tax or super-tax for any year which would have been payable in his case in respect of the income from those securities if the income had been deemed to accrue from day to day and had been apportioned accordingly, and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of income-tax or super-tax, than those securities shall be deemed to be securities to which sub-section (3) applies.

(3) For the purposes of assessment to income-tax or super-tax in the case of any such person, the income from any securities to which this sub-section applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such securities by or to him shall be deemed to have been received as and when it is deemed to have accrued :

Provided that this section shall not apply if such person proves to the satisfaction of the Income-tax Officer that the avoidance of income-tax or super-tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any such avoidance of income-tax or super-tax, or that the provisions of section 44E have been applied in his case in respect of such income.

(4) If any person fails to furnish any statement or particulars required under this section, or if the Income-tax Officer is not satisfied with any statement or particulars furnished under this section, the Income-tax Officer may make an estimate of the amount of the income which, under the foregoing provisions of this section, is to be deemed to form part of the person's total income for the purposes of income-tax or super-tax.

(5) If any person without reasonable excuse fails to furnish any statement or particulars required under this section, he shall be liable to a penalty not exceeding five hundred rupees, and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues.

(6) For the purpose of this section the expression 'securities' includes stocks and shares.]

CHAPTER VI.

RECOVERY OF TAX AND PENALTIES.

Tax when payable.

45. Any amount specified as payable in a notice of demand [1][[2][under sub-section (3)] of section 23A or] under section 29 or an order under section 31 [3][* * *] or section 33,

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LEG. REF.

[1] Inserted by S. 8 of Act XXII of 1930.

[2] Substituted for the words brackets and figure "under sub-section (4)" by S. 52 of Act VII of 1939.

[3] The words and figures "or section 32" omitted by Act XXII of 1941.

shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30 [1][* * * *], the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of :

[2][Provided further that where an assessee has been assessed in respect of income arising outside British India in a country the laws of which prohibit or restrict the remittance of money to British India, the Income-tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into British India, and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation.—For the purposes of this section income shall be deemed to have been brought into British India if it has been utilized or could have been utilized for the purposes of any expenditure actually incurred by the assessee without British India or if the income whether capitalised or not has been brought into British India in any form.]

Mode and time of recovery.

46. (1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

[3][(1*A*) For the purposes of sub-section (1), the Income-tax Officer may direct the recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of a continuing default, so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable.]

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue :

LEG. REF.

[1] The words, figures and letter "or under section 33A" omitted by S. 52 os Act VI of 1939.

[2] Added by *ibid*.

[3] Inserted by S. 8 of Act III of 1928.

NOTES.

Sec. 46.—S. 46 prescribes only a summary remedy and there is nothing in that section or in the other provisions of the Act to indicate that that is the only remedy by which income-tax is recoverable. The time-limit prescribed in S. 46 (7) of the Act obviously applies to proceedings under that section. When income-tax is assessed, it becomes a debt due by the assessee to the Crown. The Crown as a creditor has the ordinary right of suit against the assessee. This is a right under the common law and there is nothing in the Act to take away this right. A suit for recovery of arrears of income-tax would undoubtedly be a suit of a civil nature and such a suit would clearly be maintainable under the provisions of S. 9, C.P. Code, and would be governed by Art. 120, if not by Art. 149 of the Limitation Act. 1941 I.T.R. 673=196 I.C. 228. There is no doubt that an arrear of unpaid income-tax due by an assessee is a debt due to the crown and therefore a crown debt and, as such, has precedence over all other debts. The Court can order payment of a crown debt due by a debtor on the application of the crown without a formal attachment being issued, when there are funds in Court belonging to the debtor. S. 46 of the Income-tax Act is not exhaustive and the Court can order payment on mere application. 1939 I.T.R. 411. S. 46 is not exhaustive—Money realised by sale in execution of assessee's property—Application by Crown for payment out towards income-tax due by assessee—Competency—Power of Court to order payment. *See* (1938) 1 M.L.J. 351 (F.B.). Arrears of income-tax can be realised like an arrear of land revenue under S. 46 of the Act, and if orders are

[1][Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have [2][* * *] the powers which under the Code of Civil Procedure, 1908, a Civil Court has [2][* * * *] for the purpose of the recovery of an amount due under a decree.]

(3) In any area with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process.

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed when that process is employed under sub-section (3).

(5) If any assessee is in receipt of any income chargeable under the head "salaries" the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such assessee, and such person shall comply with any such requisition, and shall pay the sum so deducted to the credit of the Central Government, or as the [3][Central Board of Revenue] directs.

[4][(6) If the recovery of income-tax in any area has been entrusted to a Provincial Government under section 124 (1) of the Government of India Act, 1935, the Provincial Government may direct with respect to that area or any part thereof, that income-tax shall be recovered therein with, and as an addition to, any municipal tax or local rate, by the same person and in the same manner as the municipal tax or local rate is recovered.]

(7) Save in accordance with the provisions of sub-section (1) of section 42, [5][or of the proviso to section 45], no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of [6][the financial year] in which any demand is made under this Act;

[7][Provided that where the sum payable is allowed to be paid by instalments the period of one year herein referred to shall be recokoned from the date on which the last of such instalments was due.]

LEG. REF.

[1] Added by S. 16 of Act XVIII of 1933.

[2] Omitted by Act XXIII of 1941.

[3] Substituted for "Board of Inland Revenue" by S. 4 and Sch. of Act IV of 1924.

[4] Substituted by A.O., 1937.

[5] Inserted by S. 53 of Act VII of 1939.

[6] Substituted for the words "the year," by *ibid.*

[7] Proviso to sub-S. (7) of S. 46 added by Act XXIII of 1941.

NOTES.

passed by the Commissioner, like an arrear of Muncipal tax or local rate. 4 Pat.L.T. 171=24 Cr.L.J. 490. The Collector has power to make a fresh assessment for income-tax if he finds the first assessment made by him us low. 44 B. 234=55 I.C. 334 =22 Bom.L.R. 38. In order to succeed in a suit against the Collector for a declaration that he had acted without jurisdiction in realising sums from the plaintiff, it must be shown that he paid the sum under coercion. Income accruing to an executor under a will is liable to be taxed and the Collector acts within the limits of his jurisdiction in determining such person to be chargeable. 42 C. 151=26 I.C. 893=19 C. W.N. 138.

Sec. 46 (2): SALE UNDER, BY COLLECTOR—PRIORITY OVER PREVIOUS INSOLVENCY SALE.—Though a land was attached and sold under the provisions of the Revenue Recovery Act, the sale would not give a higher title to the purchaser than the owner of the land himself would have given if he had alienated the property privately, when the sale was for the enforcement of other dues such as the income-tax. It is only if the sale was for the land-revenue that the purchaser would get a preferential title free from all encumbrances. 158 I.C. 776=42 L.W. 663=1935 M. 882. An application for refund of income-tax already paid by mistake is not in the course of assessment under the Act. 27 Bom.L.R. 400=89 I.C. 595. If the assessee is a person liable to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in S. 2 (6) of the Act. 55 B. 734=33 Bom.L.R. 776=1931 B. 420. Certificate under S. 20 of the Act signed by the Principal Officer in the United Kingdom of such companies can be regarded as valid certificates for the purposes of S. 48 (1) of the Act and refund granted on their

Recovery of penalties.

47. Any sum imposed by way of penalty under the provisions of sub-section (2) of section 25, section 28, [1][sub-section (6) of section 44E, sub-section (5) of section 44F] or sub-section (1) of section 46, shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax.

CHAPTER VII.

REFUNDS.

Refunds.

[2][48. (1) If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

(2) [3][The Appellate Assistant Commissioner or the Appellate Tribunal in the exercise of their appellate powers] if satisfied to the like effect shall cause a refund to be made by the Income-tax Officer of any amount found to have been wrongly paid or paid in excess.

(3) Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income.

(4) Nothing in this section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive, or the review by any officer of a decision of his own which is subject to appeal or revision, or where any relief is specifically provided elsewhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the Indian Income-tax (Amendment) Act, 1939, which he would not be entitled to claim but for the passing of that Act.]

LEG. REF.

[1] The words letters, fiugres and brackets inserted by S. 54 of Act VII of 1939.

[2] Substituted S. 55 Act VII of 1939.

[3] Substituted for the original words by S. 91 *ibid.*

NOTES.

production. 55 B. 734. Assessment reduced after the passing of the Act—Party if entitled to refund. 1924 N. 24. S. 48, if modifies S. 14; *see* 39 C.W.N. 253.

APPEAL.—There is no provision made in the Act for appeals against a refusal to grant a refund under S. 48. So where the suit for refund of income-tax does not raise any question of assessment, it is not barred by S. 67. 136 I.C. 819=1932 S. 48.

Sec. 48 (2).—The legatee of the profits from the business of the firm due to one of the partners who died prior to the year of assessment is not entitled to maintain a claim for the refund of income-tax under S. 48 (2) because the deceased was not a person who paid the assessment on the firm for the year in question nor was he liable as he could not himself have been an assessee for that year. 136 I.C. 819=1932 S. 48. An association incorporated under S. 26 of the Indian Companies Act as an association limited by guarantee not existing for earning profits, and prohibited under the law from declaring any dividends to its members, is liable to assessment, and there is no exemption in the Income-tax Act in favour of such a company as such. The fact that no relief under S. 48 of the Act is available to such an association as in the case of other associations not incorporated under S. 26 of the Companies Act is an irrelevant consideration. 1936 A.L.J. 1085=1936 A. 764. A member of a firm means and can only mean a person who has entered into partnership with another person or persons. If a minor is incapable of entering into partnership with another person or persons he cannot be a member of a firm in which he is not a partner. That being so under S. 48, Cl. (2) before amendment by Act XVIII of 1933, a minor not entitled to claim a refund. 165 I.C. 565=1936 S. 203. S. 48 (2) applies to a person who has been assessed and does not apply to a person who was dead before the assessment on his income was made. A dead person cannot be assessed to income-tax. 165 I.C. 328=1936 S. 137.

Secs. 48 and 20.—If modifies S. 14. *See* 39 C.W.N. 253.

48*A*. *General power to make refunds.—Repealed by Act VII of* 1939, *S.* 58.

Relief in respect of United Kingdom income-tax.

49. (1) If any person who has paid [1][by deduction under section 18 or otherwise] Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid [2][by deduction or otherwise] United Kingdom income-tax [3][for the corresponding year] in respect of the same part of his income and that the rate at which he was entitled to, and has obtained, relief under the provisions of section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that part of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax [4][or the appropriate rate of United Kingdom income-tax, whichever is less,] and the rate at which he was entitled to, and obtained relief under that section :

[5][Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief.]

(2) In sub-section (1)—

(*a*) the expression "Indian Income-tax" means income-tax and super-tax charged in accordance with the provisions of this Act ;

[7][(*b*) the expression "Indian rate of tax" means the amount of Indian income-tax exclusive of super-tax after deduction of any relief due to a claimant under the other provisions of this Act but before deduction of any relief due to him under this section, divided by his total income after deducting therefrom any income (including income from a share in an unregistered firm) exempted from tax by or under the provisions of this Act, added to the amount of Indian super-tax before deduction of any relief due to the claimant under this section divided by his total income ;

(*c*) the expression "United Kingdom income-tax" means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts.

[8][(*d*) the expression "appropriate rate of United Kingdom income-tax" has the meaning assigned to that expression in section 27 of the Finance Act, 1920, as amended by the Finance Act, 1927.]

Relief in respect of Indian State and Dominion income-tax.

[9][49A. (1) The Central Government may, by notification in the official Gazette, make provision for the granting of relief in respect of income on which has been paid both income-tax (including super-tax) under this Act and Dominion income-tax.

(2) For the purposes of this section "Dominion income-tax" means any income-tax or super-tax charged under any law in force in any Indian State or in any part of His Majesty's Dominions (other than the United Kingdom) where the laws of that State or part provide for relief in respect of tax charged on income both in that State or part and in British India which appears to the Central Board of Revenue to correspond to the relief which may be granted by this section.

LEG. REF.

[1] Inserted by S. 57 of Act VII of 1939.

[2] Inserted by *ibid.*

[3] Substituted for the words "for that year" by Act VII of 1939.

[4] Inserted by S. 2 of Act XXIX of 1934.

[5] Proviso added by S. 57 of Act VII of 1939.

[6] Substituted by S. 57 of Act VII of 1939.

[7] Added by S. 2 of Act XXIX of 1934.

[8] Ss. 49A to 49D inserted by S. 58 of Act VII of 1939.

NOTES.

Sec. 48-A: APPLICABILITY.—S. 48-A comes into play only when the income-tax has been actually paid in excess and not earlier. 18 Lah. 706=1938 Lah. 44.

Sec. 49-A: RIGHT OF SET OFF—IF LIMITED TO AMOUNT OF TAX LEGALLY RECOVERABLE. The expression "remaining payable by the person" in S. 49-A should not be read as meaning "legally recoverable from the person". If the Legislature had really intended that under S. 49-A the right of set-off was to be limited to an amount of tax legally recoverable, they could have expressly said so. 196 I.C. 228=1941 I.T. R. 673.

Income-tax on company's divident deemed to have been paid by share-holder.

[1][49B. Where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to any of the persons specified in section 3 who is a shareholder of a company which is assessed to income-tax in British India or elsewhere, such person shall be deemed in respect of such dividend himself to have paid income-tax (exclusive of super-tax at the rate applicable to the total income of a company for the financial year in which the dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company is liable to pay income-tax bears to the whole income of the company.]

Relief granted to a company to be deemed relief granted to shareholder.

[2][49C. (1) Where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to a shareholder of a company which has obtained the relief referred to in section 49 or granted under section 49-A or under the India and Burma (Income-tax Relief Order, 1936, the shareholders shall be deemed in respect of such dividend himself to have obtained such relief at the rate at which such relief has been granted in respect of income-tax only to the company for the financial year preceding the year in which the dividend was paid, credited or distributed or is deemed to have been paid, credited or distributed.]

(2) If the rate at which a shareholder is deemed under sub-section (1) to have obtained relief exceeds the rate at which he would have been entitled to relief had such relief been given direct to him by or under the said sections or Order, any excess shall be recovered from him either as an addition to the tax payable by him on any assessment made on him under section 23 or section 34 or by setting it off against any relief due to him under section 48.

Relief in respect of tax charged in country not providing for relief in respect of British Indian income-tax.

49D. If any person who has paid by deduction or otherwise Indian Income-tax for any year in respect of any income arising without British India in a country the laws of which do not provide for any relief in respect of income-tax charged in British India proves that he has paid income-tax by deduction or otherwise under the laws of the said country in respect of the same income, he shall be entitled to the deduction from the Indian income-tax payable of a sum equal to one-half of such Indian income-tax or to one-half of such tax payable in the said country, whichever is the less.]

[3][*Explanation.*—The expression "Indian income-tax" in this section means income-tax and super-tax charged in accordance with the provisions of this Act.]

Power to set off amount of refunds against tax remaining payable.

[4][49E]. Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, [5][Appellate Assistant Commissioner] or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, if any, remaining payable by the person to whom the refund is due.

[6][49F.] Where through death, incapacity, bankruptcy, liquidation or other

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LEG. REF.

[1] New S. 49B sub-stituted for old S. 49B by XXXXIII of 1941.

[2] Sub-S. (1) of S. 49C substituted by Act of III of 1941.

[3] Explanation to S. 49D added by Act XXIII Ac 1941.

[4] The existing section 49E was originally inserted as section 49A by S. 19 of the Indian Income-tax (Second Amendment) Act, 1933 (XVIII of 1933) and was re-numbered by S. 59 of Act VII of 1939.

[5] Substituted for the words "Assistant Commissioner," by *ibid*.

[6] The existing section 49F was originally inserted as section 49B by S. 19 of Act XVIII of 1933 and was re-numbered by S. 60 of Act VII of 1939.

Power of representative of deceased person or person disabled to make claim on his behalf.

cause, a person who would but for such cause have been entitled to a refund under any of the provisions of this Act, or to make a claim under section 48 [1][* *] or 49, is unable to receive such refund or to make such claim, his executor, administrator or other legal representative, or the trustee or receiver, as the case may be, shall be entitled to receive such refund or to make such claim for the benefit of such person or his estate.

Limitation of claims for refund.

50. No claim to any refund of income-tax [2][or super-tax] under this Chapter shall be allowed, unless it is made within [3][four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India :

Provided that where the claim is to a refund of income-tax or super-tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the previous year as defined in clause (11) of section 2 in which the income arose on which the tax was recovered, whichever period may expire later:]

[4][Provided [5][further] that a claim to refund under section 49 [6][of tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939], may be admitted after the period of limitation herein prescribed, when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period.]

50A. *Appeal against Refusal to Refund.—Omitted by S.* 62 *of to Indian Income-tax* (*Amendment*) *Act* 1939 (*VII of* 1939).

LEG. REF.

[1] The word, figures and letter "or 48A" omitted by S. 60 of Act VII of 1939.

[2] Inserted by S. 61, *ibid.*

[3] Substituted by S. 61, *ibid.*

[4] Proviso added by S. 8 of Act XXII of 1930.

[5] Inserted by S. 61 of Act VII of 1939.

[6] These words, brackets and figures were nserted by *ibid.*

NOTES.

Sec. 50.—Where an application for refund under S. 48 of the Income-tax Act is made beyond the time prescribed by S. 50 of the Act, the Commissioner acts rightly in rejecting under S. 50, he has no power to extend the time prescribed by the section. 13 R. 729. An application for refund under S. 48 of the Income-tax Act must be made within the time limited by S. 50 and on no consideration can an application made beyond that time be entertained. Though the assessment has been made only after the expiry of that period, that is no justification for presenting the application beyond time. It is quite true that it is impossible for the assessee to ascertain whether he is or is not entitled to a refund under S. 48 (1) until after an assessment is made, and that it works a hardship in making it incumbent on him to present his application for refund within the time limited by S. 50, when the assessment itself is not made until after the expiry of that period. But the remedy lies not with the Courts administering the law, but with the legislature. 13 R. 729. The words *"tax was recovered"* mean "tax was recovered by the Government" and not "tax was refunded to the assessee" under the provisions of S. 27 of the Act. 50 M. 920 =1927 M. 1039=53 M.L.J. 672 (F.B.). Where an assessment for the year, 1926-27 was made on the income of the "assessee's previous year" the financial year ending with the 31st March, 1926, the period of "one year" prescribed in S. 50 of the Act ought to be computed from the 1st April, 1926, and consequently a refund application made on the 22nd March, 1927, in respect of dividend in a limited company payable to the assessee on the 21st October, 1925, was within time. 3 I.T.C. 76.

Sec. 50-A: SCOPE—REMEDY UNDER—IF EXHAUSTIVE.—Where an assessee does not avail himself of the remedy of an appeal under S. 50-A which is open to him, he cannot invoke S. 45 of the Specific Relief Act for getting relief. 41 L.W. 329=1935 M. 379=68 M.L.J. 227 (F.B.), S. 50-A of Income-tax Act gives him a specific and adequate remedy, and precludes him from taking advantage of S. 45 of the Specific Relief Act. 13 R. 729.

CHAPTER VIII.

OFFENCES AND PENALTIES.

Failure to make payments or deliver returns of statements or allow inspection.

51. If a person fails without reasonable cause or excuse—

(*a*) to deduct and pay any tax as required by section 18 or under sub-section (5) of section 46 ;

(*b*) to furnish a certificate required by sub-section (9) of section 18 or by section 20 to be furnished ;

(*c*) to furnish in due time any of the returns mentioned in [1][section 19A], [2][section 20A], section 21, [3][sub-section (2) of] section 22, or section 38 ;

(*d*) to produce, or cause to be produced, on or before the date mentioned in any notice under sub-section (4) of section 22, such accounts and documents as are referred to in the notice ;

(*e*) to grant inspection or allow copies to be taken in accordance with the provisions of section 39 ;

he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues.

False statement in declaration.

52. If a person makes a statement in a verification mentioned in [4][section 19A or] [5][section 20A [6][or section 21] or] section 22 [7][or sub-section (2) of section 26A] or sub-section (3) of section 30, [8][or sub-section (3) of section 33] [9][* * *] which is false, and which he either knows or believes to be false, or does not believe to be true, he shall [10][be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.]

LEG. REF.

[1] Inserted by S. 3 of Act XXIV of 1926.

[2] Inserted by S. 21 of Act XVIII of 1933.

[3] Inserted by S. 63 of Act VII of 1939.

[4] Inserted by S. 4 of Act XXIV of 1926.

[5] Inserted by S. 22 of Act XVIII of 1933.

[6] Inserted by S. 64 of Act VII of 1939.

[7] Inserted by S. 9 of Act XXI of 1930.

[8] Substituted by Act XXIII of 1941.

[9] The words, brackets and figures, "or sub-section (2) of section 33A or sub-section (3) of section 50A" omitted by S. 64 of Act VII of 1939.

[10] Substituted for the words "be deemed to have committed the offence described in S. 177 of the Indian Penal Code," by *ibid.*

NOTES.

Secs. 51 and 52: OFFENCES UNDER BOTH SECTIONS ARE DIFFERENT.—An offence under S. 52 is of a nature different from an offence under S. 51 and therefore an accused cannot be convicted of offence under S. 51 without calling upon him to meet that charge on his being found not guilty of offence under S. 52. 146 I.C. 848=1933 N. 358. Where there is a question of sanction and the sanctioning authority has sanctioned the prosecution under one section only, and the accused has been found not guilty of that offence, he cannot be found guilty of the other offence. 146 I.C. 848=1933 N. 358.

Secs. 51 to 53.—No one can be prosecuted under the Act except at instance of the Collector under S. 36. 23 I.C. 504=15 Cr.L.J. 296=12 A.L.J. 258. The Collector and not the District Magistrate can direct proceedings to be taken for an offence under the Income-tax Act. 38 I.C. 993=18 Cr.L.J. 433=15 A.L.J. 163. Where a person was charged with making false statements in his petition of objection for the assessment of income-tax and the petition was not signed or verified and the order to prosecute him did not disclose what particular statement was false and fell within S. 193, Penal Code, *held*, that the conviction was bad. 38 I.C. 993=15 A.L.J. 163. A conviction could not be maintained if there is no formal service of notice as required by the Act the letter having been sent by ordinary post unregistered. 17 A.L.J. 146=49 I.C. 781. The prosecution of an assessee for failure to produce his account books in obedience to a notice is not barred by reason of a prior order for penal assessment against him. 43 M. 498=38 M.L.J. 333. The only ground on which the Collector can direct a penal assessment is that the assessee has made a false return. The Collector cannot do so on ground of non-production of account books by the assessee. 43 M. 498.

Sec. 52.—An offence under S. 52 is committed on the day a return made under S. 22, is verified by a party. 1929 Cr. C. 647=1929 A. 919. The essence of offence under S. 52, and Penal Code, S. 177, lies in the verification of an untrue statement, and provided the statement was deliberately false or not believed to be true, subsequent rectification cannot make it any the less an

Prosecution to be at instance of Inspecting Assistant Commissioner.

53. (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the [1][inspecting Assistant Commissioner].

[2][(2) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence.]

Disclosure of information by a public servant.

54. (1) All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine.

LEG. REF.

[1] Substituted for the words "Assistant Commissioner" by S. 65, VII of 1939.

[2] This sub-section substituted by Act VII of 1939.

NOTES.

offence, though it may be considered as an extenuating circumstance in awarding sentence. 1929 Cr. C. 647=1929 A. 919. There is nothing in the Income-tax Act which suggests that it is essential that the act of sending an income-tax return under S. 22 should be done only by an assessee. It can be done equally by an agent or other person in charge of the assessee's business. The word "person" in S. 52 and in S. 22 (2) includes a person duly authorised. An agent who sends a false statement is therefore liable to be prosecuted under S. 52. 54 L.W. 291=1941 Mad. 941=(1941) 2 M. L.J. 475. Where the assessee submits a return, but ostensibly and openly that return is not a complete one but is stated to be incomplete, there is no verification of the return as would make the return a valid one or constitute commission of an offence under S. 52. (1929 A. 919, Dist.) 146 I. C. 848=1933 N. 358. S. 52 is without prejudice to the provision in S. 476, Cr. P. Code. An Income-tax Officer, being a Revenue Court, can act under S. 476, Cr. P. Code, and make a complaint of an offence committed before him. If an assessee produces and relies on false account books to show that his return of income is true while in fact it is false, he uses or attempts to use as genuine evidence which he knows to be false or fabricated, and can be convicted under Ss. 193 and 196, I. P. Code. 20 N.L.J. 214. S. 52 deals only with a false statement in the verification clause and does not cover the case of a false statement in the return of income to which the verification clause is attached. The proceedings before the Income-tax Officer cannot be said to start until there is some inquiry into the income of the assessee, and a statement made in the return of income-tax is not evidence given in a proceeding before the Income-tax Officer. S. 52 provides for the punishment of such an offence under S. 177, I. P. Code; it cannot become punishable under S. 193, I. P. Code, as well. 20 N.L.J. 214. Complaint for offence under—Income-tax Officer not recording finding that further enquiry was expedient—Right of appeal not affected—Proceeding, if vitiated. 8 R. 25.

Sec. 54.—The wording of S. 54 (1) is perfectly clear. It is emphatic in its language and mandatory in its provisions. Though, as a matter of practice, the Income-tax authorities may allow a partner to inspect the books of his firm which have been deposited with him that is in no way any departure or exception to the provisions of S. 54. No person, even if he is a partner in the firm whose books are in the possession of the Income-tax Officer is entitled to production or even to an examination as of right of the books, which that officer has, when the same has been produced before him in the course of proceedings under the Income-tax Act. If an application is taken out in a suit in Court by a partner of the firm to call upon the Income-tax Officer to produce the book, the Income-tax Officer is entitled to refuse to produce it. 1941 I.T. R. 693. S. 54 only lays a prohibition on the Court; it does not confer any exemption on the Income-tax Officer who is subject to every process of the Court. 1939 I.T.R. 331=1939 Mad. 546=(1939) 1 M.L.J. 791. S. 54 does not merely exclude evidence with regard to contents of any documents which may be produced before the income-

[1][* * [1][(3)] Nothing in this section shall apply to the disclosure—

(*a*) of any such particulars for the purposes of a prosecution under [2][* *] the Indian Penal Code in respect of any such statement, return, accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or

(*b*) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or

(*c*) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or

[3][(*d*) of any such particulars to a Civil Court in any suit to which Government is a party, which relates to any matter arising out of any proceeding under this Act, or

(*e*) of any such particulars to the Auditor General of India for the purpose of enabling him to discharge his functions under section 144 of the Government of India Act, 1935, or

(*f*) of any such particulars to any officer appointed by the Auditor General of India or the Central Board of Revenue to audit income-tax receipts or refunds, or

(*g*) of any such particulars, relevant to any inquiry into the conduct of an official of the Income-tax Department, to any persons appointed Commissioners under the Public Servants (Inquiries) Act, 1850, or to an officer otherwise appointed to hold such inquiry, or to a Public service Commission established under the Government of India Act, 1935, when exercising its functions in relation to any matter arising out of any such inquiry, or]

[4][(*gg*) of any such particulars, relevant to any inquiry into a charge of misconduct in connection with income-tax proceedings against a lawyer or registered accountant, to the authority referred to in sub-section (3) of section 61, when exercising the functions referred to in that sub-section,] ;

[5][[5][(*h*)] of any such particulars occasioned by the lawful exercise by a public servant of his powers under the Indian Stamp Act, 1899, to impound an insufficiently stamped document, or]

LEG. REF.

[1] The words "Provided that" omitted and the proviso numbered as sub-section (3) by S. 66 of Act VII of 1939.

[2] The words and figures "section 193 of" omitted by S. 9 of Act XXII of 1930.

[3] Inserted by S. 66 of Act VII of 1939.

[4] Inserted by S. 4 of Act XII of 1940.

[5] Original Cl. (*cc*) inserted by S. 23 of Act XVIII of 1933 and was re-lettered as cl. (*h*) by S. 66 of Act VII of 1939.

NOTES.

tax authorities for purpose of assessment, but it forbids any evidence with regard to such documents. It is wide enough to exclude evidence to the effect that account-books have been produced before the Income-tax Officer. 1935 L. 272. The intention of S. 54 is to encourage assessee to make a full and true disclosure of all relevant facts within his knowledge knowing that any statement made by him will not subsequently be used against him. It is certainly open to an assessee to object to answering interrogatories on statements made by him in such proceedings on the ground that they are privileged. 151 I.C. 104=1934 N. 181. The object of S. 54 clearly is to make the income-tax returns and statements confidential as between the assessee and the income-tax department, and against the whole world, except for certain limited purposes provided by the section itself. A Court cannot, on the application of a defendant, order the plaintiff to obtain certified copies of his returns and statements of his agent made before the Income-tax Officer, as that would clearly be an evasion of the prohibition contained in the section. Such copies are inadmissible in evidence unless the plaintiff desires their retention. 1938 Rang. L. R. 243=1938 Rang. 276. A statement on oath made by a partner of a business before the Income-tax Officer is not inadmissible in evidence, and the Court is not precluded by S. 54 from admitting in evidence a certified copy of the statement given to one of the partners by the Income-tax authorities. 50 L.W. 681=1939 I.T. R. 560=1940 Mad. 308. Income-tax return —Certified copy of—Admissibility in evidence to prove contents of return. *See* **50 L.W. 815=(1940) 2 M.L.J. 257.**

[1][(*i*) of such facts, to an authorised officer of the United Kingdom, or of any Indian State or of any part of His Majesty's Dominions which has entered into an agreement with British India for the granting of double taxation relief, as may be necessary for the purpose of enabling such relief or a refund under section 49 of this Act to be given, or

(*j*) of such facts, to an officer of a Provincial Government, as may be necessary for the purpose of enabling that Government to levy or realise any tax imposed by it on agricultural income, or

(*k*) of such facts, to any authority exercising powers under the Sea Customs Act, 1878, or any Act of the Central Legislature imposing a duty of excise as may be necessary for enabling it duly to exercise such powers, or

(*l*) of such facts, [2][to any person charged by law with the duty of inquiring into the qualifications of electors] as may be necessary to establish whether a person is or is not entitled to be entered on an electoral roll, or

(*m*) [3][of] so much of such particulars, to the appropriate authority, as may be necessary to establish whether a person has or has not been assessed to income-tax in any particular year or years, where under the provisions of any law for the time being in force such fact is required to be established.]

[4][4* * * [4][(4)] Nothing in this section shall apply to the production by a public servant before a Court of any document, declaration or affidavit filed, on the record of any statement or deposition made in a proceeding under [5][section 25A or] section 26A, or to the giving of evidence by a public servant in respect thereof.

[6]* * * [6][(5)] No prosecution shall be instituted under this section except with the previous sanction of the Commissioner.

CHAPTER IX.

SUPER-TAX.

Charge of super-tax.

55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any [7][individual, Hindu undivided family, [8][company, local authority, unregistered firm or other association of persons], not being a registered firm, [9][or the partners of the firm or members of the association individually,] an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the [10][Central Legislature] :

LEG. REF.

[1] These clauses were substituted for the original cl. (*d*), by S. 66 of Act VII of 1939.

[2] Substituted by Act XXIII of 1941.

[3] Inserted by S. 4 of Act XII of 1940.

[4] From the original proviso which was inserted by S. 10 of Act XXI of 1930, the words " Provided further that " were omitted and the proviso numbered as sub-S. (4) by S. 66 of Act VII of 1939.

[5] These words letter and figure were inserted by *ibid.*

[6] The words " Provided further that " were omitted and the proviso numbered as sub-section (5), *ibid.*

[7] Substituted for " individual, unregistered firm, Hindu undivided family or company " with effect from 1st April, 1923, by Ss. 7 and 11 of Act XI of 1924.

[8] Substituted for " company, un-registered firm or other association of individuals by S. 67 of Act VII of 1939.

[9] Inserted by *ibid.*

[10] Substituted for " Indian Legislature " by A.O., 1937.

NOTES.

Sec. 55.—Registration in the manner prescribed under the Act is a condition precedent to the right of the Income-tax Officer to proceed under S. 55. 1933 R. 229=11 R. 380. The word "individual" in the proviso to S. 55 of the Act includes a Hindu undivided family. 1935 A. 444=1935 A. L.J. 364. The expression "*Hindu undivided family*" in S. 55 of the income-tax Act includes females and is much wider than the expression "coparcenary" which includes only the males in whom the joint family property is vested. In the case of a joint Hindu family consisting of the assessee, his mother and his wife, the income received by the assessee as sole surviving coparcener by right of survivorship has to be taxed as the income of a Hindu undivided family for the purposes of super-tax under S. 55 of the Act, and not as his own individual income. 59 B. 618=37 Bom.L.R. 692=1935 B. 412.

[1][Provided that where under the provisions of clause (*b*) of sub-section (5) of section 23 an unregistered firm has been assessed in the manner applicable to a registered firm, super-tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself :]

Provided [1][further] that, where the profits and gains of an unregistered firm [1][or other association of persons not being a company] have been assessed to super-tax, super-tax shall not be payable by [2][a partner of the firm or a member of the association, as the case may be], in respect of the amount of such profits and gains which is proportionate to his share.,

Total income for purposes of super-tax.

56. Subject to the provisions of this Chapter, the total income of any [3][individual, Hindu undivided family, company, [4][local authority], unregistered firm or other [5][association of

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LEG. REF.

[1] Inserted by S. 67 of Act VII of 1939.

[2] Substituted for " an individual having a share in the firm," by *ibid.*

[3] Substituted for " individual, un-registered firm, Hindu undivided family or company," by Ss. 8 and 11 of Act XI of 1924, with effect from 1st April, 1923.

[4] Inserted by S. 68 of Act VII of 1939.

[5] Substituted for " association of individuals" by *ibid.*

NOTES.

The phrase "Hindu undivided family" is used in the statute with reference not to one school only of Hindu Law, but to all schools; and it is a mistake in method to begin by passing over the wider phrase of the Act the words "Hindu coparcenary". All the more it is not possible to say on the face of the Act that no female can be a member. Where therefore the income belongs not to the assessee himself but to the assessee, his wife and daughter jointly, the association of such individuals can be described as "Hindu undivided family". 64 I. A. 28=41 C.W.N. 385=1937 P. C. 36=(1937) 1 M.L.J. 312 (P.C.). In an extra-legal sense and even for some purposes of legal theory, ancestral property may perhaps be described, and usefully described, as family property, but it does not follow that in the eye of the Hindu law it belongs, save in certain circumstances, to the family as distinct from the individual. By reason of its origin, a man's property may be liable to be divested wholly or in part on the happening of a particular event, or may be answerable for particular obligations, or may pass at his death in a particular way; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income therefrom as his income, it is chargeable to income-tax as his, *i.e.*, as the income of an individual. It would not be in consonance with ordinary notions or with a correct interpretation of the law of the Mitakshara to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of his having a wife and daughters. 64 I.A. 28=41 C.W.N. 385=(1937) 1 M.L.J. 312=I.L.R. (1937) 1 Cal. 653 (P.C.). The income received by right of survivorship by the sole surviving male member of a Hindu undivided family can be taxed in the hands of such male member as his own individual income for the purposes of assessment to super-tax under S. 55. 39 Bom.L.R. 1010=46 L.W. 223=169 I.C. 7=1937 P.C. 239 (P.C.).

Secs. 55 to 59: SUPER-TAX.—Super-tax—Income from dividends—Liability to pay super-tax in the hands of recipient. 3 P. 470=78 I.C. 783. Where an unregistered Association is converted into a limited company, the rate of super-tax applicable to it in respect of the profits of the Association for the year previous to that of the conversion, is the flat rate of one anna in the rupee appropriate to a company. 1928 P.C. 1=40 B. 38=54 M.L.J. 1 (P.C.). Super-tax—Liability for—Undivided profits—Capitalisation of—Bonus shares newly issued on basis of—Super-tax, on value of—Shareholders' liability for. 47 M. 837=47 M.L.J. 242. Company—Profits—No declaration of dividend—Profits distributed as bonus shares—Super-tax—Liability of shareholders. 2 R. 211=1924 R. 337. Super-tax being calculated on the income of the previous year, the fact that the assessee became entitled to larger share in a firm at the time of assessment does not enable the tax being calculated on such increased share. 26 Bom.L.R. 266=48 B. 504. Levy of super-tax after the year of assessment is closed—Suit for refund—Maintainability. 78 I.C. 438=1925 S. 67. Assessee controlling and receiving income from family companies—Liability to super-tax. 51 B. 372. Per *Marten, C. J.*—Though it is permissible in law for the Crown to enquire into the genuineness of the transactions between the assessee and the family company, it would be quite wrong to start with the presumption that those transactions are sham ones. On the contrary, one should start with the presumption that they are genuine and throw the onus on the Crown to prove the contrary. 51 B. 372=1927 B. 371.

Sec. 56.—There is no provision in the Act for the assessment to income-tax or super-tax of the estate of a deceased person. 31 C.W.N. 630=103 I.C. 120=1927 C. 518.

persons]] shall, for the purposes of super-tax, be the total income as assessed for the purposes of income-tax, and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment shall also be final and conclusive for the purposes of super-tax for the same year.

[1][*　*　*　*　*　*　*　*　*]

57. *Non-resident partners and shareholders.—Omitted by S.* 69 *of the Indian Income-tax (Amendment) Act,* 1939 (*VII of* 1939).

Application of Act to super-tax.

58. (1) All the provisions of this Act, [2][relating to the charge, assessment, collection and recovery of income-tax except those contained in] section 3, [3][the second proviso] to sub-section (1) of section 7, [4][the second and third provisos to section 8, [5][clauses (*a*) and (*b*) of sub-section (2) of section 14], and section 5, [6][*] [7][*] 19, [8][and 20 and the first proviso to sub-section (1) of section 41 and section] [9][*] [10][*] [11][*] 58F and [12][sub-section (2)] of section 58G] shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax.

[13][*　*　*　*　*　*　*]

(2) Save as provided in [14][[15][sub-sections (2), (2*A*), (2*B*), (3*B*), (3*C*), (3*D*), and (3*E*)] of section 18,] [16][*　*　*] [17][and section 58H] super-tax shall be payable by the assessee direct.

[18][CHAPTER IXA.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS.

Definitions.

58A. In this Chapter, unless there is anything repugnant in the subject or context,—

(*a*) a "recognised provident fund" means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this Chapter;

(*b*) an "employer" means—

(*i*) a Hindu undivided family, company, firm, or other association of [19][*　*] persons, or

(*ii*) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10, [20][*　*　*] maintaining a provident fund for the benefit of his or its employees.

(*c*) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant;

LEG. REF.

[1] Omitted by S. 10 of Act III of 1928.

[2] Substituted for "except" by S. 25 of Act XVIII of 1933.

[3] Substituted for "the proviso" by S. 70 of Act VII of 1939.

[4] Substituted for the words and figure "the provisos to section 8" by S. 25 of Act XVIII of 1933.

[5] Substituted by Act XXIII of 1941.

[6] The figures "17" omitted by S. 70 of Act VII of 1939.

[7] The figures "18" omitted by S. 25 of Act XVIII of 1933.

[9] Substituted for the figures "20" by S. 70 of Act VII of 1939.

[8] The figures "21" omitted by *ibid.*

[10] Substituted for the word and figures "and 48" by S. 25 of Act XVIII of 1933.

[11] The figures "48" omitted by S. 70 of Act VII of 1939.

[12] Substituted for the words, brackets and figures "sub-sections (2) and (3)" by *ibid.*

[13] Omitted by S. 25 of Act XVIII of 1933.

[14] Inserted by *ibid.*

[15] Substituted for the words, brackets, figures and letters "sub-sections (3*A*), (3*B*), (3*C*) and (3*D*)" by S. 70 of Act VII of 1939.

[16] "Section 57" omitted by *ibid.*

[17] Inserted by S. 4 of Act XII of 1929.

[18] Chapter IXA inserted by S. 5 of Act XII of 1929.

[19] The words "individuals or" omitted by S. 71 of Act VII of 1939.

[20] The words and figures "or section 11" omitted by *ibid.*

NOTES.

Sec. 58.—Under S. 58 read with Ss. 34 and 35 the Assistant Commissioner has jurisdiction to inquire into an appeal from the order demanding super-tax. 145 I.C. 145=1933 S. 158. As to power of Income-tax Officer to refuse to renew certificate of registration of firm, *see* 31 N.L.R. (Supp.) 233=1936 N. 121. *See also* 1933 Sind 158; 51 M.L.J. 1 (P.C.), cited under S. 55, *supra*; 53 A. 445=1931 A.L.J. 336=1931 A. 421.

(*d*) a "contribution" means a ny sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest;

(*e*) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time;

(*f*) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest;

(*g*) the "accumulated balance due" to an employee means the balance to his credit, or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund; and

(*h*) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular providend fund.

The according and withdrawal of recognition.

58B. (1) The Commissioner of Income-tax may accord recognition to any provident fund which, in his opinion, satisfies the conditions prescribed in section 58C and the rules made thereunder, and may, at any time, withdraw such recognition if, in his opinion, the provident fund contravenes any of those conditions.

[1][* * * * * *]

[1][(2)] An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made.

[1][(3)] An order withdrawing recognition shall take effect from the day on which it is made.

[2][(3*A*) An order according recognition to a provident fund shall not, unless the Commissioner otherwise directs, be affected by the fact that the fund is subsequently amalgamated with another provident fund on the occurrence of an amalgamation of the undertakings in connection with which the two funds are maintained, or that it subsequently absorbs the whole or a part of another provident fund belonging to an undertaking which is wholly or in part transferred to or merged in the undertaking of the employer maintaining the first mentioned fund.]

[1][(4)] An employer objecting to an order of the Commissioner refusing to recognise [3][or an order withdrawing recognition from] a provident fund may appeal, within sixty days of such order, to the Central Board of Revenue.

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue.

Conditions to be satisfied by a recognised provident fund.

58C. (1) In order that a provident fund may receive and retain recognition, it shall satisfy the conditions set out below and any other conditions which the Central Government may, by rule, prescribe—

(*a*) All employees shall be employed in India, or shall be employed by an employer whose principal place of business is in British India.

[4][Provided that the Commissioner may, if he thinks fit and subject to such conditions, if any, as he thinks proper to attach to the recognition, accord recognition to a fund maintained by an employer whose principal place of business is not in British India notwithstanding that a proportion not exceeding ten per cent. of the employees is employed outside India.]

LEG. REF.

[1] Sub-S. (2) omitted and sub-sections (3), (4) and (5) re-numbered as (2), (3) and (4) respectively by S. 72 of Act VII of 1939.

[2] Inserted by S. 9 of Act XL of 1940.

[3] Inserted by S. 72 of Act VII of 1939.

[4] Added by S. 10 of Act XL of 1940.

(*b*) The contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund.

[1][Provided that an employee who retains his employment while serving in His Majesty's Forces or when taken into or employed in the national service under the National Service (European British Subjects) Act, 1940, or the National Service (Technical Personnel) Ordinance, 1940, may, notwithstanding that he receives from the employer no salary or a salary less than he would have received had he not entered His Majesty's Forces, or been so taken into or employed in the national service, contribute to the fund during his service in His Majesty's Forces or while so taken into or employed in the national service a sum not exceeding the amount he would have contributed had he continued to receive from the employer the same salary (including increments, if any) as he would have received had he not entered His Majesty's Forces, or been taken into or employed in the national service.]

(*c*) Subject to the provisions of section 58D, the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.

(*d*) The fund shall consist of contributions as above specified [2][and of donations, if any, received [3][by the trustees]], of accumulations thereof, and of interest (simple and compound), credited in respect of such [4][contributions, donations and accumulations], and of securities purchased therewith, and of no other sums.

(*e*) The fund shall be vested in two or more trustees [5][or in the Official Trustee] under a trust which shall not be revocable save with the consent of all the beneficiaries.

(*f*) The employer shall not be entitled to recover any sum whatsoever from the fund, save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill-health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund.

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof, in accordance with the regulations of the fund.

(*g*) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund.

(*h*) Save as provided in clause (*g*) or in accordance with such conditions and restrictions as the Central Government may, by rules, prescribe, no portion of the balance to the credit of an employee shall be payable to him.

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect.

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund.

Power to relax restrictions of employers' contributions in certain cases.

58D. Subject to any rules which the Central Government may make in this behalf, the Commissioner may, in respect of any particular fund, relax the provisions of condition (*c*) of sub-section (1) of section 58C—

LEG. REF.

[1] Proviso added by S. 10 of Act XL of 1940 and shall have effect from 3rd September, 1939.

[2] Inserted by S. 10 of Act XL of 1940.

[3] The words "by the trustees" substituted for the words "from the trustees" by Act XXIII of 1941.

[4] Substituted for "contributions and accumulations" by S. 10 of Act XL of 1940.

[5] Inserted by S. 2 of Act IV of 1931.

(*a*) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem; and

(*b*) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature, where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund.

Annual accretion deemed to be income received.

58E. The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year, and, subject to the exemptions specified in section 58F, shall be liable to income-tax and super-tax:

Provided that, for the purpose of sub-section (3) of section 15, out of such annual accretion only the employee's own contributions shall be included in his total income.

Exemption of annual accretion from income-tax.

58F. (1) An employee shall not be liable to pay income-tax on contributions to his individual account in a recognised provident fund, in so far as the aggregate of such contributions in any year does not exceed one-sixth of his salary in that year [1][or six thousand rupees, whichever is less].

(2) [2][Interest credited on the accumulated balance of any employee in a recognised provident fund shall be exempt from payment of income-tax, if and in so far as it does not exceed one-third of the salary of the employee for the year concerned and] in so far as it is allowed at a rate not exceeding such rate as the Central Government may, by notification in the official Gazette, fix in this behalf.

Exemption of accumulated balance from income-tax and super-tax.

58G. [3][(1) Where the accumulated balance due to an employee participating in a recognised provident fund becomes payable, such accumulated balance shall be exempt from payment of super-tax except to the extent of an amount equal to the aggregate of the amounts of super-tax on annual accretions that would have been payable under section 58E up to the first day of April, 1933, if the Indian Income-tax (Second Amendment) Act, 1933, had come into force on the 15th March, 1930.]

[3][(2)] Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years, and the accumulated balance due to him becomes payable, such accumulated balance shall be exempt from payment of income-tax [4* * * *] and shall be excluded from the computation of his total income:

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years, if, in his opinion, the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employee's business, or other cause beyond the control of the employee.

[3][(3)] Where exemption from payment of income-tax is not allowed under the provisions of [5][sub-section (2)], the Income-tax Officer shall calculate the total of the various sums of income-tax [6][and super-tax which would have been payable by the employee in respect of his total income for each of the years concerned if the fund had not been a recognised provident fund, and the amount by which such total exceeds the total of all sums paid by or on behalf of such employee by way of

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LEG. REF.

[1] Added by S. 73 of Act VII of 1939.

[2] Substituted for the original words by *ibid.*

[3] Sub-S. (1) inserted and original sub-Ss. (1) and (2) re-numbered (2) and (4) by S. 26 of Act XVIII of 1933.

[4] The words "and super-tax" omitted by *ibid.*

[5] Substituted for the word, brackets and figure "sub-section (1)," by *ibid.*

[7] Substituted for the original words by S. 74 of Act VII of 1939.

1939.

tax for such years shall be payable by the employee in addition to any other income tax and super-tax] for which he may be liable for the year in which the accumulated balance due to him becomes payable.

Deduction at source of income-tax payable on accumulated balances due.

58H. The trustees of a recognised provident fund, or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall, at the time an accumulated balance due to an employee is paid, deduct therefrom any income-tax payable under [1][sub-section (3)] of section 58G and any income-tax and super-tax payable on an employee's total income as determined under sub-section (3) of section 58J, and sub-sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income-tax payable under the head "Salaries."

Accounts of recognised provident funds.

58I. (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods, and shall contain such particulars as the Central Board of Revenue may prescribe.

(2) The accounts shall be open to inspection at all reasonable times by Income-tax authorities, and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe.

Treatment of balances in newly recognised provident funds.

58J. (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day before the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe.

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect, and sub-sections (3) and (4) shall apply thereto.

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income-tax and super-tax in accordance with the provisions of this Act other than this Chapter.

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income-tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income-tax if this Chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the funds takes effect, and shall be included in the employee's total income for that year; and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance :

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power, subject to the said rules, to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (*h*) of sub-section (1) of section 58C, an employee, in order to enable him to pay the amount of tax

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LEG. REF.

[1] Substituted for the word, brackets and figure "sub-section (2)" by S. 2 and Sch. I of Act XXIV of 1934.

assessed on his total income as determined under sub-section (3) shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income.

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded, in any manner which may be lawful.

Treatment of fund transferred by employer to trustee.

58K. (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund, or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure.

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest and exclusive of the employee's contributions and interest thereon) shall, [1][if the employer has made effective arrangements to secure that tax shall be deducted at source from the amount of such share when paid to the employee,] be deemed to be an expenditure by the employer within the meaning of [2][clause (xii)] of sub-section (2) of section 10, incurred in the year in which the accumulated balance due to the employee is paid.

Provisions relating to rules.

58L. (1) All rules made under this Chapter shall be subject to the provisions of sub-sections (4) and (5) of section 59.

(2) In addition to any power conferred by this Chapter, the Central Government may make rules—

(*a*) prescribing the statements and other information to be submitted with an application for recognition ;

(*b*) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company ;

LEG. REF.

[1] Inserted by S. 75 of Ac VII of 1939.

[2] Substituted for the word, brackets and figures " cl. (*ix*)" by S. 75 of Act VII of 1939.

NOTES.

Sec. 58-K: SCHEME OF THE ACT WITH REFERENCE TO EMPLOYER'S DEDUCTIONS.—It seems to be the scheme of the Act that the employer is to have the advantage of deductions in respect of money which he has contributed to the fund, together with the increase to the fund which his money has earned prior to the time of the transfer of the fund to the trustees. He is not to have any benefit in respect of employee's contributions or interest thereon up to that time and he is not to have the benefit in respect of any interest that is earned by the fund after transfer. 'His share' occurring in S. 58-K cannot be given the meaning of 'his contributions'. It can only mean the employer's contributions and interest thereon up to the date of transfer. 1939 I.T.R. 187=1939 N.L.J. 18=1939 Nag. 89.

'WITHOUT INTEREST'.—The words 'without interest' occurring in S. 58-K mean 'without taking into account the interest earned on the fund after it has been transferred to the trustees.' 1939 I.T.R. 187=1939 N.L.J. 18=1939 Nag. 89. The words 'without addition of interest' occurring in S. 58-K (2) mean 'without taking into account the interest earned on the fund after it has been transferred to the trustees' and the words 'his share' mean, the employer's contributions and interest thereon up to the date of transfer. It seems to be the scheme of the Act that the employer is to have the advantage of the deductions in respect of money which he has contributed to the fund together with the increase to the fund which his money has earned prior to the time of the transfer of the fund to the trustees. He is not to have any benefit in respect of employee's contributions or interest thereon up to that time and he is not to have the benefit in respect of any interest that is earned by the fund after transfer. I. L. R. (1941) Nag. 240.

(*c*) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund ;

(*d*) determining the extent to and the manner in which exemption from payment of income-tax and super-tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn ; and

(*e*) generally, to carry out the purposes of this Chapter, and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as [1][it] may deem requisite.

Application of this Chapter.

58M. This Chapter shall not apply to any provident fund to which the Provident Funds Act, 1925, applies.]

[2][CHAPTER IXB.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SUPERANNUATION FUNDS.

Definitions.

58N. In this Chapter, unless there is anything repugnant in the subject or context,—

(*a*) 'approved superannuation fund' means a superannuation fund or any part of a superannuation fund which has been and continues to be approved by the Central Board of Revenue in accordance with the provisions of this Chapter;

(*b*) 'employer,' 'employee,' and 'contribution' have, in relation to superannuation funds, the meanings assigned to those expressions in section 58A in relation to provident funds ;

(*c*) 'ordinary annual contribution' means an annual contribution of a fixed amount or an annual contribution computed on some definite basis by reference to the earnings, the contributions or the number of members of the fund.

Approval and withdrawal of approval.

58O. (1) The Central Board of Revenue may accord approval to any superannuation fund or any part of a superannuation fund which in its opinion complies with the requirements of section 58P, and may at any time withdraw such approval, if in its opinion the circumstances of the fund or part cease to warrant the continuance of the approval.

(2) The Central Board of Revenue shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The Central Board of Revenue shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Central Board of Revenue shall neither refuse nor withdraw approval to any superannuation fund or any part of a superannuation fund unless it has given the trustees of that fund a reasonable opportunity of being heard in the matter.

Conditions for approval.

58P. In order that a superannuation fund may receive and retain approval the following conditions shall be satisfied, namely :

(*a*) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in British India :

(*b*) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified

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LEG. REF.

[1] This word was substituted for the word 'he' by A.O., 1937

[2] Chapter IXB inserted by S. 76 of Act VII of 1939.

age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependants of persons who are or have been such employees on the death of those persons ; and

(*c*) the employer in the trade or undertaking shall be a contributor to the fund :

Provided that the Central Board of Revenue may, if it thinks fit and subject to such conditions, if any, as it thinks proper to attach to the approval, approve a fund or any part of a fund—

(*i*) notwithstanding that the rules of the fund provide for the return in certain contingencies of contributions paid to the fund, or

(*ii*) if the main purpose of the fund is the provision of such annuities as aforesaid, notwithstanding that such provision is not its sole purpose, or

(*iii*) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in British India.

Application for approval.

58Q. (1) An application for approval of a superannuation fund or part of a superannuation fund for any year of assessment shall be made in writing before the end of that year by the trustees of the fund to the Income-tax Officer, and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules and of the accounts of the fund for the last year for which such accounts have been made up. The Central Board of Revenue may require such further information to be supplied as it thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alteration to the Income-tax Officer, and in default of such communication any approval given shall, unless the Central Board of Revenue otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

Exemption of superannuation fund from income-tax.

58R. Income derived from investments or deposits of an approved superannuation fund shall be exempt from payment of income-tax, and any sum paid by an employer or an employee by way of contribution towards an approved superannuation fund shall, in the case of an employer, be deducted in computing his income, profits or gains for the purpose of assessment, and, in the case of an employee, be treated for all the purposes of this Act as if it were a sum to which the provisions of section 15 apply :

Provided that no such exemption shall be allowable to an employee in respect of any sum which is not an ordinary annual contribution :

Provided further that where a contribution by an employer is not an ordinary annual contribution it shall, for the purposes of this section, be treated, as the Central Board of Revenue may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Central Board of Revenue thinks proper.

Treatment of repaid contributions.

58S. (1) Where any contributions (including interest on contributions, if any) are repaid to an employee, the amount so repaid shall be deemed for the purposes of income-tax [1][* *] to be income of the employee for that year.

(2) Where any contributions (including interest on contributions, if any) are repaid to an employee during his lifetime but not at or in connection with the termination of his employment income-tax on the amount so repaid or paid shall except in the case of an employee whose employment was carried on abroad, be deducted by the trustees of the fund at the average rate of tax at which the employee

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LEG. REF.

[1] The words "and super-tax" omitted by S. 5 of Act XII of 1940.

was liable to income-tax [1][* *] during the preceding three years or during such period, if less than three years, as he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Central Board of Revenue may direct.

Deduction from pay of, and contributions on behalf of, employee to be included in return under section 21.

58T. Where an employer deducts from the emoluments paid to an employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under section 21.

Liabilities of trustees on cessation of approval of fund.

58U. If a fund or a part of a fund for any reason ceases to be an approved superannuation fund, the trustees of the fund shall nevertheless remain liable to account for tax on any sum paid—

(*a*) on account of returned contributions (including interest on contributions, if any,), and

(*b*) in commutation or in lieu of annuities,

in so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved fund under the provisions of this Chapter.

Particulars to be furnished in respect of superannuation unds.

58V. The trustees of an approved superannuation fund and any employer who contributes to an approved superannuation fund shall, when required by notice from the Income-tax Officer, within twenty-one days of the date of such notice :—

(*a*) furnish to the Income-tax Officer a return containing such particulars of contributions made to the fund as the notice may require ;

(*b*) prepare and deliver to the Income-tax Officer a return containing—

(*i*) the name and place of residence of every person in receipt of an annuity from the fund,

(*ii*) the amount of the annuity payable to each annuitant,

(*iii*) particulars of every contribution (including interest on contributions, if any) returned to the employer or to employees ; and

(*iv*) particulars of sums paid in commutation or in lieu of annuities ;

(*c*) furnish to the Income-tax Officer a copy of the accounts of the fund to the last date prior to such notice to which such accounts have been made up, together with such other information and particulars as the Central Board of Revenue may reasonably require.]

CHAPTER X.

MISCELLANEOUS.

Power to make rules.

59. (1) The [2][Central Board of Revenue] may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act and for the ascertainment and

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LEG. REF.

[1] This words "and super-tax" omitted by Sec. 5 of Act XII of 1940.

[2] Substituted for the words "Board of Inland Revenue by Sec. 4 and Sch. of Act IV of 1924.

NOTES.

Sec. 59: RULES: RULE 2.—Under R. 2 of the rules framed by the Board of Inland Revenue under S. 59, the Assistant Commissioner is not himself competent to order the registration of a firm. The only power that he can exercise under the rule is to permit the presentation of the application to the Income-tax Officer and thus condone the delay. Further the matter is entirely discretionary with him and he cannot be compelled under any provisions of the Act or the rules made thereunder, to grant the prayer made to him by the assessee. Still on general principles the High Court is competent to determine whether the jurisdiction, which vested in the Assistant Commissioner, has been perversely refused. Where in an application by a firm for registration a recital is not in accordance with facts, the Assistant determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

(2) Without prejudice to the generality of the foregoing power, such rules may—

NOTES.

Commissioner is justified in refusing to register the firm. (8 I.T.C. 107, Rel. on.) 1937 Lah. 445.

RULES 25-35.—Rr. 25 to 35 of the rules made by the Central Board of Revenue under S. 59 should not be taken as having any further effect than that they provide a somewhat arbitrary, though convenient, method of ascertaining the total profits or gains in respect of Life Assurance business and so do not prevent the assessees from claiming the benefits of the provisions of Ss. 8 and 18 (5) of the Act. The assessees may, therefore, claim exemption from income-tax in respect of interest derived from Government of India tax-free securities which come within the proviso to S. 8 and also claim credit under S. 18 (5) for any deductions of tax made at the sources. I.L.R. (1937) 2 Cal. 540=41 C.W.N. 905.

RULE 25.—The actuarial valuation referred to in R. 25 is the actuarial investigation into the company's financial condition required by S. 8 (1) of the Indian Life Assurance Companies Act, 1912, and not merely the actuarial valuation of its liabilities which by itself can never ascertain the profits. 50 L.W. 119=43 C.W.N. 926 =1939 P.C. 190 (P.C.). Under R. 25 "the income, profits and gains of a life assurance business shall be the average annual net profits disclosed by the last preceding valuation"; that is to say, shall be arrived at by taking one fifth of the surplus disclosed in the valuation balance-sheet and treating it "as the average annual income of the business for the next quinquennium". The "net profits" in this rule clearly mean the "surplus, if any" in the statutory form of valuation balance-sheet of "life assurance and annuity funds (as per balance-sheet under Third Schedule)" over the "net liability under life assurance and annuity transaction (as per summary statement provided in Fourth Schedule)." If the assessee's actuarial valuation balance-sheet on the last date of the last preceding valuation shows a deficiency, the Income-tax Department cannot go behind the said valuation balance-sheet to find out if there were any profits in respect of the period of the last preceding valuation. (61 I.A. 41, Foll.) 43 C.W.N. 926=50 L.W. 119=1939 P.C. 190 (P.C.). Where in the case of an assessee who is a Life Insurance Company, the actuarial valuation balance-sheet on the last date of the last preceding valuation shows a deficiency, R. 25 of the Rules framed under S. 59 of the Income-tax Act does not permit the department to go behind the said valuation balance-sheet to find out if there were any profits in respect of the period of the last preceding valuation. 42 C.W.N. 440. The expression 'last preceding valuation' in R. 25 does not mean the valuation covering the last valuation period terminating before the 1st of April of the year of assessment, but the last preceding valuation at the time of the return. R. 25 is of a mandatory character and provides the only manner in which the income, profits and gains of Life Assurance Companies can be ascertained. I.L.R. 1938 Mad. 270=1938 Mad. 145=(1938) 1 M.L.J. 11 (F. B.).

RULE 30.—The words "may be treated as expenditure" in R. 30 cannot be interpreted as conferring upon the Income-tax Officer and upon him alone the option to treat sums written off to meet depreciation of, or loss on securities or other assets, or carried to a reserve fund formed for that sole purpose, and not used for any other purpose, as expenditure incurred solely for the purpose of earning the profits of the business. Such a construction would do violence to the plain words of the rule. The rule really confers an option on the assessee to write off in his accounts to meet depreciation or to carry to a reserve fund to meet depreciation any amount which is justified by an actual loss in any particular year. 40 Bom. L.R. 447=1938 Bom. 345.

RULE 31.—The words *"which in the opinion of the Central Board of Revenue, is unreasonable,"* is S. 59 (*a*) (3) of the Income-tax Act, gives the Central Board of Revenue absolute discretion to decide in cases coming under Cl. (*a*) of Sub-S. (2) of S. 59, whether the amount of trouble to the assessee is unreasonable, and in that case to estimate the income in accordance with rules prescribed. Hence R. 31 of the Income-tax Rules is perfectly *intra vires* and not *ultra vires*. (1939) I.T.R. 352=1939 Sind 363. R. 31 is clearly made under S. 59 (3) of the Income-tax Act, and S. 59 (2) must be read with S. 59 (3). Insurance Companies come under S. 59 (2) (*a*) (*ii*) and it is clear that the words *"Dividing Society"* in R. 31 means and must be read as Dividing Insurance Society. It is also obvious from a reading of R. 32 that "companies" referred to in R. 31 mean Life Assurance Companies. I.L.R. (1939) Kar. 779=1939 I.T.R. 293=1939 Sind 293. *See also* 1939 I.T.R. 352=1939 Sind 363; 1939 I.T.R. 333=1939 Sind 296.

RULE 35.—The Income-tax Officer is authorised to have recourse to the method of computation provided by R. 35 of the Income-tax Rules only "in the absence of more reliable data". When he has before him the quinquennial valuations and the actuarial reports of the assessee company in respect of their Indian Life Insurance business, he cannot reject them *in toto* and assess the company under the proportionate scheme of R. 35, even if he questions the correctness of certain particulars in them. On the (*a*) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(*i*) incomes derived in part from agriculture and in part from business ;

[1][* * * * * * * *]

[1][(*ii*)] persons residing out of British India ;

(*b*) prescribe the procedure to be followed on applications for refunds ;

(*c*) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act, 1920, or under section 49 of this Act ;

(*d*) prescribe the year which, for the purpose of relief under section 49, is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1920 ; and

(*e*) provide for any matter which by this Act is to be prescribed.

[1][(3) In cases coming under clause (*a*) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(*a*) prescribe methods by which an estimate of such income, profits and gains may be made, and

(*b*) in cases coming under sub-clause (*i*) of clause (*a*) of sub-section (2) prescribe the proportion of the income which shall be deemed to be income, profit and gains liable to tax :

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.]

[3][(4)] The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication.

[3][(5)] Rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act.

60. [4][(1)] The Central Government may, by notification in the Official

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LEG. REF.

[1] Original sub-clause (*ii*) was omitted and sub-clause (*iii*) re-numbered (*ii*) by Sec. 77 of Act VII of 1939.

[2] Inserted by S. 2 of Act XXVIII of 1927.

[3] Sub-section re-numbered by *ibid.*

[4] Original S. 60 re-numbered as sub-S. (1) by S. 10 of Act XXII of 1930.

NOTES.

other hand, he must apply himself to the data before him and assess the profits and gains of the company in accordance with the methods customarily employed in estimating the profits of Life Assurance Companies. I.L.R. (1941) 1 Cal. 550=45 C.W.N. 694. A Life Insurance Company carrying on business throughout the world as well as in India submitted a statement under R. 35 of the Rules showing the profits of the Indian business as the proportion of the company's whole world-wide income that Indian premiums bear to the world-wide premiums. The company claimed exemption from income-tax under the proviso to S. 8 of the Act in respect of interest derived from tax-free securities of the Government of India. *Held,* that the company was entitled to have the same proportion of that tax-free interest that the Indian premiums bear to the world-wide premiums, deducted from the income, profits and gains assessed under Rr. 25 and 35 and exempted from tax. I.L.R. (1937) 2 Cal. 581=41 C.W.N. 922. The Income-tax Officer is authorised to have recourse to the method of computation provided by R. 35, "only in the absence of more reliable data," which (*a*) requires a scrutiny of the date which in fact had been made available to the Income-tax Officer, irrespective of any question as to the validity or correctness of the return made under S. 22 (1), and (*b*) a consideration of reliability of those data for the purpose of a computation of the income, profits or gains of the company in accordance with S. 13 of the Act. The total income, profits or gains, of the company referred to in R. 35 is the income, profits or gains as they would be ascertained for the purposes of the Act. 63 I.A. 99=60 B. 248=1936 P.C. 55=70 M.L.J. 412 (P.C.).

Sec. 60.—The law and statutory rules applicable for determining the assessment of income-tax must be the statutory laws and rules in force for the year of the assessment and not those in force during the year of the income which is assessed. The Government Notification No. 11 of 4th April, 1936, would therefore be applicable to an assessment levied on 28—10—1937 for the

Power to make exemptions, etc.

Gazette, make an exemption, reduction in rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons.

[1][(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance, [2][or by reason of his having received in any one financial year salary for more than twelve months], [3][or a payment which is under the provisions of sub-section (1) of section 7 a profit in lieu of salary] his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Central Government may grant [4][the appropriate relief].

[5][(3) After the commencement of the Indian Income-tax (Amendment) Act, 1939, the power conferred by sub-section (1) shall not be exercisable except for the purpose of rescinding an exemption, reduction or modification already made.]

Appearance by authorised representative.

[6][61. (1) Any assessee, who is entitled or required to attend before [7][the Appellate Tribunal or] any Income-tax authority in connection with any proceeding under this Act otherwise than when required under section 37 to attend personally for examination on oath or affirmation, may attend by a person authorised by him

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LEG. REF.

[1] Added by sec. 10 of Act XXII of 1930.

[2] Inserted by S. 27 of Act XVIII of 1933.

[3] Inserted by S. 78 of Act VII of 1939.

[4] Substituted for "such relief as it may think fit," by *ibid.*

[5] Sub-section added by *ibid.*

[6] This section substituted by S. 79, *ibid.*

[7] Inserted by S. 11 of Act XL of 1940.

NOTES.

year ended 31st March, 1937, even though the income assessed be for the year ended 31—3—1936. 196 I.C. 143=1941 Sind 110 =1940 I.T.R. 467. Under S. 60 the Government of India can, by notification, deal with income-tax and super-tax, but it does not follow that it cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India Notification, Finance Department (Central Revenue) No. 21, dated 12th October, 1929, exempts the assessee from the payment of income-tax in respect of such part of the profits of a firm which has discontinued its business, if tax had at any time been charged on such business under the Income-tax Act (VII of 1918) or if an assessment has been made on the firm in respect of such profits under S. 25 (1) of the Income-tax Act (XI of 1922). This notification does not, however, extend to super-tax and the profits so exempted from income-tax can be included for ascertaining whether the income is sufficient to make it chargeable to super-tax. 65 M.L.J. 327=56 M. 679=1933 M. 701 (F.B.). The intention of the Government underlying its notification, dated 12th August, 1925, was to exempt from income-tax the profits accruing from Co-operative Societies from carrying on the business of a mutual Co-operative Society upon the ground that a man cannot make a loss or profit out of himself and in that way to encourage and foster Co-operative Societies which were designed to improve the conditions of Indian cultivators. But neither interest from securities nor income derived from property is "profits" within the meaning of the term as used in the notification, unless the investment of capital in property or securities is part of the business of the Co-operative Society. In considering that question, the fact that such income appears as part of the profits in the profit and loss account of the assessee is not conclusive. 11 R. 521=1934 R. 27 (S.B.). A society was incorporated in England in 1923 under the Industrial and Provident Societies Act of 1893 and the shares were owned exclusively by two other Co-operative Societies. The Apex Society carried on business in India for growing tea, etc., and except a very small quantity of useless tea disposed of locally, the goods were consigned to the society in England and the branch societies delivered the goods to their members on a system, the object of which was to eliminate the profits of the middle man, and the question arose whether that company was assessable to income-tax in India in respect of the amount charged on the branch societies, but it appeared that such profits were distributed among the shareholders. *Held*, that the society was a mutual Co-operative Society earning no profit and was therefore not liable to assessment under S. 60 of the Income-tax Act. 1929 M.W.N. 534.

Sec. 61.—An application for a copy of the order passed by the Assistant Commissioner is within the words "attendance before an Income-tax Officer". Any person asking for a copy of the order should be expressly authorised in writing in that behalf and the fact that a pleader had been in writing in this behalf, being a relative of or a person regularly employed by the assessee, or a lawyer or accountant or Income-tax practitioner, and not being disqualified by or under sub-section (3).

(2) In this section,—

(*i*) a person regularly employed by the assessee shall include any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings;

(*ii*) "lawyer" means a Barrister-at-Law or Solicitor or any other person entitled to plead in any Court of law in British India;

(*iii*) "accountant" means a registered accountant enrolled in the Register of Accountants maintained by the Central Government under the Auditor's Certificate Rules, 1932, or a holder of a restricted certificate under the Restricted Certificate Rules, 1932, or a member of an association of accountants recognised in this behalf by the Central Board of Revenue;

(*iv*) "Income-tax practitioner" means—

(*a*) any person who, before the 1st day of April, 1938, attended before an Income-tax authority on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee;

(*b*) any person who has passed any accountancy examination recognised in this behalf by the Central Board of Revenue; or

(*c*) any person who has acquired such educational qualifications as the Central Board of Revenue may prescribe for this purpose.

(3) No person who has been dismissed from Government service after the 1st day of April, 1938, shall be qualified to represent an assessee under sub-section (1); and if any lawyer or registered accountant is found guilty of misconduct in connection with any income-tax proceedings by the authority empowered to take disciplinary action against members of the profession to which he belongs, or if any other person is found guilty of such misconduct by the Commissioner of Income-tax, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified to represent an assessee under sub-section (1):

Provided that—

(*a*) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard,

(*b*) any person against whom such direction is made may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled, and

(*c*) no such direction shall take effect until one month from the making thereof, or, when an appeal is preferred, until the disposal of the appeal.]

Receipts to be given.

62. A receipt shall be given for any money paid or recovered under this Act.

Service of notices.

63. (1) A notice or requisition under this Act may be served on the person, therein named, either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908.

NOTES.

authorised by the party to conduct his case before the Assistant Commissioner is not sufficient to authorise him to apply for a copy of the order. 11 P. 40=1932 P. 103.

Sec. 63: SERVICE OF NOTICE.—S. 63 is to be read along with S. 27, General Clauses Act. The words "unless the contrary is proved" in S. 27 refer both to the service and the time. Consequently, when a notice has been posted properly addressed and prepaid and in a register cover, the presumption raised even as regards the service is not conclusive but is rebuttable. 54 A. 548=138 I.C. 70=1932 A. 374. Section does not require that service of a notice must be by its being placed in the hands of person named therein by the officer of the Court himself and does not exclude other forms of service permitted by O. 5 of the C.P. Code. 23 Cr.L.J. 591=1922 N. 187. A notice addressed to a Hindu undivided family in its trading name is sufficient compliance with the requirements of S. 63. 17 Pat. 187=1938 Pat. 91. Where a notice under the Income-tax Act is delivered otherwise than

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family be addressed to any member of the firm or [1][to the] manager, or any adult male member of the family [2][and, in the case of any other [3][association of persons] be addressed to the principal officer thereof].

Place of assessment.

64. (1) Where an assessee carries on [4][a business, profession or vocation] at any place, he shall be assessed by the Income-tax Officer of the area in which that place is situate or, where the [4][business profession or vocation] is carried on in more places than one, by the Income-tax Officer of the area in which [5][the principal place of his business, profession or vocation] is situate.

(2) In all other cases, an assessee shall be assessed by the Income-tax Officer of the area in which he resides.

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more provinces, than one, by the Commissioners concerned, or, if they are not in agreement, by the [6][Central Board of Revenue.]

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views :

[7][Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1)

LEG. REF.

[1] Substituted for the words "one the" by S. 2 and Sch. I of Act VII of 1924.

[2] Added by S. 9 of Act XI of 1924.

[3] Substituted for the words "association of individuals," by S. 80 of Act VII of 1939.

[4] Substituted for the word "business" by S. 81, *ibid.*

[5] Substituted for the words "his principal place of business," by *ibid.*

[6] Substituted for the words "Board of Inland Revenue" by Sec. 4 and Sch. of Act IV of 1924.

[7] Provisos were added by S. 81 of Act VII of 1939.

NOTES.

by post to any clerk or servant on the premises where the assessee carries on business, and according to the practice obtaining in business, the employee is expected to hand on any communication which he has received to the manager, that is not evidence upon which the income-tax authorities can find as a fact that the manager was served with the summons. 13 R. 251=156 I.C. 385=1935 R. 144 (S.B.). Income-tax Officers, in doing the very important work of assessing income-tax, must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorised to represent the assessee, and they are not entitled to assume this merely because such person has on occasions signed a notice, possibly under pressure, or produced account books for inspection. A notice served on such person who is not authorized to accept service is not a valid service on the assessee. 30 N.L.R. 340. Delivery by unregistered post does not amount to the service required by the section. Therefore a conviction under S. 34 (*b*) based on such a notice is liable to be set aside. 17 A.L.J. 146=49 I.C. 781. In the case of an unregistered firm a notice need not be served only on the member of the firm who made the return but under S. 63 (2) it can be served on any member of the firm and such service is good service. 48 M. 602=49 M.L.J. 124.

Sec. 64.—S. 64 was intended to ensure that as far as practicable an assessee should be assessed locally, and the area to which an Income-tax Officer is appointed must, so far as the exigencies of the tax collection allowed, bear some reasonable relation to the place where the assessee carried on business or resided. I.L.R. 1940 Bom. 650=3 Fed.L.J. (H.C.) 75=42 Bom.L.R. 414=1940 Bom. 234.

Sec. 64 (1).—Where the assessee has branches at several places and his head office at Benares, the Officer at Benares has jurisdiction to call for a return of the income of all the branches, though situate out of Benares. (47 A. 631, Foll.) 1933 A.L.J. 49=1933 A. 197=145 I.C. 562. Sub-S. (3) covers only the case of a refusal on the ground of any question of law arising. It does not cover the case of a refusal to refer on the ground that the application was filed beyond time. 33 Bom.L.R. 1114. Commissioner's finding of fact based on misconception of law—Interference. *See* 55 M.L.J. 416 (F.B.). *See also* 1940 A.L.J. 855. "Ordinarily the principal's place of business of a firm or company is at the place at which the persons directing the firm or company do their business." The fact that the goods are manufactured in one place does not make that place necessarily the principal place of business. Where business is carried on in many places or at different branches, it may be said that the business is carried on in each of those places, though neither of them may be the principal place of business. 49 A. 616=100 I.C. 756=1927 A. 299. On this sub-clause, *see also* 3 Luck. 237; 1928 L. 701; I.L.R. (1940) All. 785=1940 A.L.J. 855=1940 All. 129.

of section 22 and has stated therein the principal place wherein he carries on his business, profession or vocation, or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub-section (2) of section 22 or under section 34 for the making of a return

Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made.]

(4) Notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income-tax Officer in respect of any income, profits or gains accruing, or arising or received within the area for which he is appointed.

[1][(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—

(*a*) on whom an assessment or re-assessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income-tax, or

(*b*) where by [1][any direction given or] any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of section 5, [2][or in consequence of any transfer made by him under sub-section (7*A*) of section 5], a particular Income-tax Officer has been charged with the function of assessing that assessee, or

(*c*) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5,

but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income-tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be.]

Indemnity.

65. Every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof.

Statement of case by Appellate Tribunal to High Court.

66. [3][(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33, the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal, to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court :

LEG. REF.

[1] Added by S. 6 of Act XII of 1940.

[2] Inserted by S. 12 of Act XL of 1940.

[3] Sub-Ss. substituted by S. 92 of Act VII of 1939.

NOTES.

Sec. 66: SCOPE.—The High Court should require, before they seek to entertain any question under S. 66 that the preliminary requirements of the section are strictly complied with. 1930 P.C. 151=57 I.A. 152=59 M.L.J. 242 (P.C.). Whatever conclusions are arrived at by the Income-tax authorities, they must have some material to support them, and in case it is contended that there is no material for those conclusions, the question does resolve itself into one of law. 1937 L. 305. Whether a debt is a bad debt, and if so, at what point of time it becomes a bad debt, are questions of fact to be decided in the event of dispute by the appropriate tribunal. If the finding of such tribunals is based on relevant and admissible evidence, even though it is erroneous, interference by the High Court is barred. 168 I.C. 549=1937 L. 338 (F.B.).

AMENDING ACT OF 1933—RETROSPECTIVE OPERATION.—Amendment to S. 66, by the Amending Act of 1933, giving a right to the assessee to reopen an order of the Income-

NOTES.

tax Commissioner under S. 33 on a reference to the High Court is not a mere matter of procedure and cannot be construed to give a retrospective right to an assessee to claim a reference from an order passed before the amendment came into force. 1934 L. 1013. All cases pending at the time the Act was amended in 1933, will be governed by the Act as amended. 172 I.C. 511=1938 Nag. 16.

APPLICATION FOR REFERENCE WHEN MADE.—An application by assessee for reference must be made before the case is disposed of by the Chief Revenue Authority. 64 I.C. 610=23 Bom.L.R. 1267. Application under S. 66 (2) must state the question of law to be referred to High Court. *See* 92 I.C. 249=1926 L. 168. Reference on the question whether a Hindu joint family had become divided—Statement by members—Jurisdiction of Income-tax Officer to decide the question. *See* 1927 M.W.N. 591 (F. B.). An assessee is not entitled to obtain mere *obiter dicta*. 133 I.C. 753=1931 P. 306 (F.B.).

FORM OF REFERENCE.—Where the Commissioner of Income-tax referred to the High Court whether the Income-tax Officer was right in disallowing set off, *held*, that the form of the question was open to exception in view of the fact that under S. 66, the Court has to decide the questions of law only. 58 C. 1446=35 C.W.N. 589. In stating a case to the High Court, the Commissioner should not frame the questions in general terms. Also he should state only such questions as are intended to be answered by the High Court. 35 C.W.N. 312=58 C. 906=1931 C. 543. Where the assessee asks the Commissioner of Income-tax to refer certain points of law to the High Court, it is correct and proper that the Commissioner should write a judgment, so to say, giving the reasons for his conclusion. But if part of the conclusion to which he comes is that it is right to refer a certain question to the High Court, then he ought in strictness to make out another document, namely, a statement of the case upon that point for the opinion of the High Court. 58 C. 506. It is the duty of the Commissioner to state the facts and then to formulate the questions of law which arise upon them. 34 Bom.L.R. 100=1932 B. 116. He may then if he choose give his own opinion and discuss the case. 104 I.C. 841. It is desirable that the questions of law which the Commissioner refers to the High Court should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.). In formulating questions for the opinion of the High Court, the Commissioner of Income-tax should ask only one question at a time. An attempt should not be made to combine two or more questions in the form of one question. Further, the questions should not be divorced from the facts of the particular case and should not be in the abstract. I.L.R. (1937) 1 C. 697=173 I.C. 898. *See also* 1938 Cal. 20. Where the Chief Court when requiring the Commissioner to make a reference has not made any modification in the form of the question as stated in the application of the assessee, the Commissioner is bound under R. 10 of Appendix VII of the Rules of the Chief Court to state the point of law in the form stated in the application of the assessee. 169 I.C. 404=1937 O.W.N. 634=1937 O. 416.

REFERENCE BY COMMISSIONER SUO MOTU—RIGHT TO BEGIN.—In a reference under S. 66 (1) by the Commissioner *suo motu*, the Advocate-General or Counsel on behalf of the Commissioner has the right to begin. 37 Bom.L.R. 112=1935 B. 167. *See also* 145 I.C. 254=1933 S. 148. The Income-tax Commissioner is an official charged with certain duties as to the collection of income-tax and if in the course of these duties he deems it necessary to ascertain the views of the Court upon the meaning of a section of the Act (other than one under Ch. 8), he is entitled to state a case for the opinion of a Bench of at least two Judges of the High Court. He cannot be estopped from exercising that statutory right. 177 I.C. 255=1938 Cal. 557 (S.B.).

"HIGH COURT".—Chief Court of Oudh—If High Court under the section. 13 O.L.J. 381=1926 O. 191; 105 I.C. 556=1927 O. 465=3 Luck. 237. It is open to the High Court when hearing the case on the statement of the Commissioner to decide what are the questions of law which arise. 56 A. 504=1934 A. 217. *See also* 39 P.L.R. 1028=1937 Lah. 721. On a reference under S. 66 (2), it is always desirable that the Commissioner should state correctly the questions of law raised by the stated case, but the High Court is not precluded from deciding questions of law arising from the case as stated by the Commissioner though not set out specifically for the High Court's decision. I.L.R. (1939) Kar. 779=1939 I.T.R. 293=1939 Sind 293. Though it is for the Income-tax authorities to state the questions of law for decision by the High Court, if from the case as stated by him another question of law arises, the High Court is not precluded from deciding the same because it has not been specifically sent out in the reference. 1939 I.T.R. 341=1939 Sind 301. But *see* 52 L.W. 406=1940 P.C. 158=I.L.R. 1940 K. 335 (P.C.).

JURISDICTION OF HIGH COURT—NATURE OF.—The jurisdiction conferred upon the High Court by S. 66 of the Income-tax Act is a special jurisdiction and forms no part of the Court's original or appellate jurisdiction. The High Court is not a Court of appeal in income-tax cases. Its functions are confined strictly to the disposal of references on points of law. 39 C.W.N. 1140=62 C. 671. Where a High Court in answering a

NOTES.

question referred to it under S. 66, gives its opinion, the opinion is only 'advisory'. 63 I.A. 408=164 I.C. 18=41 C.W.N. 33=1936 P.C. 269 (P.C.). When the Assistant Commissioner applies the correct principle of law to facts and comes to a certain conclusion, there is no misdirection and it is immaterial to consider whether the High Court applying the same principle to the question of fact to be decided would have arrived at the same conclusion. 177 I.C. 630=1938 Rang. 315 (S. B.). *Manohar Lal, J.*—Where a case stated by the Commissioner of Income-tax comes before the High Court for hearing, and the High Court directs the case to be sent back in order that it may be re-stated with such finding of fact as may be considered necessary, there being an error in the statement of the case, the Commissioner is bound in duty to carry out the order of the Court, and re-hear the parties, admit such further evidence as he considers relevant on the point at issue and re-state the case with his opinion thereon. He cannot refuse to do so on the ground that he has no power under S. 66 (4) to vary an opinion given under S. 66 (2). If the Commissioner is dissatisfied with the order of the High Court, which has jurisdiction to require him to re-state a case which is not found satisfactory, he should appeal to the Privy Council. But as long as the High Court's order stands, it must be carried out to the very letter and in the spirit. 18 Pat. 805=1939 I.T.R. 536=1940 Pat. 24. *See also* 53 All. 451; 1930 All. 209; 54 All. 496. Per *Dalip Singh, J.*—There is no section which empowers the Commissioner to ask the advice of the High Court as to the legality of any proceedings that he intends to take, and it would not be proper for the High Court to express any opinion on the point, because the point may never arise, as the assessee may not ask for a reference on the point, and secondly, because any decision or advice given by the Court on a question not directly arising before it cannot bind the Bench that subsequently hears the reference, if any, upon this question when it really does arise. 16 L. 937=1935 L. 742 (F.B.).

REFERENCE, NOT COMPULSORY.—It is not incumbent upon the Chief Revenue Authority to make a reference to the High Court, whenever an application for a reference is made. 45 B. 1064=63 I.C. 775=23 Bom. L.R. 609. Piecegoods—Fall in price of stock at the end of year—Estimation of loss—Balance of stock—Opening price for next year—Calculation of profit and loss—Reference under S. 66—Question—Frame of. 48 M. 836=49 M.L.J. 425. Chief Revenue Authority is not bound under S. 45, Specific Relief Act, to make reference to the High Court under S. 51 of the Income-tax Act. 45 B. 881=23 Bom.L.R. 139. High Court cannot compel reference by Revenue Board —Government of India Act, S. 106 (2)—Specific Relief Act. S. 45. 44 M. 718=41 M.L.J. 177: 30 C.W.N. 831=1926 C. 998; 28 Bom.L.R. 1096=1926 B. 566. Where in pursuance of an order under S. 45 of the Specific Relief Act by the High Court, the Board of Revenue, instead of appealing against the order, made reference to the High Court it is not open to them afterwards to object to the reference on the ground that the order was without jurisdiction. 70 I.C. 30=14 L.W. 413 (F.B.). *See also* 44 M. 718=41 M.L.J. 177=64 I.C. 782. When an application is made to a Commissioner of Income-tax to state a case to the High Court under S. 66, he cannot refuse to pass any order on the application or delegate his authority to any subordinate officer. 1924 L. 662 (2). Application to Commissioner to refer questions of law—Fee payable. 1925 R. 94=2 R. 579. Commissioner of Income-tax—Statement of case to the High Court—Points of law. 2 Pat.L.R. 1922 (Cr.). *See also* 91 I.C. 980=1926 N. 180. In making a reference to the High Court the Commissioner has power to refer additional questions besides the matter formulated in question sent down to him. 1935 L. 681.

REFERENCE, WHEN PROPER AND WHEN NOT.—When Chief Revenue Authority can be compelled to state a case. 45 M.L.J. 592 =47 B. 742=50 I.A. 227. Where the Commissioner on an application under S. 66 (2) refuses to refer a case on the view that the question arising in the case is a settled question of law, it amounts in other words to saying that the question of law does not arise and the High Court can in such a case require the Commissioner to state the case and refer it to the High Court. 15 Luck. 723=189 I.C. 458=1940 Oudh 363. Assessee can maintain an application for mandamus to direct Commissioner to state a case only on points of law which he urged before the Commissioner and he cannot be permitted to shift his ground. 6 R. 492=1928 R. 281. Whether review can be granted; whether reasonable opportunity was given under S. 33 and whether personal income can be jointly assessed with family income are questions of law necessitating a reference to the High Court. 84 I. C. 792=1925 P. 155. Non-compliance with S. 23 (2) though not raised in proceedings under S. 66 (3) before Commissioner was held to be question of law under S. 66 (2). 85 I.C. 520=1925 C. 173. The question as to what constitutes receipts for purposes of the Income-tax Act is a question of law and not a question of fact. 21 N.L.R. 175. On this section, *see also* 1933 P.C. 198=65 M.L.J. 535 (P.C.).

QUESTION OF LAW.—It is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law an officer came to a correct conclusion upon a matter of fact. (1937) 2 M.L.J. 43=41 C.W.N. 719=1937 P.C. 133=64 I. A. 102 (P.C.). Distinction between question

NOTES.

of law and fact, *see* 3 I.T.C. 10. If one of two possible inferences is drawn by the Commissioner, no question of law arises in the case also. 121 I.C. 648; 122 I.C. 479 =1930 N. 200. The true intent of the first proviso to the second sub-section of S. 66 is that a question of law that is common to both the Assistant Commissioners and the Commissioner's order is not a proper subject-matter of a reference unless the question of law is raised on a reference from the decision of the Assistant Commissioner. 171 I.C. 797=1937 Nag. 154. The question whether the Income-tax Officer legally proceeded to assess the assessee under S. 23 (4) is one of law. 100 I.C. 774 (2)=1927 L. 288. *See also* 104 I.C. 127=1927 L. 691. Before declining to adjudicate on the merits of an appeal on the ground that it is barred by the proviso to S. 30 (1) it is incumbent on the Assistant Commissioner to satisfy himself that the assessment was not merely ostensibly but genuinely under S. 23 (4). It is the duty of the Commissioner if required by the assessee to state the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the case within the ambit of proviso to S. 30 (1). 133 I.C. 753=1931 P. 306 (F.B.). When there is ample evidence upon which the Income-tax Officer can find that there was no sufficient cause preventing the assessee from producing account books requisitioned under S. 22 (2) and it appears upon the ground he had refused to cancel the assessment made under S. 23 (4) and his order is upheld by the Assistant Commissioner on appeal for the same reason there is no question of law arising under the circumstances for the purposes of S. 66 (2). 9 R. 21=1931 R. 97. The question whether an assessment made by the Income-tax Officer under S. 23 (4) is valid or not is not a question of law and cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. [6 R. 21; 8 R. 203; 8 R. 209; 7 R. 669; Over.] 9 R. 281=1931 R. 194 (F.B.). *See also* 1930 L. 1014. But *see* 1931 P. 306 (F.B.). *Whether a debt is wholly or partly and to what extent bad or irrecoverable* is in every case a question of fact, to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. 61 I.A. 318=58 B. 579=1934 P. C. 180=67 M.L.J. 213 (P.C.); 18 Lah. 306 =1937 Lah. 338; 1941 Rang.L.R. 529=1941 Rang. 185 (S.B.); 1941 Rang.L.R. 273 (S.B.); 1941 I.T.R. 332; 1939 I.T.R. 149; 1941 I.T.R. 224. No doubt the question whether a debt is a bad debt and if so at which point of time it became a bad debt, is a question of fact to be decided in the event of a dispute by the appropriate tribunal. But the conclusions of the appropriate tribunal must be based on relevant and admissible evidence, and the question whether there is such evidence to support the conclusions arrived at by the Income-tax Authorities is a question of law open to consideration by the High Court. 37 P.L.R. 497= 1935 L. 637. The Income-tax Officer is the sole arbitrator on the question of the possibility of deducing the income, profits and gains of the assessee from the method of accounting employed by him. The correctness of the opinion of the Officer under these circumstances is a question of fact which cannot be challenged by means of an application under S. 66 of the Act. (1926 L. 446, Foll.) 164 I.C. 1018=1936 L. 621. The question whether a person is or is not a member of a joint undivided family is one of fact, but when the tribunal of facts states the circumstances on which it relies for its finding, and those circumstances do not in law lead to the conclusion arrived at by the tribunal of fact, it is open to a Court of law to draw the proper inference from the circumstances stated. 14 P. 785=16 Pat.L.T. 351=1935 P. 342 (S.B.). The question *whether a person is rightly declared an agent* under S. 43 and the further question whether when an assessment is made under S. 23 (4) to proviso to S. 30 (1) bars an appeal though the appeal is not against the assessment but against the order of the Income-tax Officer declaring the assessee to be liable are questions of law and the reference under S. 66 (2) to the High Court on such questions is competent. 28 N.L.R. 194=140 I.C. 490=1932 N. 152. The question whether the Assistant Commissioner of Income-tax could or could not set aside in appeal the order of Income-tax Officer refusing to register an instrument of partnership, is a question of law. The question whether a deed of partnership and the application for its registration fulfilled the requirements of R. 2 of the rules made under the Income-tax Act, and also the question whether for the purposes of R. 2 and S. 2 (14) of the Act it is obligatory that the instrument of partnership should be signed by all the partners, and if so under what provision of law, are similarly questions of law arising out of the order of the Assistant Commissioner when his assessment was on the assumption that the assessee firm was an unregistered firm. 1930 S. 301. In a particular year an assessment was made on actual receipts. It was objected by the assessee that a certain sum already assessed in previous years was included in the receipts. Assistant Commissioner in appeal found that, as the estimate of income in those years was not assessment strictly on accrued basis but merely on best available data, there was no conclusive proof that such sum had already been included in the assessment of the previous years. *Held,* that a question of law arose from the order whether or not the assessee was entitled to show that the actual

NOTES.

receipts had in fact been included in the estimates of the previous years and the Commissioner must state and refer the case on the question. 1929 R. 245. The adoption of a particular basis and a certain method in preference to another, both being entirely within the discretion of the Income-tax Officer cannot give rise to any question of law. 32 P.L.R. 344=1931 L. 432. Whether the evidence tendered before the Income-tax authorities established that the *method of accounting* was such that the profits and gains of the business could not be properly deduced therefrom is a question of fact. 1934 L. 977. The employment of a correct procedure of assessment does not raise a question of law. 1931 L. 759. The question whether the goods still in transit can be valued at market value prevalent at the place of destination does not involve any point of law. 1931 L. 759. The decision of the Income-tax Officer under S. 20 of the Income-tax Act that no *sufficient cause for non-submission of a return* was shown by the assessee, is essentially a question of fact and not of law that can be referred to the High Court. 36 P.L.R. 198=1934 L. 983. The *validity or otherwise of an assessment made by the Income-tax Officer under S.* 23 (4) except where he made the assessment *mala fide* and arbitrarily in the sense that he acted recklessly or fraudulently, is not a question of law that can be referred to the High Court. 36 P.L.R. 198=1934 L. 983. Whatever conclusions are arrived at by the Income-tax authorities, they must have some material to support them, and in case it is contended that there is no material for those conclusions, the question does resolve itself into one of law. 1937 Lah. 305. The question whether there was any evidence upon which an Assistant Commissioner or Commissioner could come to a finding of fact is a question of law. If there was any evidence on which it was reasonably possible for the Commissioner to come to the conclusion at which he arrived, the High Court will not consider whether on that evidence that finding was correct, because the High Court is not a Court of appeal in such matters. Even where the finding of fact is an inference from other facts the question whether such an inference was properly drawn is not a question of law. Where the Assistant Commissioner from the fact of non-production of certain books which the assessee firm was ordered to produce coupled with other facts came to the conclusion that the books of account on which the assessment was based were not the full and complete accounts of the business, *held,* that it was a finding of fact which could not be the subject-matter of a reference to the High Court. 7 R. 635=1930 R. 4 (F.B.). *See also* 1930 L. 197; 1933 A. 231; 177 I.C. 630=1938 Rang. 315; 1941 I.T.R. 190. As to the legal effect of the disruption of a joint Hindu family, *see* 30 Punj.L.R. 134=1927 L. 616; the proper legal effect of proved facts, 104 I.C. 336=1927 N. 366 (46 C. 189, Foll.). Whether a statement given by the accused is incomplete and fraudulent or not, is a question of fact for the determination of the income-tax authorities and not a question on which High Court can interfere. 7 R. 281=115 I.C. 897=1929 R. 102. Where the only question is whether the accounts of the assessee are maintained in such a way that they indicate the true income of the assessee, reference cannot be made to the High Court since it is a question not of law but of fact. 1935 L. 841. Where the Income-tax Officer made an assessment under S. 23 (4) on the ground that the assessee failed to comply with the terms of the notice, the question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further, whether the evidence before the Income-tax Officer is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact. 137 I.C. 732 (1)=1932 O. 164. When an assessment has already been made in respect of the previous accounting year under S. 34, the question whether all income which had accrued and had escaped assessment had been assessed to tax or not depends upon the investigation of the facts of the case. 1931 C. 761 (S. B.). The question where a partner as partner lends money beyond the initial capital to the partnership at no agreed rate of interest and the money is used for capital expenditure, whether the interest paid by the partnership to him in the year of assessment, should be deducted in computing the profits or gains of the partnership within the meaning of S. 10 (2) (*iii*), is a question of law. 116 I.C. 454=1929 L. 404 (1). As to what legal presumption is to be drawn under certain stated circumstances. (*Ibid.*) 1927 N. 283. The question whether the Income-tax Officer is justified in increasing the estimate of the annual value of the property from Rs. 1,200 to Rs. 3,000 merely on a finding as to the cost of erection of the buildings is one of law. 131 I.C. 212=1932 L. 187. The Income-tax Officer is not competent to rectify a supposed mistake which has the effect of enhancing assessment without issuing notice to the assessee under S. 35, and where the Assistant Commissioner refuses to cancel such enhanced assessment, there arises a question of law. 117 I.C. 383=1929 L. 326.

REFERENCE, WHEN NOT PROPER.—An application under S. 66 (2) for a reference to the High Court is incompetent where the assessment has been accepted without appeal. 4 P. 224=86 I.C. 170. Where the questions as to validity of notice or propriety of assessment do not arise out of an appellate order, there cannot be a reference. 9 R. 25=1931 R. 98. *See also* 3 Luck. 237=1927 O. 465; 18 Lah. 306=1937 Lah. 338.

NOTES.

(Question whether a certain item to be allowed as bad debt); 18 Lah. 325=1937 Lah. 830. (Question whether burden of proof has been discharged by the assessee). S. 66 (2) does not say expressly that the remedy provided by that section will not be available where the assessment is not appealable: all that it requires is that there should be an order or decision under S. 31 or S. 32. Under S. 31, the Assistant Commissioner has the power to allow the appeal as well as to reject and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not under S. 31. In such cases, the assessee can take to the High Court at least the limited question as to whether an appeal did or did not lie in the circumstances of the case. 133 I.C. 753=1931 P. 306 (F. B.). But *see contra* 1932 A.L.J. 576=1932 A. 642. Where the Assistant Commissioner of Income-tax has no occasion to deal with or apply his mind to a point of law, the point not having been raised before him, such point of law cannot be said to arise out of his order and the assessee can claim no reference in respect of that point. 138 I.C. 673=1932 S. 189. No application lies to state a case when Commissioner acts under S. 33. 89 I.C. 785 (1)=1925 R. 252. If a Commissioner of his own motion under S. 33 imposes tax and penalty, is there any authority to which reference can be made if the tax and penalty are arbitrary and contrary to the provisions of Acts? 1930 P. 538 (F.B.). The failure of the Commissioner in his duty under S. 33 will not give the High Court jurisdiction to require the case to be referred under S. 66 (3), since that sub-section relates back to sub-S. (2) and sub-S. (2) deals only with order under S. 31 or S. 32 and not with order under S. 33. 8 R. 203 =1930 R. 33. No reference can be made to the High Court of any question arising out of an order under S. 52 whether such order is passed in appeal or whether it is contained in a separate proceeding. 1933 A. 231=144 I.C. 144. When the account books of the previous years do not support the verified return and the assessee's statement on oath, and the assessee fails to make use of the opportunity given to him to substantiate his allegation, *held*, that the Income-tax authorities are entitled to draw a presumption from the state of matters which had admittedly existed in previous years and that no error of law has been committed by the Income-tax authorities which would justify the High Court calling on the Commissioner of Income-tax for a reference. (50 C. 907, Dist.) 103 I.C. 38 =1927 N. 283. The question whether the purchase and sale of landed property is one of the objects with which a company was formed or whether the development of the property in order to earn a continuing profit year by year was its real object, is one of fact with which the High Court in a reference under this section, is incompetent to deal. 11 L.B.R. 309=1922 L.B. 35 (F. B.). Where the Income-tax Officer finds as a fact on the evidence that complete accounts have not been produced before him and proceeds to estimate the income under the proviso to S. 13 of the Income-tax Act, no question of law arises. 16 L. 416=1935 L. 539. *See also* 145 I.C. 944=1933 L. 832.

JURISDICTION.—Commission Agency business—Advances to Munims and Gumastas written off as irrecoverable—Diwali presents to servants—Claim to deduct the two items as business expenditure—Rejection of claims by the Officer—Question, if one of law for reference to Court. 3 I.T.C. 54. The question whether or not the accounts disclosed by the assessee do or do not disclose his true income is itself a question of fact, behind which the High Court cannot go. 9 P. 240=1930 P. 81 (S.B.). Where a question is raised as to the assessee's principal place of business under S. 64 and the same is decided by the Commissioner or Board of Inland Revenue, such decision is final and cannot be interfered with. But where there is a total failure on the part of the Income-tax authorities to apply the plain provisions of S. 64 and an Income-tax Officer illegally assumes authority to assess as though the assessee's place of business has been finally determined, the High Court can direct the Commissioner to have a case stated and the existence of an alternative remedy under S. 64 (3) does not affect the case. 49 A. 616=1927 A. 299. The Act gives no directions as to whether the officer deciding an appeal must set out fully the considerations which have led him to a certain decision. It is a matter of propriety rather than of law and is a matter in which the High Court has no business to interfere. The High Court has no jurisdiction to consider the findings of fact arrived at by an Income-tax authority and it is immaterial whether the grounds stated for those findings are sound or not sound or whether no reasons at all have been stated. 1930 R. 224. *See also* 18 L. 325. The ultimate authority on the question whether proceedings before the Assistant Commissioner were *ultra vires* or not is the High Court and not the Commissioner. 1933 S. 158=145 I.C. 145. Cl. (1) to S. 66 does not contemplate a reference at the instance of an assessee. 9 L. 317=1927 L. 513. Nor has the High Court any power to issue mandamus directing him to refer questions of law to it for opinion. 9 L. 317. Where a case, if stated by the Commissioner of Income-tax, would have to be referred to the Court of the Judicial Commissioner in Sind for decision, it would not be right for the Bombay High Court in the exercise of its discretion to make an order under this section requiring the Commissioner to state a case to it, even if the Bombay Court has jurisdiction to do so by reason of the fact that the Commissioner resides in Bombay.

NOTES.

33 Bom.L.R. 36=1931 B. 150. An assessee in Sind, unlike an assessee within the jurisdiction of High Courts, has no remedy under S. 45, Specific Relief Act, when he cannot obtain relief under S. 66 (3) of the Income-tax Act. It is, however, for the Legislature to remedy this anomaly by extending the provisions of S. 45, Specific Relief Act, or by amending S. 66 (3) of the Income-tax Act, so as to give him a right of reference where Commissioner refuses to state a case on fanciful grounds. 136 I.C. 762 =1932 S. 1.

PRACTICE AND PROCEDURE.—It is for the Commissioner in stating a case to find facts which must be accepted by the High Court. 134 I.C. 1275=1931 C. 729 (S.B.); 1932 A. 471. The Income-tax Act does not lay down any rules of procedure for references under S. 66 of the Act, and the Calcutta High Court has made the rules contained in Chapter XXX-A of its original side rules. This it had jurisdiction to do in the absence of any specific provision in the Act. 39 C. W.N. 1140=62 C. 671. The function of the High Court in cases referred to it under S. 66 is advisory only, and is confined to considering and answering the actual question referred to it. 190 I.C. 1=42 Bom. L. R. 1182=52 L. W. 406=I. L. R. 1940 Kar. 335=1940 P. C. 158 (P. C.). *See also* 41 C. W. N. 33=1936 P. C. 269 (P. C.). When an assessee is aggrieved the Commissioner is bound to refer the question in dispute to the High Court for determination. The assessee should normally be heard first and good reason must be shown before any departure is made from this practice. (1920 M. 344, Foll.) 1937 Rang.L.R. 174=1937 R. 258 (S.B.). The grounds mentioned in the opinion of the Commissioner are not necessarily binding on the High Court and the Court is entitled to go through the whole record for a proper determination of the questions raised. 57 B. 519=35 Bom.L.R. 896=1933 B. 427. Where a matter is one of fact, the High Court, though it might differ from the view of the Commissioner if the matter were before it as an appellate Court, cannot interfere with the order of the Commissioner merely on the ground that finding of fact arrived at by him was wrong. 1941 I.T.R. 190. *See also* 1938 Rang. 315; 1933 All. 231; 1941 I.T.R. 190. Whether the time granted by the Income-tax Officer under a notice as required by S. 23 (2) is reasonable or not is a question of fact. 134 I.C. 1275=1931 C. 729 (S. B.). High Court has to accept the facts as found by the Commissioner of Income-tax and if necessary may call for further facts by asking him to make a fresh statement of them under S. 66 (4),. But though ordinarily the Income-tax Commissioner would be the officer who would frame the points of law that arise in the case stated by him and though he would be expected to give his own opinion on those points of law, for the benefit of the High Court. S. 66 requires the High Court to decide the questions of law that arise in the case, *i.e.*, the High Court is entitled to "resettle the issues" as it were and to decide those issues. 1929 A. 819; 54 A. 496=1932 A. 390; 53 A. 451=1931 A. 417; *see also* 18 Pat. 805=1940 Pat. 24. 1930 A. L.J. 78=1930 A. 209. It is for the Commissioner and not for the High Court to state formally the questions which arise; and the duty of the High Court is only to decide the questions so raised. 60 I.A. 146 =12 P. 318=37 C.W.N. 598=1933 P.C. 108=64 M.L.J. 612 (P.C.): The High Court will not on a reference under S. 66 hear new points for the first time, which have not been raised earlier at any stage of the case. 59 M. 263=71 M.L.J. 35 (F. B.). The Court has power under S. 66 (5) to amend the questions asked by the Commissioner by raising the real question and then answering that question. 55 B. 637=33 Bom.L.R. 807=1931 B. 448. The case stated by the order of the Court under sub-S. (3) is not different in form from that stated under sub-S. (2) and consequently the expression "the question of law raised thereby" in sub-S. (5) does not mean such question as in the opinion of the High Court arose when the application is made by the assessee to order the Commissioner to state a case. 133 I.C. 753=1931 P. 306 (F.B.). In a reference to the High Court under S. 66 the finding of fact arrived at by the Commissioner is binding on the High Court unless it is shown that it was come to by some improper process or by failure to give effect to some rule of law. 6 P. 29=1927 P. 133. *See also* 1933 S. 145= 145 I.C. 202. It is not open to an assessee to ask the High Court upon a reference under S. 66 to examine his books of account and come to findings of fact contrary to those arrived at by the Commissioner in the case stated. Still less it is intended that the High Court should be a last resort for the production of books which were not produced before the Income-tax Officers. 35 C.W.N. 589=58 C. 1446=1931 C. 683. When a reference is made to the High Court under S. 66, High Court is not entitled to scrutinize evidence, as Commissioner's decision upon the evidence is final. 1930 M. 104. Where four persons originally formed an undivided family but subsequently became divided and were separately assessed to income-tax, four separate applications and deposits are necessary to require the Commissioner of Income-tax to take action under S. 66 (2). 50 M. 335=52 M.L.J. 273. Reference under section—Statement of case—Form of, 4 P. 73=1924 P. 679; 5 Pat.L.T. 497=82 I.C. 653. *See also* 55 C. 953. High Court can be moved under S. 66 (3) only when assessee is competent to apply to Commissioner under S. 66 (2). 7 L. 226=1926 L. 400. Competency of High Court to issue mandamus, when to be questioned. 94 I.C. 128=1926 L. 446;

Provided that, if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded.

(2) If on any application being made under sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly.

NOTES.

1937 Lah. 814=39 P.L.R. 616. When a Judge directs the Commissioner of Income-tax to state a case for the opinion of the High Court under S. 66, the question should be so framed as to leave it to the Court which afterwards hears the reference to decide the matter or the facts stated by the Commissioner of Income-tax who makes the reference. 48 M. 836=1925 M. 1242=49 M. L.J. 425. Where before issuing notice the High Court decided whether a certain point had already been decided and eventually ordered a reference to be made, *held*, that it was not competent for the Bench finally disposing of the matter to consider whether the point should be allowed to be raised. 139 I.C. 290=1932 N. 65. Where a Bench of two judges hearing a reference under S. 66 (3) of the Income-tax Act are equally divided, it is open to them to move the Chief Justice to have the matter disposed by a fuller Bench. 132 I.C. 689=1931 L. 578 (F.B.). Appeal from Commissioner's decision—Opinion of the High Court to be obtained by stating a case—Point of law not urged before the Income-tax Officer and Commissioner—Effect. 23 A.L.J. 40=1925 A. 298 (1). The High Court will not consider any point of law that was not raised before the appellate officer or the Commissioner himself by the assessees. 52 A. 991 =1930 A.L.J. 1548=1931 A. 23. It is not competent to the High Court in a reference under S. 66 (2) to decide a question which has not been referred to the High Court by the Commissioner, though it may be open to the assessee to apply under S. 66 (3). 1941 I.T.R. 618. Opinion of Commissioner on questions raised in the statement of the case is not a part of the draft case and need not be supplied to the assessee. 1936 A.L.J. 549=1936 A. 279.

RIGHT TO APPEAR BY COUNSEL.—Where, on the motion of an assessee, the Board of Revenue made a reference to the High Court under S. 51 of the Act, the assessee's pleader is entitled to be heard first. 43 M. 75 =37 M.L.J. 663 (F.B.). The practice to be followed in references under S. 66 should be that counsel for the assessee should begin and should also have a right of reply. (1921 C. 40, Foll.) 27 S.L.R. 243=1933 S. 148. *Quaere.*—Whether counsel for the Crown as such should be afforded a general right of reply. (*Marquis of Chandos* v. *Inland Revenue Commissioners,* (1851) 6 Ex. 464, Ref.) 27 S.L. R. 243=1933 S. 148. *See also* 37 Bom.L. R. 112=1935 B. 167. In a reference under S. 66 (1) by the Commissioner *suo motu,* the Advocate-General or counsel on behalf of the Commissioner has the right to begin. 37 Bom.L.R. 112=1935 B. 167. In applications under S. 66 (3) to the High Court, it would be wrong to require the appearance of the Advocate-General in the first instance, because most of those applications plainly do not raise any questions of law and they can be dismissed *in limine* without hearing the Advocate-General on behalf of the Commissioner of Income-tax. If, after hearing the applicant, the Court considers that the case for the Commissioner of Income-tax should be placed before them at that stage, then it is simple to adjourn the case in order to obtain the appearance of the Advocate-General for the Commissioner of Income-tax. That is the practice which should be adopted in such applications. 176 I.C. 601 =1938 Rang. 260 (F.B.).

Application under S. 66 (2)—Pleader filing — Vakalat for all purposes and all sections—Withdrawal of application by pleader on getting taxable amount reduced in revision—Repudiation by client and application for statement of case not maintainable. The pleader was, under the vakalatnama, acting within his powers and was authorised to withdraw the application and the assessee was bound by the withdrawal and could not claim to have a case stated. 1941 Cal. 183=1940 I.T.R. 482. The mere death of an assessee at whose instance a reference was made does not preclude the High Court from answering the question or questions formulated by the Commissioner of Income-tax. 1941 I.T.R. 193.

LIMITATION.—The refusal of the Income-tax Commissioner to make a reference of a supplementary question of law submitted to him one month after the Assistant Commissioner passed his orders, as being barred by time, is justified. 139 I.C. 599=1932 C.

NOTES.

411 (S.B.). *See also* 155 I.C. 124=1935 A.L.J. 845=1935 A. 572. The Commissioner of Income-tax has no power to extend limitation in reference to an application under S. 66. S. 30 (2) of the Act does confer powers on the Assistant Commissioner to admit an appeal after the expiration of the usual period if he is satisfied that the appellant had sufficient cause, *i.e.*, for such appeals there is a provision analogous to that of S. 5, Limitation Act; but there is no such provision for applications to the Commissioner. S. 5, Limitation Act, is also not applicable. 1937 Lah. 876. An application for reference made under S. 66 (2) more than one month after the order giving rise to the application should not be entertained and a reference made on such an application is without jurisdiction. 6 L. 373=1925 L. 615. High Court has no power to extend the limited period of one month. 28 Bom.L.R. 1096=98 I.C. 299=1926 B. 566. S. 66 (2) is express and there is no provision in it for any official or even for the Court to extend the time. 50 M. 335=1927 M. 545=52 M.L.J. 273. [The period is extended to 60 days by the Amending Act of 1930. It commences now from the date of service of notice of the order. The decision in 9 P. 172 under the old section is not now good law.] The period required for obtaining the copies of the order under S. 31 or 32 of the Income-tax Act should be excluded in computing the period of limitation for an application for reference by an assessee under S. 66 (2) and (3). 9 P. 172=1930 P. 14. An application for copy of the order of the Assistant Commissioner was struck off the file for non-prosecution. The assessee applied under S. 66 (2) after 30 days of the passing of the order and the application was rejected as time-barred. A further application was made under S. 66 (3) and the assessee contended that he ought to have been allowed time for obtaining copy. *Held*, that the application was not maintainable. 140 I.C. 714 (2)=1932 P. 167 (2). Where for an application under S. 66 (3) the rules provide that there should be copies of the orders of the Income-tax Officer, the Assistant Commissioner of Income-tax and the Commissioner of Income-tax disposing of the case, the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining orders other than those of the Commissioner of Income-tax under reference. 1931 A.L.J. 593=1931 A. 673. S. 12 of the Limitation Act does not apply to a proceeding under S. 66 (3). 1931 A. 673.

COURT-FEE.—Fee in respect of an application as whole and not for each point raised. 84 I.C. 521=1925 R. 94. As no mention of the Court-fee payable on a reference under S. 66, Income-tax Act, is to be found in Schs. I and II, Court-Fees Act, S. 4 of that Act does not apply to documents produced in a reference to the High Court under S. 66, and therefore no Court-fee is chargeable on such documents. 1933 S. 148=26 S.L.R. 243. The fee of Rs. 100 paid by an assessee for a reference under S. 66 (2) is part of the assessee's costs of reference; and the High Court when allowing costs to the assessee under S. 66 (6) of the Act has power to direct a refund of that fee to the assessee. 165 I.C. 518=38 Bom.L.R. 929=1936 B. 385.

COSTS.—All fiscal enactments must be construed in favour of the subject, and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court, yet he must lose a sum of Rs. 100 simply because the Income-tax Officer has chosen to make an assessment. 52 A. 991=1930 A.L.J. 1548 =1931 A. 23. The right rule as to costs of an application under S. 66 (3), asking the Court to direct the Commissioner of Income-tax to state a case, is that costs should follow the event. The ultimate decision upon the point of law, whether for or against the Commissioner, can have no bearing on the question whether there was a point of law upon which a case should have been stated. In the absence of special circumstances, the costs of such an application ought to follow the event. I.L.R. (1939) Bom. 574=41 Bom.L.R. 919=1939 Bom. 448. In proceedings under S. 66 (2), costs are in the discretion of the Court. There is no provision in the Act that costs payable by an assessee should be paid from or limited to the sum of Rs. 100 deposited by the assessee as required by S. 66 (2). (1939) I.T. R. 305=1939 Sind 318. Preliminary deposit by the assessee under S. 66 (2) forms part of the costs incurred in relation to the reference. 1940 I. T. R. 247=1940 Lah. 50. The amount of Rs. 100 which is payable under S. 66 (2) of the Income-tax Act cannot be described as a deposit or security for costs incurred in Court; nor could it be said that it does not fall within the discretion of the High Court under S. 66 (6). The amount is a "fee" within the meaning of S. 66 (2), *i.e.*, a part of the costs of the reference. It falls within the term "costs" as used in S. 66 (6), and it is in the discretion of Court to pass such orders in relation to it as may, in its judicial discretion seem proper. The word "fee" in S. 66 (2) is used in its ordinary meaning, being the price paid by the assessee for the reference. If the assessee is successful, ordinarily he should be entitled to his costs which would include this fee of Rs. 100. If the assessee is unsuccessful, in the absence of special circumstances, there is no reason why the fee of Rs. 100 should be returned to him, by way of cash or credit, in part or in whole. The taxed costs payable by the assessee to the Income-tax Commissioner cannot be set-off against the fee of Rs. 100 paid under S. 66 (2) which would be retained by the

NOTES.

Commissioner as a fee. 1939 I.T.R. 556 =1939 Sind 364. *See also* I.L.R. (1940) Kar. 8=187 I.C. 893; 39 Bom.L.R. 1209. In an application to the High Court to reduce the amount of costs in an Income-tax reference, *held,* by S. 66 (6) of the Act costs are in the discretion of Court. The Court having exercised its discretion is *functus officio* and cannot re-open the matter. 87 I.C. 797=1925 A. 403. All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of hearing and before a final order is drawn up. 1925 A. 403. Where the Court has awarded costs to an assessee as against the Commissioner on a reference to the High Court, the amount of Rs. 100 deposited by the assessee as fee for reference is part of such costs and must be deemed to be included in the order. (52 A. 991, Foll.) 1933 A.L.J. 942=1933 A. 853. *See also* 11 R. 454; 187 I.C. 893=I. L.R. (1940) Kar. 8.

Refund of Tax.—Application to the High Court to direct Commissioner of Income-tax to make a reference—Rectification of mistake—Refund of tax collected. 86 I.C. 170=4 P. 224. *See also* 1942 I.T.R. 93.

Revision.—An order which dismisses an application asking for the revision of a prejudicial order must be deemed to be prejudicial within the meaning of S. 66 (2) of the Income-tax Act. (57 M. 367, Overruled.) I.L.R. (1939) Mad. 358=1939 Mad. 709=(1939) 2 M.L.J. 68 (S.B.). *See also* (1939 I.T.R. 506.

Review.—No review lies in the case of a judgment of the High Court delivered in an income-tax case on a statement made by the Commissioner under S. 66 of the Income-tax Act. 1930 A.L.J. 78=1930 A. 209. Where the Commissioner operating under S. 33 refuses to review the order of the Assistant Commissioner, the position of the assessee not being altered as a consequence, the assessee is not prejudiced within the meaning of the S. 66 (2), and hence application under S. 66 (2) is incompetent. 1937 N. 154. The assessee's claim for deduction of a bad debt was disallowed by the Income-tax department on the ground that it was not proved that the debt had become bad or irrecoverable. In an application under S. 66 (3) of the Income-tax Act for a reference, the assessee produced two letters which, if genuine, would show that the debt could no longer be recovered from the debtor. *Held,* that it was not open to the High Court, not being an appellate Court, to hold that the order of the Income-tax Commissioner was incorrect on the ground that this evidence was not produced before him should now be taken into consideration by him. The Commissioner could still review his order if he considered the letters genuine and could give the assessee the relief claimed, if he was of opinion that it was justly due. 1941 I.T.R. 224.

Sec. 66 (2).—S. 66 (2) is, as is well-known, indifferently framed. The function of the High Court is to decide, not the question set out in the application under S. 66 (2), but questions of law raised by the case stated. The question whether, under proviso to S. 13, the computation of profit can legally be on the basis of the accrued interest with or without modification is not one of law. 162 I.C. 995=1936 P. 295. *See also* 1938 A. L. J. 507=1938 A. 367. The High Court is not competent to investigate matters of fact in a reference under S. 66 (2). Whether or no in any particular case there is any evidence to support the finding of fact arrived at below is, of course, a question of law; but such question of law is entirely limited to whether there was any evidence and if there was any evidence, then the finding of fact must stand, although the appellate tribunal might, itself have found the facts in a contrary way. 177 I.C. 630=1938 Rang. 315 (S.B.). The question whether a person is to be deemed to be a "successor" within the meaning of S. 26 (2) of the Act is primarily a question of fact. The facts may be such that the case presents no difficulty. But whenever the facts found to be proved give rise to a consequential question whether there is or is not a "succession" within the meaning of S. 26 (2), a question of law is involved, because the proper legal effect of proved fact is essentially a question of law. 1937 Rang.L.R. 26=1937 R. 102 (S.B.) *See also* 164 I.C. 57=1936 L. 967. Under the rules regarding applications under S. 66 (2), it is the duty of the Commissioner to settle the case in its final form only if no suggestion, addition or amendment is received by him within the prescribed period; but if a question does arise on the statement of the case, it is clearly his duty to decide whether he and the assessee are able or unable to agree. 146 I.C. 599=1933 L. 859. Question of law not raised before Commissioner—High Court—Power of, to direct reference. 1929 N. 243. *Also* 1930 M. 449=58 M.L.J. 581 (F.B.). The High Court has no jurisdiction, on an application by an assessee, under S. 66 (3), to order the Commissioner of Income-tax to state a case and refer any question of law for consideration by the High Court which the assessee had not duly required the Commissioner to refer under S. 66 (2). 12 R. 322=1934 R. 132 (S. B.). Whether the reference is under sub-S. (2) or sub-S. (3) of S. 66 it is not open to the assessee to raise before the Court any question other than that referred. 8 R. 209=1930 R. 78 (S.B.). The language of S. 66 of the Income-tax Act does not empower the High Court to require the Commissioner to state a case in respect of an original order passed by him and not in respect of an order passed in a matter which came before him on an appellate order by the Assistant Commissioner. ***Quaere.***—

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Whether an original order as to penalty imposed by the Commissioner in appeal can be the subject-matter of reference to High Court. 8 P. 877=1930 P. 127. It nearly always must be a question of fact whether or not a deduction which the assessee seeks to make can properly be described in the words of S. 10 (2) (*ix*) as an expenditure incurred solely for the purpose of earning such profits or gains. There is no obligation on the Income-tax Commissioner to refer such a question to the High Court. Where the Commissioner finds that payments made to the directors of a company as allowances which they are entitled to draw under the Articles of Association are not *bona fide* payments for services rendered, but merely a device for enabling the company to escape super-tax and after making an enquiry, allows a deduction not of what has been actually paid, but what he considers to be the market-value of the services rendered by the directors, the matter is really one of fact, and no question of law arises. It is a decision on a matter of fact with which the High Court will not interfere. 40 C.W.N. 833. *See also* I.T.R. (1941) 190. Assessee dying pending reference—Proceedings do not abate—Heirs were allowed to be heard.. 9 P. 240=1930 P. 81 (S.B.). Sufficiency of cause for having *ex parte* assessment re-opened under S. 27 is certainly question of fact dependent on the circumstances of each case. But since its determination essentially depends upon the exercise of judicial discretion, the question whether discretion has or has not been exercised in a sound and reasonable manner in reaching the conclusion invariably involves a question of law. (1930 R. 33; 1930 R. 78, Rel. on.) 1934 N. 183. It is the practice of the Nagpur High Court, and was the practice of the Judicial Commissioner's Court, when *ex parte* applications were made to a Court asking the Court to call upon the Commissioner of Income-tax to show cause why a case should not be stated, either to dismiss the application, or if it is to be entertained to give notice to the other side to show cause. 1937 N. 154. Where the Commissioner of Income-tax, acting under S. 33 refuses to interfere with the Income-tax Officer's order refusing a refund under S. 48, the Commissioner's order is not prejudicial to the party, because it does no more than leave him in the position created by the order of the Income-tax Officer. His position has already been prejudiced by the Income-tax Officer's order of refusal. An application to the Commissioner under S. 66 (2) is not therefore competent, because that section only applies when the order under S. 33 itself alters the position of the assessee or applicant to his prejudice. 1935 M. 373=68 M.L.J. 227 (F.B.). Where the question is one of fact to be decided on the findings of the Commissioner under S. 66 (2) the assessee must establish either that the Commissioner had misdirected himself on some question of law or that there was no sufficient evidence to justify his findings. 67 I.A. 464 =1940 I.T.R. 635=1940 P.C. 230=(1941) 1 M.L.J. 130 (P.C.).

APPEAL TO PRIVY COUNCIL.—*See* Now S. 66-A. The decision of a High Court on a reference is a judgment within cl. (9) of the Letters Patent, and an appeal lies to Privy Council from the same. 64 I.C. 931=23 Bom.L.R. 1102. Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact and where neither the Commissioner nor the High Court is of opinion that any question of law has arisen in the course of the assessment, it may be that the legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review an order which in the opinion of the High Court turned solely upon questions of fact. Therefore, the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from an order of the High Court under S. 66 (3) refusing to require the Commissioner to state a case. 1930 R. 274. Subject to the provisions of Ss. 109 and 110, C. P. Code, there is a right of appeal to His Majesty's Council against the decision of the High Court, on a reference to it under the Indian Income-tax Act. 18 L.W. 392 =1924 M. 63. (*See* now S. 96-A, *infra.*) Order summarily rejecting application for reference—Application for leave to appeal —Not competent under—C. P. Code, S. 110 or Letters Patent (Patna), Cl. 31. 1941 Pat. 225. A right of appeal must be given by express enactment and cannot be implied. The function of the High Court in cases referred to it under S. 66 is advisory only, and is confined to considering and answering the actual questions referred to it. 20 Pat. 561=22 Pat.L.T. 341=1941 Pat. 225. *See also* I. L. R. (1939) Mad. 770=50 L. W. 590=1939 Mad. 903=(1939) 2 M.L.J. 667 (F.B.); 1940 P.C. 158=52 L.W. 406 (P.C.).

PRACTICE AND PROCEDURE.—Where there is no question of law arising in the case, and the Commissioner holds that all the questions before him are pure questions of fact and that there is no question of law which properly can be made the subject of a reference to the High Court, there is no obligation on the part of the Commissioner to make a reference, merely because the assessee requests him to state a case on a "question of law" formulated by the assessee. The question "whether in the circumstances of this case there were any materials on which the Income-tax Officer could base his finding that the assessee (who had repeatedly failed to submit returns and account books in spite of repeated notices) was not prevented by sufficient cause from filing the return called for under S. 22 (2) or producing the accounts called for under S. 22

NOTES.

(4)," is not a question of law, but one of fact, and hence is not a proper question for submission to the High Court under S. 66 (2). 63 C. 401. A question of law which has not been raised in the appeal to the Assistant Commissioner does not arise out of the order under S. 31 of the Act. The assessee has, therefore, no right to demand that that question should be referred by the Commissioner. 155 I.C. 526=1935 L. 201. If the assessee did not, during the assessment, by the Income-tax Officer or in his appeal from that assessment, raise the issues necessary for the determination of the question of fact which arises under S. 14 (1), the question cannot be raised in reference, as it does not arise out of the appellate order. 14 P. 313=1935 P. 8. There is nothing in the Act to prevent the officiating Commissioner, who as the Assistant Commissioner had heard the appeal, from assessment from disposing of the application under S. 66. 1934 L. 977. Where the Assistant Commissioner hears the appeal of the assessee and passes an appellate order under S. 31 dismissing the appeal, the requirements of S. 66 (2) are satisfied whether the Assistant Commissioner has jurisdiction or not. 28 S.L.R. 174=1934 S. 46. The words "served with notice of an order" in S. 66 (2) do not mean "served with a written notice" or "served with a copy of the detailed order giving reasons". It is sufficient if the applicant or his representative is given notice of the order in Court. Where the order was announced to the applicant's mukhtar-i-am who was present in Court, notice to him is as good as notice to the applicant. 158 I.C. 382 (1)=1935 L. 959. The true intent of the first proviso to the second sub-section of S. 66 is that a question of law that is common to both the Assistant Commissioner's and the Commissioner's order is not a proper subject-matter of a reference, unless the question of law is raised on a reference from the decision of the Assistant Commissioner. 1937 N. 154. Where the assessee had ample notice that a reference had been made to the High Court by the Commissioner in the form originally proposed by him and he has made no application in writing, to the High Court to decide the question under R. 12, it is not open to the High Court on an oral application made at the end of arguments in reference, to direct the Commissioner to make a modified statement of the case by Commissioner. 1935 L. 727. It is the duty of the Commissioner on receipt of objections by the assessee to notify to the latter, if he does not modify the reference, that he is not prepared to accede to his prayer to modify the proposed reference to the High Court. 1935 L. 727.

Sec. 66 (2) and (3).—S. 66 (2) does not require the assessee to formulate precise questions of law. What he has to do within the prescribed time limit is to require the Commissioner to refer to the High Court any question of law arising out of the order or decision of the Assistant Commissioner, and then the Commissioner has, within sixty days, to draw up a statement of the case and refer it to the High Court, with his own opinion thereon. Where the Commissioner refuses to state a case under S. 66 (2), holding that no point of law arises, the Court can, under S. 66 (3), require the Commissioner to state "the case", and to refer it to the Court, if it is not satisfied of the correctness of the Commissioner's view of the case. If the Court thinks that questions of law arise, it should indicate to the Commissioner what those questions are; the actual framing of the questions rests with the Commissioner. But the Court under S. 66 (3) is no more limited than the Commissioner under S. 66 (2) to the precise questions formulated by the assessee. 37 Bom. L.R. 89=1935 B. 170. *See also* 1934 L. 977. Where one of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to him was competent in view of the proviso to S. 30 (1), by deciding this question himself adversely to the assessee, the Commissioner cannot deprive the assessee of the right of having the question decided by the Court. 65 I.A. 236=I.L.R. 1938 Bom. 487=42 C. W. N. 873=40 Bom. L. R. 854=1938 P.C. 175=(1938) 2 M.L.J. 115 (P.C.). Under S. 66 (as amended) no reference lies against an order of the Income-tax Commissioner under S. 33 unless the order is one which involves an enhancement of the assessment or is otherwise such as is prejudicial to the assessee; if the Income-tax Commissioner simply maintains the decision of the Assistant Commissioner and the assessment made by him, it cannot be said that the order of the Commissioner of Income-tax is such as is prejudicial to the assessee. 172 I.C. 511=1938 Nag. 16. Before an assessee can put in an application to the High Court under sub-S. (3), it is incumbent upon him to apply to the Commissioner under sub-S. (2) of S. 66. That he can do only if an order in respect of the assessment complained of is made under S. 31 or S. 32, or if an order under S. 33 enhances the assessment made on him or is otherwise prejudicial to him, or if a Board of Referees decides any question relating to his assessment under S. 33-A. Where none of these conditions exists, no application under sub-S. (2) of S. 66 is competent, and consequently sub-S. (3) of S. 66 does not come into play at all. 1938 Lah. 864. The proper course for an assessee when he desires the Commissioner to refer a question of law to the High Court is to formulate, under S. 66 (2) of the Income-tax Act, the question which he desires to have so referred. Under S. 66 (3) the High Court has power to direct the Commissioner to refer some question other than that which the applicant has formu-

(3) If on any application being made under sub-section (1) the Appellate Tribunal rejects it on the ground that it is time-barred, the assessee or the Commissioner, as the case may be, may, within two months from the date on which he is served with notice of the rejection, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under sub-section (1).

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lated, although generally, the High Court should be slow to go outside the question which the party himself asked the Commissioner to state. 152 I.C. 972=36 Bom.L.R. 818=1934 B. 378. The assessee has no right to apply to the Court for an order in the nature of a mandamus under Specific Relief Act requiring the Commissioner to state a case and refer a question of law, because a "specific and adequate legal remedy" in that behalf is available to the assessee under S. 65 (2) and (3), Income-tax Act. 12 R. 322=150 I.C. 408=1934 R. 132 (S.B.). A point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made to the best of his judgment by the Income-tax Officer, so as to make it the subject of a reference to and decision by the High Court under S. 66 (2) or (3). 1934 N. 183 (2). S. 66 (3) is controlled by S. 66 (2); and under the latter an assessee is not entitled to require the Commissioner of Income-tax to state a question of law arising under S. 48 (1) of the Act; and consequently the assessee is not entitled to apply under S. 66 (3), to the High Court for an order directing the Commissioner to refer such a question. 13 R. 729. *See also* 169 I.C. 404 =1937 O. 416. Under the second proviso in S. 66 (2) it is clear that a refund of the fee of Rs. 100 will only be made if the application is withdrawn, and when the assessee applies for refund of the money, the only logical inference is that he intends to withdraw his application. Where an applicant has withdrawn his deposit of Rs. 100, it must be held that an application under S. 66 (3) is incompetent. 1942 I.T.R. 93.

Sec. 66 (3): SCOPE.—The essential condition for an application under S. 66 (3) is that an application under S. 66 (2) has been made to the Commissioner and refused by him. The fact that the assessee makes an application under S. 33 invoking the powers of riview and the application states that if the Commissioner is unwilling to exercise his power under S. 33, he should draw a statement of the case and refer it under S. 66 (1) is not sufficient. 140 I.C. 672=1932 P. 167 (1). *See also* 1941 I.T.R. 679. The only ground upon which an application under S. 66 (3) lies is where the Commissioner refuses to state a case on the ground that no question of law arose. But where the Commissioner only dismisses an application in effect for the review of a prior order of his permitting the applicant to withdraw his application under S. 66 (2) of the Act, it is not a refusal to state a case as contemplated by Cl. (3) of S. 66 and as such an application under that clause would be incompetent. 1942 O.W.N. 98=1942 A.L.J. 105 (F.B.). The High Court has no jurisdiction under S. 66 (3) to order the Commissioner of Income-tax to state a case and to refer a question of law to the High Court which the assessee has not duly required the Commissioner to refer under S. 66 (2). 1938 Rang. 435. *See also* 1938 Cal. 168=177 I.C. 300; I.L.R. (1938) Lah. 477=40 P.L.R. 308=1938 Lah. 545. The inference to be drawn from the facts as found by the Income-tax authorities as to whether petitioners can be treated as successors of a former company and assessed on its profits prior to the conveyance of its business to the petitioners is a question of law. 167 I.C. 312=1937 Sind 41. The High Court has no jurisdiction under S. 66 (3) to order the Commissioner of Income-tax to state a case and refer a question for the consideration of the High Court which the assessee has not duly required the Commissioner to refer under S. 66 (2). 1934 L. 977. *See also* 1935 L. 727. It is not open to a Bench to consider whether an order under S. 66 (3) directing the Commissioner to state a case was valid. 28 S.L.R. 174=1934 S. 46. Where no appeal was preferred under Ss. 31 and 32 and there was no refusal by the Commissioner, an application could not be maintained before the High Court to direct the Commissioner to state a case. 3 Luck. 237 =105 I. C. 556 (2)=1927 O. 465. The refusal must be on the ground that no question of law arises. Sub-section is inapplicable where the refusal is on other grounds, such as limitation. 136 I.C. 762=1932 S. 1 following 1928 B. 434 (1)=113 I.C. 619. But *see* 1924 L. 692. The only question in a petition under S. 66 (3) was whether a small sum expended on the mortgaged property was to be disallowed. The assessee was not able to give any facts about his income. *Held,* that as the amount was small, no mandamus could be issued on it alone. 146 I.C. 551=1933 L. 822. Where a question of law is involved, *viz.*, whether the Income-tax Officer was justified in proceeding under the proviso to S. 13 and not under the first part of that section, it is a fit case in which the Commissioner should be directed to transfer the question to the High Court. 34 P.L.R. 900=1933 L. 832. *See also* 16 L. 416=157 I.C. 911=1935 L. 539. Whether the association in question

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can be held to be an assessee within the meaning of S. 3. is clearly a question of law which it would be proper for the Commissioner to refer for the decision of the High Court. 1935 L. 100. The High Court sits to hear the reference by the Income-tax Commissioner and any device, such as by a petition under S. 66 (3), to ask the the Income-tax authorities to state a case on the question which they refused to refer should be deprecated. The reference cannot be extended by an application under S. 66 (3). 58 C. 999=1931 C. 727 (F.B.). Where the matter in issue has already been decided in connection with a previous year's assessment, the assessee cannot re-agitate the matter before the income-tax authorities or move the High Court for a reference when the assessment for a subsequent year is in question. 139 I.C. 295=1932 N. 68. When on a loan advanced a suit is brought and a decree is obtained for an amount smaller than the amount claimed under the loan, the part of the loan disallowed by the decree becomes a "bad debt" at once at the date of the decree, or the "bad debt" is to be ascertained as a whole at the time when the decree is eventually realised and the lender's position *qua* the loan finally determined is one of law. 148 I.C. 228=1934 L. 67 (2). In every case when the question is whether a particular sum is "profits" or "capital", the question is a question of fact to be determined upon the material before the income-tax authorities. If therefore an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to income-tax, the question whether the remittance is a remittance from out of the profits of the foreign business or out of capital is a question of fact. In such circumstances the only question of law that can arise is whether there was material before the income-tax authorities upon which they could find that a particular sum was profits or income earned by the assessee and remitted during the year of assessment. 11 R. 397=1933 R. 217. *See also* 16 Luck. 805=198 I.C. 192. The question whether certain cash deposits on various dates entered in the khata of the assessee, is income or profits assessable to tax or is capital, is not a question of law, but one of fact and therefore cannot be considered in an application under S. 66 (3). 1941 O.W.N. 757=1941 I.T.R. 286=1941 Oudh 445. *See also* 1941 I.T.R. 273. Where it appeared that the Commissioner was wrong in refusing to state a case and refer a question of law on the request of the assessee. *Held*, that the Commissioner should be directed to pay the assessee's costs of the application to the High Court though the reference might ultimately turn out against the assessee. 8 R. 209=1930 R. 78 (S.B.). A decision to the effect that a mandamus should not be issued on an application under S. 66 (3) is a final judgment. Where in a case in which the subject-matter involved Rs. 10,000 or more in value the High Court refuses to issue a mandamus under S. 66 (3) the applicant can appeal to the Judicial Committee as of right. 12 L. 166=1931 L. 138 (F.B.). An order of the High Court dismissing an application under S. 66 (3), and refusing to require the Commissioner to state a case and refer it is not a judgment "on a reference" under S. 66-A (2) so as to allow a right of appeal to His Majesty in Council. 1934 A.L.J. 876=1934 A. 974. The High Court cannot enquire into a finding of fact arrived at by the Income-tax Officer. 1933 L. 827.

OTHER ILLUSTRATIVE CASES.—Ordinarily it is a question of fact to be determined by the Income-tax Officer *whether a particular debt is recoverable or not.* But the question, whether a sum of money which is shown in the assessee's accounts as assessable income from interest but proved irrecoverable should not be deducted from the total income in the assessment as a loss of profit and not a loss of capital is a question of law. 1934 L. 940. *See also* 39 P.L.R. 616=1937 Lah. 814; 167 I.C. 178; 1937 Lah. 338=18 Lah. 306. The question *whether an assessment under S. 23 (4) is valid or not is* not an order of the Assistant Commissioner passed under S. 31 and consequently such a question cannot be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. 1934 A.L.J. 274=1934 A. 559. Where assessment is made on the assessee under S. 23 (4), then the provisions of S. 66 (2) and (3) would not apply to it. 1940 I.T.R. 489=1940 O.W.N. 514=1940 Oudh 362. *See also* 1940 I.T.R. 243; *see also* 1941 O.W.N. 757; 1938 All. 367 (Computation of profits at a high rate); 1938 Rang.L.R. 130=1938 Rang. 154 (decision of Income-tax Officer under S. 25-A); I.L.R. (1938) Lah. 426=40 P.L.R. 228=1938 Lah. 530 (question whether an advance made by a partner is a loan or increase of capital); 1940 A.L.J. 855 (decision as to place of assessment); 1940 I.T.R. 635 (Question of sufficiency of evidence to support finding, *see also* 1941 Oudh 279); 1941 I.T.R. 330 (Question whether application of S. 13 of the Act is proper or not); 1941 I.T.R. 616 (Finding that a person is not a partner in a firm is one of fact); 1940 I.T.R. 179 (Question whether a person is carrying on business and whether he is rightly assessed at a particular figure); 1940 P.W.N. 702. (Question whether *Salami* or *nazarana* if income as rent or capital); 1940 I.T.R. 378 (Question whether rent derived by Zamindar from Patnidar under lease of land is agricultural income or not); 1940 I.T.R. 437 (Rejection of application for revision on the ground that it was belated); 1939 Sind 293 (Whether on facts found a society is a dividing society under R. 31. *See also* 1939 Sind 363; 1939

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf.

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Sind 296); 1940 All. 530. (Rejection of appeal not amounting to an order under S. 31); 1940 All. 530 (Question as to the existence of sufficient cause within the meaning of S. 27). (1939) I.T.R. 625 (Refusal of application under S. 26-A on finding that deed of partnership is share and not intended to be acted upon). 1939 I.T.R. 151 (Question of reasonableness of flat rate adopted by Income-tax Officer under S. 13). *See also* 1939 I.T.R. 513; 1939 I.T.R. 515; 1939 I.T.R. 488. The question whether a Hindu family is divided or undivided is a question of fact which is not within the competence of the High Court to decide. 1941 I.T.R. 311=1941 Pesh. 64. The assessee was called upon by a notice under S. 22 (2) to submit a return which he did, but the return did not bear such verification as is required by the Income-tax Act, nor did it bear the signature of the assessee. Subsequently, the Income-tax Officer issued another notice under S. 22 (4) directing the assessee to produce his accounts. He did not produce the accounts and the Income-tax Officer made an assessment to the best of his judgment under S. 23 (4). *Held,* that no questions of law could possibly arise on the findings of fact arrived at by the Income-tax Officer. 1934 A. 929. *See* 1941 Oudh 279; 1941 I.T.R. 241 and 306; 1941 O.W.N. 68=16 Luck. 579; 15 Luck. 723. It cannot be laid down as a general proposition that it is not possible at all to evolve a question of law out of the various circumstances mentioned in S. 27 of the Act. On the other hand a question of law can well arise from a refusal of the Income-tax Officer to cancel an assessment under S. 27 of the Act, and certain questions may form the subject of a reference under S. 66, though in the majority of cases no question of law would ordinarily arise out of the decision of an Assistant Commissioner of Income-tax dismissing appeal against an order of the Income-tax Officer under S. 27. I.L.R. (1937) All. 834=1937 A.L.J. 957=1937 All. 770. The question as to *whether money deposited with the assessee belongs to the person in whose name it stands deposited* is not a question of law. 154 I.C. 191=1935 L. 81. (S.B.). *Whether the association in question can be held to be an assesee* within the meaning of S. 3, is clearly a question of law which it would be proper for the Commissioner to refer for the decision of the High Court. 1935 L. 100. In the case of a printing press *whether "type" is part of the machinery or plant* is a question of law. 1934 L. 919. The assessee was assessed for the assessment year 1933—34 to a certain sum. He claimed that a certain sum should not be included in the assessment as it consisted of bad debts. This was disallowed by the Income-tax Officer on the ground that the last balances were struck in 1930 and that it had not been shown that the amount had become irrecoverable by the accounting year, 1932-33. *Held,* that it did not follow that because a debtor firm was in difficulties in 1930, it would never recover, and that all debts due by it should immediately be struck off as bad debts, and that a mandamus must issue on the Commissioner to state a case on this question. 167 I.C. 178.

Sec. 66 (3) and (5).—Under sub-S. (3) of S. 66, it is nowhere laid down that a question is to be formulated by the Court issuing the mandamus. Further, sub-S. (5) of the same section also does not confine the High Court to the decision of the question of law as formulated by the Commissioner or the Court issuing the mandamus. On the other hand, it confers upon it full power to decide the question of law in the form it actually arises from the statement of the case made by the Commissioner. It is therefore competent to High Court to clarify the issue of law involved in the statement of the case made by the Commissioner and to give its considered opinion on the question really at issue; not to do so would amount to a refusal to do its duty. 39 P.L.R. 1028=1937 Lah. 721.

Sec. 66 (4).—Where a case referred to the High Court under S. 66 (2) had ultimately to be decided on the findings which did not appear in the statement of the case as made by the Commissioner, *held,* that the High Court could send back the case to the Commissioner for further findings. 50 C. L.J. 300=1929 C. 753. *See also* 1929 A. 819.

Sec. 66 (4) and (5).—*Costello, J.*—The question whether there is in any particular case a "succession" within the meaning of S. 26 (2) of the Act is a question of fact. 41 C.W.N. 132. *Panckridge, J.*—The question of succession is at the bottom a question of fact, though the question whether a particular set of facts amount to succession within the meaning of S. 26 (2) is a question of law. It is not correct to say that the High Court is not entitled to look beyond the specific findings of fact of the Commissioner. To so hold would be a very narrow interpretation of the powers of the High Court under S. 66 (4) of the Income-tax Act. The High Court on the other hand is entitled to look at the documents and proceedings annexed to the statement of the case by the Income-tax Commissioner. 41 C.W.N. 132=I.L.R. (1937) 2 Cal. 7.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.]

(6) Where a reference is made to the High Court [1][* * *] the costs shall be in the discretion of the Court.

(7) Notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case :

Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow [2][unless the High Court, on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to His Majesty in Council, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council].

[3][(7*A*) Section 5 of the Indian Limitation Act, 1908, shall apply to an application to the High Court by an assessee [4][under sub-section (2) or sub-section (3)].]

[5][(8) For the purposes of this section " the High Court " means—

(*a*) in relation to [6][* * *] British Baluchistan the High Court of Judicature at Lahore ;

LEG. REF.

[1] The words " on the application of an assessee" omitted by S. 92 of Act VII of 1939.

[2] Added by S. 82 of Act VII of 1939.

[3] Sub-section inserted by S. 28 of Act XVIII of 1933.

[4] Substituted for " under sub-s. (3) or sub-S. (3*A*) " by S. 92 of Act VII of 1939.

[5] Added by S. 7 of Act XXIV of 1926.

[6] The words "the North-West Frontier Province and " omitted by S. 82 of Act VII of 1939.

NOTES.

Sec. 66 (5).—It is the duty of the Income-tax Department to take up the question of re-assessment after a reference by the Commissioner of Income-tax has been answered by the High Court and to see in the presence of the assessee whether in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say the material alteration in the figure of assessment is not expected and therefore re-assessment is not necessary. 1932 A.L.J. 174=1932 A. 317. If the case stated by the Commissioner of Income-tax contains merely conclusion on pure questions of fact, then it is not open to the High Court to go behind the statement of facts. But if what the Commissioner states he has found on facts is actually a series of conclusions founded partly on pure facts and partly on inferences drawn from those facts, the High Court has power and ought to deal with the whole case and to see whether the evidence justified what the Commissioner held. It is not as if the only course open to the High Court is to either express an opinion upon the findings of the Commissioner or to say that it is impossible to do so because the findings are not warranted by the evidence on which they are based. It is competent to the High Court to look at the real situation and to give a decision founded upon what appears to the High Court to be the real position. 62 C. 87=39 C.W.N. 70. If an officer vested with the discretion to do or not to do a particular thing, does not misdirect himself in law, or in other words, does not exercise his discretion arbitrarily, the High Court will not be justified in interfering wth it. 18 Lah. 325=1937 Lah. 830. Sub-S. (5), S. 66 enacts that the High Court upon the hearing of any such case shall decide the question of law raised thereby and the Court is not bound by the applicant's point of law or the Commissioner's. But the question of law must arise out of the appellate order. 28 S.L.R. 174=149 I.C. 1204=1934 S. 46; 18 Lah. 706=1938 Lah. 44. (Interference with question of fact). It is for the Commissioner and not for the High Court to state formally the questions which arise; and the duty of the High Court is only to decide the questions so raised. 60 I.A. 146=12 P. 318=64 M.L.J. 612 (P.C.). *See also* 40 P.L.R. 308=1938 Lah. 545.

Secs. 66 (5), 49-A and 33 (2).—High Court declaring assessment illegal—Power of Commissioner to order further enquiry—Fresh assessment and demand of security for refund of tax previously paid—Legality. 63 I.A. 408=1936 P.C. 269=60 B. 900 (P.C.).

Sec. 66 (6).—Under S. 66 (6) the High Court has power to deal with all costs of (*b*) in relation to the province of Ajmer-Merwara, the High Court of Judicature at Allahabad ; and

(*c*) in relation to the province of Coorg, the High Court of Judicature at Madras.]

References to be heard by Benches of High Courts, and appeal to lie in certain cases to Privy Council.

[1][66A. (1) When any case has been referred to the High Court under section 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Latters Patent of any High Court established by Letters Patent or in any other law for the time being in force :

[2][Provided that where in any reference heard by the Bench of the Court of the Judicial Commissioner of the North-West Frontier Province, a difference of opinion arises between the Judicial Commissioner and the Judge of the said Court, the opinion of the Judicial Commissioner shall prevail.]

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court :

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (5) or sub-section (7) of section 66 :

Provided further that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court.

(4) Where the judgment of the High Court is varied or reversed in appeal under this section, effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of section 66 in the case of a judgment of the High Court.

(5) Nothing in this section shall be deemed—

(*a*) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

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LEG. REF.

[1] Inserted by S. 8 of Act XXIV of 1926.

[2] Added by S. 83 of Act VII of 1939.

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and subsequent to the application of the assessee to state a cause and make a reference to the High Court. It is entirely in the discretion of the Taxing master to decide if a case is of sufficient importance to justify the Commissioner in getting the reference settled by the Government solicitor and the Advocate-General. 39 Bom.L.R. 1209. The fee of Rs. 100 paid along with a reference under S. 16 (2) forms part of the costs of and incidental to the reference and may be allowed to the assessee in a proper case. 11 R. 454. *See also* 1933 A.L.J. 942=1933 A. 853 and cases under heading "COSTS" supra.

Secs. 66 and 66-A: REFERENCE UNDER—JUDGMENT NOT APPEALED AGAINST—FINALITY OF.—Upon a reference of question of law made by the Commissioner of Income-tax under S. 66 of the Act, the prior judgment delivered by the High Court, if not appealed against, is binding between the parties (*i.e.*, the Income-tax authorities on the one hand and the assessee on the other) and such judgment, whether right or wrong, must govern the relations of the parties in the particular case. 61 I.A. 1=56 All. 1=66 M.L.J. 127 (P.C.).

REVIEW.—The High Court, when acting under the powers conferred by S. 66 is exercising a special jurisdiction, and those proceedings are not subject to the provisions of the C.P. Code. The tribunal determining the questions referred to under S. 66 does not operate as a Civil Court so as to attract the C.P. Code and therefore an application for review of judgment passed in an Income-tax matter under S. 66 is incompetent and no review lies. 1940 I.T. R. 412.

Sec. 66-A.—The intention of the legislatrue in adding S. 66-A was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the (*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.]

67. No suit shall be brought in any Civil Court to set aside or modify any

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question of law involved was one of great private or public importance. 8 L. 269=1927 L, 118. *See also* 9 L. 284=54 I.A. 421=53 M. L.J. 819 (P,C.). If the law permits the Commissioner of income-tax to have the judgment of this Court examined by their Lordships of the Privy Council, there is no reason why his request for leave to appeal to the Privy Council might come to a different conclusion. 1933 S. 344. The fact that the decision ought to be appealed against might affect the action or the position of other companies who sought to evade payment of income tax by adopting the method that was adopted by the assessee in the case is not sufficient for the granting of the certificate. 8 L. 269=1927 L. 181. The Act in providing that the Commissioner in proper cases should make references to the Civil Court, merely provides a convenient procedure for obtaining the decision of the Court with regard to the matter in dispute and so when the matter comes before the Civil Court, the Commissioner is a party. 119 I.C. 689=1929 N. 265. A decision that an assessee succeeded to the old business does not involve a question of importance within the meaning of S. 109 (*c*), C.P. Code, which alone can justify a certificate allowing leave to appeal. 123 I. C. 530 (2)=1930 L. 109. There is no review of a judgment in an income-tax case under S. 66-A. 1930 A. 211 (1). The words "to be a fit one for appeal to His Mtjesty in Council" coupled with the words 'so far as may be' in para. 3, S. 66-A, exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. 1929 S. 336. On a reference by the Commissioner under S. 66 (2), Income-tax Act, all the questions referred to were answered in favour of the assessee by the High Court and the Commissioner was not allowed to support the assessment on other provisions of the Act which he had not taken before. *Held*, that it was not a fit case for appeal to the Privy Council and that leave should not be granted. 146 I.C. 942=1933 L. 673. In granting leave to appeal to His Majesty in Council on the application of the Income-tax authorities the High Court has no power to impose a condition to the effect that the Incme-tax authorities should pay the costs of the assessee respondent. The powers of the High Court are confined in this respect to those conferred by S. 66-A of the Income-tax Act and the provisions of the Civil Procedure Code which have been made applicable to such appeals. Though the Privy Council have, on occasions, stipulated in granting special leave that the appellant shall bear the costs, the High Court has no such powers. 174 I.C. 491=1938 Mad. 352 (F.B.). The question as to the effect of the second proviso to S. 4 (1) of the Income-tax Act is a substantive question of law, and is a fit one for appeal to His Majesty in Council. 174 I.C. 491=1938 M. 352=47 L.W. 350. In an application for leave to appeal to His Majesty in Council in respect of an assessment to income-tax involving only Rs. 3,500, leave ought not to be refused merely because the assessment in question is less than the required amount of Rs. 10,000. Where the assessee carries on a large business and the question is likely to arise every year while he remains in the business, the amount in the end would be very considerable; a certificate of leave to appeal should therefore be granted in such a case. 47 L.W. 350=1938 Mad. 352 (F.B.). *See also* 1931 Lah. 138; 1934 All. 974; 50 L.W. 590=I.L.R. (1939) Mad. 770=1939 Mad. 903=(1939) 2 M.L.J. 667 F.B.). The right of appeal to His Majesty in Council from a judgment of the High Court delivered on a reference made under S. 66 is confined only by sub-S. (2) and not by sub-S. (3) of S. 66-A of the Act and is therefore confined to only such cases as are certified to be fit by the High Court. Sub-S. (3) obviously deals with the procedure to be applied to appeals where such an appeal lies under sub-S. (2). 1935 A.L.J. 513=1935 A. 464. An order passed by the High Court, declining to call upon the Commissioner to state a case and refer it to the High Court is not a judgment "on a reference" within the meaning of S. 66-A (2) so as to allow a right of appeal to His Majesty in Council. 151 I. C. 604=1934 A.L.J. 876=1934 A. 974. The rules in Chapter XXXIII of the Rules and Orders of the Calcutta High Court, so fas as they have the effect of altering the provisions of O. 45, C.P. Code, have been made under S. 129, C.P. Code and apply only to matters arising within the original civil jurisdiction of that Court, and therefore have no application to petitions for leave to appeal to the Privy Council in income-tax matters. In S. 66-A of the Income-tax Act, specific provision has been made and the procedure therein laid down must be followed. 39 C.W.N. 1140=62 C. 671.

Sec. 67.—S. 67 is not *ultra vires* by virtue of S. 32 of Government of India Act, because a suit for recovery of the tax paid would not have lain against the East India Company prior to 1858. 5 R. 825. *See also* 27 Bom. L.R. 1507. When a statute confers exclusive power over a subject-matter on an autho-

Bar of suits in Civil Court.

assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any [1][officer of the Crown] for anything in good faith done or intended to be done under this Act.

Computation of periods of limitation.

[2][67A. In computing the period of limitation prescribed for an appeal under, this Act or for an application under section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded.]

Act to have effect pending legislative provision for charge of incometax.

[3][67B. If on the 1st day of April in any year provision has not yet been made by an Act of the Indian Legislature for the charging of income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision proposed in the Bill then before the Legislature, whichever is more favourable to the assessee, were actually in force.]

68. [*Repeals.*] *Repealed by the Repealing Act*, 1927 (XII *of* 1927).

LEG. REF.

[1] Substituted for "Government Officer" by A.O., 1937.

[2] Inserted by S. 12 of Act XXII of 1930.

[3] Inserted by S. 7 of Act XII of 1940.

NOTES.

rity, the Civil Court cannot interfere; but it will interfere if the authority purports to exercise those powers on what is not the subject-matter. 62 I.C. 394. Where an assessee contends that he is not liable to be assessed to income-tax on the ground that he is not resident in British India, the Income-tax Officer, as the assessing authority, has power to determine the question of the assessee's residence in British India and the consequent receipt of assets under S. 4 of the Income-tax Act. A suit by the assessee for a declaration that he is not liable to be assessed to income-tax and to recover the tax paid by him is not maintainable in a Civil Court. Such a suit is barred by S. 67 of the Act. Subject to the controlling effect of the words "made under this Act" in S. 67, the exclusion of the jurisdiction of the Civil Court is almost absolute, and the appropriate remedies of an assessee by way of appeal and reference have been provided in the Act itself. *Stodart, J.*—A statutory tribunal or authority which has to arrive at a decision as to the existence or non-existence of certain facts before proceeding to take further action under the statute, is acting within the jurisdiction in making that decision and is immune from civil proceedings to quash that decision except such as are prescribed by the statute. The absence of any other remedy is not to be taken into consideration in deciding the question whether the decision of a statutory tribunal is or is not final. I. L.R. (1937) M. 211=1936 M.W.N. 1056 =44 L.W. 808=1937 M. 241. Suit contesting validity of the assessment order—If maintainable—Jurisdiction of Civil Court. 18 S.L.R. 68=1925 S. 130. The Income-tax Act creates a special jurisdiction and provides a special remedy against order of assessment. Where the Collector professes to tax income only and has not levied an assessment on any of the classes of income excepted under the Act, he exercises only a jurisdiction under the Act and a suit will not lie in a Civil Court challenging his order, even if there are errors in calculation. 78 I.C. 940=1925 S. 130. Civil Court has no jurisdiction where income only is taxed. 18 S. L.R. 68=1925 S. 130. Refusal to make a Return of income on alleged error or description—Assessment by Income-tax Officer—Suit for refund of tax paid not maintainable, *see* 5 R. 825. A suit by an executor of a deceased for a declaration that he is not liable to pay income-tax is barred. 42 C. 151 =26 I.C. 893=19 C.W.N. 138. In assessing income-tax, the Collector has to determine what is the income and what is the outgoing which ought to be legitimately deducted. A mistake by the Collector in his decision cannot be rectified by Civil Court in a suit brought before it for the purpose. 62 I.C. 394. Act does not prohibit a suit for declaration that an assessment is *ultra vires.* 27 Bom.L.R. 1507. *See also* 5 R. 825. A suit in which the relief claimed is merely a declaration that the registration of instrument of partnership was *ultra vires* and void is not a suit to modify an assessment made under the Act. Such a suit is not barred by S. 67. 11 R. 380=1933 R. 229. There is no provision made in the Act for appeals against a refusal to grant a refund under S. 48. So where a suit for refund of income-tax does not raise any question of assessment, it is not barred by S. 67. 136 I. C. 819=1932 S. 48. *See also* 196 I.C. 228 =1941 I.T.R. 673. An application to have a firm registered under R. 2 of the Indian Income-tax Act, 1922, must be made on or before the date when a return is due under S. 22 (2) of the Act. 27 Bom.L.R. 223 =16 I.C. 851=1925 B. 247 (2).

[1][THE SCHEDULE.]

[*See* section 10 (7).]

RULES FOR THE COMPUTATION OF THE PROFITS AND GAINS OF INSURANCE BUSINESS.

1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(*a*) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(*b*) the annual average of the surplus [2][arrived at by adjusting the surplus or deficit] disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, [3][* * *] so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business,

whichever is the greater :

Provided that the amount to be allowed as management expenses shall not exceed—

(*a*) 7½ per cent. of the premiums received during the preceding year in respect of single premium life insurance policies, *plus*

(*b*) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums received is less than twelve, or for which the number of years during which premiums are payable is less than twelve, for each such premium or each such year 7½ per cent. of such first year's premiums received during the preceding year, *plus*

(*c*) 85 per cent. of the first year's premiums received during the preceding year in respect of other life insurance policies and 8½ per cent. of other premiums received during that year in respect of all life insurance policies other than single premium life insurance policies.

3. In computing the surplus for the purpose of rule 2,—

(*a*) one-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction :

Provided that in the first such computation made under this rule of anysuch surplus no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous inter-valuation period :

Provided further that if any amount so reserved for policy holders ceases to be so reserved, and is not paid to or expended on behalf of policy-holders one-half of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved ;

(*b*) any amount either written off or reserved in the accounts or through the actuarial valuation balance sheet to meet depreciation of or loss on the realisation of securities or other assets, shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus :

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Superintendent of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies, the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase the surplus for the purposes of these rules to a figure which is fair and just ;

(*c*) the whole amount of interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall be deducted.

4. Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-section (5) of section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period.

5. For the purposes of these rules—

(*i*) 'preceding year' means that year for which annual accounts are required to be prepared under the Insurance Act, 1938, immediately preceding the year for which the assessment is to be made or until the commencement of the Insurance Act, 1938, the previous year as defined in section 2 of this Act :

(*ii*) 'gross external incomings' means the full amount of incomings from interest, dividends, fines and fees and all other incomings from whatever source derived (except premiums received from policy-holders and interest and dividends on any annuity fund) and includes also profits from reversions and on the sale or the granting of annuities, but excludes profits on the realisation of securities:

LEG. REF.

[1] The original Schedule repealed by Act XII of 1927 and this Schedule added by S. 84 of Act VII of 1939.

[2] Inserted by S. 8 of Act XII of 1940.

[3] The words "after adjusting such surplus" were omitted by *ibid.*

Provided that incomings, including the annual value of the property occupied by the assessee, which but for the provisions of sub-section (7) of section 10 would have been assessable under section 9 shall be computed upon the basis laid down in the last-named section, and that there shall be allowed from such gross incomings such deductions as are permissible under that section.

(*iii*) 'management expenses' means the full amount of expenses (including commissions) incurred exclusively in the management of the business of life insurance, and in the case of a company carrying on other classes of business as well as the business of life insurance in addition thereto a fair proportion of the expenses incurred in the general management of the whole business. Bonuses or other sums paid to or reserved on behalf of policy-holders, depreciation of, and losses on the realisation of, securities and any expenditure other than expenditure which may under the provisions or section 10 of this Act be allowed for in computing the profits and gains of a business are not management expenses for the purposes of these rules;

(*iv*) 'life insurance business' means life insurance business as defined in clause (11) of section 2 of the Insurance Act, 1938;

(*v*) 'securities' includes stocks and shares.

6. The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Superintendent of Insurance after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business. Profits and losses on the realisation of investments and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance.

7. The profits and gains of companies carrying on dividing society or assessment business shall be taken to be 15 per cent. of the premium income of the previous year, or in the case of non-resident companies 15 per cent. of the British Indian premium income of the previous year.

8. The profits and gains of the British Indian branches of an insurance company not resident in British India, in the absence of more reliable data, may be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income. For the purpose of this rule, the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India.

9. These rules apply to the assessment of the profits of any business of insurance carried on [1][by a mutual insurance association].]

THE INDIAN INCOME-TAX (AMENDMENT) ACT (XXIII OF 1941)

[26*th November* 1941.

An Act further to amend the Indian Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1941.

(2) It shall come into force at once; but effect shall not be given to the amendments hereby made in the Indian Income-tax Act, 1922, by section 4, section 6, section 7, section 8, clause (*b*) of section 10 and clause (*a*) of section 13 in the making of any assessment under that Act for any year before the year ending on the 31st day of March, 1943.

[N.B.—*The amendments have been incorporated in their proper places in the main Act.*]

THE INDIAN (FEDERAL COURT JUDGES) ACT, 1942.

(5 and 6 Geo. 6, Ch. 7.)

An Act to extend the power of the Governor-General of India to make acting appointments of Judges of the Federal Court.

[26*th February,* 1942.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

LEG. REF.

[1] Substituted for by a "mutual insurance company" by S. 13 of Act XL of 1940.

Amendment of S. 202 of the Government of India Act, 1935, 26 Geo. V and I. Edw. 8 c. 2.

1. (1) At the end of section two hundred and two of the Government of India Act, 1935, there shall be added the following sub-section:—

"(2) If the Governor-General in his discretion is satisfied, after considering a report from the Chief Justice of India—

(*a*) that in view of some personal interest which any Judge of the Federal Court has in the decision of any particular case, or of some part which any judge of the Federal Court has already taken, as judge or counsel or otherwise, in or in relation to any particular case (whether or not while it was before the Federal Court), that judge ought not to take part in the hearing and determination thereof, and

(*b*) that without Judge there are not sufficient Judges of the Federal Court available to sit for that purpose.

the Governor-General may in his discretition appoint a Judge of a High Court who is duly qualified for appointment as Judge of the Federal Court to act temporarily as a Judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a Judge of the Federal Court until that case has been heard and determined by the Federal Court".

(2) The amendment made by this Act in the Government of India Act, 1935, shall be deemed to have been made therein immediately before the passing thereof.

(3) A copy of the said Act giving effect to—

(*a*) the amendments mentioned in sub-section (2) of section seventeen of the India and Buruma (Miscellaneous Amendments) Act, 1940; and

(*b*) the amendment made by this Act,

shall be prepared and certified by the Clerk of the Parliaments and deposited with the Rolls of Parliament, and His Majesty's printer shall print in accordance with the copy so certified all copies of the Government of India Act, 1935, which are printed after the said copy has been so prepared, certified and deposited.

Short title.

2. This Act may be cited as THE INDIA (FEDERAL COURT JUDGES) ACT, 1942.

THE INDUSTRIAL STATISTICS ACT (XIX OF 1942).

[*3rd April*, 1942.

An Act to facilitate the collection of statistics of certain kinds relating to industries.

WHEREAS it is expedient to facilitate the collection of statistics of certain kinds relating to industries; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE INDUSTRIAL STATISTICS ACT, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province on such date as the Provincial Government may, by notification in the official Gazette, appoint in this behalf for such Province.

Definition.

2. In this Act "prescribed" means prescribed in rules made under this Act or in any form prescribed by those rules.

Collection of statistics.

3. (1) The Provincial Government may, by notification in the official Gazette, direct that statistics shall be collected relating to any of the following matters, namely:—

(*a*) any matter relating to factories,

(*b*) any of the following matters so far as they relate to welfare of labour and conditions of labour, namely:—

(i) prices of commodities,
(ii) attendance,
(iii) living conditions, including housing, water-supply and sanitation,
(iv) indebtedness,
(v) rents of dwelling-houses,
(vi) wages and other earnings,
(vii) provident and other funds provided for labour,
(viii) benefits and amenities provided for labour,
(ix) hours of work,
(x) employment and unemployment,
(xi) industrial and labour disputes,

and trereupon the provisions of this Act shall apply to the collection of those statistics.

(2) In clause (*a*) of sub-section (1), "factory" means a factory as defined in clause (j) of section 2 of the Factories Act, 1934, or any premises deemed to be a factory in pursuance of a declaration made under sub-section (1) of section 5 of that Act.

Appointment of statistics authority.

4. The Provincial Government may appoint an officer to be the statistics authority for the purposes of the collection of any statistics under this Act.

Power of statistics authority to call for returns and information.

5. (1) The statistics authority may serve or cause to be served on any person a notice requiring him to furnish, at such intervals and in such form and with such particulars as may be prescribed, such information or returns relating to any matter in respect of which statistics are to be collected and to such authority or person and in such manner and at such times as may be prescribed.

(2) The notice referred to in sub-section (1) may be served by post.

Right of access to record or document.

6. The statistics authority or any person authorized by him in writing in this behalf shall, for the purposes of the collection of any statistics under this Act, have access to any relevant record or document in the possession of any person required to furnish any information or return under this Act, and may enter at any reasonable time any premises wherein he believes such record or document to be, and may ask any question necessary for obtaining any information required to be furnished under this Act.

Restriction on the publication of returns and information.

7. (1) No individual return, and no part of an individual return, made, and no information with respect to any particular undertaking given, for the purposes of this Act, shall, without the previous consent in writing of the owner for the time being of the undertaking in relation to which the return or information was made or given, or his authorized agent, be published in such manner as would enable any particulars to be identified as referring to a particular undertaking.

(2) Except for the purposes of a prosecution under this Act or under the Indian Penal Code, no person not engaged in connexion with the collection of statistics under this Act shall be permitted to see any individual return or information referred to in sub-section (1).

Penalties.

8. If any person required to furnish any information or any return—

(*a*) wilfully refuses or without lawful excuse neglects to furnish such information or return as required under this Act, or

(*b*) wilfully furnishes or causes to be furnished any information or return which he knows to be false, or

(*c*) refuses to answer or wilfully gives a false answer to any question necessary for obtaining any information required to be furnished under this Act,

or if any person impedes the right of access to relevant records and documents or the right of entry conferred by section 6, he shall for each such offence be punishable with fine which may extend to five hundred rupees, and in the case of a continuing offence to a further fine which may extend to two hundred rupees for each day after the first during which the offence continues; and in respect of false information, returns or answers the offence shall be deemed to continue until true information or a true return or answer has been given or made.

Penalty for improper disclosure of information or returns.

9. If any person engaged in connexion with the collection of statistics under this Act wilfully discloses any information or the contents of any return given or made under this Act otherwise than in the execution of his duties under this Act or for the purposes of the prosecution of an offence under this Act or under the Indian Penal Code, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both imprisonment and fine.

Cognizance of offences.

10. No prosecution under section 8 shall be instituted except by or with the sanction of the statistics authority and no prosecution under section 9 shall be instituted except by or with the sanction of the Provincial Government.

Power of the Central Government to give directions.

11. The Central Government may give directions to a Provincial Government as to the carrying into execution of this Act in the Province.

Power of Provincial Governments to make rules.

12. (1) The Provincial Government may, subject to the condition of previous publication by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing powers, rules may be made under thir section regulating the exercise of the right of access to documents and the right of entry conferred by section 6.

THE INDEMNITY ACT (XXVII OF 1919).

[REPEALED BY ACT (I OF 1938).]

INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (16 AND 17 GEO. V, CH. 40) 1926.

See Colonial (Indian) and Divorce Jurisdiction Act in Vol. I.

INDIAN SECURITIES ACT (X OF 1920).

See Securities Act in Vol. III.

THE INHERITANCE ACT (XXX OF 1839).[1]

Year.	No.	Short title.	Amendment.
1839	XXX	The Inheritance Act, 1839.	Repealed in part VIII of 1868; XII of 1891; X of 1914; Supplemented. XXXVIII of 1866 S. 29,

Short title given, Act XIV of 1897.
Rep. (except as to intestacies occurring before 1st January, 1866), Act VIII of 1868.
Rep. in pt., Act XII of 1891.
S. 1 rep. in pt., Act X of 1914.
Supplemented, Act XXVIII 1866, S. 29.
Declaration in force throughout British India except as regards the Scheduled Districts, Act XV of 1874, S. 3.

CONTENTS.

SECTIONS.
1. PREAMBLE.
"Interpretation."
"Land".
"The Purchaser".
"Descent."
"Descendants."
"Person last entitled."
"Assurance."
2. Descent shall always be traced from the purchaser but the last owner shall be considered to be the purchaser, unless the contrary be proved.
3. Heir entitled under a will shall take as devisee',and a limitation to the grantor or his heirs shall create an estate by purchase.
4. Where heirs take by purchase under limitations to the heirs of their ancestors, the land shall descend as if the ancestor had been the purchaser.
5. Brothers, etc., shall trace descent through their parent.
SECTIONS.
6. Lineal ancestor may be heir in preference to collateral persons claiming through him.
7. The male line to be preferred.
8. The mother of more remote male ancestor, to be preferred to the mother of the less remote male ancestor.
9. Half-blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.
10. After the death of a person attained, his descendants may inherit.
11. Act not to extend to any descent before 1st July, 1840.
12. Limitations made before the 1st July 1840, to the heirs of a person then living, shall take effect as if the Act had not been made.
13. Saving of certain inheritance and jurisdiction.

THE INHERITANCE ACT (XXX OF 1839).[1]

16th December, [1839.

An Act for the amendment of the Law of inheritance.

Preamble.

1. WHEREAS it is expedient to extend the amendments in the English law of inheritance contained in the[2] Statute 3rd and 4th William IV, Chapter CVI, to the territories of the East India Company in cases which, but for the passing of this Act, would be governed by the English law of inheritance as it existed previously to the passing of the aforesaid statute;

"Interpretation".

It is hereby enacted that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this

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LEG. REF.

[1] Short title, "The Inheritance Act, 1839" *See* the Indian Short Titles Act, 18997 (XIV of 1897). The whole Act except as to intestacies occuring before 1st January, 1866, was repealed by Act VIII of 1868. As to inheritance, where descent took place before the 1st January, 1866, the Act, has been declared, by the Laws Local Extent Act, 1874 S. 3, to be in force in the whole of British India except as regards the Scheduled Districts. Section 29 of the Trustees and Mortgagees Powers Act, 1866 (XXVIII of 1866), is to be read as part of Act XXX of 1839. *See* Act XXVIII of 1866, S. 29, *infra*.

[2] Short title, "The Inheritance Act, 1839" *see* the Short Titles Act, 1897 (59 & 60 Vict., c. 14).

Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say),

"Land".

the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or of any other tenure, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interest, or any of them, shall be in possession, reversion, remainder or contingency;

"The puruhaser".

and the word "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition or enclosure, by the effect of which the land shall have become part of, or descendible in, the same manner as other land acquired by descent;

"Descent".

and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue;

"Descendants".

and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor;

"Person last entitled".

and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of rents and profits thereof;

"Assurance."

and the word "assurance" shall mean any deed or instrument other than a will by which any land shall be conveyed or transferred at law or in equity;

[1][* * * * *]

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

2. [2][* * *] In every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser unless it shall be proved that he inherited the same.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. When any land shall have been devised by any testator who shall die after the first day of July one thousand eight hundred and forty to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the lands as a devisee and not by descent; and, when any land shall have been limited by any assurance executed after the said first day of July one

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LEG. REF.

[1] Last portion in S. 1 repealed by Act X of 1914, Sch. II.

[2] The words "And it is hereby further enacted that" in Ss. 2 and 4 to 6 repealed by Act (XII of 1891).

thousand eight hundred and forty to the person or the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

Where heirs take by purchase under limitations to the heirs of their ancestors, the land shall descend as if the ancestor had been the purchaser.

4. [1][* * *] When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said first day of July one thousand eight hundred and forty, or under a limitation to the heir or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said first day of july one thousand eight hundred and forty, then and in any of such cases such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land.

Brothers, etc., shall trace descent through their parent.

5. [1][* * *] No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Lineal ancestor may be heir in preference to collateral persons claiming through him.

6. [1][* * *] Every lineal ancestor shall be capable of being heir to any of his issue, and, in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

The male line to be preferred.

7. [2][* * *] None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and [2][* *] no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and [2][* *] no female maternal ancestor of such person, or any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants, shall have failed.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

8. [2][* * *] Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestors, or her descendants, shall be the heir or heirs of such person, in preference to the mother of less remote male paternal ancestors, or her descendants; and where there shall be a failure of male maternal ancestors, of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants.

9. [2][* * *] Any person related to the person from whom the descent is

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LEG. REF.

[1] *Vide* note to S. 2.

[2] In sections 7 to 13, certain formal words in the beginning were repealed by Act XII of 1891.

to be traced by the half-blood shall be capable of being his heir, and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother shall inherit next after the mother.

Half-blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

After the death of a person attainted, his descendants may inherit.

10. [* * *] When the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of July one thousand eight hundred and forty.

Act not to extend to any descent before 1st July, 1840.

11. [* * *] This Act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of July one thousand eight hundred and forty.

Limitations made before the 1st July, 1840, to the heirs of a person then living, shall take effect as if the Act had not been made.

12. [* * *] Where any assurance executed before the said first day of July, one thousand eight hundred and forty, or the will of any person who shall die before that time, shall contain any limitation or gift, to the heir or heirs of any person under which the person or persons answering the description of heir shall be entitled to an estate by purcase, then the person or persons who would have answered such description of heir if this Act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living at the time aforesaid.

Saving of certain inheritances and jurisdiction.

13. [* * *] This Act shall not be construed to affect inheritances of land which are not subject to the English law of inheritance, or to extend or alter the jurisdiction of any of Her Majesty's Courts of Justice.

THE INDIAN INSOLVENCY RULES ACT (X OF 1898).[1]

Year.	No.	Short title.	Amendments.
1898	X	The Indian Insolvency Rules Act.	Rep. in part, Act III of 1909; Act X of 1914.

S. 1 rep. in pt., Act X of 1914.
Ss. 2, 3 rep., Act III of 1909.

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1898, Pt. V, p. 275; for Proceedings in Council, *see ibid.*, 1898, Pt. VI pp. 295 and 336.

PREFATORY NOTE.—The Hon'ble Mr. Chalmers in moving for leave to introduce a Bill to make provision for certain matters connected with insolvency said:—

"The Bill is a very simple one and consists of two clauses: Its object is to remove some doubts which have arisen as to the extent of the powers of the High Courts to frame rules under section 76 of the Indian Insolvency Act of 1848 and at the same time to confirm certain rules which were made by the Bombay High Court in 1878 under those powers and which have been acted upon ever since, but with respect to the validity of which doubts have arisen from time to time". (*Fort St. George Gazette, 3rd May,* 1898, p. 12.)

Statements of Objects and Reasons to Indian Insolvency Rules Act, 1898—This Bill is intended to remove some doubts which have from time to time arisen as to the extent of the powers of a High Court to frame rules under sections 15 and 76 of the Indian Insolvency Act, 1848 (11 & 12 Vict., C. 21) and at the same time to validate and confirm rules which were made by the Bombay High Court in 1878 in pursuance of the said provisions.

[*2nd September,* 1898.

An Act to make provision for certain matters connected with Insolvency.

WHEREAS doubts have arisen as to the extent of the power to make rules conferred by Ss. 15 and 76 of the Indian Insolvency Act, 1848, and whereas it is expedient to remove those doubts and to confirm certain rules which were made by the High Court of Judicature at Bombay on the thirty-first day of July, 1878; It is hereby enacted as follows:—

Short title and commencement. 1. (1) This Act may be called THE INDIAN INSOLVENCY RULES ACT 1898;[1] [*]

(2) [1][* * *]

2. [Extent of rule-making power.] *Repealed by S. 127 and Sch. III of the Presidency-Towns Insolvency Act,* 1909 (*III of* 1909).

3. [Confirmation of rules.] *Repealed by S. 127 and Sch. III of the Presidency Towns Insolvency Act,* 1909 (*III of* 1909).

Official assignee's allowance for pension. 4. The Chief Justice of the said Court may, with the previous sanction of the Central Government pay to the present Official Assignee, out of the interest on the Unclaimed Dividend Account, such sum by way of pension on retirement, or bonus in lieu thereof, as may be reasonable and proper having regard to the length, nature and conditions of his service.

THE INDIAN INSURANCE ACT (IV OF 1938).

CONTENTS.

SECTIONS.

PART I.

PRELIMINARY.

1. Short title, extent and commencement.
2. Definitions.

PART II.

PROVISIONS APPLICABLE TO INSURERS.

2-A. Insurers to be subject to this Act while liabilities remain unsatisfied.
2-B. This Act not to apply to certain insurers ceasing to enter into new contracts before commencement of Act.
3. Registration.
3-A. Renewal of Registration.
4. Minimum limits for annuities and other benefits secured by policies of life insurance.
5. Restriction on name of insurer.
6. Requirements as to capital.
7. Deposits.
8. Reservation of deposits.
9. Refund of deposits.
10. Separation of accounts and funds.

SECTIONS.

11. Accounts and balance-sheet.
12. Audit.
13. Actuarial report and abstract.
14. Register of policies and register of claims.
15. Submission of returns.
16. Returns by insurers established outside British India.
17. Exemption from certain provisions of the Indian Companies Act, 1913.
17-A. This Act not to apply to preparation of accounts, etc., for periods prior to this Act coming into force.
18. Furnishing reports.
19. Abstract of proceedings of general meetings.
20. Custody and inspection of documents and supply of copies.
21. Powers of Superintendent of Insurance regarding returns.
22. Power of Superintendent of Insurance to order re-valuation.

LEG. REF.

[1] The word 'and' and sub-S. (2) repealed by Act X of 1914,

SECTIONS.
23. Evidence of documents.
24. [*Omitted*.]
25. Returns to be published in statutory forms.
26. Alterations in the particulars furnished with application for registration to be reported.

INVESTMENT, LOANS AND MANAGEMENT.
27. Investment of assets and restriction on loans.
28. Statement of investments of assets.
29. Prohibition of loans.
30. Liability of directors, etc., for loss due to contraventions of sections 27 and 29.
31. Assets of insurer how to be kept.
32. Limitation on employment of managing agents and on the remuneration payable to them.

INSPECTION.
33. Power of Superintendent of Insurance to order inspection.
34. Powers of investigator.

AMALGAMATION AND TRANSFER OF INSURENCE BUSINESS.
35. Amalgamation and transfer of insurance business.
36. Sanction of amalgamation and transfer by Court.
37. Statements required after amalgamation and transfer.

ASSIGNMENT OR TRANSFER OF POLICIES AND NOMINATIONS.
38. Assignment and transfer of insurance policies.
39. Nomination by policy-holder.

COMMISSION AND REBATES AND LICENSING OF AGENTS.
40. Prohibition of payment by way of commission or otherwise for procuring business.
41. Prohibition of rebates.
42. Licensing of insurance agents.
43. Register of insurance agents.
44. Prohibition of cessation of payments of commission.

SPECIAL PROVISIONS OF LAW.
45. Policy not to be called in question on ground of mis-statement after two years.
46. Application of British Indian law to policies issued in British India.
47. Payment of money into Court.
48. Directors of insurers being companies.
49. Restriction on dividends and bonuses.
50. Notice of options available to the assured on the lapsing of a policy.
51. Supply of copies of proposals and medical reports.
52. Prohibition of business on dividing principle.

WINDING UP.
53. Winding up by the Court.
54. Voluntary winding up.
55. Valuation of liabilities.
56. Application of surplus assets of life insurance fund in liquidator or insolvency.
57. Winding up of secondary companies.
58. Schemes for partial winding up of insurance companies.

SECTIONS.
59. Return of deposits.
60. Notice of policy values.
61. Power of Court to reduce contracts of insurance.

SPECIAL PROVISIONS RELATING TO EXTERNAL COMPANIES.
62. Power of Central Government to impose reciprocal disabilities on non-Indian companies.
63. Particulars to be filed by insurers established outside British India.
64. Books to be kept by insurers established outside British India.

PART III.

PROVIDENT SOCIETIES.
65. Definition of "provident society".
66. Restrictions on provident societies.
67. Name.
68. Insurable interest.
69. Dividing business.
70. Registration.
70-A. Renewal of registration.
70-B. Supplementary information and reports of alterations in particulars furnished with application for registration.
71. Prohibition of managing agents.
72. Working capital.
73. Deposits.
74. Rules.
75. Amendment of rules.
76. Supply of copy of rules.
77. Registered office.
78. Publication of authorised capital to contain also subscribed and paid up capital.
79. Registers and books.
80. Revenue account, balance-sheet and annual statements.
81. Actuarial report and abstract.
82. Submission of returns to Superintendent of Insurance.
83. Actuarial examination of schemes.
84. Separation of accounts and funds.
85. Investment of funds.
86. Inspection of books.
87. Inquiry by or on behalf of Superintendent of Insurance.
88. Winding up by Court and voluntary winding up.
89. Reduction of insurance contracts.
90. Appointment of liquidator.
91. Powers of liquidator.
92. Procedure at liquidation.
93. Dissolution of provident society.
94. Nominations and assignmtnts.

PART IV.

MUTUAL INSURANCE COMPANIES AND CO-OPERATIVE LIFE INSURANCE SOCIETIES.
95. Definitions.
96. Application of Act to Mutual Insurance Companies and Co-operative Life Insurance Societies.
97. Working capital of Mutual Insurance Companies and Co-operative Life Insurance Societies.
98. Deposits to be made by Mutual Insurance Companies and Co-operative Life Insurance Societies.
99. Transferees and assignees of policies not to become members.

SECTIONS.
100. Publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies.
101. Supply of documents to members.
PART V.
MISCELLANEOUS.
102. Penalty for default in complying with, or act in contravention of, this Act.
103. Penalty for transacting insurance business in contravention of sections 3, 7 and 98.
104. Penalty for false statement in document.
105. Wrongfully obtaining or withholding property.
106. Wrongfully diminishing life insurance fund.
106-A. Notice to and hearing of Superintendent of Insurance.
107. Previous sanction of Advocate-General for institution of proceedings.
108. Power of Court to grant relief.
109. Cognizance of offences.
110. Appeals.
110-A. Delegation of powers and duties of Superintendent of Insurance.
110-B. Signature of documents.
111. Service of notices.
112. Declaration of *interim* bonuses.
113. Acquisition of surrender values by policy.
114. Power of Central Government to make rules.
115. Alteration of forms.
116. Power to exempt from certain requirements.
SECTIONS.
116-A. Summary of returns to be published.
117. Saving of provisions of Indian Companies Act, 1913.
118. Exemptions.
119. Inspection and supply of copies of published prospectus, etc.
120. Determination of market-value of securities deposited under this Act.
121. Amendment of section 130, Act IV of 1882.
122. Amendment of Schedule I, Act IX of 1908.
123. Repeals.
SCHEDULES.
THE FIRST SCHEDULE.—Regulations and Forms for the preparation of Balance-Sheet.
THE SECOND SCHEDULE.—Regulations and Forms for the preparation of Profit and Loss Accounts.
THE THIRD SCHEDULE.—Regulations and Forms for the preparation of Revenue Accounts.
THE FOURTH SCHEDULE.—Regulations for the preparation of Abstracts of Actuaries' Reports and Requirements applicable to such Abstracts.
THE FIFTH SCHEDULE.—Regulations for preparing statements of business in force and requirements applicable to such statements.
THE SIXTH SCHEDULE.—Rule as to the valuation of the Liabilities of an Insurer in Insolvency or Liquidation.

THE INSURANCE ACT (IV OF 1938).

[Amended by Act XI of 1939; XLI of 1939; XX of 1940; XIII of 1941; *see also* I of 1941.]

[*26th February,* 1938.

An Act to consolidate and amend the law relating to the business of insurance.

WHEREAS it is expedient to consolidate and amend the law relating to the business of insurance; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INSURANCE ACT, 1938.

(2) It extends to the whole of British India.

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1937, Pt. V, p. 63; and for Report of Select Committee, see *ibid.*, p. 144.

This Act has been applied to—

(1) British Baluchistan, *see* Notification No. 200-F, dated 10th August 1938, Gazette of India, 1938, Pt. I, p. 1371.

(2) the partially excluded areas in the Mymensingh District and the District of Darjeeling, *see* Bengal Government Notification No. 1902-Com., dated 28th June, 1939, Calcutta Gazette, dated 16th July, 1939.

NOTES.

Sec. 1: GENERAL.—*Contract of Insurance*—Formalities for conclusion of contract. 37 Bom.L.R. 304=1935 Bom. 236. What is *insurable interest*. 42 P.L.R. 801=1941 Lah. 33. Stipulation as to payment of

(3) It shall come into force on such date[1] as the Central Government may, by notification in the official Gazette, appoint in this behalf.

LEG. REF.

[1] The 1st July, 1939, *see* Notification No. 589-I (4) 38, dated the 1st April, 1939, Gazette of India 1939, Pt. I, p. 631.

NOTES.

premium, if and how far a condition precedent. 1935 Bom. 236. *Place of contract.* 38 L.W. 504=1933 Mad. 764=65 M.L.J. 455. *Life Insurance Contract*—Construction of. *See* 1936 Sind 222; 1939 Sind 254; 1921 P.C. 195; 42 C.W.N. 1197=1938 Cal. 693 (Reference to prospectus); 40 Bom.L.R. 155. Wilful non-disclosure of material facts makes contract voidable. 1939 Sind 254. Contracts of Insurance are *uberrimae fidei.* 1936 Sind 222; 1939 Sind 254. *See also* 45 C.W.N. 623; 34 Bom.L.R. 1295=1932 Bom. 582; 1938 Cal. 120; 1937 Cal. 510; 1936 Cal. 437 (False answers as to family history of assured); 41 C.W.N. 941=1937 Cal. 510 (False statements of assured treated as representation and not warranties not sufficient to vitiate policy in absence of fraud). *See also* 15 Luck. 360 =1940 O.W.N. 149=1940 Oudh 212; 42 C.W.N. 823=1939 Cal. 8; 1937 Rang. 262. *Proof of age. See* 1937 Cal. 243=171 I.C. 193; when once age is admitted on the policy, company cannot dispute it afterwards. *See* I.L.R. (1938) 2 Cal. 457=42 C.W.N. 855 =1938 Cal. 641. *See also* 41 Bom. L. R. 353=1939 Bom. 161.

Proof of Death.—*See* 1929 Mad. 347=56 M.L.J. 299.

Life Insurance.—Suit for policy amount —*Jurisdiction. See* 1932 Bom. 392; 28 S.L.R. 192=1934 Sind 76; 45 L.W. 616=1937 Mad. 571.

Life Assurance Policy by member of joint Hindu family.—No presumption that it is for the benefit of the family. 15 N.L.J. 51=1932 Nag. 162. *See also* 33 Bom. L.R. 720=1931 Bom. 300 (Right of nominee of assured—No privity of contract). *See also* 1935 Rang. 211 (Insurance amount in hands of company not liable to attachment). *See also* 40 Mys. H. C. Rep. 462.

Life Insurance.—*Place of suing for claims. See* 34 Bom.L.R. 815=1932 Bom. 392; 1934 Sind 76.

Lapse of policy—Claim for refund of amount paid.—34 L.W. 643=1932 Mad. 241=61 M.L.J. 388. *Provision for forfeiture.* See 5 Rang. 208=1927 Rang. 196; *Power of cancellation* reserved in policy not necessarily void. 19 S. L. R. 346=1927 Sind 116. *Lapse of policy—Misstatements in declaration* of assured in revival application; effect of. *See* 40 L.W. 612=1934 Mad. 674=67 M.L.J. 522. *Premium, payment of*—Terms relating to payment of, not in the nature of penalty. 34 L.W. 643 =1932 Mad. 241=61 M. L. J. 388. (*See also* 1933 Mad. 680=65 M.L.J. 324. Construction of default clause in policy). *Non-forfeiture* clause—Construction of. *See* I.L.R. (1939) Kar. 409=1941 Sind 209. *Days of grace* for payment of premium calculation of. *See* 48 L.W. 746=1939 Mad. 159=(1939) 2 M.L.J. 1020.

Life Insurance amount, payment of—Company can call for *succession certificate* or *letters of administration* before payment of amount. 54 All. 1026=1932 A. L. J. 1015=1933 All. 1. *Accused committing suicide*—Right of assignee to policy amount. *See* I.L.R. (1938) Lah. 542=40 P.L.R. 735=1938 Lah. 561. *Exception to policy—Burden of proof* is on the company. 43 L.W. 276=1936 P.C. 74=70 M.L.J. 437 (P.C.).

Life Insurance Policy.—Payment of premia to agent—not intimated to Head Office —Effect of. *See* I.L.R. (1941) Kar. 409 =1941 Sind 209. Right of agent canvassing policies to *renewal commission* on policies effected by him previous to the termination of his agency. 60 I.C. 69=44 Mad. 170=1921 M. 309; 40 C.W.N. 694=1936 Cal. 246.

Life Insurance.—Effect and validity of conditional or contingent assignment. *See* 1937 Sind 181=31 S.L.R. 98; I. L. R. (1939) Mad. 415=49 L.W. 199=1939 Mad. 411=(1939) 1 M.L.J. 261 (Effect of provision in assignment deed for reverter to assured in case of assignee—(wife)—predeceasing assured or assurer being alive at time of maturity of policy); "Money payable to self or wife"—Meaning of. *See* (1938) 2 M.L.J. 22 (F.B.); *see* 32 S.L.R. 138=1938 Sind 20 as to construction of life insurance policy generally; *see also* 40 C.W.N. 1247 (Clause making money payable to executors, administrators or assigns—Construction of).

Policy Holder.—Right to apply for winding up of company. 42 Bom.L.R. 52. *See also* 30 S.L.R. 92=1936 Sind 165. Procedure in winding up of Provident Ins. Co. 2 Rang. 144=1924 Rang. 317 (Assured failing to demand issue of policy—Effect of); 52 Cal. 239=1925 Cal. 690 (Endowment policy—Insured allotted shares in company—Lien on dividends for premia).

Nominee in policy.—Right of, to sue company for money—Liability to be attached for debts of deceased. 55 Cal. 1315=32 C.W.N. 634=1928 Cal. 518.

Beneficiary named in policy.—Right to sue for amount. 69 I.C. 788=1922 Lah. 145.

Priority.—Assured dying and policy money becoming payable—Subsequent liquidation of company—Assured has no right to rank as preferential creditor. 39 Bom. L.R. 1163=1938 Bom. 91.

Fire Insurace Policy.—Interpretation of. *See* 47 Bom. 509=25 Bom.L.R. 164=1923 Bom. 249.

Fire Insurance.—Insurable interest. *See*

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "actuary" means an actuary possessing such qualifications as may be prescribed;

(2) "policy-holder" includes the person who is the absolute assignee of the benefits under the policy;

(3) "approved securities" means Government securities, and any other security charged on the revenues of the Central Government or of a Provincial Government, or guaranteed fully as regards principal and interest by the Secretary of State in Council or the Secretary of State or the Central Government or a Provincial Government; and any debenture or other security for money issued under the authority of any Act of a Legislature established in British India by or on behalf of a port trust or municipal corporation or city improvement trust in any Presidency-town, or by or on behalf of the trustees of the port of Karachi [1][and any security issued by the Government of an Indian State and specified as an approved security for the purposes of this Act by the Central Government by notification in the official Gazette];

(4) "auditor" means a person qualified under the provisions of section 144 of the Indian Companies Act, 1913, to act as an auditor of companies;

(5) "certified" in relation to any copy or translation of a document required to be furnished by or on behalf of [2][an insurer or a provident society as defined in Part III] means certified by a principal officer of [3][such insurer or provident society] to be a true copy or a correct translation, as the case may be;

(6) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction;

LEG. REF.

[1] Added by S. 2, Act XX of 1940.

[2] Substituted for the words "an insurer" by S. 2, Act XIII of 1941.

[3] Substituted for the words "the insurer", *ibid*.

1939 A.C. 452=1939 P.C. 195; 9 Rang. 452=1931 Rang. 210. *Joint insurance*—Fraud of one would avoid the claim of the other also. 162 I.C. 443. *See also* 171 I. C. 631=1937 Rang. 262 (Life policy). As to estoppel of company, *see* 40 P.L.R. 549 =1938 Lah. 168. Construction of terms in Fire Insurance Policy. *See* 190 I.C. 843 =1940 P. C. 199 ("Civil commotion"); I.L.R. (1938) 2 Cal. 400=1939 Cal. 105 ("Opening" in godown); 41 C.W.N. 339= 1936 Cal. 550 (Construction of term as to arbitration in fire policy); 1939 A.C. 452= 1939 P.C. 195 ("Insurance of goods" does not cover profits); 1936 Lah. 685=38 P.L. R. 405 ("Rules for the time being in force" —Meaning of in life policy). 1934 Rang. 15 (Clause limiting liability of company to claims made within 1 year). *Fire Insurance Policy* constitutes entire contract. 40 P.L. R. 549=1938 Lah. 168 (Effect of warranty by assured); 1938 Lah. 168. As to burden of proof, *see* 190 I.C. 843=1940 P.C. 199 (P. C.); 41 C.W.N. 941=1937 Cal. 510 (Life policy). *Fire Insurance Policy*, when becomes effective. 153 I.C. 387=1934 Rang. 343; Commencement of risk. 56 All. 237=1933 All. 900; 1934 All. 298=1934 A. L.J. 719=56 All. 726. As to effect of renewal of policy, *see* 1933 Cal. 170=36 C. W.N. 1101; 1934 Rang. 261; 67 M.L.J. 522 (Life policy). As to the effect of material misdescription of property insured, *see* 41 L. W. 160=1935 P.C. 1=68 M. L. J. 99 (P.C.); 11 Rang. 266=1933 Rang. 166. *See also* 67 I.C. 28=1923 Rang. 6 (Insured premises destroyed by fire—Right of mortgagee of premises). *Fire, marine and Life Insurance*—Contract of reinsurance is one of indemnity. *See* 196 I.C. 198=1941 Lah. 68 (Power of indemnified person to compromise).

MOTOR INSURANCE.—*See* 1937 A.L.J. 442 =1937 All. 535; 1937 O. W. N. 907=13 Luck. 474=1937 Oudh 476; 1933 A.C. 70= 1933 P.C. 11=64 M.L.J. 133 (P.C.).

MARINE INSURANCE.—What is *"total loss"*. 104 I.C. 332=1927 P.C. 188 (P.C.). *Non-payment of premium* is no defence on a suit by assured to recover losses. 27 Bom. L.R. 1310=1926 Bom. 82. On a time policy there is no *warranty of seaworthiness* of the vessal. 27 Bom.L.R. 1310=1926 Bom. 82. Loss by perils of the seas—What is. *See* 1941 P.C. 68 (P.C.).

Sec. 2 (2).—*See* 40 Bom.L.R. 52=1938 Bom. 182 (Meaning of "Policy holder"); 31 S.L.R. 416=1937 Sind 113 (Policy providing for payment of certain sum on happening of contingency during lifetime of member and providing for no payment to representative in case member dies before contingency—Nature of). *See also* 30 S. L.R. 92=1936 Sind 165.

(7) "Government securities" means Government securities as defined in the Indian Securities Act, 1920;

(8) "insurance company" means any insurer being a company, association or partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act, 1932, applies;

(9) "insurer" means—

(*a*) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than British India, carrying on insurance business (not being a person specified in sub-clause (*c*) of this clause) which—

(*i*) carries on that business in British India, or

(*ii*) has his or its principal place of business or is domiciled in British India;

[1][or

(*iii*) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in British India;]

(*b*) any body corporate (not being a person specified in sub-clause (*c*) of this clause) carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in British India; or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913, as defined by sub-section (2) of section 2 of that Act, and

(*c*) any person who in British India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters,

but does not include an insurance agent licensed under section 42 or a provident society [2][as defined in Part III];

(10) "insurance agent" means an insurance agent licensed under section 42 being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business;

(11) "life insurance business" includes annuity business, that is to say, the business of effecting contracts of insurance for the granting of annuities on human life and, if so provided in the contract of insurance, disability and double [3][or triple] indemnity accident benefits;

(12) "manager" and "officer" have the meanings assigned to those expressions in clauses (9) and (11) respectively of section 2 of the Indian Companies Act, 1913;

(13) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement, and includes any person, firm or company occupying such position by whatever name called.

Explanation.—If a person occupying the position of managing agent calls himself manager or managing director, he shall nevertheless be regarded as managing agent for the purposes of section 32 of this Act;

LEG. REF.

[1] Added by S. 2, Act XI of 1939.

[2] Substituted for the words "to which the provisions of Part III apply" by S. 2, Act XIII of 1941.

[3] Inserted by S. 2, Act XI of 1939.

(14) "prescribed" means prescribed by rules made under section 114; and

(15) "Superintendent of Insurance" means the officer, who shall be a qualified actuary, appointed by the Central Government to perform the duties of the Superintendent of Insurance under this Act.

PART II.

PROVISIONS APPLICABLE TO INSURERS.

Insurers to be subject to this Act while liabilities remain unsatisfied.

[1][2-A. Every insurer shall be subject to all the provisions of this Act in relation to any class of insurance business so long as his liabilities in British India in respect of business of that class remain unsatisfied or not otherwise provided for.

This Act not to apply to certain insurers ceasing to enter into new contracts before commencement of Act.

2-B. The provisions of this Act shall not apply to an insurer as defined in paragraph (*i*) or (*iii*) of sub-clause (*a*) of clause (9) of section 2 in relation to any class of his insurance business where such insurer has ceased, before the commencement of this Act, to enter into any new contracts of that class of business.]

Registration.

3. (1) No [2][person] shall, after the commencement of this Act, begin to carry on any class of insurance business in British India, and no insurer carrying on any class of insurance business in British India shall, after the expiry of three months from the commencement of this Act, continue to carry on any such business, unless he has obtained from the Superintendent of Insurance a certificate of registration:

[3][Provided that in the case of an insurer who was carrying on any class of insurance business in British India at the commencement of this Act, failure to obtain a certificate of registration in accordance with the requirements of this sub-section shall not operate to invalidate any contract of insurance entered into by him if before [4][such date as may be fixed in this behalf by the Central Government by notification in the official Gazette], he has obtained that certificate.]

(2) Every application for registration shall be accompanied by—

(*a*) a certified copy of the memorandum and articles of association, where the applicant is a company and incorporated under the Indian Companies Act, 1913, [5][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] or, in the case of any other insurer specified in sub-clause (*a*) (ii) or sub-clause (*b*) of clause (9) of section 2, a certified copy of the deed of partnerhip or of the deed of constitution of the company, as the case may be, or, in the case of an insurer having his principal place of business or domicile outside British India, document specified in clause (*a*) of section 63;

(*b*) the name, address and the occupation, if any, of the directors where the insurer is a company incorporated under the Indian Companies Act, 1913, [5][or

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LEG. REF.

[1] Inserted by S. 2-A, Act XI of 1939.

[2] Substituted for the word "insurer" by S. 3, Act XX of 1940.

[3] Added (with retrospective effect), *ibid.*

[4] Substituted for the words, brackets and figures "the expiry of one month from the commencement of the Insurance (Amendment) Act, 1940" by S. 3, Act XIII of 1941.

[5] Inserted by S. 2, Act XLI of 1939.

under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] and in the case of an insurer specified in sub-clause (*a*) (ii) of clause (9) of section 2 the names and addresses of the proprietors and of the manager in British India, and in any other case the full address of the principal office of the insurer in British India, and the names of the directors and the manager at such office and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the insurer;

(*c*) a statement of the class or classes of insurance business done or to be done, and a statement that the amount required to be deposited by section 7 or section 98 before application for registration is made has been deposited together with a certificate from the Reserve Bank of India showing the amount deposited;

(*d*) where the provisions of section 6 or section 97, apply, a declaration verified by an affidavit made by the principal officer of the insurer authorised in that behalf that the provisions of those sections as to working capital have been complied with;

(*e*) in the case of an insurer having his principal place of business or domicile outside [1][India], a statement verified by an affidavit made by the principal officer of the insurer setting forth the requirements (if any) not applicable to nationals of the country in which such insurer is constituted, incorporated or domiciled which are imposed by the laws or practice of that country upon Indian nationals as a condition of carrying on insurance business in that country;

(*f*) a certified copy of the published prospectus, if any, and of the standard policy forms of the insurer and statements of the assured rates, advantages, terms and conditions to be offered in connection with insurance policies together with a certificate in connection with life insurance business by an actuary that such rates, advantages, terms and conditions are workable and sound:

Provided that in the case of marine, accident and miscellaneous insurance business other than workmen's compensation and motor car insurance the above requirements regarding prospectus, forms and statements shall be complied with only in so far as the prospectus, forms and statements may be available; and

(*g*) the prescribed fee for registration being not more than [2][five] hundred rupees for each class of business.

(3) In the case of any insurer having his principal place of business or domicile outside [3][India], the Superintendent of Insurance shall withhold registration or shall cancel a registration already made, if he is satisfied that in the country in which such insurer has his principal place of business or domicile Indian nationals are debarred by the law or practice of the country relating to, or applied to insurance from carrying on the business of insurance, or that any requirement imposed on such insurer under the provisions of section 62 is not satisfied.

[4][(4) The Superintendent of Insurance shall cancel the registration of an insurer either wholly or in so far as it relates to a particular class of insurance business, as the case may be,—

(*a*) if the insurer fails to comply with the provisions of section 7 or section 98 as to deposits, or

(*b*) if the insurer is in liquidation or is adjudged an insolvent, or

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LEG. REF.

[1] Substituted for the words "British India" by S. 3, Act XX of 1940.

[2] Substituted for the word "one" by S. 3, XIII of 1941.

[3] Substituted for "British India" by S. 3, Act XX of 1940.

[4] Sub-section substituted (with retrospective effect) *ibid.*

(*c*) if the business or a class of the business of the insurer has been transferred to any person or has been transferred to or amalgamated with the business of any other insurer, or

(*d*) if the whole of the deposit made in respect of a class of insurance business has been returned to the insurer under section 9;]
[1][or];

[1][(*e*) if, in the case of an insurer specified in sub-clause (*c*) of clause (9) of section 2, the standing contract referred to in that sub-clause is cancelled or is suspended and continues to be suspended for a period of six months,

and the Superintendent of Insurance may cancel the registration of an insurer, if the insurer has failed to have the registration renewed].

(5) When the Superintendent of Insurance with holds or cancels any registration under sub-section (3) or [2][clause (*a*) of sub-section (4)] [3][clause (*e*) of sub-section (4), or because the insurer has failed to have the registration renewed], he shall give notice in writing to the insurer of his decision, and the decision shall take effect on such date as he may specify in that behalf in the notice, such date not being less than one month nor more than two months from the date of the receipt of the notice in the ordinary course of transmission.

[4][(5-A) When the Superintendent of Insurance cancels any registration under clause (*b*), clause (*c*) or clause (*d*) of sub-section (4) the cancellation shall take effect on the date on which notice of the order of cancellation is served on the insurer.

(5-B) When a registration is cancelled the insurer shall not, after the cancellation has taken effect, enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by him before such cancellation takes effect shall, subject to the provisions of sub-section (5-D), continue as if the cancellation had not taken place.

(5-C) Where a registration is cancelled under clause (*a*) of sub-section (4), [5][clause (*e*) of sub-section (4), or because the insurer has failed to have his registration renewed], the Superintendent of Insurance may at his discretion revive the registration, if the insurer within six months from the date on which the cancellation took effect makes the deposits required by section 7 or section 98, [5][or has his standing contract restored or has had an application under sub-section (4) of section 3-A accepted], as the case may be, and complies with any directions which may be given to him by the Superintendent of Insurance.

(5-D) Where a registration is cancelled under sub-section (4) and the insurer is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, the Superintendent of Insurance shall, as soon as may be after the expiry of six months from the date on which the cancellation took effect, apply to the Court for an order to wind up the insurance company, or to wind up the affairs of the company in respect of a class of insurance business, unless the registration of the insurance company has been revived under sub-section (5-C) or an application for winding up the company has been already presented to the Court. The Court may proceed as if an ap-

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LEG. REF.

[1] The word "or", clause (*e*) and the words following clause (*e*) were added by S. 3, Act XIII of 1941.

[2] Substituted (with retrospective effect) for the word, brackets and figure "sub-section (4)" by S. 3, Act XX of 1940.

[3] Inserted by S. 3, Act XIII of 1941.

[4] Sub-sections 5-A to 5-D inserted (with retrospective effect) by S. 3, Act XX of 1940.

[5] Inserted by S. 3, Act XIII of 1941.

plication under this sub-section were an application under sub-section (2) of section 53, or sub-section (1) of section 58, as the case may be.]

(6) The Superintendent of Insurance shall, on being satisfied that the applicant has fulfilled all the requirements of [1][this section] applicable to him, [2][register the insurer and grant him] a certificate of registration.

Renewal of Registration.

[3][3-A. (1) An insurer who has been granted a certificate of registration under section 3 shall have the registration renewed annually for each year after that ending on the 31st day of December, 1941.

(2) An application for the renewal of a registration for any year shall be made by the insurer to the Superintendent of Insurance before the 31st day of December of the preceding year, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed one thousand rupees for each class of insurance business, but may vary according to the volume of business done by the insurer in India in each class of insurance business to which the registration relates.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(4) If an insurer fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as an application to the Court under sub-section (5-D) of section 3 has not been made, accept an application for renewal of the registration on receipt from the insurer of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by him, as the Superintendent of Insurance may require:

Provided that an appeal shall lie to the Central Government from an order passed by the Superintendent of Insurance imposing a penalty on the insurer.

(5) The Superintendent of Insurance shall, on fulfilment by the insurer of the requirements of this section, renew the registration and grant him a certificate of renewal of registration.]

Minimum limits for annuities and other benefits secured by policies of life insurance.

4. (1) No insurer, not being [4][a provident society as defined in Part III], or a Co-operative Life Insurance Society or a Mutual Insurance Company to which Part IV of this Act applies, shall pay or undertake to pay on any policy of life insurance issued after the commencement of this Act an annuity of fifty rupees or less or a gross sum of rupees five hundred or less exclusive of any profit or bonus provided that this shall not prevent an insurer from converting any policy into a paid up policy of any value or payment of surrender value of any amount.

[5][(2) Nothing contained in this section shall apply to any policy of the description known as a group policy, where the number of persons covered by the policy is not less than fifty or such smaller number as may be approved by the Superintendent of Insurance and a standard form of the policy has been certified in writing by the Superintendent of Insurance to be a policy of such description.]

LEG. REF.

[1] Substituted for the words "the Act" by S. 3, Act XX of 1940.

[2] Substituted for the words "grant the insurer," *ibid*.

[3] Inserted by S. 4, Act XIII of 1941.

[4] Substituted for the words "a provident society to which Part III" by S. 5, Act XIII of 1941.

[5] This sub-section was substituted, *ibid*.

Restriction on name of insurer.

5. (1) An insurer shall not be registered by a name identical with that by which an insurer in existence is already registered, or so nearly resembling that name as to be calculated to deceive except when the insurer in existence is in the course of being dissolved and signifies his consent to the Superintendent of Insurance.

(2) If an insurer, though inadvertence or otherwise, is without such consent as aforesaid registered by a name identical with that by which an insurer already in existence whether previously registered or not is carrying on business or so nearly resembling it as to be calculated to deceive, the first-mentioned insurer shall, if called upon to do so by the Superintendent of Insurance on the application of the second-mentioned insurer, change his name within a time to be fixed by the Superintendent of Insurance:

Provided that nothing in this section shall apply to any insurer carrying on business before the 27th day of January, 1937, under the Indian Life Assurance Companies Act, 1912.

(3) No insurer other than a provident society [1][as defined in Part III], who begins to carry on insurance business after the commencement of this Act, shall adopt as its name and no such insurer carrying on business before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name any combination of words which includes the word "provident".

Requirements as to capital.

6. No insurer incorporated after, or who commenced carrying on the business of life insurance in British India, whether solely or in common with any other business, after the 26th day of January, 1937, shall be registered unless he has as working capital a net sum of not less than fifty thousand rupees exclusive of the deposit to be made before registration under sub-section (5) of section 7 of this Act, and exclusive in the case of a company of any sums payable as preliminary expenses in the formation of the company.

Deposits.

7. (1) Every insurer not being an insurer specified in sub-clause (*c*) of clause (9) of section 2 shall, in respect of the insurance business carried on by him in British India, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government [2][the amount hereafter specified, either in cash in approved securities estimated at the market value of the securities on the day of deposit, or partly in cash and partly in approved securities so estimated]:

(*a*) where the business done or to be done in life insurance only, two hundred thousand rupees;

(*b*) where the business done or to be done is fire insurance only, one hundred and fifty thousand rupees;

(*c*) where the business done or to be done is marine insurance only, one hundred and fifty thousand rupees;

(*d*) where the business done or to be done [3][is miscellaneous insurance only, that is to say, insurance which is not in the opinion of the Central Govern-

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LEG. REF.

[1] Substituted for the words "to which Part III applies" by S. 6, Act XIII of 1941.

[2] Substituted for the words "cash or approved securities estimaaed at the marker value of the securities on the day of deposit of the amount hereafter specified, namely" (with retrospective effect) by S. 4, Act XX of 1940.

[3] Substituted for the words "is accident and miscellaneous insurance including workmen's compensation and motor car insurance" (with retrospective effect) by S. 4, Act XX of 1940.

NOTES.

Sec. 7.—*See* 74 C.L.J. 491=46 C.W.N. 284, cited under S. 9, *infra.*

ment principally or wholly of any kind or kinds included in clauses (*a*), (*b*) or (*c*)], one hundred and fifty thousand rupees;

(*e*) where the business, done or to be done [1][is] life insurance and any one of the three classes specified in clauses (*b*), (*c*) and (*d*), three hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*f*) where the business done or to be done [1][is] life insurance and any two of the three classes specified in classes (*b*), (*c*) and (*d*), four hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*g*) where the business done or to be done [1][is] life insurance and all three classes specified in clauses (*b*), (*c*) and (*d*), four hundred and fifty thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*h*) where the business done or to be done does not include life insurance but [1][is] any two of the classes specified in clauses (*b*), (*c*) and (*d*), two hundred and fifty thousand rupees;

(*i*) where the business done or to be done does not include life insurance but [1][is] all three classes specified in clauses (*b*), (*c*) and (*d*), three hundred and fifty thousand rupees; [2][*]

[2][* * * * * * * *]

[3][Provided that, where the business done or to be done is marine insurance only and relates exclusively to country craft or its cargo or both, the amount to be deposited under this sub-section shall be ten thousand rupees only.]

(2) Where the insurer is an insurer specified in sub-clause (*c*) of clause (9) of section 2, he shall be deemed to have complied with the provisions of this section as to deposit, if in respect of any class of insurance business [4][carried on] by him in British India under a standing contract of the nature referred to in sub-clause (*c*) of clause (9) of section 2 a deposit of an amount one-and-a-half times that specified in sub-section (1) as the deposit for that class of insurance business has been made in the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government in cash or approved securities estimated at the market value of the securities on the day of deposit by or behalf of the underwriters who are members of the Society of Lloyd's with whom he has his standing contract.

(3) Where the deposit is to be made by an insurer incorporated before, or carrying on the business of insurance in British India before, the 27th day of January, 1937, the deposit referred to in sub-section (1) may be made in not more than seven instalments, of which the first shall be not less than one-fourth of the total amount of the deposit and shall be paid before the application for registration is made, the second shall be not less than one-sixth of the balance of the deposit and shall be paid before [5][the expiry of four months from the commencement of the Act], and the subsequent instalments shall be of not less than the minimum amount required as the second instalment and shall be paid before the 1st day of January of each succeeding year:

Provided that in the case of insurers carrying on life insurance business only, the deposit may be made in not more than ten instalments, of which

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LEG. REF.

[1] Substituted for the word "includes", *ibid*.

[2] The word "and" and clause (*j*) omitted by S. 4, Act XX of 1940.

[3] This proviso added, *ibid*.

[4] Substituted for the word "transacted" by Act XI of 1939.

[5] Substituted for the words and figures "the 1st day of January, 1939", *ibid*.

the first shall be not less than one-fourth of the total amount of the deposit, and shall be paid before the application for registration is made, the second shall be not less than one-ninth of the balance of the deposit, and shall be paid before [1][the expiry of four months from the commencement of this Act], and the subsequent instalments shall be of not less than the minimum amount required as the second instalment, and shall be paid before the 1st day of January of each succeeding year.

(4) Notwithstanding anything contained in sub-section (3), in the case of an insurer [2][to whom that sub-section applies,] not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit referred to in sub-section (1) shall be made in two instalments of which the first shall be not less than one-half of the total amount of the deposit and shall be made before the application for registration is made, and the second shall be made before the expiry of one year from the date of registration.

(5) Where the deposit is to be made by an insurer neither incorporated before, nor carrying on insurance business in British India before, the 27th day of January, 1937, the deposit may be made in instalments of not less than one-fourth the total amount before the application for registration is made, not less than one-third the balance before the expiry of one year from the commencement of business in British India, and not less than one-half the residue before the expiry of two years from the commencement of business in British India and the balance before the expiry of three years from the commencement of business in British India:

Provided that in the case of any insurer not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit shall be made in full before the application for registration is made.

(6) No class of insurance business in addition to the class or classes in respect of which an insurer is already liable to make a deposit under sub-section (1) or sub-section (2) shall be undertaken by the insurer until the deposit to which he is already liable has been made in full, and the additional deposit required in respect of the additional class of business or so much thereof as under the provisions of sub-section (3), (4) or (5) is to be made before the application for registration, has also been made in full.

(7) Securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 1912, shall be transferred by him to the Reserve Bank of India and shall, to the extent of their market value [3][as at the date of the commencement of this Act], be deemed to be deposited under this Act [4][as the instalment or as part of the instalment to be made under the foregoing provisions of this section before the application for registration is made whether any such application is or is not in fact made].

(8) A deposit made in cash shall be held by the Reserve Bank of India to the credit of the insurer and shall [5][except to the extent, if any, to which the

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LEG. REF.

[1] Substituted for the words and figures "the 1st day of January, 1939" by S. 3 of Act XI of 1939.

[2] These words were inserted by *ibid*.

[3] Substituted for the words "on the day of the first deposit made in compliance with this Act" (with retrospective effect) by S. 4 of Act XX of 1940.

[4] Substituted (with retrospective effect) for the words "in respect of the life insurance business of the insurer", *ibid*.

[5] These words were inserted (with retrospective effect), by *ibid*.

NOTES.

Sec. 7 (7).—S. 7 (7) is simply a general provision to make available the securities already deposited under the old Act for the purpose of being used as deposits under the new Act, the provision as to valuation being purely a question of machinery. Although there is no specific provision stating that deposits already made and now deemed to be made under the new Act by virtue of S. 7 (7) will be appropriated according to the instalments fixed by S. 7 (3) that is implied in the words of S. 7 (7) themselves "deemed to be deposited under this Act." I.L.R. (1940) 2 Cal. 127=1940 Cal. 529.

cash has been invested in securities under sub-section (9-A)], be returnable to the insurer in cash in any case in which under the provisions of this Act a deposit is to be returned; and any interest accruing due and collected on securities deposited under sub-section (1) or sub-section (2) shall be paid to the insurer, subject only to deduction of the normal commission chargeable for the realization of interest.

[1][(9) The insurer may at any time replace any securities deposited by him under this section with the Reserve Bank of India either by cash or by other approved securities or partly by cash and partly by other approved securities, provided that such cash, or the value of such other approved securities estimated at the market rates prevailing at the time of replacement, or such cash together with such value as the case may be, is not less than the value of the securities replaced estimated at the market rates prevailing when they were deposited.

(9-A) The Reserve Bank of India shall, if so requested by the insurer,—

(*a*) sell any securities deposited by him with the Bank under this section and hold the cash realised by such sale as deposit, or

(*b*) invest in approved securities specified by the insurer the whole or any part of a deposit held by it in cash or the whole or any part of cash received by it on the sale of or on the maturing of securities deposited by the insurer, and hold the securities in which investment is so made as deposit, [2][and may charge the normal commission on such sale or on such investment].

(9-B) Where sub-section (9-A) applies;—

(*a*) if the cash realised by the sale of or on the maturing of the securities (excluding in the former case the interest accrued) falls short of the market value of the securities at the date on which they were deposited with the Bank, the insurer shall make good the deficiency by a further deposit either in cash or in approved securities estimated at the market value of the securities on the day on which they are deposited, or partly in cash and partly in approved securities so estimated, within a period of two months from the date on which the securities matured or were sold or where the securities matured or were sold before the 21st day of March, 1940, within a period of four months from the commencement of the Insurance (Amendment) Act, 1940; and unless he does so the insurer shall be deemed to have failed to comply with the requirements of this section as to deposits; and

(*b*) if the cash realised by the sale of or on the maturing of the securities (excluding in the former case the interest accrued) exceeds the market value of the securities at the date on which they were deposited with the Bank, the Central Government may, if satisfied that the full amount required to be deposited under sub-section (1) is in deposit, direct the Reserve Bank to return the excess.]

(10) If any part of a deposit made under this section is used in the discharge of any liability of the insurer, the insurer shall deposit such additional sum in cash or approved securities [3][estimated at the market value of the securities on the day of deposit, or partly in cash and partly in such securities], as will make up the amount so used. The insurer shall be deemed to have failed to comply with the requirements of sub-section (1), unless the deficiency is supplied within a period of two months from the date when the deposit or any part thereof is so used for discharge of liabilities.

Reservation of deposits.

8. (1) Any deposit made under section 7 [4][or section 98] shall be deemed to be part of the assets of the insurer but shall not be susceptible of any assignment or charge; nor shall it be available for the discharge of any liability of the insurer other than liabilities

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LEG. REF.

[1] Sub-Ss. (9), (9-A) and (9-B) were substituted for the original sub-S. (9) (with retrospective effect) by S. 4 of Act XX of 1940.

[2] Added by S. 7 of Act XIII of 1941.

[3] Inserted by S. 4 of XX of 1940.

[4] Inserted by S. 4 of Act XI of 1939.

arising out of policies of insurance issued by the insurer so long as any such liabilities remain undischarged; nor shall it be liable to attachment in execution of any decree except a decree obtained by a policy-holder of the insurer in respect of a debt due upon a policy which debt the policy-holder has failed to realise in any other way.

(2) Where a deposit is made in respect of life insurance business the deposit made in respect thereof shall not be available for the discharge of any liability of the insurer other than liabilities arising out of policies of life insurance issued by the insurer.

Refund of deposits.

9. Where an insurer has ceased to carry on in British India any class of insurance business in respect of which a deposit has been made under section 7 [1][or section 98] and his liabilities in British India in respect of business of that class have been satisfied or are otherwise provided for, the Court may, on the application of the insurer, order the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which he continues to carry on.

Separation of accounts and funds.

10. (1) Where the insurer carries on business of more than one of the classes specified in clauses *(a)*, *(b)*, *(c)* and *(d)* of sub-section (1) of section 7, he shall keep a separate account of all receipts and payments in respect of each such class of insurance business [2][and where the insurer carries on business of the class specified in clause *(d)* of that sub-section whether alone or in conjunction with business of another class, he shall, unless the Superintendent of Insurance waives this requirement in writing, keep a separate account of all receipts and payments in respect of each such sub-class of the class specified in clause *(d)* as may be prescribed in this behalf:

Provided that no sub-class of the class of insurance business specified in clause *(d)* of sub-section (1) of section 7 shall be prescribed under this sub-section if the insurance business comprised in the sub-class consists of insurance contracts which are terminable by the insurer at intervals not exceeding twelve months and

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LEG. REF.

[1] Inserted by S. 5 of Act XI of 1939.

[2] Added by S. 8 of Act XIII of 1941.

NOTES.

Sec. 9.—Where under a scheme of compromise under S. 153, Companies Act, it is proposed not to change one kind of company into another kind, but, in the process of reconstruction to put an end to the old company which was limited by shares and to create a new mutual company, the provisions of S. 9 with regard to refund of deposit will come into force. 45 C.W.N. 979. No order for refund can be made under S. 9 in respect of a discontinued business unless all the liabilities in respect of the same have been fully satisfied or otherwise provided for. 74 C.L.J. 491=46 C.W.N. 284.

Secs. 9 and 7.—It is not necessary that an insurer should deposit the full amount as is required under S. 7 (1) before he can present an application for refund under S. 9 of the Act in respect of a certain class of insurance business that has been discontinued by him. Under S. 7 (1) of the Act, the amount to be deposited by an insurer is rupees two lacs, if the business carried on by him is purely life insurance business. If on the other hand, miscellaneous insurance business is combined by him with life insurance, the deposit is increased to rupees three lacs, out of which rupees two lacs should be regarded as deposit for life insurance business. Under sub-S. (3) of the section the insurer has the right to deposit this amount in certain instalments. As the entire deposit of rupees three lacs as required under S. 7 (1) is to be divided into two parts, the instalments permitted under sub-S. (3) are susceptible of similar division and it would be quite proper to allocate one third of such instalments to the miscellaneous insurance business and the remaining two-thirds to the Life Insurance. If the insurer discontinues the former class of business, he can under S. 9 of the Act obtain refund of so much of the instalments of deposit as do not relate to the life insurance which he continues to carry on. It would be extremely unreasonable to hold that although he has discontinued one class of business, he will still be bound to make deposits in respect of both classes of business and unless and until the full amount is deposited no separation of funds is permissible. 74 C.L.J. 491=46 C.W.N. 284, under which, if a claim arises, the insurer's liability to pay benefit ceases within one year of the date on which the claim arose.]

(2) Where the insurer carries on the business of life insurance, [1][all receipts due in respect of such business], shall be carried to and shall form a separate fund to be called the life insurance fund and the deposit made by the insurer in respect of life insurance business shall be deemed to be part of such fund.

(3) The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly [2]* * * for any purposes [3][other than those of the life insurance business of the insurer].

Accounts and balance-sheet.

11. (1) Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall at the expiration of each calendar year prepare with reference to that year—

(*a*) in accordance with the regulations contained in Part I of the First Schedule, a balance-sheet in the form set forth in Part II of that Schedule;

(*b*) in accordance with the regulations contained in Part I of the Second Schedule, a profit and loss account in the forms set forth in Part II of that Schedule, except where the insurer carries on business of one class only of the classes specified in clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 7 and no other business;

(*c*) [4][in respect of each class or sub-class of insurance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments] in accordance with the regulations contained in Part I of the third Schedule, a revenue account in the form or forms set forth in Part II of that Schedule applicable to [5][that class or sub-class of insurance business].

(2) Unless the insurer is a company [6][, as defined in clause (2) of sub-section (1) of section 2 of the Indian Companies Act, 1913], the accounts and statements referred to in sub-section (1) shall be signed by the insurer, or in the case of a company by the chairman, if any, and two directors and the principal officer of the company, or in the case of a firm by two partners of the firm, and shall be accompanied by a statement containing the names and descriptions of the persons in charge of the management of the business during the period to which such accounts and statements refer and by a report by such persons on the affairs of the business during that period.

(3) Where an insurer carrying on the business of insurance at the commencement of this Act has prepared the balance-sheet and accounts required by the Indian Life Assurance Companies Act, 1912, or has based his accounts upon the financial and not the calendar year, the provisions of this section shall, if the Central Government so directs in any case apply until the 31st day of December,

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LEG. REF.

[1] Substituted for the words "the excess of receipts over payments in respect of such business" by S. 8 of Act XIII of 1941.

[2] The words and figures "save as provided in S. 49" were omitted, *ibid*.

[3] These words were substituted for the words "other than those of life insurance", *ibid*.

[4] Substituted for the words "in respect of each class of insurance business carried on by him" by S. 9 of Act XIII of 1941.

[5] Substituted for the words "that class of insurance business", *ibid*.

[6] Substituted for the words and figures "to which the Indian Companies Act, 1913, applies", *ibid*.

1939, as if in sub-section (1) references to the calendar year were references to the financial year.

Audit.

12. The balance-sheet, profit and loss account, revenue account and profit and loss appropriation account of every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-section (*b*) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall, unless they are subject to audit under the Indian Companies Act, 1913; be audited annually by an auditor, and the auditor shall in the audit of all such accounts have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities and penalties imposed on, auditors of companies by section 145 of the Indian Companies Act, 1913.

Actuarial report and abstract.

13. (1) Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India, and also in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all life insurance business transacted by him, once at least in every five years cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule.

(2) The provisions of sub-section (1) regarding the making of an abstract shall apply whenever at any other time an investigation into the financial condition of the insurer is made with a view to the distribution of profits or an investigation is made of which the results are made public.

(3) There shall be appended to every such abstract as is referred to in sub-section (1) or sub-section (2) a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(4) There shall be appended to every such abstract a statement, in conformity with the requirements of Part II of the Fifth Schedule and prepared in accordance with the regulations contained in Part I of that Schedule, of the life insurance business in force at the date to which the accounts of the insurer are made up for the purposes of such abstract:

Provided that, if the investigation, referred to in sub-sections (1) and (2) is made annually by any insurer, the statement need not be appended every year but shall be appended at least once in every five years.

(5) Where an investigation into the financial condition of an insurer is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance-sheet as at the date at which the investigation is made shall be prepared and audited in the manner provided by this Act.

[1][(6) The provisions of this section relating to life insurance business shall apply also to any such sub-class of insurance business included in the class 'Miscellaneous Insurance' as may be prescribed under sub-section (1) of section 10; and the Superintendent of Insurance may authorise such modifications and variations of the regulations contained in Part I of the Fourth and Fifth Schedules and of the requirements of Part II of those Schedules as may be

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LEG. REF.

[1] Sub-section added by S. 10 of Act XIII of 1941.

necessary to facilitate their application to any such sub-class of insurance business:

Provided that, if the Superintendent of Insurance is satisfied that the number and amount of the transactions carried out by an insurer in any such sub-class of insurance business is so small as to render periodic investigation and valuation unnecessary, he may exempt that insurer from the operation of this sub-section in respect of that sub-class of insurance business.]

Register of policies and register of claims.

14. Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall maintain—

(*a*) a register or record of policies, in which shall be entered, in respect of every policy issued by the insurer, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice, and

(*b*) a register or record of claims, in which shall be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or, in the case of a claim which is rejected, the date of rejection and the grounds therefor.

Submission of returns.

15. (1) The audited accounts and statements referred to in section 11 and the abstract and statement referred to in section 13 shall be printed, and four copies thereof shall be furnished as returns to the Superintendent of Insurance [1][in the case of the accounts and statements referred to in section 11 within six months and in the case of the abstract and statement referred to in section 13 within nine months] from the end of the period to which they refer. [2]* * * * *:

Provided that the said period of six months shall in the case of insurers having their principal place of business or domicile outside India and in the case of insurers constituted, incorporated or domiciled in British India but also carrying on business outside India be extended by three months, and provided further that the Central Government may in any case extend the time allowed by this sub-section for the furnishing of such returns by a further period not exceeding three months.

(2) Of the four copies so furnished one shall be signed in the case of a company by the chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual by the insurer himself.

(3) Where the insurer's principal place of business or domicile is outside British India, he shall forward to the Superintendent of Insurance, along with the documents referred to in section 11, the balance-sheet, profit and loss account and revenue account and the valuation reports and valuation statements, if any, which the insurer is required to file with the public authority of the country in which the insurer is constituted, incorporated or domiciled, or, where such documents are not required to be filed, a certified statement showing the total assets and liabilities of the insurer at the close of the period covered by the said documents and his total income and expenditure during that period.

LEG. REF.

[1] Substituted for the words "within six months" by S. 11 of Act XIII of 1941.

[2] The words "The Superintendent of Insurance may extend the time allowed for furnishing the abstract and statement referred to in S. 13 by a period not exceeding three months" were omitted, *ibid*.

Returns by insurers established outside British India.

16. (1) Where by the law of the country in which an insurer, not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, is constituted, incorporated or domiciled, the insurer is required to prepare and to furnish to a public authority of that country documents of substantially the same nature as the documents required to be furnished as returns in accordance with the provisions of section 15, the provisions of sub-section (2) of this section shall apply to such insurer in lieu of the provisions of sections 11, 12, 13 and 15.

(2) The insurer shall, within the time specified in sub-section (1) of section 15, furnish to the Superintendent of Insurance four certified copies in the English language of every balance-sheet, account, abstract, report and statement supplied to the public authority referred to in sub-section (1) of this section, and in addition thereto, [1][four certified copies] in the English language of each of the following statements, namely:—

(*a*) a statement [2][audited by a person duly qualified under the law of the insurer's country] showing the assets held by the insurer in India [3][as at the date of any balance-sheet so funished];

(*b*) [4][for each class or sub-class of insurance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments, a revenue account for the period covered by any account so furnished] in the form or forms set forth in Part II of the Third Schedule applicable to [5][that class or sub-class of insurance business] [2][and similarly audited,] showing separately with respect to business transacted by the insurer in India the details required to be supplied in a revenue account furnished under this clause of this sub-section;

[6][(*a*) a separate abstract of the valuation report in respect of all business transacted in India in each class or sub-class of insurance business to which section 13 refers, prepared in the manner required by that section, and];

(*d*) a declaration in the prescribed form stating that all amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India have been shown in the revenue account except such sums as properly appertain to the capital account.

Exemption from certain provisions of the Indian Companies Act, 1913.

17. Where an insurer, being a company incorporated under the Indian Companies Act, 1913 [7][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] in any year furnishes [8][his balance-sheet and accounts] in accordance with the provisions of section 15, he may at the same time send to the Registrar of Companies [9][copies of such balance-sheet and accounts]; and [10][where such copies are so sent] it shall not be necessary for the company [11][to file copies of the balance-sheet and accounts] with the Registrar as required

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LEG. REF.

[1] Substituted for the words "four copies" by S. 7 of Act XI of 1939.

[2] Inserted by S. 7 of Act XI of 1939.

[3] Added by S. 12 of Act XIII of 1941.

[4] Substituted for the words "for each class of insurance business carried on by him, a revenue account", *ibid*.

[5] Substituted for the words "that class of business", *ibid*.

[6] This clause was substituted, *ibid*.

[7] Inserted by S. 8 of Act XI of 1939.

[8] Substituted for the words "his accounts and balance-sheet", *ibid*.

[9] Substituted for the words "a copy of such accounts and balance sheet", *ibid*.

[10] Substituted for the words "where such copy is so sent", *ibid*.

[11] Substituted for the words "to file a balance sheet, *ibid*.

by sub-section (1) of section 134 of that Act and [1][such copies so sent] [2][shall be chargeable with the same fees and] shall be dealt with in all respects as if they were filed in accordance with that section.

This Act not to apply to preparation of accounts, etc., for periods prior to this Act coming into force.

[3][17-A. Nothing in this Act shall apply to the preparation of accounts by an insurer and the audit and submission thereof in respect of any accounting year which has expired prior to the commencement of this Act, and notwithstanding the other provisions of this Act, such accounts shall be prepared, audited and submitted in accordance with the law in force immediately before the commencement of this Act.]

Furnishing reports.

18. Every insurer shall furnish to the superintendent of Insurance a certified copy of every report on the affairs of the concern which is submitted to the members or policy-holders of the insurer immediately after its submission to the members or policy-holders as the case may be.

Abstract of proceedings of general meetings.

19. Every insurer, being a company or body incorporated under any law for the time being in force in British India, shall furnish to the Superintendent of Insurance an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates.

Custody and inspection of documents and supply of copies.

20. (1) Every return furnished to the Superintendent of Insurance or a certified copy thereof shall be kept by the Superintendent and shall be open to inspection; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words or fractional part thereof required to be copied, any five figures being deemed equivalent to one word.

(2) A printed or certified copy of the accounts, statements and abstract furnished in accordance with the provisions of section 15 or section 16 shall, on the application of any shareholder or policy-holder made at any time within two years from the date on which the document was so furnished, be supplied to him by the insurer within fourteen days when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application.

(3) A copy of the memorandum and articles of association of the insurer, if a company, shall on the application of any policy-holder, be supplied to him by the insurer on payment of one rupee.

Powers of Superintendent of Insurance regarding returns.

21. (1) If it appears to the Superintendent of Insurance that any return furnished to him under the provisions of this Act is inaccurate or defective in any respect, he may—

(*a*) require from the insurer such further information, certified if he so directs by an auditor or actuary, as he may consider necessary to correct or supplement such return;

(*b*) call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose;

(*c*) examine any officer of the insurer on oath in relation to the return;

(*d*) decline to accept any such return unless the inaccuracy has been corrected or the deficiency has been supplied before the expiry of one month from the

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LEG. REF.

[1] Substituted for the words "the copy of the accounts and balance-sheet so sent," by S. 8 of Act XI of 1939.

[2] Inserted by S. 13 of Act XIII of 1941.

[3] Section inserted by S. 9 of Act XI of 1939.

date on which the requisition asking for correction of the inaccuracy or supply of the deficiency was delivered to the insurer and if he declines to accept any such return, the insurer shall be deemed to have failed to comply with the provisions of section 15 or section 16 relating to the furnishing of returns.

(2) The Court may on the application of an insurer and after hearing the Superintendent cancel any order made by the Superintendent under clause (*a*), (*b*) or (*c*) of sub-section (1) or may direct the acceptance of any return which the Superintendent has declined to accept, if the insurer satisfies the Court that the action of the Superintendent was in the circumstances unreasonable.

[1][Provided that no application under this sub-section shall be entertained unless it is made before the expiration of four months from the time when the Superintendent of Insurance made the order or declined to accept the return.]

Power of Superintendent of Insurance to order revaluation.

22. If it appears to the Superintendent of Insurance that an investigation or valuation to which section 13 refers [2][or an abstract of a valuation report furnished under clause (*c*) of sub-section (2) of section 16] does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent of Insurance.

Evidence of documents.

23. (1) Every return furnished to the Superintendent of Insurance, which has been certified by the Superintendent to be a return so furnished, shall be deemed to be a return so furnished.

(2) Every document, purporting to be certified by the Superintendent of Insurance to be a copy of a return so furnished, shall be deemed to be a copy of that return and shall be received in evidence as if it were the original return, unless some variation between it and the original return is proved.

24. [*Summary of returns to be published.*] *Omitted by s.* 16 *of the Insurance (Amendment) Act,* 1941 (*XIII of* 1941).

Returns to be published in statutory forms.

25. No insurer shall publish in British India any return in a form other than that in which it has been furnished to the Superintendent of Insurance:

Provided that nothing contained in this section shall prevent an insurer from publishing a true and accurate abstract from such returns for the purposes of publicity.

Alterations in the particulars furnished with application for registration to be reported.

26. Whenever any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 3 to accompany an application by an insurer for registration, the insurer shall forthwith furnish to the Superintendent of Insurance full particulars of such alteration.

[3][All such particulars shall be authenticated in the manner required by that sub-section for the authentication of the matters therein referred to, and, where the alteration affects the assured rates, advantages, terms and conditions offered

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LEG. REF.

[1] This proviso added by S. 14, Act XIII of 1941.

[2] Inserted by S. 15, *ibid.*

[3] Added by S. 17, Act XIII of 1941.

NOTES.

Sec. 22.—Where in the Punjab a company is registered both under the Life Assurance Companies Act as well as the Companies Act, an application for its winding up must be presented in the District Court only and not in the High Court, and must be made by persons and subject to the qualifications mentioned in S. 22 of the Life Assurance Companies Act, in view of the provisions of this section read with S. 287 of the Companies Act. After this application has been made, the procedure is regulated by the provisions of the Companies Act. 44 P.L.R. 1.

in connection with life insurance policies, the actuarial certificate referred to in clause (*f*) of the said sub-section shall accompany the particulars of the alteration.]

INVESTMENT, LOANS AND MANAGEMENT.

Investment of assets and restriction on loans.

27. (1) Every insurer incorporated or domiciled in British India shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than fifty-five per cent. of the sum of the amount of his liabilities to holders of life insurance policies in India on account of matured claims ad the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 [1][or section 98] by the insurer in respect of his life insurance business and less any amount due to the insurer for loans granted by him on policies of life insurance [2][maturing for payment in India and within their surrender values], in the manner following, namely, twenty-five per cent. of the said sum in Government securities and a further sum equal to not less than thirty per cent. of the said sum in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

Explanation.—The provisions of this sub-section shall apply also to insurers incorporated in or domiciled in the United Kingdom.

(2) An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than the sum of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 [1][or section 98] by the insurer in respect of his life insurance business and less any amount due to the insurer on loans granted by him on policies of life insurance [2][maturing for payment in India and within their surrender values,] in the manner following, namely, thirty-three and one-third per cent. of the said sum in Government securities, and the balance in Government securities, or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

(3) An insurer carrying on business at the commencement of this Act to whom sub-section (1) or sub-section (2) applies shall before the expiry of four years from the commencement of this Act invest the total amount required to be invested by those sub-sections in the manner required thereby:

Provided that of such total amount the insurer shall have invested not less than one-fourth in securities of the nature specified in sub-section (1) before the expiry of one year, not less than one-half before the expiry of two years, and not less than three-fourths before the expiry of three years from the [3][30th day of June, 1939].

(4) The assets required by this section to be held invested by an insurer to whom sub-section (2) applies shall be held in trust for the discharge of claims of the nature referred to in sub-section (2) and shall be vested in trustees resident in British India and approved by the Central Government by an instrument of trust which shall be executed by the insurer and approved by the Central Government and shall define the manner in which alone the subject matter of the trust shall be dealt with.

Explanation.—Sub-sections (2) and (4) shall apply to an insurer incorporated in British India whose share capital to the extent of one-third is

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LEG. REF.

[1] Inserted by S. 10, Act XI of 1939.

[2] These words were inserted, *ibid.*

[3] Substituted for the words "commencement of this Act" by S. 5, Act XX of 1940.

owned by, or the members of whose Governing Body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom.

Statement of investments of assets.

28. [1][(1) Every insurer registered under this Act carrying on the business of life insurance shall every year, within thirty-one days from the beginning of the year, submit to the Superintendent of Insurance a statement showing as at the 31st day of December of the preceding year the assets held invested in accordance with section 27, and all other particulars necessary to establish that the requirements of that section have been complied with, and such statement shall be certified by a principal officer of the insurer.

(2) Every such insurer shall also furnish, within fifteen days from the last day of March, June and September, a statement certified as aforesaid showing as at the end of each of the said months the assets held invested in accordance with section 27.

(3) The Superintendent of Insurance may at his discretion require any insurer to whom sub-section (1) applies to submit before the 1st day of August in each of any year a statement of the nature referred to in sub-section (1), certified as required by that sub-section and prepared as at the 30th day of June.

(4) In the case of an insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance may, on application made by the insurer, extend the periods of fifteen and thirty-one days mentioned in the foregoing sub-sections to thirty days and sixty days, respectively.]

[2][(5)] The Superintendent of Insurance shall be entitled at any time to take such steps as he may consider necessary for the inspection or verification of the assets invested in compliance with section 27 [3][or for the purpose of securing the particulars necessary to establish that the requirements of that section have been complied with]. [4][The insurer shall comply with any requisition made in this behalf by the Superintendent of Insurance, and if he fails to do so within two months from the receipt of the requisition he shall be deemed to have made default in complying with the requirements of this section.]

Proribition of loans.

29. [5][(1)] No insurer shall grant loans or temporary advances either on hypothecation of property or on personal security or otherwise, except loans on life policies issued by him within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer if a company, or where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, officer or partner holds the position of a director, manager managing agent, actuary, officer or partner:

Provided that nothing herein contained shall apply to loans made by an insurer to a banking company:

Provided further that every existing loan to any director, manager, managing agent, auditor, actuary, officer or partner, notwithstanding any contract to the contrary, shall be repaid within one year from the commencement of this Act, and in case of default, such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of one year from the commencement of this Act:

LEG. REF.

[1] Substituted for the original sub-section (1) by S. 18, Act XIII of 1941.

[2] Re-numbered (5) by, *ibid*.

[3] Inserted by S. 6, Act XX of 1940.

[4] Substituted for the words "and the insurer shall comply with all requisitions made by the Superintendent in that behalf", *ibid*.

[5] Re-numbered as sub-S. (1) of that section by S. 19, Act XIII of 1941.

Provided further that nothing in this section shall prohibit a company from granting such loans or advances to a subsidiary company or to any other company of which the company granting the loan or advance is a subsidiary company.

[1] [(2) The provisions of section 86-D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of an insurer being a company, if the loan is one granted on the security of a policy on which the insurer bears the risk and the policy was issued to the director on his own life, and the loan is within the surrender value of the policy.]

Liability of directors, etc., for loss due to contraventions of Ss. 27 and 29.

30. If by reason of a contravention of any of the provisions of section 27 or section 29, any loss is sustained by the insurer or by the policy-holders, every director, manager, managing agent, officer or partner who is knowingly a party to such contravention shall, without prejudice to any other penalty to which he may be liable under this Act, be jointly and severally liable to make good the amount of such loss.

Assets of insurer how to be kept.

31. None of the assets in British India of any insurer shall, except in the case of deposits made with the Reserve Bank of India under section 7 [2][or section 98] or in so far as assets are required to be vested in trustees by sub-section (4) of section 27, be kept otherwise than [3][in the name of a public officer approved by the Central Government, or] in the corporate name of the undertaking, if a company, or in the name of the partners, if a firm, or in the name of the proprietor, if an individual.

Limitation on employment of managing agents and on the remuneration payable to them.

32. (1) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business.

(2) Where any insurer engaged in the business of insurance before the commencement of this Act employs a managing agent for the conduct of his business, then, notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in the articles of the insurer, if a company, or in any agreement entered into by the insurer, such managing agent shall cease to hold office on the expiry of three years from the commencement of this Act and no compensation shall be payable to him by the insurer by reason only of the premature termination of his employment as managing agent.

(3) After the commencement of this Act, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the articles of association of an insurer being a company, no insurer shall pay to a managing agent and no managing agent shall accept from an insurer as remuneration for his services as managing agent more than two thousand rupees per month in all, including salary and commission and other remuneration payable to and receivable by him, for his services as managing agent.

INSPECTION.

Power of Superintendent of Insurance to order inspection.

33. (1) If the Superintendent of Insurance has reason to believe that the interests of the policy-holders of an insurer are in danger or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of this Act, or that an offence under this Act has been or is likely to be committed by an insurer or any officer of an

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LEG. REF.

[1] Added by S. 19, Act XIII of 1941.

[2] Inserted by S. 12, Act XI of 1939.

[3] These words were inserted, *ibid.*

insurer, or if he receives a requisition in this behalf signed by shareholders of an insurer being a company not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity to be heard, [1][order an investigation of the affairs of the insurer to be made by an auditor or actuary, or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor, or may himself make such investigation:

Provided that an auditor or actuary appointed for this purpose by the Superintendent of Insurance shall not be an auditor or actuary in the employ of the insurer.]

(2) The Court may, on the application of an insurer and after giving notice to and hearing the Superintendent of Insurance, forbid such action by the Superintendent, if the insurer satisfies the Court that it is unnecessary in the circumstances:

[2][Provided that no application under this sub-section shall be entertained unless it is made before the expiration of three months from the date on which the Superintendent of Insurance intimates to the insurer his intention to take such action.]

[3][(3) The results of any investigation made under this section shall be recorded in writing by the auditor or actuary appointed or by the Superintendent of Insurance, as the case may be, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the investigation is completed a copy of such record, or where both an auditor and an actuary have been appointed, of each such record, shall be furnished by the Superintendent of Insurance to the insurer and to the shareholders or the policy-holders who have sent a requisition for such an investigation.]

(4) The Superintendent of Insurance may require the insurer to comply within a time to be specified by him (not being less than fifteen days from the receipt of the notice by the insurer) with any directions he may issue to remedy defects disclosed by such inspection.

(5) If, as a result of any investigation made under this section, the Superintendent of Insurance is of opinion that it is necessary in the interests of the policy-holders that the business of the insurer should be wound up, or if the insurer fails to comply with any directions issued under sub-section (4), the Superintendent may, after giving notice to the insurer and giving him an opportunity to be heard, apply to the Court to have the business of the insurer wound up.

Powers of investigator.

34. When any investigation is made in pursuance of section 33 the provisions of section 140 of the Indian Companies Act, 1913, shall apply for the purposes of such investigation as they apply to an investigation made in pursuance of section 138 of that Act, and all expenses of and incidental to such investigation [4][including any expenses incurred before the making of an order by the Court under sub-section (2) of section 33] shall be defrayed by the insurer, [5][shall have priority over other debts due from the insurer and shall be recoverable as an arrear of land-revenue].

LEG. REF.

[1] Substituted for the words "appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, or may himself make such investigation" by S. 20, Act XIII of 1941.

[2] This proviso was added, *ibid.*

[3] This sub-section was substituted, *ibid.*

[4] Inserted (with retrospective effect) by S. 21, Act XIII of 1941.

[5] Added (with retrospective effect), *ibid.*

AMALGAMATION AND TRANSFER OF INSURANCE BUSINESS.

Amalgamation and transfer of insurance business.

35. (1) No life insurance business of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 shall be transferred to [1][any person or transferred to] or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Court having jurisdiction over one or other of the [2][parties concerned.]

(2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions as may be necessary for giving effect to the scheme.

(3) Before an application is made to the Court to sanction any such scheme, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason therefor shall, at least two months before the application is made, be sent to the Central Government, [3][and certified copies, four in number, of each of the following documents shall be furnished to the Central Government, and other such copies shall] during the two months aforesaid be kept open for the inspection of the members and policy-holders at the principal and branch offices and chief agencies of the insurers concerned, namely:—

(*a*) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer;

[4][(*b*) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule;

(*c*) actuarial reports and abstracts in respect of the life insurance business of each of the insurers so concerned, prepared in conformity with the requirements of Part II of the Fourth and Fifth Schedules and in accordance with the regulations contained in Part I of the Schedule concerned;

(*d*) a report on the proposed amalgamation or transfer, prepared by an independent actuary who has never been professionally connected with any of the parties concerned in the amalgamation or transfer at any time in the five years preceding the date on which he signs his report;

(*e*) any other reports on which the scheme of amalgamation or transfer was founded.

The balance-sheets, reports and abstracts referred to in clauses (*b*), (*c*) and (*d*) shall all be prepared as at the date at which the amalgamation or transfer if sanctioned by the Court is to take effect, which date shall not be more than twelve months before the date on which the application to the Court is made under this section:

Provided that if the Central Government so directs in the case of any particular insurer there may be substituted respectively for the balance-sheet, report and abstract referred to in clauses (*b*) and (*c*) prepared in accordance with this sub-section certified copies of the last balance-sheet and last report and abstract prepared in accordance with sections 11 and 13 [5][of this Act or sections 7 and 8 of the Indian Life Assurance Companies Act, 1912] if that balance-sheet

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LEG. REF.

[1] Inserted by S. 7, Act XX of 1940.

[2] Substituted for the words "insurers concerned", *ibid*.

[3] Substituted for the words "and certified copies of the following documents shall be furnished to the Central Government and shall" by S. 22, Act XIII of 1941.

[4] Substituted for the original Cls. (*b*) and (*c*) S. 7, Act XX of 1940.

[5] Inserted (with rethospective effect) by S. 22, Act XIII of 1941.

is prepared as at a date not more than twelve months, and that report and abstract as at a date not more than five years, before the date on which the application to the Court is made under this section.]

(4) Where an application under sub-section (3) is made to the Court within three months from the commencement of this Act, the Court may, on application, extend for the insurer whose business is to be transferred to or amalgamated with the business of another insurer, the time allowed for registration [1][under section 3 and for the payment of the instalments of the deposit under section 7 or section 98] for such period not exceeding nine months as the Court may think fit.

Sanction of amalgamation and transfer by Court.

36. When any application such as is referred to in sub-section (3) of section 35 is made to the Court, the Court shall cause, if for special reasons it so directs, notice of the application to be sent to every person resident in British India or in an Indian State who is the holder of a life policy of any insurer concerned and shall cause a statement of the nature and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct, and, after hearing the directors and such policy-holders as apply to be heard and any other persons whom it considers entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established [2][and shall make such consequential orders as are necessary to give effect to the arrangement, including orders as to the disposal of any deposit made under section 7 or section 98]:

[3][Provided that—

(*a*) no part of the deposit made by any party to the amalgamation or transfer shall be returned except where, after effect is given to the arrangement, the whole of the deposit to be made by the insurer carrying on the amalgamated business or the person to whom the business is transferred is completed,

(*b*) only so much shall be returned as is no longer required to complete the deposit last mentioned in clause (*a*), and

(*c*) while the deposit last mentioned in clause (*a*) remains uncompleted, no accession, resulting from the arrangement, to the amount already deposited by the insurer carrying on the amalgamated business or the person to whom the business is transferred shall be appropriated as payment or part payment of any instalment of deposit subsequently due from him under section 7 or section 98.]

Statements required after amalgamation and transfer.

37. Where an amalgamation takes places between any two or more insurers, or [4][where any business of an insurer is transferred] whether in accordance with a scheme confirmed by the Court or otherwise, the insurer carrying on the amalgamated business or [5][the person to whom the business is transferred] as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, [6][furnish in duplicate to the Central Government]—

(*a*) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and

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LEG. REF.

[1] Substituted for the words and figures "and for the payment of the first instalment of the deposit under sections 3 and 7" by S. 13, Act XI of 1939.

[2] Added by S. 8, Act XX of 1940.

[3] Proviso added by S. 23, Act XIII of 1941.

[4] Substituted for the words "where any business of one insurer is transferred to another" by S. 24, *ibid*.

[5] Substituted for the words "the insurer to whom the business is transferred" by *ibid*.

[6] Substituted for the words "furnish to the Central Government", *ibid*.

(*b*) [1][a declaration signed by every party concerned] or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

[2][(*c*) where the amalgamation or transfer has not been made in accordance with a scheme sanctioned by the Court under section 36—

(*i*) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(*ii*) certified copies of any other reports on which the scheme of amalgamation or transfer was founded.]

ASSIGNMENT OR TRANSFER OF POLICES AND NOMINATIONS.

Assignment and transfer of insurance policies.

38. (1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but [3][except where the transfer or assignment is in favour of the insurer] shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment [3][[4][and] either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorised agents] [5][have been delivered] to the insurer [6][* * *]:

[7][Provided that where the insurer maintains one or more places of business in British India, such notice shall be delivered only at the place in British India mentioned in the policy for the purpose or at his principal place of business in British India.]

(3) The date on which the notice referred to in sub-section (2) is delivered to the insurer shall regulate the priority of all claims under a transfer or assignment as between persons interested in the policy; and where there is more than one instrument of transfer or assignment the priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-section (2) are delivered.

(4) Upon the receipt of the notice referred to in sub-section (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice, and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

LEG. REF.

[1] Substituted for the words "a declaration signed by every insurer concerned" by S. 24, Act XIII of 1941.

[2] This clause was substituted, *ibid*.

[3] Inserted by S. 14, Act XI of 1939.

[4] Substituted for the words "together with" by S. 25, Act XIII of 1941.

[5] Substituted for the words "has been delivered", *ibid*.

[6] The words "at his principal place of business in British India by or on behalf of the transferor or transferee" were omitted by S. 14, Act XI of 1939.

[7] This proviso was added, *ibid*.

(5) [1][Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice referred to in sub-section (2),] recognise the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

[2][(6) Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this Act shall not be affected by the provisions of this section.]

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the [3][lifetime of the person whose life is insured], and an assignment in favour of the survivor or survivors of a number of persons, shall be valid.

Nomination by policy holder.

39. (1) The holder of a policy of life insurance [4][on his own life, [5]* * *] may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be [6][but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in records of the insurer.]

[7][(3) The insurer shall furnish to the policy-holder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.]

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination:

[8][Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.]

LEG. REF.

[1] Substituted for the words, brackets and figure "From the date of the receipt of the notice referred to in sub-section (2), the insurer shall," by S. 14, Act XI of 1939.

[2] This sub-section was substituted, *ibid*.

[3] Substituted for the words "life of the policy-holder", *ibid*.

[4] Inserted by S. 15, Act XI of 1939.

[5] The words 'not being an absolute assignee of the benefits under the policy," were omitted by S. 26, Act XIII of 1941.

[6] **Added by S. 15, Act XI of 1939.**

[7] This sub-section was substituted. *ibid*.

[8] Proviso added by S. 26, Act XIII of 1941.

NOTES.

Sec. 38 (7).—Though an assignment by a Mahomedan husband in favour of his wife be construed as contingent gift it would be nevertheless valid, as S. 38 (7) renders the Mahomedan Law of gift inapplicable to it, 1939 A.L.J. 1103=1939 All. 744=I.L.R. (1939) All. 957.

(5) Where the policy matures for payment during the [1][lifetime of the person whose life is insured] or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the [2][person whose life is insured], the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies.

COMMISSION AND REBATES AND LICENSING OF AGENTS.

Prohibition of payment by way of commission or otherwise for procuring business.

40. (1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent [3]* * * * * * * or a person acting on behalf of an insurer who for the purposes of insurance business employs [4]* insurance agents.

(2) No insurance agent [3]* * * * * shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of life insurance business, forty per cent. of the first year's premium payable on any policy or policies effected through him and five per cent. of a renewal premium, or, in the case of business of any other class, fifteen per cent. of the premium:

Provided that insurers, in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent. of the first year's premium payable on any policy or policies effected through them and six per cent. of the renewal premiums.

(3) Nothing in this section shall prevent the payment under any contract existing prior to the 27th day of January, 1937, of gratuities or renewal commission to [5][any person, whether an insurance agent within the meaning of this Act or not,] or to his representatives after his decease in respect of insurance business effected through him before the said date.

Prohibition of rebates.

41. (1) No person shall allow or offer to allow, either directly or indirectly, as an inducement to any person to [6][take out or renew or continue] an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person taking out or renewing [7][or continuing] a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer.

[8][Provided that the acceptance by an insurance agent of commission in connection with a policy of life insurance taken out by himself on his own life shall not be deemed to be acceptance of a rebate of premium within the meaning of this sub-section if at the time of such acceptance the insurance agent satisfies the prescribed conditions establishing that he is a *bona fide* insurance agent employed by the insurer.]

LEG. REF.

[1] Substituted for the words "lifetime of the policy-holder" by S. 15, Act XI of 1939.

[2] These words were substituted for the word "policy-holder", *ibid*.

[3] The words and figures "licensed under S. 42" were omitted by S. 16, *ibid*.

[4] The word "licensed" was omitted, *ibid*.

[5] Substituted for the words "an insurance agent" by S. 16, Act XI of 1939.

[6] These words were substituted for the words "effect or renew" by S. 27, Act XIII of 1941.

[7] These words were inserted, *ibid*.

[8] This proviso was added, *ibid*.

(2) Any person making default in complying with the provisions of this section shall be punishable with fine which may extend to one hundred rupees, unless the default is made by a person [1][taking out or renewing or continuing] a policy, in which case he shall be punishable with fine which may extend to fifty rupees only.

Licensing of insurance agents.

42. (1) The Superintendent of Insurance or an officer authorised by him in this behalf shall, in the prescribed manner and on payment of the prescribed fee which shall not be more than [2][three rupees], issue to any individual [3][making an application in the prescribed manner] and not suffering from any of the disqualifications hereinafter mentioned a licence to act as an insurance agent for the purpose of soliciting or procuring insurance business.

(2) A licence issued under this section shall entitle the holder to act as an insurance agent for any registered insurer.

(3) A licence issued under this section [4][shall remain in force for a period of twelve months only from the date of issue], but shall, if the applicant does not suffer from any of the disqualifications hereinafter mentioned, be renewed from year to year on payment of [5][the prescribed fee which shall not be more than three rupees, and an additional fee of a prescribed amount not exceeding one rupee by way of penalty if the application for renewal of the licence does not reach the issuing authority before the date on which the licence ceases to remain in force.]

[6][Provided that when any licence is issued or renewed within the year beginning on the day on which the Insurance (Amendment) Act, 1940, came into operation, the Superintendent of Insurance may specify the date, not being earlier than one year nor later than two years from the date of issue or renewal, on which the licence shall cease to be in force.

Provided further that the Central Government may, by notification in the official Gazette, make provision in respect of licences in force at the commencement of the Insurance (Amendment) Act, 1940, extending the period for which they are to remain in force by a term of from one to eleven months.]

(4) The disqualifications above referred to shall be the following:—

(*a*) that the person is a minor;

(*b*) that he is found to be of unsound mind by a Court of competent jurisdiction;

(*c*) that he has been found guilty of criminal misappropriation or criminal breach of trust or cheating [7][or forgery or an abetment of or attempt to commit any such offence] by a Court of competent jurisdiction;

[8][Provided that, where at least five years have elapsed since the completion of the sentence imposed on any person in respect of any such offence, the Superintendent of Insurance shall ordinarily declare in respect of such person that his conviction shall cease to operate as a disqualification under this clause;]

(*d*) that in the course of any judicial proceeding relating to any policy of insurance or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he has been guilty

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LEG. REF.

[1] Substituted for the words "effecting or renewing" by S. 27, Act XIII of 1941.

[2] Substituted for the words "one rupee" by S. 28, *ibid*.

[3] Substituted for the words "making an application under this section", *ibid*.

[4] Substituted for the words, figures and letters "shall expire on the 31st day of March in each year" by S. 9, Act XX of 1940.

[5] Substituted for the words "a fee of one rupee" by S. 28, Act XIII of 1941.

[6] Inserted by S. 9, Act XX of 1940.

[7] Inserted by S. 28, Act XIII of 1941.

[8] This proviso was added, *ibid*.

of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation [1][against an insurer or an insured.]

(5) If it be found that an insurance agent suffers from any of the foregoing disqualifications, without prejudice to any other penalty to which he may be liable, the Superintendent of insurance shall, and if the agent has knowingly contravened any provision of this Act may, cancel the licence issued to the agent under this section.

[2][(6) The authority which issued any licence under this section may issue a duplicate licence to replace a licence lost, destroyed or mutilated on payment of the prescribed fee which shall not be more than one rupee.]

Register of insurance agents.

43. (1) Every insurer and every person who acting on behalf of an insurer employs [3]* insurance agents shall maintain a register showing the name and address of every [2]* insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased.

(2) Any individual not holding a licence issued under section 42 who acts as an insurance agent shall be punishable with fine which may extend to fifty rupees, and any insurer who, or any person acting on behalf of an insurer who, appoints as an insurance agent any individual not so licensed, or transacts any insurance business in India through any such individual, shall be punishable with fine which may extend to one hundred rupees.

(3) The provisions of sub-section (2) shall not take effect until the expiry of six months from the commencement of this Act.

Prohibition of cessation of payments of commission.

44. Notwithstanding anything to the contrary in a contract between any person and an insurance agent [4]* * * forfeiting or stopping payment of renewal commission to such insurance agent, no such person shall in respect of life insurance business done in India refuse payment to an insurance agent, of commission on renewal premiums due to him under the agreement by reason only of the termination of his agreement except for fraud:

Provided that such agent has served such person continually and exclusively for at least ten years, and provided further that, after his ceasing to act as agent, he does not directly or indirectly solicit or procure insurance business for any other person.

SPECIAL PROVISIONS OF LAW.

Policy not to be called in question on ground of misstatement after two years.

45. No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement [5][was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made] by the policy-holder and that the policy-holder knew at the time of making it that the statement was false [6][or that it suppressed facts which it was material to disclose.]

LEG. REF.

[1] Substituted for the words "against an insurer or an assured", by S. 28, Act XIII of 1941.

[2] Added by S. 28, Act XIII of 1941.

[3] The word "licensed" was omitted by S. 29, *ibid*.

[4] The words "licensed under S. 42" were omitted by S. 30, *ibid*.

[5] Substituted for the words "was on a material matter and fraudulently made" by S. 31, Act XIII of 1941.

[6] These words were added, *ibid*.

[1][Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal.]

Application of British Indian law to policies issued in British India.

46. The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to receive payment in British India of any sum secured thereby and to sue for any relief in respect of the policy in any Court of competent jurisdiction in British India; and if the suit is brought in British India any question of law arising in connection with any such policy shall be determined according to the law in force in British India.

Payment of money into Court.

47. (1) Where in respect of any policy of life insurance maturing for payment an insurer is of opinion that by reason of conflicting claims to or insufficiency of proof of title to the amount secured thereby or for any other adequate reason it is impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, [2][the insurer may] before the expiry of nine months from the date of the maturing of the policy [3][or, where the circumstances are such that the insurer cannot be immediately aware of such maturing, from the date on which notice of such maturing is given to the insurer,] apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.

(2) A receipt granted by the Court for any such payment shall be a satisfactory discharge to the insurer for the payment of such amount.

(3) An application for permission to make a payment into Court under this section shall be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely:—

(*a*) the name of the insured person and his address;

(*b*) if the insured person is deceased, the date and place of his death;

(*c*) the nature of the policy and the amount secured by it;

(*d*) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received;

(*e*) the reasons why in the opinion of the insurer a satisfactory discharge cannot be obtained for the payment of the amount; and

(*f*) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into Court.

(4) An application under this section shall not be entertained by the Court if the application is made before the expiry of six months [4][from the maturing of the policy by survival, or from the date of receipt of notice by the insurer of the death of the insured, as the case may be].

(5) If it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it shall allow the

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LEG. REF.

[1] This proviso was added by S. 31, Act XIII of 1941.

[2] Substituted for the words "the insurer shall" by S. 32, Act XIII of 1941.

[3] These words were inserted by S. 18, Act XI of 1939.

[4] Substituted for the words "from the death of the insured, or the maturing of the policy by survival" by S. 18, Act XI of 1939.

amount to be paid into Court and shall invest the amount in Government securities pending its disposal.

(6) The insurer shall transmit to the Court every notice of claim received after the making of the application under sub-section (3), and any payment required by the Court as costs of the proceedings or otherwise in connection with the disposal of the amount paid into Court shall as to the costs of the application under sub-section (3) be borne by the insurer and as to any other costs be in the discretion of the Court.

(7) The Court shall cause notice to be given to every ascertained claimant of the fact that the amount has been paid into Court, and shall cause notice at the cost of any claimant applying to withdraw the amount to be given to every other ascertained claimant.

(8) The Court shall decide all questions relating to the disposal of claims to the amount paid into Court.

Directors of insurers being companies.

48. (1) Where the insurer is a company incorporated under the Indian Companies Act, 1913, [1][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] and carries on the business of life insurance, not less than one-fourth of the whole number of the directors of the company [2][shall notwithstanding anything to the contrary in the Articles of Association of the company be elected in the prescribed manner by the holders of policies of life insurance issued by the company].

[3][(2) Only and all persons holding otherwise than as assignees policies of life insurance issued by the company of such minimum amount and having been in force for such minimum period as may be prescribed shall be eligible for election as directors under sub-section (1), and only and all persons holding policies of life insurance issued by the company and having been in force at the time of the election for not less than six months shall be eligible to vote at such elections:

Provided that the assignment of a policy to the person who took out the policy shall not disqualify that person for being eligible for election as a director under sub-section (1).

(3) The Central Government may, for such period, or to such extent and subject to such conditions as may be specified by it in this behalf, exempt from the operation of this section—

(*a*) any Mutual Insurance Company as defined in clause (*a*) of sub-section (1) of section 95, in respect of which the Superintendent of Insurance certifies that in his opinion owing to the conditions governing membership of the company or to the nature of the insurance contracts undertaken by it the application of the provisions of this sub-section to the company is impracticable, or

(*b*) any company in respect of which the Superintendent of Insurance certifies that in his opinion the company, having taken all reasonable steps to achieve compliance with the provisions of this section, has been unable to obtain the required number of directors with the required qualifications.]

[4][[5][(4)] This section shall not take effect, in respect of any company in existence at the commencement of this Act, until the expiry of one year therefrom,

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LEG. REF.

[1] These words and figures were inserted by S. 19, *ibid*.

[2] Substituted by S. 33, Act XIII of 1941.

[3] These sub-section were inserted, *ibid*.

[4] Substituted by S. 19, Act XI of 1939.

[5] The original sub-S. (2) was re-numbered (4) by S. 33, Act XIII of 1941.

and in respect of any company incorporated after the commencement of this Act, until the expiry of two years from the date of registration to carry on life insurance business.]

Restriction on dividends and bonuses.

[1][49. No insurer, being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, who carries on the business of life insurance or any other class or sub-class of insurance business to which section 13 applies shall for the purpose of declaring or paying any dividend to share-holders or any bonus to policy-holders or of making any payment in service of any debentures, utilize directly or indirectly any portion of the life insurance fund or of the fund of such other class or sub-class of insurance business, as the case may be, except a surplus shown in the valuation balance-sheet in Form I as set forth in the Fourth Schedule submitted to the Superintendent of Insurance as part of the abstract referred to in section 15 as a result of an actuarial valuation of the assets and liabilities of the insurer; nor shall he increase such surplus by contributions out of any reserve fund or otherwise unless such contributions have been brought in as revenue through the revenue account applicable to that class or sub-class of insurance business on or before the date of the valuation aforesaid, except when the reserve fund is made up solely of transfers from similar surpluses disclosed by valuations in respect of which returns have been submitted to the Superintendent of Insurance under section 15 of this Act or to the Central Government under section 11 of the Indian Life Assurance Companies Act, 1912:

Provided that payments made out of any such surplus in service of any debentures shall not exceed fifty per cent. of such surplus including any payment by way of interest on the debentures, and interest paid on the debentures shall not exceed ten per cent. of any such surplus except when the interest paid on the debentures is offset against the interest credited to the fund or funds concerned in deciding the interest basis adopted in the valuation disclosing the aforesaid surplus.]

Notice of options available to the assured on the lapsing of a policy.

50. An insurer shall, [2][before the expiry of three months from the date on which the premiums in respect of a policy of life insurance were payable but not paid], give notice to the policy-holder informing him of the options available to him [3][unless these are set forth in the policy.]

Supply of copies of proposals and medical reports.

51. Every insurer shall, on application by a policy-holder and on payment of a fee not exceeding one rupee, supply to the policy-holder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith.

Prohibition of business on dividing principle.

52. [4][(1)] No insurer shall after the commencement of this Act begin, or after three years from that date continue to carry on, any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits:

Provided that nothing in this section shall be deemed to prevent an insurer from allocating bonuses to holders of policies of life insurance as a result of a periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses or otherwise:

LEG. REF.

[1] Substituted by S. 34, *ibid*.

[2] Substituted for the words "within three months of the lapsing of a policy of life insurance," by S. 20, Act XI of 1939.

[3] Added by S. 35, Act XIII of 1941.

[4] S. 52 was re-numbered as sub-S. (1) of that section by S. 36, *ibid*.

Provided further that an insurer who continues to carry on insurance business on the dividing principle after the commencement of this Act shall withhold from distribution a sum of not less than forty per cent. of the premiums received during each year after the commencement of this Act in which such business is continued so as to make up the amount required for investment under section 27.

[1][(2) On the expiry of the period of three years referred to in sub-section (1), or on the insurer's ceasing before such expiry but at any time after the commencement of the Insurance (Amendment) Act, 1941, to carry on business on the dividing principle, the insurer shall forthwith cause an investigation to be made by an actuary, who shall determine the amount accumulated out of the contributions received from the holders of all policies to which the dividing principle applies and the extent of the claims of those policy-holders against the realisable assets of the insurer, and shall, before the expiration of six months from the date on which he is entrusted with the investigation, make recommendations regarding the distribution, whether by cash payments or by the allocation of paid up policies or by a combination of both methods, of such assets as he finds to appertain to such policy-holders; and the insurer shall, before the expiry of six months from the date on which the actuary makes his recommendations, distribute such assets in accordance with those recommendations.

(3) Where at any time prior to the commencement of the Insurance (Amendment) Act, 1941, an insurer has ceased to carry on business on the dividing principle, the insurer shall, before the expiration of two months from the commencement of that Act, report to the Superintendent of Insurance the measures taken or proposed by him for the distribution among holders of policies to which the dividing principle applies of the assets due to them: and the Superintendent of Insurance may either sanction such measures or refuse his sanction, and, if he refuses his sanction or if the insurer does not report to him as required by this sub-section, the provisions of sub-section (2) shall apply to the insurer forthwith.]

WINDING UP.

Winding up by the Court.

53. (1) The Court may order the winding up in accordance with the Indian Companies Act, 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this [2][Act] apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—

(*a*) if with the sanction of the Court previously obtained a petition in this behalf is presented by shareholders not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or by not less than fifty policy-holders holding, policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees; or

(*b*) if the Superintendent of Insurance, who is hereby authorised to do so, applies in this behalf to the Court on any of the following grounds, namely:—

(*i*) that the company has failed to deposit or to keep deposited with the Reserve Bank of India the amount required by section 7 [3][or section 98],

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LEG. REF.

[1] Added by S. 36, Act XIII of 1941.

[2] This word was substituted for the word "Chapter" by S. 37, Act XIII of 1941.

[3] Inserted by S. 37, Act XIII of 1941.

NOTES.

Sec. 53 (1).—Court means principal Court of Original Jurisdiction (*i.e.*) the District Court. Hence District Court has Jurisdiction to hear an application instituted under S. 53 of the Insurance Act and not any particular Judge of that Court. 1940 A.M.L.J. 86.

(ii) that the company having failed to comply with any requirement of this Act has continued such failure [1][or having contravened any provision of this Act has continued such contravention] for a period of three months after notice of such failure [1][or contravention] has been conveyed to the company by the Superintendent of Insurance,

[(iii) that it appears from the returns furnished under the provisions of this Act or from the results of any investigation made thereunder that the company is insolvent; or

(iv) that the continuance of the company is prejudicial to the interests of the policy-holders.

Voluntary winding up.

54. Notwithstanding anything contained in the Indian Companies Act, 1913, an insurance company shall not be wound up voluntarily except for the purpose of effecting an amalgamation or a re-construction of the company, or on the ground that by reason of its liabilities it cannot continue its business.

Valuation of liabilities.

55. (1) In the winding up of an insurance company or in the insolvency of any other insurer the value of the assets and the liabilities of the insurer shall be ascertained in such manner and upon such basis as the liquidator or receiver in insolvency thinks fit, subject, so far as applicable, to the rule contained in the Sixth Schedule and to any directions which may be given by the Court.

(2) For the purposes of any reduction by the Court of the amount of the contracts of any insurance company the value of the assets and liabilities of the company and all claims in respect of policies issued by it shall be ascertained in such manner and upon such basis as the Court thinks proper having regard to the rule aforesaid.

(3) The rule in the Sixth Schedule shall be of the same force and may be repealed, altered or amended as if it were a rule made in pursuance of section 246 of the Indian Companies Act, 1913, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of insurance companies.

Application of surplus assets of life insurance fund in liquidation or insolvency.

56. (1) In the winding up of an insurance company and in the insolvency of any other insurer the value of the assets and the liabilities of the insurer in respect of life insurance business shall be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets shall be applied to the discharge of any liabilities other than those in respect of life insurance business except in so far as those assets exceed the liabilities in respect of life insurance business;

(2) In the winding up of an insurance company carrying on the business of life insurance or in the insolvency of any other insurer carrying on such business where any proportion of the profits of the insurer was before the commencement of the winding up or insolvency allocated to policy-holders, if, when the assets and liabilities of the insurer have been ascertained, there is found to be a surplus of assets over liabilities (hereinafter referred to as a *prima facie* surplus) there shall be added to the liabilities of the insurer in respect of the life insurance business an amount equal to such proportion of the *prima facie* surplus as is equivalent to such proportion of the profits allocated to shareholders and policy-holders as was allocated to policy-holders during the ten years immediately proceding the commencement of the winding up and the assets of the insurer shall be deemed to exceed his liabilities only in so far as those assets exceed those liabilities after such addition:

LEG. REF.

[1] Inserted by S. 37, Act XIII of 1941.

Provided that—

(*a*) if in any case there has been no such allocation or if it appears to the Court that by reason of special circumstances it would be inequitable that the amount to be added to the liabilities of the insurer in respect of the life insurance business should be an amount equal to such proportion as aforesaid, the amount to be so added shall be such amount as the Court may direct; and

(*b*) for the purpose of the application of this sub-section to any case where before the commencement of the winding up or insolvency a proportion of such profits as aforesaid of a branch only of the life insurance business in question has been allocated to policy-holders, the value of the assets and liabilities of the insurer in respect of that branch shall be separately ascertained in like manner as the value of his assets and liabilities in respect of the life insurance business was ascertained, and the surplus so found, if any, of assets over liabilities shall, for the purpose of determining the amount to be added to the liabilities of the insurer in respect of the life insurance business be deemed to be the *prima facie* surplus.

Winding up of secondary companies.

57. (1) Where the insurance business or any part of the insurance business of an insurance company has been transferred to another insurance company under an arrangement in pursuance of which the first mentioned company (in this section referred to as the secondary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section referred to as the principal company) then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the secondary company to be wound up in conjunction with the principal company and may by the same or any subsequent order appoint the same person to be liquidator for the two companies and make provision for such other matters as may seem to the Court necessary with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the secondary company.

(3) In adjusting the rights and liabilities of the members of the several companies among themselves the Court shall have regard to the constitution of the companies and to the arrangements entered into between the companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as circumstances admit.

(4) Where any company alleged to be secondary is not in process of being wound up at the same time as the principal company to which it is alleged to be secondary, the Court shall not direct the secondary company to be wound up, unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is secondary to the principal company and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or secondary company.

(6) Where a company stands in the relation of a principal company to one insurance company and in the relation of a secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles laid down in this section.

Schemes for partial winding up of insurance companies.

58. (1) If at any time it appears expedient that the affairs of an insurance company in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purposes may be prepared and submitted for confirmation of the Court in accordance with the provisions of this Act.

(2) Any scheme prepared under this section shall provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise on the proposed winding up), for any future rights of every class of policy-holders in respect of their policies and for the manner of winding up any of the affairs of the company which are proposed to be wound up and may contain provisions for altering the memorandum of the company with respect to its objects and such further provisions as may be expedient for giving effect to the scheme.

(3) The provisions of this Act relating to the valuation of liabilities of insurers in liquidation and insolvency and to the application of surplus assets of the life insurance fund in liquidation or insolvency shall apply to the winding up of any part of the affairs of a company in accordance with the scheme under this section in like manner as they apply in the winding up of an insurance company, and any scheme under this section may apply with the necessary modifications any of the provisions of the Indian Companies Act, 1913, relating to the winding up of companies.

(4) An order of the Court confirming a scheme under this section whereby the memorandum of a company is altered with respect to its object shall as respects the alteration have effect as if it were an order confirmed under section 12 of the Indian Companies Act, 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly.

Return of deposits.

59. In the winding up of an insurance company and in the insolvency of any other insurer the liquidator or assignee as the case may be shall apply to the Court for an order for the return of the [1][deposit made by the company or the insurer, as the case may be, under section 7 or section 98] and the Court shall on such application order a return of the deposit subject to such terms and conditions as it shall direct.

Notice of policy values.

60. In the winding up of an insurance company for the purposes of a cash distribution of the assets and in the insolvency of any other insurer the liquidator or assignee as the case may be in the case of all persons appearing by the books of the company or other insurer to be entitled to or interested in the policies granted by the company or other insurer shall ascertain the value of the liability of the company or other insurer to each such person and shall give notice of such value to those persons in such manner as the Court may direct and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in such manner and within such time as may be specified by a rule or order of the Court.

Power of Court to reduce contracts of insurance.

61. (1) Where an insurance company is in liquidation or any other insurer is insolvent the Court may make an order reducing the amount of the insurance contracts of the company or other insurer upon such terms and subject to such conditions as the Court thinks just.

LEG. REF.

[1] Substituted for the words and figures "deposit made by the company under S. 7" by S. 22, Act XI of 1939.

(2) Where a company carrying on the business of life insurance has been proved to be insolvent, the Court may if it thinks fit in place of making a winding up order reduce the amount of the insurance contracts of the company upon such terms and subject to such conditions as the Court thinks fit.

(3) Application for an order under this section may be made either by the liquidator or by or on behalf of the company or by a policy-holder, or by the Superintendent of Insurance and the Superintendent of Insurance and any person whom the Court thinks likely to be affected shall be entitled to be heard on any such application.

SPECIAL PROVISIONS RELATING TO EXTERNAL COMPANIES.

Power of Central Government to impose reciprocal disabilities on non-Indian companies.

62. Where, by the law or practice of any country outside India in which an insurer carrying on insurance business in British India is constituted, incorporated or domiciled, insurance companies incorporated in British India are required as a condition of carrying on insurance business in that country to comply with any special requirements whether as to the keeping of deposits of assets in that country or otherwise which is not imposed upon insurers of that country under this Act, the Central Government shall, if satisfied of the existence of such special requirement, by notification in the Official Gazette, direct that the same requirement, or requirements as similar thereto as may be, shall be imposed upon insurers of that country as a condition of carrying on the business of insurance in British India.

Particulars to be filed by insurers established outside British India.

63. Every insurer, having his principal place of business or domicile outside British India, who establishes a place of business within British India, or appoints a representative in British India with the object of obtaining insurance business, shall within three months from the establishment of such place of business or the appointment of such [1][representative], file with the Superintendent of Insurance—

(*a*) a certified copy of the charter, statutes, deed of settlement or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not written in the English language, a certified translation thereof,

(*b*) a list of the directors, if the insurer is a company,

(*c*) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power certified translation thereof,

(*d*) the full address of the principal office of the insurer in British India;

(*e*) a statement of the classes of insurance business to be carried on by the insurer, and

(*f*) a statement verified by an affidavit setting forth the special requirements, if any, of the nature specified in section 62 imposed in the country of origin of the insurer on Indian nationals;

and, in the event of any alteration being made in the address of the principal office or in the classes of business to be carried on, or in any instrument here referred to, or in the name of any of the persons here referred to, or in the matters specified in clause (*f*) above, the company shall forthwith furnish to the Superintendent of Insurance particulars of such alteration.

Books to be kept by insurers established outside British India.

64. Every insurer having his principal place of business or domicile outside British India shall keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements and abstracts which he is required under this Act to

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LEG. REF.

[1] Substituted for the word "agent" by S. 23, Act XI of 1939.

furnish to the Superintendent of Insurance in respect of the insurance business transacted by him, in India to be compiled and, if necessary, checked by the Superintendent of Insurance.

PART III.

PROVIDENT SOCIETIES.

Definition of "provident society".

[1][65. (1) In this Part "provident society" means, a person who, or a body which, not being an insurer registered for the time being of persons (whether corporate or unincorporate) under Part II of this Act, carries on the business of insuring the payment, on the happening of any of the contingencies mentioned in sub-section (2), of—

(*a*) an annuity of or equivalent to fifty rupees or less, payable for an uncertain period; or

(*b*) a gross sum of five hundred rupees or less, whether paid or payable in a lump sum or in two or more instalments over a certain period,

exclusively in both cases (*a*) and (*b*) of any profit or bonus not being a guaranteed profit or bonus.

Explanation.—For the purposes of this sub-section, a period is "certain" if its duration is ascertainable in advance and "uncertain" if its duration is not so ascertainable.

(2) The contingencies referred to in sub-section (1) are the following, namely:—

(*a*) the birth, marriage or death of any person or the survival by a person of a stated or implied age or contingency;

(*b*) failure of issue;

(*c*) the occurrence of a social, religious or other ceremonial occasion;

(*d*) loss of or retirement from employment;

(*e*) disablement in consequence of sickness or accident;

(*f*) the necessity of providing for the education of a dependent;

(*g*) any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

(3) For the purposes of sub-section (1) and (2)—

(*a*) contracts entered into before the commencement of this Act shall not be taken into account;

(*b*) two or more policies issued to one person shall, for the purposes of determining whether the limits fixed by sub-section (1) have or have not been exceeded, be deemed to be one policy if the contingencies on the happening of which the sums are payable under the policies (whether the contingencies be the same or different) relate to one person only, whether he be the policy-holder or some other person.

(4) Every person or body of persons for the time being registered as a provident society under the Provident Insurance Societies Act, 1912, and every person or body of persons for the time being registered as a provident society under this Act shall be deemed to be a provident society for all the purposes of this Act.

(5) If any question arises whether any person or body of persons is or is not a provident society within the meaning of this section, the Superintendent of Insurance shall decide the question and his decision shall be final.]

LEG. REF.

[1] **Substituted (with retrospective effect) by S. 10, Act XX of 1940.**

Restrictions on provident societies.

[1][66. No provident society shall undertake any form of insurance not falling within the limits fixed by sub-section (1) of section 65, nor shall any provident society be eligible to be registered under section 3.]

Name.

67. No provident society established after the commencement of this Act shall adopt as its name, and no provident society established before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name, any combination of words which fails to include the word "provident" or which includes the word "life".

Insurable interest.

68. No provident society shall receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium or contribution or the wife, husband, child, grand-child, parent, brother or sister, nephew or niece of such a person.

Dividing business.

69. (1) No provident society shall carry on any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on [2][the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits].

(2) The Superintendent of Insurance shall, as soon as possible, take steps to have any provident society which carries on business on the dividing principle wound up:

Provided that, where any such provident society in existence at the commencement of this Act applies within three months of such commencement to the Superintendent of Insurance for permission to continue carrying on its business with a view meanwhile to reorganise its business in accordance with the provisions of this Act, the Superintendent of Insurance may at his discretion, with due regard to the past history of the society, permit the society to continue business for a period not exceeding two years from the date of receipt of such permission, so however that no new business on the dividing principle is undertaken by the society.

[3][(3) Where after the commencement of the Insurance (Amendment) Act, 1941, a provident society is to be wound up in pursuance of this section, or where, whether before or after the commencement of that Act, a provident society ceases to carry on business on the dividing principle, the provisions of sub-section (2) and sub-section (3) of section 52 shall, so far as may be, apply in like manner as they apply to an insurer ceasing to carry on business on the dividing principle.]

Registration.

70. (1) No provident society except a provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall receive any premium or contribution until it has obtained from the Superintendent of Insurance a certificate of registration.

(2) Every application for registration shall be accompanied by—

(*a*) a certified copy of the rules of the society, and when the society is a company incorporated under the Indian Companies Act, 1913, [4][or under the

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LEG. REF.

[1] Substituted (with retrospective effect) by S. 10, Act XXof 1940.

[2] Substituted for the words "the results of a distribution, amongst policies maturing for payment within certain time-limits, of certain sums" by S. 38, Act XIII of 1941.

[3] Added by *ibid*.

[4] Inserted by S. 39, *ibid*.

Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] a certified copy of the Memorandum and Articles of Association or where the society is not such a company a certified copy of the deed of constitution of the society;

(*b*) the names and addresses of the proprietors or directors, and the managers of the society [1][the full address of the registered office of the society, the full address of the principal office of the society in British India, the name of the manager at such office, and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the society];

(*c*) a certificate from the Reserve Bank of India that the initial deposit referred to in section 73 has been made; [2][* *];

(*d*) a declaration verified by an affidavit that the minimum working capital required by section 72, is available; [3][and

(*e*) the prescribed fee for registration being not more than two hundred rupees.]

(3) The Superintendent of Insurance may refuse to issue a certificate of registration until he is satisfied that the rules of the society comply with the provisions of this Act and that the minimum working capital required by section 72 is available, but if he is so satisfied he shall register the society and its rules.

(4) The Superintendent of Insurance may, after giving previous notice in writing in such manner as he thinks fit specifying the grounds for the proposed cancellation, and allowing the society concerned an opportunity of being heard, apply to the Court and obtain sanction for cancellation of the registration made under this section or made under the provisions of the Provident Insurance Societies Act, 1912,—

(*a*) if he is satisfied as the result of an inquiry made under section 87—

(i) that the society is insolvent or is likely to become so, or

(ii) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business,

(*b*) if the initial deposit or any of the further deposits required by section 73 has not been made; or

(*c*) if the society, having failed to comply with any requirement [4][or having contravened any provision] of this Act, has continued such failure [4][or contravention], for a period of one month after notice of such failure [4][or contravention] has been conveyed to the society by the Superintendent of Insurance:

Provided that the Superintendent of Insurance may, if he thinks fit, instead of applying for cancellation of the registration under sub-clause (*i*) of clause (*a*) of this sub-section make a recommendation to the Court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate.

[5][Provided further that the Superintendent of Insurance may, without previous notice and without application to the Court for sanction,—

(*a*) cancel the registration of a provident society, which has failed to have its registration renewed; or

(*b*) cancel, on such terms and conditions as he thinks fit, the registration of any provident society which applies to him for such cancellation if he is satisfied

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LEG. REF.

[1] Added by S. 38, Act XIII of 1941.

[2] Omitted by *ibid*.

[3] The word "and" and clause (*c*) where added, *ibid*.

[4] Inserted by *ibid*.

[5] This proviso was added, *ibid*.

that the society has ceased to carry on insurance business and that all it liabilities in respect of insurance policies are either satisfied or otherwise provided for.]

[1][(5) When a registration is cancelled the provident society shall not, after the cancellation has taken effect, enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by it before such cancellation takes effect shall, subject to the provisions of section 88, continue as if the cancellation had not taken place.

(6) Where a registration is cancelled under clause (*b*) of sub-section (4), or because the society has failed to have its registration renewed, the Superintendent of Insurance may at his discretion revive the registration if the provident society, within six months from the date on which the cancellation took effect, makes the deposits required by section 73 or has had an application under sub-section (3) of section 70-A accepted, as the case may be, and complies with any directions which may be given to it by the Superintendent of Insurance.]

Renewal of registration.

[2][70-A. (1) Every provident society registered under this Act, or under the Provident Insurance Societies Act, 1912, shall have its registration renewed annually for each period of twelve months after that ending on the 30th day of June, 1942.

(2) An application for the renewal of a registration shall be made by the society to the Superintendent of Insurance before the 30th day of June preceding the period for which renewal is sought, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed two hundred rupees but may vary according to the volume of insurance business done by the society.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(4) If a provident society fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as he has taken no action under section 88 to have the society wound up, accept an application for renewal of registration on receipt from the society of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by the society, as he may require.

(5) The Superintendent of Insurance shall, on being satisfied that the society has fulfilled the requirements of this section, renew the registration and grant it a certificate of renewal of registration.

Supplementary information and reports of alterations in particulars furnished with application for registration.

70-B. (1) Every provident society registered under section 70 before the commencement of the Insurance (Amendment) Act, 1941, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance such particulars in addition to those already supplied for the purpose of obtaining registration as are required by sub-section (2) of section 70 of this Act as amended by the Insurance (Amendment) Act, 1941.

(2) Every provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to

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LEG. REF.

[1] Added by S. 39, Act XIII of 1941. [2] Inserted by S. 40, *ibid*.

the Superintendent of Insurance so far as it has not already done so the documents and information required by clauses (*a*) and (*b*) of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section.

(3) When any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section, or are to be furnished to the Superintendent of Insurance under this section, the provident society shall furnish forthwith to the Superintendent of Insurance full particulars duly authenticated of such alteration.]

Prohibition of managing agents.

71. The provisions of section 32 shall apply to provident societies as they apply to insurers.

Working capital.

72. No provident society [1]* * * * * * shall be registered unless it has a paid up capital sufficient to provide as working capital a net sum of not less than five thousand rupees exclusive of deposits made under this Act and exclusive in the case of a company of any expenses incurred in connection with the formation of the company.

Deposits.

73. (1) Every provident society shall, if established before the commencement of this Act within one year from such commencement, or, if established after the commencement of this Act before the society applies for registration under section 70, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of deposit to five thousand rupees, and shall thereafter [2][make in each calendar year] a further deposit amounting to not less than one-fifth of the gross premium [3][income for the preceding calendar year] (including admission fees and other fees received by the society) until the total amount so deposited and kept is fifty thousand rupees.

(2) The provisions of sub-sections (8), (9), [4][(9-A), (9-B)] and (10) of section 7 and of sub-section (1) of section 8 [5][and of section 9] shall apply to the deposits made under this section as they apply to deposits made by an insurer.

Rules.

74. (1) Every provident society [6]* * * * * shall in its rules set forth—

(*a*) the name, the object and the location of the registered office of the society;

(*b*) the contingencies or classes of contingency on the happening of which money is to be paid;

(*c*) the conditions to be complied with before, and the payments to be made on, admission to the society;

(*d*) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable;

LEG. REF.

[1] The words "established after the commencement of this Act" were omitted by S. 41, Act XIII of 1941.

[2] Substituted for the words "make each year" by S. 25, Act XI of 1939.

[3] Substituted for the words "income for the year", *ibid*.

[4] Inserted by S. 11, Act XX of 1940.

[5] These words and figures were inserted, *ibid*.

[6] The words "established after the commencement of this Act" were omitted by S. 42, Act XIII of 1941.

(*e*) the maximum amount payable to a subscriber or policy-holder;

(*f*) the nature and amounts of the benefits provided for by the society;

(*g*) the circumstances in which a bonus may be paid to a policy-holder;

(*h*) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid;

(*i*) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on a policy may be returned, or a surrender value of a policy may be granted;

(*j*) the penalties for delay in paying or failure to pay premiums or contributions;

(*k*) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society;

(*l*) the person or persons who or the authority which shall have power to invest the funds of the society;

(*m*) the provisions for appointment of auditors and their remuneration;

(*n*) the procedure to be adopted in altering the rules of the society;

(*o*) unless these are provided for in the articles of association of a society which is a company incorporated under the Indian Companies Act, 1913, [1][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,]—

(*i*) the mode of appointment and removal, the qualification and the powers of a director, manager, secretary or other officer of the society;

(*ii*) the manner of raising additional capital, and

(*iii*) the provisions for the holding of general meetings of the members and policy-holders and for the powers to be exercised and the procedure to be followed thereat; and

(*p*) such other matters as may be prescribed.

(2) Where the rules of any provident society registered under the Provident Insurance Societies Act, 1912, fail to comply with the provisions of this section the society shall, before the expiry of twelve months from the commencement of this Act, amend the rules so as to comply with these provisions.

Amendment of rules.

75. (1) No amendment of any rule of a provident society shall be valid until it has been sent to the Superintendent of Insurance and has been registered by him.

(2) The Superintendent of Insurance on being satisfied that the proposed amendment is not contrary to the provisions of this Act shall, unless he is of opinion that the amendment unfairly affects the rights of existing members or policy-holders of the society, issue to the society an acknowledgment of the registration of the amended rule.

Supply of copy of rules.

76. Every provident society shall on demand deliver free of cost to any member of the society a copy of the rules of the society and to any person other than a member a copy of such rules on the payment of a sum not exceeding one rupee.

Registered office.

77. Every provident society [2][shall have in British India a principal office] (on the outside of which it shall keep displayed its name in a conspicuous position in legible characters) to which all communications and notices may be addressed, and shall give notice to the Superintendent of Insurance of any change in the location thereof within twenty-eight days of its occurrence.

LEG. REF.

[1] Inserted by S. 42 Act XIII of 1941.

[2] Substituted for the words "shall have an office" by S. 43, Act XIII of 1941.

Publication of authorised capital to contain also subscribed and paid up capital.

78. Where any notice, advertisement or other official publication of a provident society contains a statement of the amount of the authorised capital of the society, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

Registers and books.

79. Every provident society [1][shall keep at its principal office in British India]—

[2][(*a*) such registers in such form as may be prescribed;]

[3][(*b*)] a cash book in which shall be entered separately for each class of contingency separately specified in section 65 all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place;

[3][(*c*)] a ledger.

[3][(*d*)] a journal.

Revenue account, balance-sheet and annual statements.

80. (1) Every provident society shall at the expiry of the calendar year prepare a revenue account and balance-sheet in the prescribed form verified in the prescribed manner, together with a report on the general state of the society's affairs and shall cause the revenue account and balance-sheet to be audited by an auditor, and the auditor shall so far as may be in the audit of a provident society have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities imposed on, an auditor of companies by section 145 of the Indian Companies Act, 1913.

(2) Every provident society shall at the expiry of the calendar year prepare with respect to that year—

(*a*) a statement showing separately for each class of contingency separately specified in section 65—

(*i*) the number of new policies effected, the total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and

(*ii*) the total amount of claims made and the total amount paid in satisfaction thereof;

(*b*) a statement showing details of every insurance effected on a life other than the life of the person insuring; and

(*c*) a statement showing the total amount paid as allowances to agents and canvassers.

(3) Until the expiry of two years from the commencement of this Act this section [4][and section 73] shall apply to provident societies registered before the commencement of this Act under the Provident Insurance Societies Act, 1912, as if the reference to the calendar year were a reference to either the financial year or the calendar year.

Actuarial report and abstract.

81. (1) Every provident society shall once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into its financial condition including the valuation of its liabilities and assets by an actuary.

LEG. REF.

[1] Substituted for the words "shall keep at its registered office" by S. 44, Act XIII of 1941.

[2] This clause was substituted for the original clauses (*a*) to (*d*), *ibid*.

[3] The original clauses (*e*), (*f*) and (*g*) were re-lettered, respectively, as clauses (*b*), (*c*) and (*d*), *ibid*.

[4] Inserted by S. 26 of the Insurance (Amendment) Act XI of 1939.

(2) The report of the actuary shall contain an abstract in which shall be stated—

(*a*) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained,

(*b*) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation,

(*c*) the reserve values held against policies effected.

(*d*) the rate of interest assumed, and

(*e*) the provision made for expenses,

and shall have appended to it a certificate signed by a principal officer of the society that all material necessary for proper valuation has been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(3) If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policy-holders or as dividend to the shareholders, he shall state in his report whether in his opinion the society is insolvent and, if so, whether it should be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.

Submission of returns to Superintendent of Insurance.

82. (1) The revenue account and balance-sheet with the auditor's report thereon and the report on the general state of the society's affairs referred to in sub-section (1) of section 80, [1][shall be printed and four copies of these and of the statements referred to], in sub-section (2) of section 80, shall be furnished as returns to the Superintendent of Insurance [2][within six months] from the end of the period to which they relate and copies of the revenue account and balance-sheet and the auditor's report thereon and of the report on the general state of the society's affairs shall, on the application of any member or policy-holder made within two years from the date on which the document was so furnished, be sent to him within fourteen days from the receipt of the application on payment of a fee of one rupee.

(2) All the material necessary for the proper valuation of the liabilities of the society under the provisions of section 81 shall be placed at the disposal of the actuary within three months from the end of the period to which such material relates, and the report and abstract referred to in section 81 shall be furnished as a return to the Superintendent of Insurance within a further period of three months.

(3) [3][The provisions of sub-section (2) of section 15 relating to the copies therein referred to shall apply to the returns referred to in sub-section (1) of this sub-section, and] the provisions of section 17 shall apply to the accounts and balance-sheet of a provident society being a company incorporated under the Indian Companies Act, 1913, [4][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] as they apply to the accounts and balance-shneet of an insurer, [5][and the Superintendent of Insurance may exercise, in respect of return made by a provident society and in respect of an investigation or valuation to which section 81 refers, the same powers as are exercisable by him under section 21 and section 22, respectively, in the case of an insurer].

LEG. REF.

[1] Substituted for the words "and the statements referred to" by S. 45, Act XIII of 1941.

[2] Substituted for the words "within three months", *ibid*.

[3] Inserted by S. 45, Act XIII of 1941.

[4] Inserted by S. 27, Act XI of 1939.

[5] Added by S. 45, Act XIII of 1941.

Actuarial examination of schemes.

83. (1) Every provident society, [1][registered] after the commencement of this Act, shall cause every scheme of insurance which it proposes to put into operation, and every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912 [2][shall cause any scheme which it proposes to put into operation for the first time], after such commencement to be examined by an actuary, and shall not receive any premium or contribution in connection with the scheme until the actuary has certified [3][that the rates, advantages, terms and conditions of the scheme are workable and sound], and such certificate has been forwarded to the Superintendent of Insurance.

(2) The provisions of sub-section (1) shall apply to any alteration of a scheme already in operation but the Superintendent of Insurance may, if he is of opinion that the alteration unfairly affects the interests of existing policy-holders, prohibit the alteration, and, if he does so, the society shall not put the altered scheme into operation, unless it first discharges to the satisfaction of the Superintendent of Insurance all its liabilities to those of the existing policy-holders who dissent from the alteration.

(3) Every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912, shall, as soon as may be and in any event before the expiry of six months from the commencement of this Act, submit all schemes of insurance which the society has in operation at the commencement of this Act to examination by an actuary [4][and shall, before the expiration of six months from the commencement of the Insurance (Amendment) Act, 1941, send the report of the actuary], thereon to the Superintendent of Insurance.

(4) The report of the actuary shall state in respect of each scheme whether [5][the rates, advantages, terms and conditions are workable and sound], and, where no actuarial report such as is referred to in section 81 has been made within the two years preceding the examination, the report shall also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and, if not, how in the opinion of the actuary the existing contracts should be modified.

[6][(5) If the rates, advantages, terms and conditions of any scheme are not reported by the actuary to be workable and sound, the Superintendent of Insurance shall give notice to the society prohibiting the scheme, and the society shall not after its receipt of such notice enter into any new contract of insurance under the scheme, but all rights and liabilities in respect of contracts of insurance entered into by the society before receipt of the notice shall, subject to the provisions of sub-section (6), continues as if the notice had not been given.]

(6) Where a scheme is [7][prohibited] under the provisions of sub-section (5) the society shall, where its assets are sufficient to meet all existing liabilities, set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so [7][prohibited], and, where its assets are not so sufficient, within three months from the date of the [8][prohibition], apply to the Court for a modification of its existing contracts or failing such modification for the winding up of the society.

LEG. REF.

[1] This word was substituted for the word "established" by S. 46, Act XIII of 1941.

[2] Substituted for the words "shall cause any new scheme which it proposes to put into operation," *ibid*.

[3] Substituted for the words "that the scheme is sound" by S. 46, Act XIII of 1941.

[4] Substituted for the words "and shall send the report of the actuary", *ibid*.

[5] Substituted for the words "it is actuarially sound, *ibid*.

[6] Substituted by S. 46, Act XIII of 1941.

[7] Substituted for the word "discontinued", *ibid*.

[8] Substituted for the word "discontinuance", *ibid*.

Separation of accounts and funds.

84. Where a provident society effects policies of insurance in connection with more than one of the classes of contingency separately specified in [1][sub-section (2) of] section 65, the receipts and payments in respect of each such class shall be recorded in a separate account in the cash book kept in accordance with section 79.

Investment of funds.

85. (1) Every provident society shall, unless it already holds invested in Government securities or securities mentioned or referred to in clauses (*c*) and (*d*) of section 20 of the Indian Trusts Act, 1882, not less than fifty per cent. of the total assets of the society, [2][invest in such securities every increase that takes place in those assets and in that part of those assets which is held in cash as soon as practicable after the increase takes place and in any case within six months of its taking place], until the total amount so invested amounts to not less than fifty per cent. of the total assets of the society, and shall thereafter keep invested in such securities not less than fifty per cent. of the total assets of the society.

[3][Provided that for the purpose of determining the amount to be invested under this sub-section, any deposit made in cash under section 73 shall be taken into accounts as if such cash were Government securities amounting at the market value of the securities on the date the deposit was made to the total deposited in cash.]

(2) No funds or investments of a provident society except a deposit made under section 73 shall be kept otherwise than in the name of the society [4][or in the name of a public officer approved by the Central Government].

(3) No loan shall be made out of the assets of a provident society to [5][any director, manager, managing agent, auditor, actuary, officer or partner of the society], except on the security of a policy of insurance held in the society and within its surrender value and no such loan shall be made to any concern of which [6][a director, manager, managing agent, actuary, officer or partner of the society is a director, manager, managing agent, actuary, officer or partner].

[7][(3A) Any loan prohibited under sub-section (3), made before and outstanding at the commencement of the Insurance (Amendment) Act, 1940, shall be repaid before the 1st day of January, 1941, and in case of default the director, manager, managing agent, auditor, actuary, officer or partner who has received the loan or is connected with the concern which has received the loan, as the case may be, shall cease to hold office in or be a partner of the society and shall be ineligible to hold office in or be a partner of the society until the loan is repaid.]

(4) Any director, [8][manager, managing agent, auditor, actuary, officer or partner], of a society which contravenes the provisions of sub-section (3), who is knowingly a party to the contravention, shall without prejudice to any other penalty which he may incur be jointly and severally liable to the society for the amount of the loan, and such amount, together with interest from the date of the loan at such rate not exceeding twelve per cent. per annum as the Superintendent of Insurance may fix, shall on application by the Superintendent of Insurance to any Civil Court of competent jurisdiction be recoverable by execution as if a decree for such amount had been passed by that Court.

LEG. REF.

[1] Inserted by S. 12, Act XX of 1940.

[2] Substituted for the words "invest all surplus assets in such securities" by S. 47, Act XIII of 1941.

[3] This proviso was added, *ibid*.

[4] Added by S. 28, Act XI of 1939.

[5] Substituted for the words "any director or officer of the society" by S. 13, Act XX of 1940.

[6] Substituted for the words "a director or officer of the society is a director or partner", *ibid*.

[7] Inserted by S. 13, Act XX of 1940.

[8] Substituted for the words "or officer", *ibid*.

[1][(5) The provisions of section 86-D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of a provident society being a company if the loan is one granted on the security of a policy on which the society bears the risk and the policy was issued to the director on his own life and the loan is within the surrender value of the policy.]

Inspection of books.

86. The books of every provident society shall at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him in this behalf or by any member or policy-holder of the society who has made an application in this behalf to the Superintendent of Insurance.

Inquiry by or on behalf of Superintendent of Insurance.

87. (1) The Superintendent of Insurance shall at least once in two years and may, if he thinks fit, at any time visit personally or depute a suitable person to visit the principal office of a provident society [2][or the principal office in British India of a society having its principal place of business or domicile outside British India] and inquire into the solvency of the society and the manner in which the business of the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an inquiry to be made by an auditor or actuary appointed by him [3][or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor].

(2) For the purposes of any such inquiry the Superintendent or the auditor or actuary, as the case may be, shall be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.

[4][(3) The results of any such inquiry shall be recorded in writing by the person making the inquiry, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the inquiry is completed a copy of the record or of each such record where more than one are made in the course of the same inquiry, shall be sent by the Superintendent of Insurance to the society concerned and shall be open to inspection by any member or policy-holder of the society.]

[5][(4) All expenses of and incidental to any inquiry made by an auditor or actuary under sub-section (1) including any expenses incurred before the date on which the Superintendent of Insurance receives notice of an appeal under clause (*e*) of sub-section (1) of section 110 shall be defrayed by the provident society, shall have priority over other debts due from the society, and shall be recoverable as an arrear of land-revenue.]

Winding up by Court and voluntary winding up.

88. (1) The Court may order the winding up of a provident society being a company incorporated under the Indian Companies Act, 1913, [6][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby], and the provisions of [7][the Indian Companies Act, 1913], shall, subject to the provisions of this Part, apply accordingly.

LEG. REF.

[1] Inserted by S. 47, Act XIII of 1941.
[2] Inserted by S. 48, Act XIII of 1941.
[3] These words were added, *ibid*.
[4] This sub-section was substituted, *ibid*.
[5] This sub-section was added, *ibid*.
[6] Inserted by S. 49, Act XIII of 1941.
[7] These words and fiugures were substituted for the words "that Act," *ibid*.

NOTES.

Sec. 88.—As to winding up of Provident Insurance Society, *see* 30 S.L.R. 92=1936 Sind 165.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of a provident society, if the registration of the society is cancelled by the Superintendent of Insurance under sub-section (4) of section 70 and he applies for the winding up of the society.

(3) A provident society being a company incorporated under the Indian Companies Act, 1913, [1][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby], may be wound up voluntarily in accordance with the provisions of [2][the Indian Companies Act, 1913], but shall not be so wound up except for the purpose of effecting an amalgamation or re-construction of the society or on the ground that by reason of its liabilities it cannot continue its business.

(4) A provident society not being a company incorporated under the Indian Companies Act, 1913, [1][or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby], may be wound up voluntarily under this Act if a resolution is passed by the proprietors that the society should be wound up voluntarily for the purpose or on the ground specified in sub-section (3), and the Superintendent of Insurance may, in any case where he has ordered the cancellation of the registration of a society-under sub-section (4) of section 70, order the winding up of the society under this Act.

Reduction of Insurance contracts.

89. The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just—

(*a*) if the Superintendent of Insurance as an alternative to cancelling the registration of a society under sub-section (4) of section 70 applies to the Court in this behalf;

(*b*) if while a society is in liquidation the Court thinks fit;

(*c*) if when a society has been proved to be insolvent, the Court thinks fit to do so in place of making an order for the winding up of the society; or

(*d*) if the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy-holders an opportunity to be heard that it is desirable to do so.

Appointment of liquidator.

90. (1) Where a provident society is to be wound up whether under the Indian Companies Act, 1913, or under this Act, the society shall, within seven days from the date of the order of the Court ordering the winding up or the passing of the resolution authorising the winding up, as the case may be, give notice thereof to the Superintendent of Insurance, and, except where the winding up is done by an order of the Court, the Superintendent of Insurance shall appoint the liquidator and shall determine the remuneration to be paid to him.

[3][Provided that if the Superintendent of Insurance is not satisfied that the assets of the society are sufficient to meet the costs of liquidation including the remuneration of the liquidator, he may decline to make such appointment, and in such a case the society shall itself appoint a liquidator who shall carry out the liquidation as if the winding up was being done by an order of the Court.]

LEG. REF.

[1] Added by S. 49, Act XIII of 1941.

[2] These words and figures were substituted for the words "that Act", *ibid*.

[3] Added by S. 50, Act XIII of 1941.

NOTES.

Secs. 90-91.—When a liquidator is appointed in respect of a provident fund by the Superintendent of insurance under S. 90 (1) of the Act, he has no powers under S. 91 (2) of the Act of 'realising the amount of contribution' except such powers as an official liquidator has in a winding up order of the Court. He cannot by himself make a call. The making of a call cannot be said to be merely the determination of the contribution to be made by the members within the meaning of S. 91 (1) (*b*) of the Act. 1942 A. 136=1942 A.L.J. 47=199 I.C. 663.

(2) Any liquidator [1][appointed by the Superintendent of Insurance under sub-section (1)] may be removed by the Superintendent of Insurance if satisfied that the duties entrusted to him are not being properly discharged.

Powers of liquidator.

91. (1) A liquidator appointed to wind up a society shall have power—

(*a*) to institute or defend any legal proceedings on behalf of the society by his name of office;

(*b*) to determine the contribution to be made by members of the society respectively to the assets of the society;

(*c*) to investigate all claims against the society and to decide questions of priority arising between claimants;

(*d*) to determine by what persons and in what proportion the costs of the liquidation [2][including the remuneration of the liquidator and any expenses incurred under clause (*g*) of this sub-section] are to be borne;

(*e*) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society;

(*f*) to summon, and enforce the attendance of, witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a Civil Court by the Code of Civil Procedure, 1908; and

(*g*) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

(2) The liquidator shall, for settling the list of contributories and realising the amount of contributions, have the same powers as an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

Procedure at liquidation.

92. (1) As soon as a liquidator is appointed to wind up a society he shall take charge of all property movable or immovable of the society and of all its books and documents.

(2) If any proprietor or officer of the society or any other person retains any portion of the assets of the society or fails to deliver to the liquidator any book or document when so required by the liquidator, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and the Court may order the delivery of the assets or book or document to the liquidator.

(3) The liquidator shall within fifteen days of his appointment send notice by post to all persons who appear to him to be creditors of the society that a meeting of the creditors of the society will be held on a date not being less than twenty-one nor more than twenty-eight days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated.

(4) At the meeting so held the creditors shall determine whether an application shall be made for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection, and, if they so resolve and an application accordingly is made at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting, the Superintendent of Insurance shall appoint a suitable person in place of or jointly with the liquidator already appointed, and if so desired, a committee of inspection.

LEG. REF.

[1] Substituted for the words "so appointed" by S. 50, Act XIII of 1941.

[2] These words, brackets and letter were inserted by S. 51, *ibid*.

(5) The committee of inspection shall, subject to any prescribed conditions, have a general power of supervision over the acts of the liquidator and shall have the right to inspect his accounts at all reasonable times.

(6) The liquidator shall, with such assistance from an actuary as may be required, ascertain as soon as practicable the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society, and shall give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice shall be bound by the value so ascertained.

(7) The liquidator shall make a valuation of the assets of the society and an estimate of the costs of the winding up, and shall on the basis of these, settle the list of contributories.

(8) The liquidator shall apply to the Superintendent of Insurance for an order for the return of the deposit made by the society under section 73 and the Superintendent of Insurance shall on such application order the return of the deposit subject to such terms and conditions as he may think fit.

(9) In administering and distributing the assets of the society the liquidator shall have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.

(10) The liquidator shall keep books of account in which he shall record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books may, with the sanction of the Superintendent of Insurance, be inspected by any creditor or contributory.

(11) If the winding up continues for more than a year, the liquidator shall summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and shall lay before them an account of his acts and dealings and of the conduct of the winding up, and that account together with any views expressed thereon by the meeting shall be forwarded by the liquidator to the Superintendent of Insurance.

(12) So far as is not otherwise provided herein or is not otherwise prescribed under this Act, the liquidator shall so far as practicable follow the procedure to be followed by an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

[1][(13) The costs of the liquidation including the remuneration of the liquidator and any expenses incurred under clause (*g*) of sub-section (1) of section 91 shall, if the liquidator decides that they shall be payable out of the assets of the society, be payable in priority to all other claims.]

Dissolution of provident society.

93. (1) As soon as the affairs of a provident society are fully wound up, the liquidator shall prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and shall call a meeting of the members, creditors and contributories for the purpose of laying before it the account and giving any explanation thereof.

(2) Notice of the meeting shall be sent to each person individually and shall be advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.

(3) Within one week after the meeting the liquidator shall send to the Superintendent of Insurance a copy of the account and shall report to him the holding of the meeting and its date and shall forward to him a copy of the proceedings of the meeting.

LEG. REF.

[1] Added by S. 52. Act XIII of 1941.

(4) The Superintendent of Insurance may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator shall comply with such requirement and shall submit a further report to the Superintendent of Insurance within six months.

(5) If the Superintendent of Insurance is satisfied that the affairs of the society have been fully wound up he shall register the account of the liquidator who shall forthwith make over to the Superintendent of Insurance sums, if any, remaining undisposed of, and on the expiry of three months from the registering of the account the Superintendent of Insurance shall declare the society dissolved and cause the dissolution of the society to be notified in the local official Gazette, and the liquidator shall thereupon be discharged from further responsibility.

(6) If within a period of five years from the date on which any sums have been made over to the Superintendent of Insurance under sub-section (5) an order of a Court of competent jurisdiction has not been obtained at the instance of any claimant to such sums for their disposal the said sums shall become the property of Government.

Nominations and assignments.

94. (1) The provisions of section 38 and section 39 relating to assignment, transfer and nomination in the case of life insurance policies shall, subject to the provisions of this section, apply to policies of insurance issued by any provident society covering any of the contingencies specified in clause (*a*) of section 65.

(2) No nomination shall be valid if the person nominated is not the husband, wife, father, mother, child, grand-child, brother, sister, nephew or niece of the holder of the policy.

PART IV.

MUTUAL INSURANCE COMPANIES AND CO-OPERATIVE LIFE INSURANCE SOCIETIES.

Definitions.

95. (1) In this Part—

(*a*) "Mutual Insurance Company" means an insurer, being a company [1][incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby,] which has no share capital and of which by its constitution only and all policy-holders are members; and

(*b*) "Co-operative Life Insurance Society" means an insurer being a society registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on whose application, the society is registered and all policy-holders are members:

Provided that any Co-operative Life Insurance Society in existence at the commencement of this Act shall be allowed a period of one year to comply with the provisions of this Act.

(2) Notwithstanding anything contained in sub-section (1), other co-operative societies may be admitted as members of a Co-operative Life Insurance Society, without being eligible to any dividend, profit or bonus.

(3) A Provincial Government may, subject to any rules made by the Central Government, empower the Registrar of Co-operative Societies of the province to register co-operative societies for the insurance of cattle or crops or

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LEG. REF.

[1] Substituted for the words and figures "incorporated under the provisions of the Indian Companies Act, 1913," by S. 29, Act XI of 1939.

both under the provisions of the Co-operative Societies Act in force in the province.

(4) A Provincial Government may make rules not inconsistent with any rules made by the Central Government to govern such societies, and the provisions of this Act, in so far as they are inconsistent with those rules, shall not apply to such societies.

Application of Act to Mutual Insurance Companies and Co-operative Life Insurance Societies.

96. The provisions of sections 6 and 7 and of sub-section (2) of section 20, so far as those provisions are inconsistent with the provisions of this Part, shall not apply, and the provisions of this Part shall apply, to Mutual Insurance Companies and Co-operative Life Insurance Societies.

Working capital of Mutual Insurance Companies and Co-operative Life Insurance Societies.

97. No Mutual Insurance Company incorporated after the 26th day of January, 1937, and no Co-operative Life Insurance Society registered after that date under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies shall be registered under this Act, unless it has as working capital a sum of fifteen thousand rupees, exclusive of the deposit to be made before or at the time of application for registration in accordance with sub-section (2) of section 98 of this Act and of the preliminary expenses, if any, incurred in the formation of the company or society.

Deposits to be made by Mutual Insurance Companies and Co-operative Life Insurance Societies.

98. (1) Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of two hundred thousand rupees in cash or in approved securities estimated at the market value of the securities on the day of deposit.

(2) The deposit referred to in sub-section (1) may be made in instalments, of which the first shall be a payment, made before or at the time the application for registration under this Act is made [1][of not less than twenty-five thousand rupees] or such sum as with any deposit previously made by the insurer under the provisions of the Indian Life Assurance Companies Act, 1912, brings the amount deposited, up [2][to not less than twenty-five thousand rupees] and the subsequent instalments shall be annual instalments made before the expiry of each subsequent [3][calendar year] of an amount in cash or in approved securities estimated at the market value of the securities on the day of payment of the instalment, [4][equal to not less than one-third of the gross premium] income received in the previous [3][calendar year].

[5][(3) The provisions of sub-section (7) of section 7 shall apply in respect of a Mutual Insurance Company and a Co-operative Life Insurance Society as if for the words 'under the foregoing provisions of this section' the words and figures 'under the provisions of section 98' were substituted.]

Transferees and assignees of policies not to become members.

99. No transferee or assignee of a policy issued by an insurer to whom this Part applies shall become a member of a Mutual Insurance Company or a Co-operative Life Insurance Society merely by reason of any such transfer or assignment.

LEG. REF.

[1] Substituted for the words "of twenty-five thousand rupees" (with retrospective effect) by S. 53, Act XIII of 1941.

[2] Substituted (with retrospective effect) for the words "to twenty-five thousand rupees", *ibid*.

[3] Substituted for the word "year" by S. 30, Act XI of 1939.

[4] Substituted (with retrospective effect) for the words "equal to one-third of the gross premium" by S. 53, Act XIII of 1941.

[5] Added (with retrospective effect), *ibid*.

Publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies.

100. Notwithstanding the provisions of section 79 and section 131 of the Indian Companies Act, 1913, a Mutual Insurance Company or a Co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance-sheet, revenue account and other documents which they are required to send to the members under those sections, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in an Indian language circulating in the place where the principal office of the company is situated:

Provided that, where any members of the company are domiciled in a province other than that in which the principal office of the company is situated, publication of the [1][* * * *] notice of the meetings shall be made in a newspaper or newspapers published in the principal languages of that province and circulating therein [2][and any member of the company domiciled in that province shall be entitled on application to the company to receive from it a copy of the balance-sheet and revenue account]:

Supply of documents to members.

101. Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, on the application of any member made within two years from the date on which any such document is furnished to the Registrar of Companies under the provisions of section 134 of the Indian Companies Act, 1913, or to the Registrar of Co-operative Societies of the province in which the Co-operative Life Insurance Society is registered, furnish a copy of the document free of cost to the member within fourteen days of the application.

PART V.

MISCELLANEOUS.

Penalty for default in complying with, or act in contravention of this Act.

102. (1) Except as otherwise provided in this Act, any insurer who makes default in complying with or acts in contravention of any requirement of this Act and, where the insurer is a company, any director, managing agent, manager or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing default, with an additional fine which may extend to five hundred rupees for every day during which the default continues.

(2) [3][Any provident society as defined in Part III which makes default in complying with or acts in contravention of any of the requirements of this Act] and any director, managing agent, manager, secretary or other officer of the society who is knowingly a party to the default, [4][or contravention], shall be punishable with fine which may extend to five hundred rupees or in the case of a continuing default [4][or contravention] with fine which may extend to two hundred

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LEG. REF.

[1] The words "balance-sheet, revenue account and" were omitted by S. 54, Act XIII of 1941.

[2] Added by S. 54, *ibid*.

[3] Substituted for the words "Any provident society which makes default in complying with any of the requirements of Part III" by S. 55, *ibid*.

[4] Inserted by *ibid*.

NOTES.

Sec. 102.—Construction of section. As to who are liable under the section. *see* 51 L. W. 534=1940 M.W.N. 384=1940 Mad. 760. (Same person holding different capacities would be liable in all capacities.

and fifty rupees for every day during which the default [1][or contravention] continues.

Penalty for transacting insurance business in contravention of sections, 3, 7 and 98.

103. (1) Any insurer or any person acting on behalf of an insurer, who [2][carries on] any class of insurance business in contravention of any of the provisions of section 3, [3][* *] section 7, [4][* *] or section 98, or does any one or more of the acts constituting the business of insurance [5][in relation to any insurance business [6][carried on] in contravention of any of the said sections] shall be punishable with fine which may extend to two thousand rupees.

(2) Any person knowingly taking out a policy of insurance with any issurer or person guilty of an offence under sub-section (1) shall be punishable with fine which may extend to five hundred rupees:

Provided that nothing in [7][sub-section (1) or sub-section (2)] shall apply to the business of re-insurance between the head office of an insurer in British India and the head office of an insurer not having an office in British India.

[8][(3) Any provident society or any person acting on behalf of a provident society who carries on any class of insurance business in contravention of any of the provisions of section 70, section 73 or section 83, or does any one or more of the acts constituting the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to one thousand rupees.]

Penalty for false statement in document.

104. Whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both.

Wrongfully obtaining or withholding property.

105. [9][(1)] Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied and in default to suffer imprisonment for a period not exceeding two years.

[10][(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer.]

Wrongfully diminishing life insurance fund.

106. [11][(1)] If on the application of [12][the Superintendent of Insurance or] an insurer or any member of an insurance company or any policy-holder or the liquidator of an insurance company (in the event of the insurer being in liqui-

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LEG. REF.

[1] Inserted by S. 55, Act XIII of 1941.

[2] Substituted for the word "transacts" by S. 56, *ibid*.

[3] The word and figure "S. 6" were omitted, *ibid*.

[4] The word and figure "S. 97" were omitted, *ibid*.

[5] Substituted for the words "in relation to any such class of insurance business" by S. 31, Act XI of 1939.

[6] Substituted for the word "transacted" by S. 56, Act XIII of 1941.

[7] Substituted for the words "this section", *ibid*.

[8] This sub-section was added, *ibid*.

[9] Re-numbered as sub-S. (1) of that section by S. 57, *ibid*.

[10] This sub-section was added, *ibid*.

[11] S. 106 was re-numbered as sub-S. (1) of that section by S. 58, *ibid*.

[12] These words were inserted, *ibid*.

dation) the Court is satisfied that by reason of any contravention of the provisions of this Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the insurer shall be deemed in respect of the contravention to have been guilty of misfeasance in relation to the insurer unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omisssion on his part; and the Court shall have all the powers which a Court has under sections 235 and 237 of the Indian Companies Act, 1913, and shall also have the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.

[1][(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer.]

Notice to and hearing of Superintendent of Insurance.

[2][106-A. (1) When application is made to the Court for the making of any order to which this section applies the Court shall, unless the Superintendent of Insurance has himself made the application or has been made a party thereto, send a copy of the application together with intimation of the date fixed for the hearing thereof to the Superintendent of Insurance, and shall give him an opportunity of being heard.

(2) The orders to which this section applies are the following namely:—

(*a*) an order for the attachment in execution of a decree of any deposit made under section 7 or section 98;

(*b*) an order under section 9 or section 59 for the return of any such deposit;

(*c*) an order under section 36 sanctioning any arrangement for the transfer or amalgamation of life insurance business or any order consequential thereon;

(*d*) an order for the winding up of an insurance company or a provident society;

(*e*) an order under section 58 confirming a scheme for the partial winding up of an insurance company;

(*f*) an order under section 89 reducing the amount of the insurance contracts of a provident society.]

Previous sanction of Advocate-General for institution of proceedings.

107. [3][(1)] Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-section (2) of section 41 shall be instituted by

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LEG. REF.

[1] Added by S. 58, Act XIII of 1941.

[2] Inserted by S. 14, Act XX of 1940.

[3] Re-numbered as sub-S. (1) of that section by S. 59, Act XIII of 1941.

NOTES.

Sec. 107.—Where the allegations made against the manager of an Insurance Company amount to offences under both the Companies Act and the Insurance Act, it would be trifling with the law to prosecute him under the Companies Act instead of under the Insurance Act. The prosecution under the Companies Act should be confined to matters which are offences only under that Act. **I.L.R. (1940) 1** Cal. 575 =44 C.W.N. 454=1940 Cal. 232. S. 107 of the Insurance Act requires the sanction of the Advocate-General before a private prosecution could be started against an insurer or any director, manager or other officer of an insurer for any offence under the Act. The section is not confied to a prosecution under S. 41 (2) of the Act. The words "who is liable under sub-S. (2) of S. 41" in the section qualify the words "any person", otherwise, the words "no proceedings under this Act" would have no real meaning. I.L.R. (1940) 1 Cal. 575=44 C.W.N. 454=1940 Cal. 232.

any person unless he has previous thereto obtained the sanction of the Advocate-General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

[1][(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer.]

Power of Court to grant relief.

108. If in any proceedings, civil or criminal, it appears to the Court hearing the case that a person is or may be liable in respect of negligence, default, breach of duty or breach of trust but that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him either wholly or partly from his liability on such terms as it may think fit.

Cognizance of offences.

109. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Appeals.

110. (1) An appeal shall lie to the Court having jurisdiction from any of the following orders, namely:—

(*a*) an order under section 3 refusing to register, or cancelling the registration of, an insurer;

(*b*) an order under section 5 directing the insurer to change his name;

(*c*) an order under section 42 cancelling the licence issued to an agent;

(*d*) an order under section 75 refusing to register an amendment of rules;

(*e*) an order under section 87 directing an inquiry by an auditor or actuary; or

(*f*) an order made in the course of the winding up or insolvency of an insurer or a provident society.

(2) The Court having jurisdiction for the purposes of sub-section (1) shall be the principal Court of civil jurisdiction within whose local limits the principal place of business of the insurer concerned is situate.

(3) An appeal shall lie from any order made under sub-section (1) to the authority authorised to hear appeals from the decisions of the Court making the same and the decision on such appeal shall be final.

[2][(4) No appeal under this section shall be entertained unless it is made before the expiration of four months from the date on which the order appealed against was communicated to the appellant.]

Delegation of powers and duties of Superintendent of Insurance.

[3][110-A. The Superintendent of Insurance may by general or special order delegate any of his powers or duties under this Act to any person subordinate to him. The exercise or discharge of any of the powers or duties so delegated shall be subject to such restrictions, limitations and conditions, if any, as the Superintendent of Insurance may impose, and shall be subject to his control and revision.

Signature of documents.

110-B. Every document which is required by this Act or by any rule made thereunder to be signed by the Superintendent of Insurance or by any person subordinate to him or by

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LEG. REF.

[1] This sub-section was added by S. 59, Act XIII of 1941.

[2] Added by S. 60, *ibid*.

[3] S. 110-A and 110-B were inserted S. 15, Act XX of 1940.

NOTES.

Sec. 110: APPEALS UNDER—PROCEDURE.—Appeals under S. 110 of the Act may be made by **petitions setting out the objections** *seriatim* in a manner analogous to grounds of appeal. I.L.R. (1940) 2 Cal. 127= 1940 Cal. 529.

any officer authorised by him under sub-section (1) of section 42 shall be deemed to be properly signed, if it bears a facsimile of the signature of such Superintendent, person or officer printed, engraved, lithographed or impressed by any other mechanical process approved by the Central Government.]

Service of notices.

111. (1) Any process or notice required to be served on an insurer or provident society shall be sufficiently served if addressed to any person registered with the Superintendent of Insurance as a person authorised to accept notices on behalf of the insurer or provident society and left at, or sent by registered post to, the address of such person as registered with the Superintendent of Insurance.

(2) Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent and any notice so addressed and sent shall be deemed to be notice to the holder of such policy:

Provided that, where any person claiming to be interested in a policy as transferee, assignee or nominee has given to an insurer or to a provident society notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice.

Declaration of *interim* bonuses.

112. Notwithstanding anything to the contrary contained in this Act an insurer carrying on the business of life insurance shall be at liberty to declare an *interim* bonus or bonuses to policy-holders whose policies mature for payment by reason of death or otherwise during the inter-valuation period on the recommendation of the investigating actuary made at the last preceding valuation.

Acquisition of surrender values by policy.

113. [1][(1) A policy of life insurance under which the whole of the benefits become payable either on the occurrence, or at a fixed interval or fixed intervals after the occurrence, of a contingency which is bound to happen shall, if all premiums have been paid for at least three consecutive years in the case of a policy issued by an insurer, or five years in the case of a policy issued by a provident society as defined in Part III, acquire a guaranteed surrender value, to which shall be added the surrender value of any subsisting bonus already attached to the policy, and every such policy issued by an insurer shall show the guaranteed surrender value of the policy at the close of each year after the second year of its currency or at the close of each period of three years throughout the currency of the policy:

Provided that the requirements of this sub-section as to the addition of the surrender value of the bonus attaching to a policy at surrender shall be deemed to have been complied with where the method of calculation of the guaranteed surrender value of the policy makes provision for the surrender value of the bonus attaching to the policy:

Provided further that the requirements of this sub-section as to the showing of the guaranteed surrender value on a policy shall be deemed to have been complied with where the insurer shows on the policy the guaranteed surrender value of the policy by means of a formula accepted in this behalf by the Superintendent of Insurance as satisfying the said requirements:

Provided further that the provisions of this sub-section as to the showing of the guaranteed surrender value on a policy shall not take effect until after the expiry of six months from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

LEG. REF.

[1] **Substituted for the original sub-Ss. (1) and (2) by S. 61, Act XIII of 1941.**

(2) Notwithstanding any contract to the contrary, a policy which has acquired a surrender value shall not lapse by reason of the non-payment of further premiums but shall be kept alive to the extent of the paid-up sum insured, and the paid-up sum insured shall for the purposes of this sub-section include in full all subsisting reversionary bonuses that have already attached to the policy, and shall, where the policy is one on which the maximum number of annual premiums payable is fixed and the premiums are of uniform amount, before the inclusion of such bonuses not less than the amount bearing to the total sum insured by the policy exclusive of bonuses the same proportion as the total period for which premiums have already been paid bears to the maximum period for which premiums were originally payable.

(3) A policy kept alive to the extent of the paid up sum insured under sub-section (2) shall not be entitled by virtue of that sub-section to participate in any profits declared distributable after the conversion of the policy into a paid-up policy.]

[1][(4)] [2][Sub-section (2) and sub-section (3) shall not apply];

[3][* * * *].

[4][(*a*) where the paid up sum insured by a policy, being a policy issued by an insurer, is less than one hundred rupees inclusive of any attached bonus, or takes the form of an annuity of less than twenty-five rupees, or where the paid up sum insured by a policy, being a policy issued by a provident society as defined in Part III, is less than fifty rupees inclusive of any attached bonus or takes the form of an annuity of less than twenty-five rupees, or]

[5][(*b*)] where the parties after the default has occurred in the payment of the premium agree in writing to some other arrangement, or

[6][(*c*)] to policies in which the surrender value is automatically applied under the terms of the contract to maintaining the policy in force after its lapse through non-payment of premium.

Power of Central Government to make rules.

114. (1) The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the qualifications to be possessed by actuaries;

[7][(*b*) the manner in which it shall be determined which of the transactions of an insurer are to be deemed for the purposes of this Act to be insurance business transacted in India or in British India, as the case may be;]

(*c*) the procedure to be followed by the Reserve Bank of India in dealing with deposits made in pursuance of this Act, including the receipt of, custody of, withdrawal of, and payment of interest on securities lodged as such deposits, and their inspection and verification by the Superintendent of Insurance;

(*d*) the form referred to in clause (*d*) of sub-section (2) of section 16;

(*e*) the manner in which the prospectuses and tables referred to in sub-section (1) of section 41 shall be published and the form in which they shall be drawn up;

(*f*) the matters to be prescribed for the purposes of section 48;

(*g*) the manner in which licences to act as insurance agents may be [8][applied for,] issued or cancelled;

LEG. REF.

[1] The original sub-S. (3) was re-numbered (4) by S. 61, Act XIII of 1941.

[2] Substituted for the words "This section shall not apply to", *ibid*.

[3] The original Cl. (*a*) was omitted, *ibid*.

[4] Substituted for the original Cl. (*b*), *ibid*.

[5] The original Cl. (*c*) was re-lettered (*b*), *ibid*.

[6] The original Cl. (*d*) was re-lettered (*c*), *ibid*.

[7] Substituted by S. 62, *ibid*.

[8] Inserted by *ibid*.

(*h*) the contingencies other than those specified in clauses (*a*) to (*f*) of [1][sub-section (2) of] section 65 on the happening of which money may be paid by provident societies;

(*i*) the matters other than those specified in clauses (*a*) to (*o*) of sub-section (1) of section 74 on which a provident society shall make rules;

(*j*) the form of any account, return or register required by Part III and the manner in which such account, return or register shall be verified;

(*k*) subject to the provisions of this Act, the fees payable thereunder and the manner in which they are to be collected; [2][* *]

(*l*) the conditions and the matters which may be prescribed under sub-sections (5), [3][(6)], (10) and (12) of section 92;

[4][(*m*) any other matter which is to be or may be prescribed.]

[5][* * * * * *.]

[6][(3) Every rule made under this section shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of one month which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.]

[7][(4)] All rules made by a Local Government under the provisions of section 24 of the Provident Insurance Societies Act, 1912, and in force at the commencement of this Act shall so far as not inconsistent with the provisions of Part III continue in force and have effect as if duly made under this section until they are replaced by rules made under this section.

Alteration of forms.

115. The Central Government may, on the application or with the consent of an insurer, not being a company, alter the forms contained in the Schedules as respects that insurer, for the purpose of adapting them to the circumstances of that insurer:

Provided that nothing done under this section shall exempt the insurer from supplying all information required under this Act so far as it is possible for the insurer to do so.

Power to exempt from certain requirements.

116. [8][(1)] The Central Government may, by notification in the official Gazette, exempt any insurer constituted, incorporated or domiciled in an Indian State [9][from any of the provisions of this Act which may be specified in the notification] either absolutely or subject to such conditions or modifications as may be specified in the notification.

[10][Provided that no such notification shall be issued unless the Central Government is satisfied that insurers constituted, incorporated or domiciled in British India are under the law or practice in such State entitled therein to benefits corresponding to those conferred by the notification or to benefits which in the opinion of the Central Government are at least equivalent thereto.]

LEG. REF.

[1] Inserted by S. 16, Act XX of 1940.
[2] The word "and" was omitted, *ibid.*
[3] Inserted by S. 32, Act XI of 1939.
[4] Inserted by S. 16, Act XX of 1940.
[5] The proviso was omitted, *ibid.*
[6] This subsection was inserted, *ibid.*
[7] The original sub-S. (3) was renumbered (4) by S. 16, Act XX of 1940.
[8] S. 116 was re-numbered as sub-S. (1) of that section by S. 63, Act XIII of 1941.
[9] Substituted by S. 17, Act XX of 1940.
[10] This proviso was added, *ibid.*

[1][(2) This section shall apply in respect of provident societies as defined in Part III as it applies in respect of insurers.]

Summary of returns to be published.

[2][116-A. The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished in pursuance of the provisions of this Act to the Superintendent of Insurance during the year preceding the year of publication, and may append to such summary any note of the Superintendent of Insurance or of the Central Government and any correspondence:

Provided that nothing in this section shall require the publication of the statements referred to in sub-section (1) of section 28.]

Saving of provisions of Indian Companies Act, 1913.

117. Nothing in this Act shall affect the liability of an insurer being a company [3][or a provident society as defined in Part III being a company] to comply with the provisions of the Indian Companies Act, 1913, in matters not otherwise specifically provided for by this Act.

Exemptions.

118. Nothing in this Act shall apply to any Trade Union registered under the Indian Trade Unions Act, 1926, or to any insurance business carried on by the Central or by a Provincial Government, or to any provident fund to which the provisions of the Provident Funds Act, 1925, apply, or, if the Superintendent of Insurance so orders in any case, and to such extent [4][or subject to such conditions or modifications] as he specifies in such order, to—

(*a*) any fund in existence and officially recognised by the Central Government before the 27th day of January, 1937, maintained by or on behalf of Government servants or Government pensioners for the mutual benefit of contributors to the fund and of their dependents, or

(*b*) any mutual or provident insurance society composed wholly of Government servants or of railway servants which has been exempted from any or all of the provisions of the Provident Insurance Societies Act, 1912.

Inspection and supply of copies of published prospectus, etc.

[5][119. Any person may on payment of a fee of five rupees inspect the documents filed by an insurer with the Superintendent of Insurance under clause (*f*) of sub-section (2) of section 3, and may obtain a copy of any such document or part thereof on payment in advance at the prescribed rate for the making of the copy.]

Determination of market value of securities deposited under this Act.

120. The market value on the day of deposit of securities deposited in pursuance of any of the provisions of this Act with the Reserve Bank of India shall be determined by the Reserve Bank of India whose decision shall be final.

Amendment of section 130, Act IV of 1882.

121. To the Exception to section 130 of the Transfer of Property Act, 1882, the following words and figures shall be added, namely:—

"or affects the provisions of section 38 of the Insurance Act, 1938".

Amendment of Schedule I, Act IX of 1908.

[6][122. In Item No. 86 in the First Schedule to the Indian Limitation Act, 1908,—

(*a*) for the entry in the first column the following shall be substituted, namely:—

LEG. REF.

[1] Added by S. 63, Act XIII of 1941.

[2] Inserted by S. 64, *ibid*.

[3] Inserted by S. 65, *ibid*.

[4] Inserted by S. 66, *ibid*.

[5] Substituted by S. 67, *ibid*.

[6] Inserted by S. 68, *ibid*. **(The original S. 122 was repealed by Act XI of 1939).**

'(*a*) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.

(*b*) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.';

(*b*) for the entry in the third column, the following shall be substituted, namely:—

'(*a*) The date of the death of the deceased.

(*b*) The date of the occurrence causing the loss.']

Repeals.

123. The Provident Insurance Societies Act, 1912, the Indian Life Assurance Companies Act, 1912, and the Indian Insurance Companies Act, 1928, are hereby repealed.

THE FIRST SCHEDULE.

(*See* Section 11.)

Regulations and Forms for the preparation of Balance-Sheet.

PART I.

Regulations.

1. The balance-sheet required to be prepared in respect of every class of business carried on by an insurer is, in the form in which it is set out in Part II of this Schedule (Form A), appropriate to a case where the insurer maintains a separate fund in respect of life insurance business.

2. The balance-sheet of life insurance business shall be prepared as a separate document. The balance-sheet of any class of business may be prepared as a separate document instead of being incorporated by the addition of columns and headings in the general balance-sheet, but the totals of each such separate balance-sheet (showing the total assets of the class of business, the balance at the credit of the life insurance fund or other separate fund or account, the amount of shareholders' undivided profits, and outstanding liabilities) must in any case be incorporated in the general balance-sheet.

3. If any combined balance-sheet is for any purpose issued by an insurer, it shall be in accordance with the Form set out in this Schedule, and there shall not be included among the assets shown in any such combined balance-sheet any amount in respect of any holding in or advance to any insurer whose assets and liabilities have been incorporated therein. Every combined balance-sheet must show clearly on the face thereof that it is a combined balance-sheet and must set out fully the name of every insurer whose assets and liabilities have been incorporated therein; if the assets and liabilities of any person not being an insurer are included in a combined balance-sheet the fact must be stated thereon.

4. Where any guarantee has been given by an insurer (otherwise than in the ordinary course of re-insurance business) in respect of the policies of any other insurer, the balance-sheet of the insurer by whom the guarantee was given must show clearly the name of every insurer whose policies have been so guaranteed and the extent of the guarantee:

Provided that this regulation shall not apply where a combined balance-sheet is issued incorporating the assets and liabilities of the insurer whose policies are guaranteed.

5. Where any part of the assets of an insurer is deposited in any place outside British India as security for the owners of policies issued in that place, the balance-sheet shall state that part of the assets has been so deposited, and, if any such part forms part of the life insurance fund, shall show the amount thereof and the place where it is deposited. Where any combined balance-sheet is issued by an insurer for any purpose, the information required by this regulation shall be shown in the aggregate in respect of all the insurers whose assets and liabilities have been incorporated in the balance-sheet.

6. There shall be appended to the balance-sheet a statement in Form AA as set out in Part II of this Schedule showing the market value and the book value of the assets in India.

7. Every balance-sheet shall contain the following certificates, namely:—

(*a*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet explaining how the values as shown in the balance-sheet of the Investments in Stocks and Shares have been arrived at and how the market value thereof has been ascertained for the purpose of comparison with the values so shown;

(*b*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and signed also, so far as respects the value of any items, shown in the balance-sheet under the heading of "Reversions and Life Interests", by an actuary, certifying that the values of all the assets have been reviewed as at the date of the balance-sheet, and that in their belief the assets set forth in the balance-sheet are shown in the aggregate at amounts not exceeding their realisable or market value under the several headings—"Loans", "Reversions and Life Interests", "Investments", "Agent's Balances", "Outstanding Premiums", "Interest Dividends and Rents outstanding", "Interest, Dividends and Rents accruing but not due", "Amounts due from other Persons or Bodies carrying on Insurance Business", "Sundry Debtors", "Bills Receivable", "Cash" and the several items specified under "Other Accounts".

Provided that if the persons signing the certificate are unable to certify that the assets set forth in the balance-sheet are so shown as aforesaid, a full explanation of the bases upon which the values shown in the balance-sheet have been assessed shall be given in the certificate;

(*c*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and by the auditor certifying that no parts of the assets of the life insurance fund has been directly or indirectly applied in contravention of the provisions of this Act relating to the application and investment of life insurance funds; and

(*d*) certificates signed by the auditor (which shall be in addition to any other certificate or report which he is required by law to give with respect to the balance-sheet) certifying—

(i) that he has verified the cash balances and the securities relating to the insurer's loans, reversions and life interests, and investments;

(ii) to what extent, if any, he has verified the investments and transactions relating to any trusts undertaken by the insurer as trustee; and

(iii) in the case of a combined balance-sheet, that he has audited the balance-sheet and accounts of every insurer whose assets and liabilities are incorporated therein, or that any such balance-sheet and accounts which have not been audited by him have been certified by independent auditors. The said certificate shall contain a reference to such reservations, if any, as may have been made by any auditor upon any report or certificate given by him with respect to the balance-sheet and accounts of any insurer whose assets and liabilities are incorporated in the combined balance-sheet.

8. If the values shown in the balance-sheet in respect of "Holdings in Subsidiary Companies" or "House property (i) in India (ii) out of India" haee been increased since the last previous balance-sheet, the certificate required by paragraph (*b*) of the last foregoing regulation shall state the amount of every increase not solely due to the cost of subsequent additions or, as respects holdings in controlled companies, to increased profits, and shall contain an explanation of the reason therefor.

9. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "combined balance-sheet" includes any combined statement made by an insurer of assets and liabilities in the form of a balance-sheet which includes the assets and liabilities of any other insurer; and

(*b*) "market value" means as respects any assets the market value thereof as ascertained from published market quotations, or, if there be no such value, its fair value as between a willing buyer and a willing seller.

PART II.

FORMS.

FORM A.

Form of Balance-Sheet.

Balance-Sheet of 19 .

	Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.		Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.
	Rs. A. P.	Rs. A. P.	Rs. A. P.	Loans:—	Rs. A. P.	Rs. A. P.	Rs. A. P.
Shareholders' capital (each class to be stated separately) ..				On Mortgages of property within British India ..			
Authorised:				On Mortgages of property outside British India ..			
........shares of Rs....each Rs.				On security of municipal and other public rates ..			
Subscribed:				On Stocks and Shares ..			
........shares of Rs....each Rs.				On Insurer's Policies within their surrender value ..			
Called up:				On personal security ..			
......shares of Rs.....each Rs.				To Subsidiary Companies (other than Reversionary) (*f*) ..			
Less Unpaid calls Rs.				Reversions and Life Interests purchased..			
Reserve or Contingency Accounts(*a*):				Loans on Reversions and Life Interests ..			
Investment Reserve Account ..				Debentures and Debenture stocks of Subsidiary Reversionary Companies (*f*) ..			
Profit and Loss Appropriation Balance Account.				Ordinary Stocks and Shares of Subsidiary Reversionary Companies (*f*) ..			
Balances of Funds and Accounts:				Loans to subsidiary Reversionary Companies (*f*) ..			
Life Insurance Fund.				Investments:			
Fire Insurance Business Account				Deposit with the Reserve Bank of India (securities to be specified) ..			
Marine Iusurance Business Aceount				Indian Government Securities ..			
[1] [*] Miscellaneous Insurance Business Account [2][*m*] ..				Provincial Government Securities ..			
Other accounts, if any (to be specified) (*l*)				British, British Colonial and British Dominion Government Securities ..			
Pension or Superannuation Accounts (*b*) ..				Foreign Government Securities ..			
Debenture Stock per cent ..							

LEG. REF.

[1] The words "Accident and" were omitted by S. 18, Act XX of 1940.

[2] These brackets and letter were added by S. 69, Act XIII of 1941.

Form —(*Contd.*)

	Life and Annuity Business (1)	Other Class of Business. (2)*	Total		Life and Annuity Business. (1)	Other Class of Business. (2)*	Total.
	Rs. A. P.	Rs. A. P.	Rs A. P.		Rs. A. P.	Rs. A. P.	
Loans and Advances (*c*) ..				Indian Municipal Securities ..			
Bills payable (*c*) ..				British and Colonial Securities ..			
Estimated Liability in respect of outstanding claims, whether due or intimated (*d*) ..				Foreign Securities ..			
Annuities due and unpaid (*d*) ..				Bonds, Debentures, Stocks and other securities whereon Interest is guaranteed by the Indian Government or a Provincial Government ..			
Outstanding Dividends ..				Bonds, Debentures, Stocks and other Securities whereon interest is guaranteed by the British or any Colonial Government ..			
Amounts due to Other Persons or Bodies carrying on Insurance Business (*c*) ..				Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government ..			
Sundry Creditors (including outstanding and accruing expenses and Taxes) (*c*) ..				Debentures of any railway in India			
Other sums owing by the insurer (particulars to be given) (*c*) ..				Debentures of any railway out of India..			
Contingent Liabilities (to be specified) (*e*) ..				Preference or guaranteed Shares of any railway in India ..			
Rs ——				Preference or guaranteed Shares of any railway out of India ..			
				Railway Ordinary Stocks (*i*) in India (*ii*) out of India ..			
				Other Debentures and Debenture Stock of Companies incorporated (*i*) in India, (*ii*) out of India ..			
				Other guaranteed and preference Stocks and Shares of companies incorporated (*i*) in India (*ii*) out of India ..			
				Other Ordinary Stocks and Shares of Companies incorporated (*i*) in India (*ii*) out of India ..			
				Holdings in Subsidiary Companies (*f*)			
				House property (*i*) in India (*ii*) out of India ..			

			Freehold and Leasehold ground rents and rent charges ..			
			Agent's Balances ..			
			Outstanding Premiums (*g*) [1][*d*] ..			
			Interest, Dividends and Rents outstanding (*d*)			
			Interest, Dividends and Rents accruing but not due (*d*) ..			
			Amounts due from other Persons or Bodies carrying on Insurance Business (*h*) ..			
			Sundry Debtors (*i*)			
			Bills Receivable ..			
			Cash:			
			At Bankers on Deposit Account ..			
			At Bankers on Current Account and in hand ..			
			At Call and Short Notice (*j*) ..			
			Other Accounts (to be specified) (*k*) ..			

LEG. REF.

[1] These brackets and letter were added by S 69, Act XIII of 1941).

* Assets and Liabilities, Shareholders' Capital and Reserves, not allocated to any lass of business specified in column (1) must be shown in column (2).

NOTES.

(*a*) The Reserves or Contingency Accounts must be separately stated.

(*b*) If the insurer has not full and unrestricted control of the assets constituting the Pension or Superannuation Accounts, either those Accounts and the assets and liabilities relating thereto must be omitted from the balance-sheet or the assets of which the insurer has not such control must be clearly indicated on the face of the balance-sheet.

(*c*) If the insurer has deposited security as cover in respect of any of these items, the amount and nature of the escurities so deposited must be clearly indicated on the face of the balance-sheet

(*d*) These items are or have been included in the corresponding items in the Revenue or Profit and Loss Account. Outstanding and accruing interest, dividends and rents must be shown after deduction of income-tax or the income-tax must be provided for amongst the liabilities on the other side of the balance-sheet.

(*e*) Such items as amount of liability in respect of bills discounted, uncalled capital of subsidiary companies, uncalled capital of other investments, etc., must either be shown in their several categories under the heading "Contingent Liabilities" or the appropriate items on the assets side must be set out in such detail as will clearly indicate the amount of the uncalled capital.

(*f*) As respects life and annuity business full particulars of holdings in and loans to subsidiary companies must be stated, giving the name of each company, the number and description of each class of shares held, the amounts paid up thereon, and the value at which the holdings in each company stand in the balance-sheet.

(*g*) Either this item must be shown net or the commission must be provided for amongst the liabilities on the other side of the balance-sheet.

(*h*) The aggregate amount owing by a subsidiary company or subsidiary companies is to be shown separately from all other assets and the aggregate amount owing to a subsidiary company or subsidiary companies is to be shown separately from all other liabilities.

(*i*) Amounts due from directors and officers must be shown separately.

(*j*) No amounts must be entered under this heading unless fully secured. If not fully secured, the amounts must be included under the heading "Sundry Debtors".

(*k*) Under this heading must be included such items as the following, which must be shown under separate headings suitably described: office furniture, good will, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued other expenditure carried forward to be written off in future years, balance being loss on Profit and Loss Appropriation Accounts, etc. The amounts included in the balance-sheet must not be in excess of cost.

(*l*) Under the head "Other accounts, if any (to be specified)" on the left hand side, fines realised from the staff and their contribution towards the provident fund, if any, should be shown under separate sub-heads.

[1][(*m*) Where the insurer is required to maintain a separate account in respect of any sub-class of miscellaneous insurance business this heading is to be split up accordingly.]

LEG. REF

[1] Added by S. 69 of Act XIII of 1941.

FORM AA.

Classified Summary of the [1][Assets in India] of the..........Company on 19 .

Class of Asset.	Book value as per (*a*) below.	Market value as per (*b*) below.	Remarks as per (c) below.
	Rs.	Rs.	
(1) Government of India Securities ..			
(2) Indian Provincial Government Securities ..			
(3) Indian Municipal Port and Improvement Trust Securities including Debentures.			
(4) Debentures of Indian Railways ..			
(5) Guaranteed and Preference Shares of Indian Railways.			
(6) Annuities of Indian Railways ..			
(7) Ordinary Shares of Railways in India ..			
(8) Other Debentures of concerns in India ..			
(9) Other Guaranteed and Preference Shares of concerns in India.			
(10) Other Ordinary Shares of concerns in India.			
(11) Loans on the Company's policies effected in India and within their surrender value.			
(12) Loans on Mortgage of property in India ..			
(13) Loans on Personal Security to persons domiciled and resident in India.			
(14) Other loans granted in India (particulars to be stated).			
(15) Land and House property in India ..			
(16) Cash on Deposit in Banks in India ..			
(17) Cash in Hand and on current account in banks in India.			
(18) Agents' balances and outstanding premiums.			
(19) Interest, dividends and rents either outstanding or accrued but not due. ..			
(20) Other assets in India (to be specified) ..			

The statement shall show—

(*a*) the value for which credit is taken in the balance-sheet for each of the abovementioned classes of assets;

(*b*) the market value of such of the abovementioned classes of assets as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance-sheet;

(*c*) how the value of such of the abovementioned classes of assets as has not been ascertained from published quotations has been arrived at, and

(*d*) the rates of exchange at which the values of the assets other than in rupee currency have been converted into rupees.

The market values need not be shown separately, where they are not less than the book values and a certificate to that effect is appended to the statement.

No amounts on account of any of the following items may be entered in the statement:—

Goodwill.

Preliminary, formation, organisation or development expenses.

Commission or discount on shares or debentures issued.

Commuted Commission.

Expenditure carried forward to be written off in future years.

LEG. REF.

[1] These words substituted for "Indian Assets" by S. 35, Act XI of 1939.

THE SECOND SCHEDULE.

(*See* Section 11.)

Regulations and Forms for the preparation of Profit and Loss Accounts.

PART I.

Regulations.

1. The items on the income side of the Profit and Loss Account and Profit and Loss Appropriation Account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

2. Deductions from Interest, Dividends and Rents to be shown in respect of income-tax must include all amounts in respect of British Indian income-tax whether or not it has been or is to be deducted at source or paid direct.

3. The Interest, Dividends and Rents *less* income-tax thereon shown in the Revenue Accounts for any classes of business other than life insurance business, including annuity business may, if the insurer so desires, be included with the corresponding items in the Profit and Loss Account.

PART II.

FORMS.

FORM B.

Form of Profit and Loss Account.

Profit and Loss Account of for the year ended 19 .

	Rs. A. P.		Rs. A. P.
British Indian Taxes on the Insurer's Profits (not applicable to any particular Fund or Account).		Interest, Dividends and Rents (not applicable to any particular Fund or Account). Rs. Less—Income-Tax thereon Rs.	
Expenses of Management (not applicable to any particular Fund or Account)*.		Profit on realisation of Investments (not credited to Reserves or any particular Fund or Account) ..	
Loss on Realisation of Investments (not charged to Reserves or any particular Fund or Account) ..		Appreciation of Investments (not credited to Reserves or any particular Fund or Account) ..	
Depreciation of Investments (not charged to Reserves or any particular Fund or Account) ..		Profit transferred from Revenue Accounts (details to be given) ..	
Loss transferred from Revenue Accounts (details to be given) ..		Transfer Fees ..	
Other Expenditure (to be specified) ..		Other Income (to be specified)	
Balance for the year carried to Appropriation Account ..		Balance being loss for the year carried to appropriation Account ..	

FORM C.

Form of Profit and Loss Appropriation Account.

Profit and Loss Appropriation Account of for the year, ended 19 .

	Rs. A. P.		Rs. A. P.
Balance being loss brought forward from last year ..		Balance brought forward from last year .. Rs.	
Balance being loss for the year brought from Profit and Loss Account (as in Form B) ..		Less—Dividends since paid in respect of last year (to be specified and if "free of tax" to be so stated)† .. Rs.	

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*If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount must be shown separately.

†NOTE.—This item may be shown on the other side of the account if preferred.

FORM C—*contd.*

	Rs. a. p.		Rs. a. p.
Dividends paid during the year on account of the current year (to be specified and if "free of tax" to be so stated)			
Transfers to any particular Funds or Accounts (details to be given) ..		Balance for the year brought from Profit and Loss Account (as in Form B) ..	
Balance at end of the year as shown in the Balance-Sheet		Balance being loss at end of the year as shown in the Balance-Sheet	

THE THIRD SCHEDULE.

(*See* section 11.)

Regulations and Forms for the preparation of Revenue Accounts.

PART I.

Regulations.

1. Form D is, as set out in Part II of this Schedule, appropriate for life insurance business, but a separate revenue account must be prepared for every class [1][or sub-class] of business in respect of which the insurer is required to maintain a separate account.

2. Form F is, as set out in Part II of this Schedule, appropriate for fire insurance business. A separate revenue account in the same form must be prepared for [2][* * *] miscellaneous insurance [1][exclusive of any sub-class of such business in respect of which the insurer is required to maintain a separate account] [3][* * * *]. Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business.

[4][For a sub-class of miscellaneous insurance in respect of which the insurer is required to maintain a separate account, Form D or Form F as set out in Part II of this Schedule may be used with such modifications as the Superintendent of Insurance may authorise.]

3. If any combined revenue account is for any purpose issued by an insurer it must be in accordance with the forms specified in this Schedule and must clearly show on the face thereof that it is a combined revenue account, and must set out fully the name of every insurer required to make separate returns under this Act whose revenue and expenditure have been included therein; if the revenue and expenditure of any person not being an insurer are included in a combined revenue account, the fact must be stated thereon.

4. The items on the income side of the revenue account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

5. Re-insurance premiums, whether on business ceded or accepted, are to be brought into account gross (*i.e.*, before deducting commissions) under the head of premiums.

6. As respects life insurance business the following statements shall be furnished to the Superintendent of Insurance every year showing details provided for in a Form pertaining thereto:—

(A) A statement in form DD as set forth in Part II of this Schedule.

(B) A statement in form DDD as set forth in Part II of this Schedule.

(C) A statement in form DDDD as set forth in Part II of this Schedule.

7. The following information shall be supplied in addition to the revenue account, namely, the gross premium written in India for life, fire, marine and accident and miscellaneous insurance business.

8. Any office premises which form part of the assets of a life insurance fund must be treated as an interest earning investment, and accordingly, in the revenue account for life insurance business a fair rent for the premises must be included under the heading "Interest, Dividends and Rents" and in the revenue account for every class of business for which the premises are used proper charges for the use thereof must be included under the heading "Expenses of Managment".

LEG. REF.

[1] Inserted by S. 70, Act XIII of 1941.

[2] The words "accident and" were omitted by S. 19, Act XX of 1924.

[3] The words "including Workmen's Compensation and Motor Car Insurance" were omitted by *ibid*.

[4] Added by S. 70, Act XIII of 1941.

9. Where an insurer carries on the business of life insurance in conjunction with any other class of insurance business the expenses of management charged to the life insurance revenue account must not include more than a reasonable proportion of the common expenses and in particular, no such account must be charged with more than a fair sum for the use of any office premises having regard to the income from the various classes of business carried on and to the extent to which the premises are used for the purposes of each class of business.

10. Deductions from Interest, Dividends and Rents in respect of income-tax must include all income-tax charged on such income whether or not it has been or is to be deducted at source or paid direct; the income-tax to be shown as so deducted in the life insurance Revenue Account is British Indian, United Kingdom, Foreign and Dominion income-tax, but the income-tax to be shown as deducted in Revenue Accounts of any other classes of business is British Indian income-tax only.

PART II.

FORMS.

FORM D.

Form of Revenue Account applicable to Life Insurance Business.

Revenue Account of for the year ended 19 , in respect of Business.

—	Business within India.	Business out of India. (a)	Total.	—	Business within India.	Business out of India (a)	Total.
	Rs.	Rs.	Rs.		Rs.	Rs.	Rs
Claims under Policies (including provision for claims due or intimated), less Re-insurance—				Balance of Fund at the beginning of the year ..			
By death				Premiums, less Re-insurances—			
By maturity ..				(i) First year premiums ..			
Annuities, less Re-insurances				(ii) Renewal premiums ..			
Surrenders (including Surrenders of Bonus), less Re-insurances.				(iii) Single premiums ..			
Bonuses in Cash, less Re-insurance ..				Consideration for Annuities granted, less Re insurances (c).			
Bonuses in Reduction of premiums, less Re insurances. [1][* *]				Interest, Dividends and Rents ..			
Expenses of Management (b)—				Less—Income tax thereon (d) ..			
[2][1. (a) Commission to insurance agents (less that on re insurances)..				Registration fees .			
(b) Allowances and commission (other than commission included in sub-item (a) preceding)] ..				Other Income (to be specified) (e).			
				Loss transferred to Profit and Loss Account.			
				Transferred from Appropriation Account ..			

LEG. REF.

[1] The entry "Commission to insurance agents (less that on re-insurances) was omitted by S. 70, Act XIII of 1941.

[2] This entry was substituted for the entry "1. Allowances and Commission (other than commission to insurance agents)", *ibid*.

FORM D—*contd.*

—	Business within India.	Business out of India. (a)	Total.	—	Business within India.	Business out of India. (a)	Total.
	Rs.	Rs.	Rs.		Rs.	Rs.	Rs
2. Salaries, etc. (other than to agents and those contained in item No. 1).							
3. Travelling expenses.							
4. Directors' fees.							
5. Auditor's fees.							
[1][6. Medical fees].							
[2][7.] Law charges.							
[2][8.] Advertisements ..							
[2][9.] Printing and Stationery ..							
[2][10.] Other expenses of management (accounts to be specified) ..							
[2][11.] Other payments (accounts to be specified).							
[2][12.] Rents for offices belonging to and occupied by the insurer ..							
[2][13.] Rents of other offices occupied by the insurer ..							
Bad Debts ..							
United Kingdom, British Indian, Dominion and Foreign Taxes ..							
Other Expenditure (to be specified) ..							
Profit transferred to Profit and Loss Account ..							
Balance of Fund at the end of the year as shown in the Balance sheet.							
Rs.	—	—	—	Rs.	—	—	—

NOTES.

(*a*) [3][****]These columns apply only to business the premiums in respect of which are [4][ordinarily paid outside India].

[5] If any question arises whether any premiums are ordinarily paid outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.

LEG. REF.

[1] Inserted by S. 70, Act XIII of 1941.

[2] The original entries numbered 6 to 12 were re-numbered 7 to 13, *ibid*.

[3] The words "In the case of an insurer having his head office in British India" were omitted, *ibid*.

[4] Substituted for the words "payable outside India" by S. 19, Act XX of 1940.

[5] Added by *ibid*.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately. Under this item the salary paid to the managing agent or managing director shall be shown separately from the total amount paid as salaries to the remaining staff.

(*c*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*d*) British Indian, United Kingdom, Foreign and Dominion Income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominions taxes, other than those shown under this item.

(*e*) Under the head "Other Income" fines, if any, realised from the staff must be shown separately. All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside [1][* *], India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

(*f*) In the case of an insurer having his principal place of business outside British India the expenses of management for business out of India and total business need not be split up into the several sub-heads, if they are not so split up in his own country.

LEG. REF.

[1] The word "British" was omitted by S. 36, Act XI of 1939.

FORM DD.

Classified statement of life insurance policies of the Company, for the year ending 19 .

—	New life insurance business in respect of which a premium has been paid in the year.				Total life insurance business in force at end of the year.		Premium income for which credit has been taken in the revenue account.
	Number of policies.	Sums insured and annuities per annum.	Single premiums (including consideration for immediate [1][or deferred] annuities and all other premiums paid at the out-set where no subsequent premium is payable).	Yearly renewal premium income.	Number of policies.	Sums insured with bonuses and annuities per annum.	
Ordinary policies.		Rs.	Rs.	Rs.		Rs.	Rs.
In India ..							
Out of India ..							
Total ..							
Annuity contracts, etc.							
In India ..							
Out of India ..							
Total ..							
Group insurance policies.							
In India ..							
Out of India ..							
Total ..							

The amounts should be stated to the nearest rupees and after deduction of re-insurances

LEG. REF.

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[1] These words were inserted by S. 36 of Act XI of 1939.

FORM DDD.

Additions to and deductions from policies of the Company for the year ending 19 .

—	Ordinary life insurance policies insuring money to be paid on death or survivance.			Annuities.	
	No.	Sum assured.	Reversionary bonus additions.	No.	Annuity per annum.
		Rs.	Rs.		Rs.
(1) Policies at beginning of year ..					
(2) New policies issued ..					
(3) Old policies revived ..					
(4) Old policies changed and increased ..					
(5) Bonus additions allotted ..					
Total ..					
Discontinued during year—					
(6) By death ..					
(7) By survivance or the happening of the contingencies insured against other than death ..					
(8) By expiry of term under temporary insurances ..					
(9) By surrender of policy ..					
(10) By surrender of bonus ..					
(11) By forfeiture or lapse ..					
(12) By change and decrease ..					
(13) By being not taken up ..					
Total discontinued ..					
Total existing at end of year ..					

[1][A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted.

Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.]

FORM DDDD.

Particular of the policies forfeited or lapsed in the last [2][*] *year under review, less those* [3]*[revived] and reinstated for full benefits, classified according to the year in which they were issued.*

[2][*] Year in which the policies were issued.	Number of policies forfeited or lapsed.	Sum insured under policies forfeited or lapsed.
		Rs.
Year ending 19 , being the year under review.		
Year ending 19 , being the year previous to that under review.		

LEG. REF.

[1] Added by S. 36, Act XI of 1939.

[2] The word "financial" was omitted by *ibid*.

[3] Substituted for "revised" by *ibid*.

And so on, the number of and sum insured under policies forfeited or lapsed in the last [1][*] year under review being stated after classification according to each of the proceeding years in which they were issued.

A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted.

Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.

FORM E.

Form of Revenue Account applicable to Marine Insurance Business.

Revenue Account of for the year ended 19 , in respect of Marine Insurance Business.

—	Current year.	Last preceding year.	Previous years.	Total.	—	Current year.	Last preceding year	Prexious years.	Total.
	Rs	Rs.	Rs.	Rs.		Rs.	Rs	Rs.	Rs.
*Claims paid (less Salvages and Re-insurances) (*a*) (*c*) ..					Balance of Marine Insurance Business Account at beginning of the year Balances ..				
*Commission ..									
*Expenses of Management (*b*) ..					Additional Reserve (if any).				
*Bad Debts ..					*Premiums (less Returns, Reinsurances, Brokerages and Discount (*c*) ..				
United Kingdom, British Indian, Dominion and Foreign Taxes ..					Interest, Dividends and Rents. Rs				
*Other Expenditure (to be specified) ..					Less—Income-tax thereon Rs.				
Profit transferred to Profit and Loss Account ..					*Other Income (to be specified) (*d*) ..				
Balance of Marine Insurance Business Account at end of year as shown in the Balance-sheet: Balances ..					Loss transferred to Profit and Loss Account ..				
Additional Reserve (if any) ..					Transferred from Appropriation Account ..				

NOTES.

(*a*) This heading must include all expenses directly incurred in settling claims.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(*c*) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claiments in [2][*] India and claimants outside [2][*] India, and for premiums derived from business effected in [2][*] India and effected outside [2][*] India must be given.

(*d*) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside [2][*] India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

*Where the account is furnished under the provisions of clause (*b*) of sub-section (2) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within [2][*] India and business out of [2][*] India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

LEG. REF.

[1] The word "financial" was omitted by S. 36, Act XI of 1939.

[2] The word "British" was omitted by *ibid*.

FORM F.

Form of Revenue Account applicable to Fire Insurance Business and to [1][*] *Miscelleneous Insurance Business.*[2][* * *].

Revenue Account of   for the year ended   19   , in respect of   Business.

	Rs.		Rs.
*Claims under Policies, less Re-insurances (*a*) (*d*):		Balance of Account at beginning of the year:	
Paid during the year .. Rs.		Reserve for Unexpired Risks .. Rs.	
Total estimated liability in respect of outstanding claims at end of the year whether due or intimated .. Rs.		Additional Reserve (if any) .. Rs.	
Total ..		*Premiums, less Re-insurances (*d*) ..	
Less—Outstanding at end of previous year (*b*) .. Rs.		Interest, Dividends and Rents .. Rs.	
		Less—Income-tax thereon. Rs.	
*Commission ..		*Other Income (to be specified) (*e*) ..	
*Expenses of Management (*c*) ..		Loss transferred to Profit and Loss Account ..	
*Bad Debts ..		Transferred from Appropriation Account ..	
United Kingdom, Foreign and Dominion Taxes ..			
*Other Expenditure (to be specified) ..			
Profit transferred to Profit and Loss Account ..			
Balance of Account at the end of the year as shown in the Balance-Sheet.			
Reserve for Unexpired Risks, being per cent. of premium income of year .. Rs.			
Additional Reserve (if any) .. Rs.			
Rs		Rs.	

NOTES.

(*a*) This heading must include all expenses directly incurred in settling claims.

(*b*) If in any year the claims actually paid and those still unpaid at the end of that year in respect of the previous year or years are in excess of the amount included in the previous year's Revenue Account as provision for outstanding claims, then the amount of such excess must be shown in the Revenue Account.

(*c*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(*d*) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in [3][*] India and claimants outside [3][*] India, and for premiums derived from business as effected in [3][*] India and effected outside [3][*] India must be given.

(*e*) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside [3][*] India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

* Where the account is furnished under the provisions of clause (*b*) of sub-section (2) of section 16 of the Insurance Act, 1938 by an insurer to whom that section applies, separate figures for business within [3][*] India and business out of [3][*] India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

LEG. REF.

[1] "Accident and" were omitted by S. 19, Act XX of 1940.

[2] The words "Including Workmen's Compensation and Motor Car Insurance Business" were omitted, *ibid.*

[3] The word "British" was omitted by S. 36, Act XI of 1939.

THE FOURTH SCHEDULE.

(*See* section 13.)

Regulations for the preparation of Abstracts of Actuaries' Reports and Requirements applicable to such Abstracts.

PART I.

Regulations.

1. Abstracts and Statements must be so arranged that the numbers and letters of the paragraphs correspond with those of the paragraphs of Part II of this Schedule.

2. In showing the proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, in accordance with the requirements of [1][paragraph 4] of Part II of this Schedule no credit is to be taken for any adjustments made in order to secure that no policy is treated as an asset.

3. (1) The average rate of interest yielded in any year by the assets constituting a life insurance fund shall, for the purposes of [2][paragraph 5] of Part II of this Schedule, be calculated by dividing the interest of the year by the mean fund of the year; and for the purposes of any such calculation the interest of the year shall be taken to be the whole of the interest credited to the life insurance fund during the year after deduction of income-tax charged thereon (any refund of income-tax in respect of expenses of management made during the year being taken into account), and the mean fund of the year shall be ascertained by adding a sum equal to one-half of the amount of the life insurance fund at the beginning of the year to a sum equal to one-half of that fund at the end of the year, and deductions from the aggregate of those two sums an amount equal to one half of the interest of the year.

(2) For the purposes of the calculation aforesaid either—

(*a*) all profits and income arising during the year from sums invested in reversions shall be included in the interest credited to the life insurance fund during the year; or

(*b*) such portion of the life insurance fund as is invested in the purchase of reversions, and the profits and income arising therefrom, shall be excluded from the calculation; but in that case a statement must be added to the information required under the said [2][paragraph 5], showing in respect of the portion of the fund excluded as aforesaid, the average rate of annual profit and income for which credit has been taken during the five years last preceding the valuation date, and explaining the manner in which the said average rate has been calculated.

(3) The information given in accordance with the requirements of the said [2][paragraph 5] shall show clearly by which of the methods hereinbefore in this regulation mentioned the sums invested in reversions and the profits and income arising therefrom have been dealt with.

4. Every abstract prepared in accordance with the requirements of Part II of this Schedule shall be signed by an actuary and shall contain a certificate by him to the effect that he has satisfied himself as to the accuracy of the valuations made for the purposes thereof and of the valuation data:

Provided that in the case of an abstract prepared on behalf of [3][an insurer], if the actuary who signs the abstract is not a permanent officer of [4][the insurer] the certificate as to the accuracy of the valuation data shall be given and signed by the principal officer of [4][the insurer] and the actuary shall include in the abstract a statement signed by him showing what precautions he has taken to ensure the accuracy of the data.

5. For the purposes of the Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

"extra premium" means a charge for any risk not provided for in the minimum contract premium;

"inter-valuation period" means, as respects any valuation, the period to the valuation date of that valuation from the valuation date of the last preceding valuation in connection with which an abstract was prepared under this Act or under the enactments repealed by this Act, or, in a case where no such valuation has been made in respect of the class of business in question, from the date on which the insurer began to carry on that class of business;

"maturity date" means the fixed date on which any benefit will become payable either absolutely or contingently;

LEG. REF.

[1] Substituted for the word and figure "paragraphh 3" by S. 37, Act XI of 1939.

[2] Substituted for the word and figure "paragraph 4", *ibid.*

[3] Substituted for the words "an insurance company", *ibid.*

[4] Substituted for the words "the company", *ibid.*

"net premiums" means as respects any valuation the premiums taken credit for in the valuation;

"premium term" means the period during which premiums are payable;

"valuation date" means as respects any valuation the date as at which the valuation is made.

PART II.

Requirements applicable to an Abstract in respect of Life Insurance Business.

The following tabular statements shall be annexed to every abstract prepared in accordance with the requirements of this Part of this Schedule, namely:—

(*a*) a Consolidated Revenue Account, in the Form G annexed to this Part of this Schedule, for the inter-valuation period (except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business); and

(*b*) a Summary and Valuation in the Form H annexed to this Part of this Schedule of the policies included at the valuation date in the class of business to which the abstract relates; and

(*c*) a Valuation Balance-Sheet in the Form I annexed to this Part of this Schedule; and

(*d*) a statement in Form DDD as set forth in Part II of the Third Schedule of the additions to and deductions from the number of policies and the sums insured thereunder for each class of life insurance [1][for the inter-valuation period (except that it shall not be necessary to prepare such statement in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business).]

[2][* * * * * * * * *]

and every such abstract shall show—

1. The valuation date.

2. The general principles and full details of the methods adopted in the valuation of each of the various classes of insurances and annuities shown in the said Form H, including statements on the following points:—

(*a*) whether the principles were determined by the instruments constituting the company or by its regulations or bye-laws or how otherwise;

(*b*) the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated for the purpose of the valuation;

(*c*) the methods by which the valuation age, period from the valuation date to the maturity date, and the future premium terms, have been treated for the purpose of the valuation;

(*d*) the rate of bonus taken into account where by the method of valuation definite provision is made for the maintenance of a specific rate of bonus;

(*e*) the method of allowing for—

(i) the incidence of the premium income; and

(ii) premiums payable otherwise than annually;

(*f*) the methods by which provision has been made for the following matters, namely:—

(i) the immediate payment of claims;

(ii) future expenses and profits in the case of limited payment and paid-up policies;

(iii) the reserve in respect of lapsed policies, not included in the valuation, but under which a liability exists or may arise; and whether any reserves have been made for the matters aforesaid;

(*g*) whether under the valuation method adopted any policy would be treated as an asset, and, if so, what steps, if any, have been taken to eliminate such asset;

(*h*) a statement of the manner in which policies on under-average lives and policies subject to premiums which include a charge for climatic, military or other extra risks have been dealt with; and

(*i*) the rates of exchange at which liabilities in respect of policies issued in foreign currencies have been converted into rupees and what provision has been made for possible increase of liability arising from future variations in the rates of exchange.

3. The table of mortality used, and the rate of interest assumed, in the valuation.

LEG. REF.

[1] These words were substituted for the word "; and" by S. 71, Act XIII of 1941.

[2] Clause (*e*) was omitted, *ibid*.

4. The proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, separately specified in respect of insurances with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits.

5. The average rates of interest yielded by the assets, whether invested or uninvested, constituting the life insurance fund for each of the years covered by the valuation date.

6. The basis adopted in the distribution of profits as between the insurer and policy-holders, and whether such basis was determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise.

7. The general principles adopted in the distribution of profits among policy-holders, including statements on the following points, namely:—

(*a*) whether the principles were determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise;

(*b*) the number of years' premiums to be paid, period to elapse and other conditions to be fulfilled before a bonus is allotted;

(*c*) whether the bonus is allotted in respect of each year's premium paid, or in respect of each completed calendar year or year of assurance or how otherwise; and

(*d*) whether the bonus vests immediately on allocation, or, if not, the conditions of vesting.

8. (1) The total amount of profits arising during the inter-valuation period, including profits paid away and sums transferred to reserve funds or other accounts during that period, and the amount brought forward from the preceding valuation (to be stated separately) and the allocation of such profits—

(*a*) to interim bonus paid;

(*b*) among policy-holders with immediate participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(*c*) among policy-holders with deferred participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(*d*) among policy-holders in the discounted bonus class, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(*e*) to the insurer or, in the case of an insurance company, among shareholders or to shareholders' accounts (any such sums passed through the accounts during the inter-valuation period to be separately stated);

(*f*) to every reserve fund or other fund or account (any such sums passed through the accounts during the inter-valuation period to be separately stated);

(*g*) as carried forward unappropriated.

(2) Specimens of bonuses allotted [1][as a result of this valuation] to policies for one thousand rupees—

(*a*) for the whole term of life effected at the respective ages of 20, 30 and 40, and having been in force respectively for five years, ten years and upwards at intervals of ten years; and

(*b*) for endowment insurances effected at the respective ages of 20, 30 and 40, for endowment terms of fifteen, twenty and thirty years, and having been in force respectively for five years, ten years and upwards at intervals of ten years;

together with the amounts apportioned under the various manners in which the bonus is receivable.

9. A statement in Form J annexed to this Part of this Schedule of specimen policy reserve values held or required to be held according to the methods adopted in the valuation, and specimen minimum surrender values in respect of whole life insurance policies for Rs. 1,000 with premiums payable throughout life effected at the respective ages of 20, 30, 40 and 50, and immediately on payment of the first, second, third, fourth, [2][fifth,] sixth, seventh, eighth, ninth, tenth, fifteenth and twentieth annual premium; with similar specimen policy reserve values and specimen surrender values in respect of whole life insurance policies subject to premiums payable for 20 years and of endowment insurance policies maturing at age 55.

10. A statement showing how the liability under any disability clause in a policy has been determined in the valuation with full information of the tables of sickness or accident used for the purpose.

[1][FORM G.

Consolidated Revenue Account of for years Commencing

LEG. REF.

[1] Substituted for the words "as at the valuation date" by S. 71, Act XIII of 1941.

[2] This word was inserted, *ibid.*

and ending .

	Business within India (*a*).	Total.		Business within India (*a*).	Total.
	Rs.	Rs.		Rs.	Rs.
Claims under Policies (including provision for claims due or intimated), less Re-insurances—			Balance of Life Insurance Fund at the beginning of the period.		
By death ..			Premiums, less Re-insurances—		
By maturity ..			(i) First year premiums ..		
Annuities, less Re-insurances.			(ii) Renewal premiums. ..		
Surrenders (including surrenders of Bonus), less Re-insurances.)			(iii) Single premiums ..		
Bonuses in cash, less Re-insurances.			Consideratiod for Annuities granted, less Re-insurances (*c*).		
Bonuses in Reduction of Premiums, less Re-insurances.			Interest, Dividends and Rents Rs. Less—Income-tax thereon (*d*). Rs. Registration fees.		
Expenses of Management (*b*) (*e*)—			Other Income (to be specified)		
1. (*a*) Commission to insurance agents (less that on Re-insurances).			Loss transferred to Profit and Loss Account.		
(*b*) Allowances and Commission (other than commission included in sub-item (*a*) preceding).			Transferred from Apropriation Account.		
2. Salaries, etc. (other than to agents and those contained in sub-item 1 (*b*) preceding).					
3. Travelling expenses ..					
4. Directors' fees ..					
5. Auditors' fees ..					
6. Medical fees ..					
7. Law charges ..					
8. Advertisements ..					
9. Printing and Stationery ..					
10. Other expenses of management (accounts to be specified).					
11. Other payments (accounts to be specified)					
12. Rent for offices belonging to and occupied by the insurer.					
13. Rents of other offices occupied by the insurer.					
Bad debts ..					
United Kingdom, British Indian, Dominion and Foreign Taxes.					
Other Expenditure (to be specified).					
Profit transferred to Profit and Loss Account.					
Balance of Life Insurance Fund at end of the period as shown in the Balance-sheet.					
Rs.			Rs.		

LEG. REF.

[1] Substituted for the original Form G by S. 71, Act XIII of 1941.

NOTES.

(*a*) These columns apply to all business except business the premiums in respect of which are ordinarily paid outside India. If any question arises whether any premiums are ordinarily paid inside or outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(*c*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*d*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*e*) In the case of an insurer having his principal place of business outside British India the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.]

FORM H.

Summary and valuation of the Policies of as at 19 .

Description of Transactions.	Particulars of the Policies for Valuation.					Valuation.			
	Number of policies.	Sums Assured.	Bonuses.	Office yearly premiums.	Net yearly premiums.	Sums Assured and Bonuses.	Office yearly premiums.	Net yearly premiums.	Net Liabilities.
DIVISION I.									
Insurances.									
Group A—									
With immediate participation in profits.									
For whole term of life									
Other classes (to be specified)									
Extra premiums									
Total insurances									
Deduct—Re-insurances									
Net insurances									
Group B—									
With deferred participation in profits.									
For whole term of life									
Other classes (to be specified)									
Extra premiums									
Total Insurances									
Deduct—Re-insurances									
Net insurances									
Group C—									
Under discounted bonus systems									
For whole term of life									
Other classes (to be specified)									
Extra premiums									
Total Insurances									
Deduct—Re-insurances									
Net insurances									
Total insurances with profits									
Group D—									
Without participation in profits									
For whole term of life									
Other classes (to be specified)									

Description of Transactions.	Particulars of the Policies for Valuation.					Valuation.			
	Number of policies.	Sums Assured.	Bonuses.	Office yearly premiums.	Net yearly premiums.	Sums Assured and Bonuses.	Office yearly premiums.	Net yearly premiums.	Net Liabilities.
Extra premiums ..									
Total insurances ..									
Deduct—Re-insurances ..									
Net insurances ..									
Total insurances without profits ..									
Total of the insurances shown in all groups ..									
Deduct—Re-insurances ..									
Net amount of insurances ..									
Adjustments, if any (to be separately specified).									
DIVISION II. *Annuities on Lives.*									
Immediate Annuities ..									
Deferred Annuities with return of premiums ..									
Deferred Annuities without return of premiums ..									
Other classes (to be specified) ..									
Total Annuities ..									
Deduct—Re-insurances ..									
Net Annuities on Lives ..									
Total of the results (after deduction of Re-insurances).									

NOTES.

1. Items in this Summary are to be stated to the nearest rupee.

2. No policy of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, is to be included in Groups A, B, C, or D of this Form: any such policies must be shown in a separate Group which must be added to the Form.

3. If policies without participation in profits but with a guaranteed rate of bonus are issued, they must be separately specified in Group D of this Form.

4. Policies under which there is a waiver of premiums during disability must be shown as a separate class.

5. Separate forms must be prepared in respect of classes of policies valued by different tables of mortality or at different rates of interest or involving the valuation of net premiums on different bases.

6. In cases where separate valuations of any portion of the business are required under local laws in places outside British India and reserves based on such valuations are deposited in such places, a statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured

and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place with a statement as to such bases respectively.

7. Office and not premiums and the values thereof must be shown after deduction of abatements made by the application of bonus.

FORM I.

Valuation Balance-Sheet of　　　as at　　　19　.

	Rs.		Rs.
Net liability under business as shown in the Summary and Valuation of Policies ..		Balance of Life Insurance Fund as shown in the Balance-Sheet.	
Surplus, if any ..		Deficiency, if any ..	

NOTE.—If the proportion of surplus allocated to the insurer, or in the case of an insurance company to shareholders, is not uniform in respect of all classes of insurances, the surplus must be shown separately for the classes to which the different proportions relate.

FORM J.

Specimen policy reserve values and minimum surrender values under a olicy for Rs. 1,000

[1][Number of annual premiums paid up to the valuation date.]	Age at entry 20.		Age at entry 30.		Age at entry 40.		Age at entry 50.	
	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender. value.	Reserve value.	Minimum surrender value.
1.								
2.								
3.								
4.								
5.								
6.								
7.								
8.								
9.								
10.								
15.								
20.								

NOTE.—Items in this Form to be stated to the nearest rupee.

[2][NOTE.—The reserve value is to be based on the rate of office premium payable by an insured who entered at the age shown and who had, by the valuation date, paid the number of annual premiums shown in the first column.]

LEG. REF.

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[1] Substituted for the words "Number of premiums paid" by S. 71, Act XIII of 1941.

[2] Added by *ibid*.

THE FIFTH SCHEDULE.

(*See* section 13.)

Regulations for preparing statements of business in force and requirements applicable to such statements.

PART I.

Regulations.

1. Statements prepared under this Schedule must be prepared, so far as practicable, in tabular form and must be identified by numbers and letters corresponding with those of the paragraphs of Part II of this Schedule.

2. Except with respect to rates of premium or contribution, items in statements prepared under this Schedule are to be shown to the nearest rupee.

3. Extra premium shown in the forms of Summary and Valuation prepared under the Fourth Schedule to this Act must not be included in statements prepared under this Schedule.

4. Every statement prepared under this Schedule shall be signed by the actuary making the investigation in connection with which it is prepared.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "annual loading" means the provision made for future expenses and profits;

(*b*) "extra premiums" means a charge for any risk not provided for in the minimum contract premium;

(*c*) "net premiums" means the premiums taken credit for in the valuation in connection with which any statement is prepared; and

(*d*) "valuation date" means as respects any valuation the date as at which the valuation is made.

PART II.

Requirements for statements applicable to Life Insurance Business.

The statements required to be prepared under this Part of this Schedule are as follows, namely:—

1. Statements, separately prepared in respect of policies with and without participation in profits, showing—

(*a*) as respects policies for the whole term of life, the rates of office premiums charged, in accordance with the published tables in use, for new policies giving the rates for decennial ages at entry from 20 to 70 inclusive; and

(*b*) as respects endowment insurance policies, the rates of office premiums charged, in accordance with the published tables in use, for new policies with original terms of ten, fifteen, twenty, thirty and forty years, giving the rates for decennial ages at entry from 20 to 40 inclusive, but excluding policies under which the age at maturity, exceeds 60.

2. Statements, separately prepared in respect of policies with immediate profits, with deferred, profits, with profits under discounted bonus systems, and without profits, showing in quinquennial groups—

(*a*) as respect policies for the whole term of life—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped according to ages attained;

(*ii*) the amount per annum, after deducting abatements made by application of bonus of office premiums payable throughout life, and of the corresponding net premiums, grouped according to ages attained; and

(*iii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable for a limited number of years, and, either, the corresponding net premiums, grouped in accordance with the grouping adopted for the purposes of the valuation, or, the annual loading reserved for the remaining duration of the policies, grouped according to ages attained;

(*b*) as respects endowment insurance policies—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped in accordance with the grouping adopted for the purposes of the valuation; and

(*ii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable, and of the corresponding net premiums, grouped in accordance with the grouping adopted for the purposes of the valuation:

Provided that—

(*a*) as respects endowment insurance policies which will reach maturity in less than five years, the information required by sub-paragraph (*b*) (*i*) of this paragraph must be given for each year instead of in quinquennial groups; and (*b*) where the office premiums payable under policies for the whole term of life for a limited number of years, or the office premiums payable under endowment insurance policies, or the corresponding net premiums, are grouped for the purposes of the valuation otherwise than according to the number of years' payments remaining to be made, or, where the sums assured under endowment insurance policies are grouped for the purposes of the valuation otherwise than according to the years in which the policies will mature for payment or in which they are assumed to mature if earlier than the true year, then, in any such case the valuation constants and an explanation of the method by which they are calculated must be given for each group, and in the case of the sums assured under endowment insurance policies a statement must also be given of the amount assured maturing for payment in each of the two years following the valuation date.

3. Statements as respects any policies in force under which premiums cease to be payable, whether permanently or temporarily, during disability arising from sickness or accident, showing the total amount of the office premiums payable.

4. Statements as respects immediate annuities on single lives for the whole term of life, separately prepared in respect of annuities on male and female lives, showing in quinquennial age groups the total amount of such annuities.

5. Statements as respects deferred annuities, separately prepared in respect of annuities on male and female lives, showing the specimen reserve values for annuities of one hundred rupees which will be produced on maturity on the basis of valuation adopted at ages, in the case of male lives, 60 and 65, and in the case of female lives, 55 and 60; the said statements must show the specimen reserve values which will be produced under the table of annual premiums in use for new policies, and if under any other table of annual premiums in use for any other deferred annuity policies in force smaller reserve values will be produced, the like specimens of these must also be given.

6. Statements as respects any policies of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, showing the total claims paid since the date as at which the last statements were prepared under this Part of this Schedule or, where no such statements have been prepared, since the date on which the insurer began to carry on the class of business to which the statements relate, and the reserve for unexpired risks and outstanding claims.

THE SIXTH SCHEDULE.

(*See* section 55.)

Rule as to the valuation of the Liabilities of an insurer in Insolvency or Liquidation.

The liabilities of an insurer in respect of current contracts effected in the course of life insurance business including annuity business, shall be calculated by the method and upon the basis to be determined by an actuary approved by the Court, and the actuary so approved shall, in determining as aforesaid, take into account—

(*a*) the purpose for which such valuation is to be made,

(*b*) the rate of interest and the rates of mortality and sickness to be used in valuation, and

(*c*) any special directions which may be given by the Court.

The liabilities of an insurer in respect of current policies other than life policies shall be such portion of the last premium paid as is proportionate to the unexpired portion of the policy in respect of which the premium was paid.

THE INSURANCE DEPOSITS (TEMPORARY REDUCTION) ACT (I OF 1941).

[*3rd March*, 1941.

An Act to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938.

WHEREAS, in consequence of conditions arising out of the present war, it is expedient to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938;

It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INSURANCE DEPOSITS (TEMPORARY REDUCTION) ACT, 1941.

(2) It extends to the whole of British India.

Definition.

2. In this Act "insurer" means an insurer as defined in clause (9) of section 2 of the Insurance Act, 1938, except that it does not include a Mutual Insurance Company or a Co-operative Life Insurance Society to which Part IV of that Act applies.

Reduction of instalments of deposit.

3. (1) An insurer entitled to the benefits of this Act shall, subject to the provisions of section 5, be deemed in respect of any instalment of the deposit to be made by him under section 7 of the Insurance Act, 1938, which he was required to pay during the year commencing on the 1st day of January, 1940, or which he may be required to pay at any time after the end of that year and so long as this section continues to have effect, to have complied with the provisions of the said section 7 as to payment of instalments of deposits, if he has paid or pays in accordance with the provisions of that section not less than one half the total amount which would have been required by that section as the instalment, had the insurer not availed himself of the provisions of this Act.

(2) If an insurer entitled to the benefits of this Act, when paying an instalment of deposit, has, in respect of any instalment due during the year commencing on the 1st day of January, 1940, paid more than one half the total amount required by the said section 7 as the instalment, he may at his option have the amount of any such surplus payment appropriated to the payment of the next or any subsequent instalment of deposit required from him under the said section 7 read with sub-section (1) of this section.

(3) This section shall cease to have effect on the expiration of one year from such date as may be fixed, for the purposes of this Act, by the Central Government by notification in the official Gazette as the date of termination of the present hostilities.

Insurers entitled to the benefits of this Act.

4. An insurer shall be entitled to the benefits of this Act only if—

(*a*) he carries on life insurance business only, and

(*b*) the date on which he first assumed risk on any policy issued by him was earlier than the 3rd day of September, 1939, but not earlier than the 3rd day of September, 1929.

Cesser of title to the benefits of this Act.

5. (1) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in any year if in the preceding year his total premium income, including annuity considerations, as shown in the revenue-account prepared under the Insurance Act, 1938, exceeded rupees thirty thousand.

(2) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in respect of any future instalment—

(*a*) if after the 1st day of January, 1941, he declares any bonus or dividend at a rate higher than the rate at which such bonuses or dividends were last declared by him before the 3rd day of September, 1939, or

(*b*) if the proportion of his renewal premium income spent by him in payment of commission and other expenses including capital expenditure, determined in accordance with Rule 25 of the Insurance Rules, 1939, exceeds in any year the proportion as so determined for the accounting period ending on the 31st day of December, 1939.

Resumption of payment of instalments in accordance with Act IV of 1938.

6. (1) When section 3 ceases to have effect, or if before that date an insurer ceases under clause (*a*) or clause (*b*) of sub-section (2) of section 5 to be entitled to the benefits of this Act, instalments of deposits shall be paid in accordance with the provisions of section 7 of the Insurance Act, 1938 (except that no insurer shall be

required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act), until the last instalment required to be paid under the said section 7 has been paid, and the balance of the deposit then remaining unpaid in consequence of the reduced instalments authorised under this Act shall be paid by the insurer in such further instalments, of such amount and at such times, as the Central Government may direct.

(2) If while section 3 continues to have effect an insurer ceases in any year under sub-section (1) of section 5 to be entitled to the benefits of this Act, instalments of deposit in that year shall be paid by him in accordance with the provisions of section 7 of the Insurance Act, 1938, except that he shall not be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act, and the provisions of sub-section (1) of this section shall apply to the payment by such insurer of any balance of the deposit due from him which remains unpaid after the last instalment required to be paid under the said section 7 has been paid.

Saving in respect of delayed payments of instalments of deposits.

7. For the purposes of the Insurance Act, 1938, an insurer entitled to the benefits of this Act who has failed to pay before the 1st day of January, 1941, an instalment of deposit due in the year 1940 shall not be liable to any consequences on that account in respect of a failure to comply with the provisions of section 7 of the said Act as to deposits if before the 15th day of February, 1941, he has paid as such instalment not less than one half the total amount required by the said section 7.

Removal of difficulties.

8. If any difficulty arises in determining the amount payable as an instalment of deposit by an insurer under this Act, the matter shall be decided by the Central Government whose decision shall be final.

THE INTEREST ACT (XXXII OF 1839).[1]

Short title given, Act XIV of 1897.
Declared in force—
Throughout British India except as regards the Scheduled Districts Act XV of 1874, S. 3.

[30*th December*, 1839.

An Act concerning the allowance of Interest in certain cases.

Preamble.

WHEREAS it is expedient to extend to the territories under the Government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of [2]the Statute 3rd and 4th, William IV, Chapter 42, section 28, concerning the allowance of interest in certain cases.

1. It is, therefore, hereby enacted that, upon all debts or sums certain

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LEG. REF.

[1] Short title, "The Interest Act, 1839". *See* the Indian Short Titles Act (XIV of 1897).

[2] Short Title.—"The Civil Procedure Act, 1833". *See* the Short Titles Act, 1836 (58 & 60 Vict., c. 14).

NOTES.

Sec. 1: (*See also* Notes under S. 73, Contract Act): CASE-LAW—CONSTRUCTION OF ACT.—The Interest Act and Lord Tenterden's Act being indistinguishable cases under the English Law are relevant for the decision of questions under the former Act. 12 P. 216=1933 P. 196. *See also* 31 I.A. 116=26 A. 229 (P.C.). There is nothing in law which debars a creditor from suing for the recovery of interest alone if he has complied with the formalities required by the Interest Act and if his case is otherwise governed by the said Act. (1 C.W.N. 219, Disappr.) 134 I.C. 1028=1931 L. 457. *See also* 1938 Nag. 119=20 N.L.J. 145=I.L.R. (1938) Nag. 482.

Power of Court to allow interest.

payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law.

NOTES.

DELAY IN FILING SUIT, if and when ground for disallowance of interest. *See* I.L.R. (1937) Nag. 360=1937 Nag. 165; 1938 P. W.N. 186=19 Pat.L.T. 202. The date upon which an execution sale is confirmed is the date upon which the money due by the judgment-debtor under the decree is paid by him and realized by the judgment-creditor through the Court. If there is no subsequent action on the part of the judgment-debtor, during the period between the receipt of the money into Court and the actual payment by the Court of the money to the judgment-creditor, which prevents or postpones that payment, no question arises of any further liability resting upon the judgment-debtor under the decree either for interest or otherwise. When no blame attaches to the judiment-debtor, he cannot be compelled to pay interest for any further period beyond the date when payment was made into Court in satisfaction of the decree. Merely because an injunction is issued at the instance of the auction-purchaser and delay is caused in payment out, the judgment-creditor cannot claim further interest from the judgment-debtor on the ground that the judgment-creditor has not been to blame for the delay. 55 L.W. 212=(1942) 1 M.L.J. 439.

ALLOWANCE OF INTEREST IN CERTAIN CASES.—The Act is only an enabling Act by which the Court is vested with a discretion to grant interest in certain cases, but does not create a right to interest in favour of creditors, which, of itself, could be made the subject-matter of a suit. 1 C.W.N. 219. But *see also* 4 Bom.L.R. 205; 40 M.L.J. 18=12 L.W. 562; 75 I.C. 64; 21 N.L.R. 16=1925 N. 451; 31 B. 354. *See also* 1937 Pat. 656=172 I.C. 744; 1940 O.W. N. 581=1940 Oudh 308 (Pronote inadmissible in evidence—Interest prior to suit not allowed in absence of any demand). *See also* 1937 Oudh 387. Claim for simple interest after principal amount has been recovered is not tenable. I.L.R. (1938) Nag. 482=20 N.L.J. 145=1938 Nag. 119. A creditor can claim interest (1) on the ground of agreement, (2) on the basis of statute, and (3) on the ground of usage. The practice of a particular creditor's shop cannot amount to usage. Nor would the mere writing on the bills that interest at 1 per cent. will be charged, amount to a contract. 16 Luck. 701=1941 Oudh 254. *See also* 1942 O.W.N. 157=1942 Oudh 88. Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.). *See also* I.L.R. (1940) Mad. 50=50 L.W. 466=1939 Mad. 877=(1939) 2 M.L.J. 579; 42 C.W.N. 1004=1938 Cal. 618. Interest before suit cannot be decreed if the case is not covered either by the Interest Act or by S. 73 of the Contract Act. 4 C.W.N. 818=27 C. 814; 139 I.C. 158=1932 A.L.J. 733=1932 A. 505. [*N.B.*—There is however a conflict of rulings between the several High Courts on this matter. *See* cases cited below.] *See also* D.C.R. Part II, 7; 19 P. L.R. 1902=104 P.R. 1901; 37 P.R. 1867; 54 I.C. 431; 41 A. 254=21 I.C. 253; 40 M.L.J. 18=75 I.C. 64. It is not correct to say that Courts have power to award interest in all cases where money due is withheld. 116 I.C. 669 (2)=1929 N. 170. *See also* 20 I.C. 194; 1933 O. 146; 39 I. C. 158=1932 A.L.J. 505; 1933 A. 186. Act is not exhaustive of all claims as to interest and it is open to the Courts in India to award interest in cases not coming within the purview of the Act, on principles of equity. Act does not apply to an unascertained sum such as the profits of a trade. 42 M. 661=36 M.L.J. 456=52 I.C. 505; 51 M.L.J. 633=1927 M. 59; 12 P. 216=146 I.C. 56=1933 P. 196; 35 P.L.R. 735=1934 L. 664; 1934 L. 175; 1933 M. 729=65 M.L.J. 620. *See also* 40 M.L.J. 18=12 L.W. 568; 75 I.C. 64=1923 L. 302; 71 I.C. 257; 47 M.L.J. 312=1925 M. 46=81 I.C. 536; 139 I.C. 158=1932 A.L.J. 733=1932 A. 505. If there is no agreement between the parties to pay interest, interest may be allowed by way of damages though not authorised by the Interest Act. 105 I.C. 836=4 O.W.N. 1061; 1935 C. 347; 1933 A. 147; 1933 L. 127; 1933 P.

NOTES.

198. *See also* 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=42 C.W.N. 985=(1938) 1 M.L.J. 640 and where the practice of the Court is not to allow more than six per cent. interest by way of damages the principle should be adhered to. 105 I.C. 836=4 O.W.N. 1061. *See also* 139 I.C. 158=1932 A. 505; 1937 Lah. 455. As to claim for interest on equitable grounds, *see* I.L.R. (1938) All. 243=1938 A.L.J. 1=1938 All. 151; 42 C. W.N. 1004=1938 Cal. 618; 1936 Rang. 141 (Discretion of Court); 1937 P.C. 193. The Act allows the Court or an arbitrator to whom a suit on a pro-note claiming interest is referred, to award interest even though there is no provision in the pro-note for payment of interest. 1934 A.L.J. 939=1934 All. 939. Where a claim for dower is decreed it is in the discretion of the Court to award interest on the amount from the date of the institution of the suit till the recovery of the amount. 131 I.C. 115=1931 A.L.J. 197=1931 A. 403. *See also* 1935 A. 239=56 A. 711=1934 A.L.J. 230 (interest on maintenance amount payable under a will. *See also* 12 P. 869. It has, however, been held in a recent case by the Bombay High Court, that interest cannot be awarded by way of damages apart from the special provisions of the Interest Act. 25 Bom.L.R. 837. *See also* 133 I.C. 861 =33 Bom.L.R. 703=1931 B. 386. In the absence of an agreement or usage giving a right to interest and of a written demand giving notice that interest would be claimed, a creditor will not be entitled to interest. 19 P.L.R. 1902=104 P.R. 1902; 22 A.L. J. 558. *See also* 1922 M. 1279=22 L.W. 490. Per *Curiam.*—"It is clear that neither under the common law nor under the Indian Contract Act can interest be claimed upon a debt unless there has been either an express promise to pay interest or such promise is to be implied from the usage of trade or other circumstancs." 8 L. 524=101 I.C. 644 =1927 L. 287. *See also* I.L.R. (1938) 2 Cal. 590=42 C.W.N. 1004=1938 Cal. 618; 1937 O.W.N. 622=1937 Oudh 387 (Pro-note inadmissible being insufficiently stamped—Suit on original loan—Interest can be awarded as compensation); 1940 Oudh 308; 49 L.W. 132; 71 M.L.J. 651 (Award of interest in claim for contribution). Interest cannot be allowed merely on the ground that the debtor delayed the payment of debt due by him. 8 P.R. 1914=20 I.C. 194. *See also* 152 I.C. 786=11 O.W.N. 1397; 61 C. 711; 151 I.C. 54; 42 C.W.N. 1004= 1938 Cal. 618; 134 I.C. 1028=1931 L. 457; 136 I.C. 719=33 P.L.R. 161; 1933 O. 146. In a suit by a beneficiary under a deed of wakf against the mutawalli for the payment to her share of profits, the payment of which had been unreasonably delayed, *held*, that the plaintiff was entitled to interest on the amount of his claim on "equitable" grounds. The mutawalli, though not a trustee, stands, in respect of his obligations, in the position of a quasi-trustee. 1933 A.L. J. 21=1933 A. 186. *See also* 1932 A. 505. Suit on oral contract—Absence of demand—Whether interest before suit recoverable. 20 M. 481=7 M.L.J. 263. Price of goods sold —No written instrument or demand in writing—Whether interest prior to suit recoverable. 6 W.R. 288. *See also* 83 I.C. 268=1925 N. 204 (No interest recoverable). In a suit for price of goods sold a claim for interest on the amount by way of damages for the delay in payment is not tenable; and such interest allowed by a Court can be disallowed in revision. 1933 L. 212. *See also* 1933 L. 127; 145 I.C. 247; 37 P.L.R. 87; 145 I.C. 157; 1933 L. 556 =146 I.C. 154. If in cases where Courts of equity would grant specific performance the purchaser obtains possession of the subject-matter of contract before the payment of the price, he must in the absence of express agreement to the contrary pay interest on his purchase money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase-money. The principle of payment of interest on the purchase-money from the date of the purchase to the date of payment, applies to compulsory purchases also. 197 I.C. 186=1941 P.C. 114. Interest by way of damages cannot be awarded on an unascertained amount. It can however be allowed in respect of a specified amount, namely, rent as determined on a particular date. Scope of Interest Act discussed. 12 P. 216=14 Pat.L.T. 140= 1933 P. 196; 1934 L. 175; I.L.R. (1938) Nag. 308=1937 Nag. 345 (Suit for damages for breach of contract—Interest not allowed as it would amount to giving *damages on damages*); 46 L.W. 790=1938 Mad. 206= (1937) 2 M.L.J. 798 (Railway Co. liable for loss of goods—Interest given from date of plaint, not from date of loss of goods). In a suit by the lessor for recovery of the unpaid part of premium payable in respect of a lease, interest by way of damages for failure to pay as agreed can be allowed although there is no agreement as to payment of interest. 1933 A. 147. Contract of sale—Vendee let into possession—Formal sale-deed not executed and purchase-money not paid—Right of vendor to interest in equity. 1933 M.W.N. 127. *See also* 10 O.W.N. 52=1933 O. 146. Act does not apply where there is an agreement between the parties regulating the amount of interest. 10 M.I.A. 229. Act does not apply to a contract to pay interest, implied from the dealings of the parties. 36 P.R. 1894. The language of the Act does not show that

NOTES.

a contingency in the liability, not affecting the amount of debt or the time of payment, can in any way prevent the operation of the provisions of the first part of S. 1. 27 C. 955. *See also* 1910 M.W.N. 731=8 I.C. 348. There is no general rule to the effect that payment and acceptance of a debt *post diem* precludes recovery of interest for the delay in payment. 4 Bom.L.R. 205. The Act has not the effect of restraining the power of the Court to allow interest in cases other than those mentioned in it. Marsh 239=1 Hay 500. *See also* 31 B. 354. This Act extends the provisions of the Statute 3 and 4 Wm. IV, c. 42, S. 28 to India. 6 M.I.A. 32. *See* 31 I.C. 116 (P.C.). The Act is retrospective in its operation, and authorizes the allowance of interest, although it was not provided for by the bond executed prior to passing of the Act. 6 M.I.A. 32. *English decisions* may be referred to as guide in construing the Act. 31 I.A. 116 =26 A. 229=14 M.L.J. 190 (P.C.). Interest is given under this Act by way of damages, on the ground that the debtor has wrongfully refused to pay the debt. 10 C. L.R. 561=7 C. 594. *See also* 1935 C. 347. But *see also* 20 I.C. 194; 1933 Lah. 556; 1933 M. 729=65 M.L.J. 620. There can be no wrongful refusal, where there is no hand to receive payment and give a complete discharge. Thus where an Insurance Company refused payment to the executors of the assignee of an insurance policy, on the ground that they were ignorant as to the terms of the assignment, and as to whether any consideration passed or not, and that the executors should obtain the authority or concurrence of the representatives of the deceased (who was the person assured), it was *held* the company were not liable to pay interest. 7 C. 594. A co-sharer collecting and retaining rent due to another co-sharer is liable to pay interest as damages under S. 73, Contract Act. 139 I.C. 158=1932 A.L.J. 733=1932 A. 505. *See also* 1933 A. 186. There is nothing to prevent a party from waiving or agreeing to waive the benefit or advantage of an Act or rule made solely for the benefit or protection of the individual in his private capacity, and which may be dispensed with without infringing on any public right or public policy. 5 I. C. 285. A *debt payable in kind* is a debt under the Act and interest is allowable on it under the Act. 38 M. 464=31 I.C. 432 (12 Bom.L.R. 831, Diss.). It was however laid down in a Bombay case that payment in kind is not such a debt as is contemplated by the Interest Act. 34 B. 506=12 Bom.L.R. 831=8 I.C. 411. Act does not apply to a *debt due on a foreign* judgment. When judgment given in England is silent as to interest, the plaintiff cannot make the defendant liable for interest as the English statutes as to judgments carrying interest do not apply to India. 5 C.W.N. 741=28 C. 641. *See also* 75 P.R. 1909=99 P.L.R. 1909=3 I.C. 522. A wager contract before the passing of Act XXI of 1848 is not within the scope of this Act; as the Act does not affect debts contingent in amount and time of becoming due. 7 M.I.A. 263; 57 M.L.J. 662 (P.C.). *See also* 26 C. 955; 1933 P. 196. The Act does not authorize the allowance of interest where the debt on which it is claimed is irrecoverable. 27 B. 330= 5 Bom.L.R. 198. Interest should not be awarded on unliquidated damages. 7 B. H.C. (A.C.) 89; 32 C.L.J. 239=60 I.C. 288. *See also* 1933 P. 196; 1937 Nag. 345. It is doubtful whether a Court possesses the jurisdiction under the Act to allow what in effect would be compound interest. But, even if the Court has jurisdiction, there can be no doubt that it would be exercising a sound discretion in not allowing a compound interest, except in cases where compound interest is expressly provided for by the agreement. 1 C.W.N. 219; 1933 M. 171 and cases referred to therein. But *see also* 7 C.W.N. 876. The Court has power, under this Act, to give interest *post diem* at a reasonable rate, if it be on money payable at a certain time and under a written instrument. 18 M. 242=4 M.L.J. 265. Where a mortgage instrument is silent as to *post diem* interest, although more than six years have elapsed after the due date of the bond, such interest may be recovered under this Act, and may be made a charge on the mortgaged property. 5 M.L.J. 154; 33 P.L.R. 735 [following 5 L. 422 (P. C.)]. *See also* 1933 M. 171. But *see also* 35 A. 534. The joint effect of the Interest Act and S. 88 of the Transfer of Property Act is in favour of the award of interest *post diem* as interest till date of payment at a reasonable rate, and as a charge upon the mortgaged property. 18 M. 248. But *see* 17 A. 581, *contra. See also* 18 M. 338 (notes); 24 C. 699=1 C.W.N. 437 (F.B.); 20 M. 371; 21 C. 274; 35 A. 534=11 A.L.J. 829=21 I.C. 253. Where in a mortgage bond there was no stipulation for payment of *post diem* interest, such interest could be given under the Act, though the claim for future interest by way of damages had become barred. 5 M.L.J. 154. *See also* 1930 M.W.N. 1240; 59 C. 722=1932 C. 689. The *awarding of future interest* rests on the discretion of the trial Court which will not without sufficient grounds be interfered with by the appellate Court. 139 I.C. 64=9 O.W.N. 253=1932 O. 255. *See also* 16 Pat. 557=18 Pat.L.T. 787=1937 Pat. 628 (Interest *pendente lite*); 1930 M.W.N. 1240; 33 P.L.R. 716. Where in a mortgage bond there is no precise definition of the rate of interest prior to default, it is not possible to draw an

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inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment of instalments. In such a case, the Court should allow a reasonable rate of interest. Interest allowed at 12 per cent. per annum. 28 N.L.R. 1=136 I.C. 887=1932 N. 39. Where under the deed of mortgage with possession, the mortgagee is to enjoy the mortgaged property in lieu of interest for a period of five years and where he is deprived of his possession without payment of the principal, he is entitled to interest even subsequent to the period of five years fixed for the redemption and the same can be made chargeable on the mortgaged property. 136 I.C. 783=1932 M. 173.

INTEREST—POST-DECREE—DISCRETION OF COURT.—Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling the Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in O. 34, r. 11 and even that only says that the Court "may" order. 140 I.C. 104=13 Pat.L.T. 545=1932 P. 332. *See also* 59 C. 722=139 I.C. 455=1932 C. 689. Interest can be allowed under this Act as damages for the breach of contract which occurs when the debt is wrongfully detained after it has fallen due, and it can be allowed only in a suit brought within six years of such breach under Art. 116. There can be no recurring cause of action in such cases, and the starting point for limitation is the date of failure to pay the money. If, however, the interest in question is "money charged on land" the article applicable would be Art. 132 and not Art. 116. 18 M. 331. Effect of Contract Act, S. 73. On this Act, *see* 7 M.L.J. 264=24 M. 481. This Act provides for the award of interest on debts in certain cases, and provides that, where the conditions required by the Act are satisfied, interest will be recoverable, quite irrespective of the question whether any actual loss or damage has been caused to the creditor; but compensation under S. 73 of the Contract Act will not be recoverable by the creditor from the debtor on the ground that the payment of the money due to him has been withheld by the debtor, unless he can show that actual loss or damage has been caused to him. 26 C. 955. *See also* 1 S.L.R. 179; 9 Bom.L.R. 439; 1932 A. 505.

"MAY BE RECOVERED"—MEANING.—The expression "may be recovered" in the Act does not mean the same thing as "is sought to be recovered". 134 I.C. 1028=32 P.L.R. 546=1931 L. 457.

DEBTS OR SUMS CERTAIN PAYABLE AT A CERTAIN TIME.—*See* 9 Bom.H.C. 7; 7 B.H.C. (A.C.) 89. When by a contract, a sum of money is payable at a time certain, and upon a sum to be ascertained on a certain date, but a dispute occurs as to the amount, which is settled by the Court, interest is payable. 32 C.L.J. 239. Interest pending suit is not claimable in a suit for unliquidated damages. *See* 60 I.C. 288; 26 S.L.R. 167=1932 Sind 9. In a suit to recover the value of certain articles entrusted with the defendant, interest cannot be allowed on the amount decreed, as it will be tantamount to awarding damages upon damages. 137 I.C. 217=9 O.W.N. 239=1932 O. 165. The mere fact that the contract does not come within the protection afforded by the Act is not a reason for holding that it is not controlled by the Act. The term 'payable at a certain time' in the Act refers to payment agreed between parties and not under a presumption of law. 40 M.L.J. 18=12 L.W. 568. *See also* 8 L. 524=1927 L. 287. A sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed and no interest can be allowed on such sum. 119 I.C. 615=1929 P.C. 185=57 M.L.J. 662 (P.C.).

INTEREST ON MONTHLY MAINTENANCE AMOUNT.—*See* 15 Luck. 537=1940 Oudh 305.

INTEREST ON MESNE PROFITS.—*See* 1937 P.C. 143 (P.C.); 1937 A.L.J. 297=1937 All. 328. Interest on *wages outstanding* not allowed. 1939 M.L.R. 122; in suit for accounts. *See* 1936 Rang. 141; 1940 Oudh 257; suit for rent of shop. *See* 1938 P.W.N. 689. As to right to compound interest, *see* 1936 Rang. 141; 1936 Cal. 326; 1939 Pat. 323; 1939 Pat. 552. Interest claimed but not granted in preliminary decree cannot be allowed in final decree. 1936 Rang. 141.

INSTALMENT BONDS.—In case of instalment bonds where there is a double penalty, namely, enhanced interest on defaulted instalments and an exigibility clause in case of certain defaults, the correct method in granting interest is to allow the enhanced interest on the defaulted instalments up to the date when the exigibility clause comes into operation and then from that date to allow interest at the original rate on the whole principal amount till the date of suit. From the date of suit, further interest may be allowed on the whole sum found due until the date fixed for payment. 142 I.C. 603=1933 N. 104 (Relying on 1928 N. 6).

THE COURT MAY IF IT SHALL THINK FIT.—The Act is an enabling Act which vests the Court with a discretion; it does not create

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a right to interest in favour of creditors, which of itself could be made the subject-matter of a suit. 1 C.W.N. 219. *See also* 1925 N. 541. As to whether the discretion vested in the Court by this Act, in allowing or refusing interest in cases within the Act, is liable to review, *see* 7 M.I.A. 263. *See also* 1938 P.W.N. 186=19 Pat.L.T. 202; 1939 Pat. 323; 1938 All. 151.

CURRENT RATE OF INTEREST.—Where a certain sum of money is payable by virtue of a written instrument at a certain time, the Court can under the Interest Act allow interest, if it thinks fit, at a rate not exceeding the current rate, from the time when the money is payable. Where there is no security, a rate of one per cent. per mensem, is not unreasonable. 52 I.C. 953 (N.). As to what is reasonable rate of interest, *see* 1939 All. 308=I.L.R. (1939) All. 329 (Pronote). 1939 All. 323; 1937 Pat. 73; 1939 Pat. 552; 1939 Pat. 203.

IF SUCH DEBTS BE PAYABLE BY VIRTUE OF SOME WRITTEN INSTRUMENT.—A certificate of the Administrator-General admitting a debt to be due is not a "written instrument" such as is contemplated by the Act, because the amount mentioned therein is not payable by virtue of the certificate, which merely purports to certify the registration of the amount of the admitted debt for the purpose of convenience in administering the estate. 25 C. 54. *See also* 75 I.C. 64=1923 L. 302. It is doubtful whether a decree or an order of a Settlement Officer under S. 40, Act XVII of 1876, is a written instrument within the meaning of the Interest Act. 1 O.C. 94. A principal is not entitled to interest on moneys received and detained by the agent on behalf of the principal in the absence of a contract to the contrary. 41 A. 254=17 A.L.J. 169=49 I.C. 696. Interest is not allowed in a suit for recovery of money for use and occupation, because such sums are not payable by an instrument in writing and at a certain time. 9 I.C. 221 (Oudh).

WHEN DEMAND OF PAYMENT SHALL HAVE BEEN MADE IN WRITING.—The Interest Act is applicable only when a notice is given that interest will be claimed from the date of demand till date of payment. In the absence of such a notice interest cannot be claimed under the Act. 16 Luck. 701=192 I.C. 885=1941 Oudh 254. *See also* 1940 Pat. 384. There must also be demand in writing. Interest prior to the institution of the suit cannot be given under this Act, unless a demand of payment has been made in writing. 7 Bom.L.R. 798; 101 I.C. 57=1927 A. 444. *See also* 152 I.C. 786=11 O.W.N. 1397; 145 I.C. 157=1933 L. 212; 20 I.C. 299=39 P.R. 1913; 22 L.W. 490=1925 M. 1279; 1937 A.L.J. 168=1937 All. 257; 1936 Nag. 285=I.L.R. (1937) Nag. 61. In a suit to recover price of goods sold, if the claim for interest is based on an alleged agreement that is not proved, and no notice as to interest is given as required by Act XXXII of 1839, interest should be disallowed. 1933 L. 212=10 O.W.N. 316=1933 O. 259. Where the plaintiff had made a demand of the amount due under a pronote but there was no claim for interest by way of damages from the date of demand until payment, *held*, that plaintiff was not entitled to such interest under the Act. 1933 O. 259. The provisions of the Interest Act are all comprehensive and interest can only be allowed in accordance therewith. Where the plaintiff who had paid a sum of Rs. 1·400 towards shares which, however, were never allotted to him, sued for refund of the money, *held*, that the payment was not "a debt or sum certain payable at a certain time" within the meaning of the Interest Act that interest was only payable "otherwise" as money had and received from the date of demand. 141 I.C. 120=1933 M. 320=64 M.L.J. 130. Where no established usage is proved for claiming interest on the price of goods sold and delivered. interest can be awarded under the provisions of the Interest Act of 1839 from the date of the demand for interest. 32 Bom.L.R. 404. *See also* 1933 L. 212; 1933 L. 127. Where a debt or sum is not payable at a certain time, then interest is payable from the time when demand of payment shall have been made in writing, unless there was a stipulation for payment of interest, when the Act would have no application, and if an agreement to pay interest cannot also be implied and the debt was not payable on demand, the plaintiff is not entitled to any interest till the filing of the suit which affords a clear intention to charge interest. 10 Pat.L.T. 373 =1929 P. 365. Interest up to the date of the suit cannot be awarded on sums payable, not under a written instrument, the payment of which has been illegally delayed, unless there is a written demand of payment. 1 M.H.C. 369 (Ref. to in 20 M. 481; 23 M. 41; 31 B. 354; 9 Bom.L.R. 439; 148 P.R. 1907). In a suit on an oral contract, where no agreement for interest or usage for payment of interest was alleged, *held*, that interest was not allowable. 20 M. 481=7 M. L.J. 263. *See also* 22 L.W. 490=1925 M. 1279. A letter of the plaintiff demanding interest on an outstanding debt retrospectively, up to the date of the demand, was held to have made it sufficiently clear by implication, that it was the intention of the plaintiff to claim interest prospectively, up to the date of payment and to have complied with the requirements of the Act. 23 M. 41. *See also* 83 I.C. 253=1925 N. 245. Demand for retrospective interest may imply demand for prospective interest. *See* 181 P.L.R. 1901 and 23 M. 41. Demand for

THE JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850).[1]

[4th *April*, 1850.

An Act for the protection of Judicial Officers.

Preamble. For the greater protection of Magistrates and others acting judicially; It is enacted as follows:—

1. No Judge, Magistrate, Justice of the Peace, Collector or other person

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LEG. REF.

[1] SHORT TITLE, 'The Judicial Officers Protection Act, 1850'. *See* the Indian Short Titles Act (XIV of 1897).

NOTES.

principal may imply demand for interest. 23 M. 41. Interest is not allowed upon the unpaid price of goods sold, unless demand has been made for the arrears. A printed headline in the tradesman's bill that interest would be charged on all arrears after a certain period is not such a demand as is contemplated by the Interest Act. 8 P.R. 1914=20 I.C. 194; 47 M.L.J. (Short Notes) 41. *See also* A.W.N. (1887) 287. In the absence of any agreement to pay interest on a particular transaction or of any notice of the vendor's intention to claim interest if debt is not paid within a certain time, a claim for interest cannot be decreed under the Act. 54 I.C. 431. In a suit by a contractor to recover money payable for work and labour done under a building contract, which provided that all works done by the contractor should be paid for by the contractee according to the rates therein specified within a reasonable time after it had been inspected and finally approved and passed. *Held*, that the provision was not one for the payment of a sum certain within the meaning of S. 1 and that, in the absence of provision for payment of interest in the contract or any proof of demand, the Court had no power to allow interest under the Act from the time when the money became payable. *Held also*, that Court could not award interest under the proviso to S. 1 of the Act. 40 M.L.J. 18=12 L.W. 567; 1920 M.W.N. 717=60 I.C. 353.

SUCH DEMAND SHALL GIVE NOTICE TO DEBTOR THAT INTEREST WILL BE CLAIMED.—Under this Act a creditor has the option of notifying to his debtor the date from which interest will be claimed, and failure to give such notice deprives the creditor of interest. 181 P.L.R. 1901; 92 I.C. 354=1925 M. 1279. At the head of every bill of the seller of goods, the following was printed: "Interest will be charged at 12 per cent. per annum on bills not paid on presentation." *held*, that the bill was a sufficient notice under the Act. 7 A.W.N. 287. But *see contra* 21 I.C. 194=47 M.L.J. (Short Notes) 41; 152 I.C. 786=11 O.W.N. 1397. A letter demanding interest, from which it was made clear, by implication, that it was the creditor's intention to claim interest up to the date of payment, was sufficient notice under the Act. 181 P.L.R. 1901. *See also* 23 M. 41. When a contractor is, for no fault of his own, kept out of his money, the principal sum, for a long time after it is due, it would be reasonable that the law should admit of interest being recoverable by way of damages. 23 M. 41. But *see also* 43 M. L.J. 98=12 L.W. 568: 60 I.C. 353. The existence of previous litigation upon the same subject-matter is sufficient notice in order to entitle the plaintiff to charge interest. 2 Hay. 123.

EXECUTING COURT cannot award interest; only the Court which adjudicates as to the actual debt or claim can award interest. 53 C. 354=98 I.C. 238=1926 C. 1119.

PROVIDED THAT INTEREST SHALL BE PAYABLE IN ALL CASES IN WHICH IT IS NOW PAYABLE AT LAW.—*See* (1942) 1 M.L.J. 250; 65 I.A. 66=I.L.R. (1938) 2 Cal. 72= 1938 P.C. 67=(1938) 1 M.L.J. 640 (P. C.); 50 L.W. 466=1939 Mad. 877=(1939) 2 M.L.J. 579. Neither the Interest Act nor the Contract Act affects the rule of Hindu Law, that in the case of a debt wrongfully withheld after demand of payment has been made interest becomes payable by way of damages. 9 Bom.L.R. 439=31 B. 354. But *see* 18 M.L.J. 245=31 M. 250; 7 M. L.T. 108. The interest Act expressly provides that interest shall be payable in all cases in which it is payable by law. And money obtained by fraud can be recovered with interest under the law. 25 M.L.J. 531=21 I.C. 394. Where an improvement lease provided that the lands were to be gradually brought under cultivation and until they were so brought nothing would be payable to the Government or to the Jenmi and it further provided that the tenant should pay from the year in which Government revenue was paid rent at a certain rate, *held*, that interest could not be awarded under the Interest Act in respect of the arrears of rent claimed by the lessor. ***Held****, also*, that interest could not be awarded under the proviso to the Act on general equitable grounds. 31 L.W. 655=1930 M. W.N. 438. Per *Madhavan Nair, J.*—The Interest Act is exhaustive and only such equitable grounds as have been generally recognised in Courts of Equity can be relied on in India in awarding interest on equitable grounds. The case in 42 M. 616 is not correctly decided. 31 L.W. 665=1930 M.W.N. 438.

Sec. 1: SCOPE OF ACT.—The Act does not probably contemplate the protection of a

Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders.

acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

NOTES.

Judge from a suit for damages for breach of contract, but the language of the Act is sufficiently wide to grant protection even against a suit of that nature. 1931 A.L.J. 41=1931 All. 189 (F.B.). The Act has no bearing whatsoever on the case of a contract into which a Judge may enter according to the general law of the land. Enforceability of security bond executed in the name of the judge considered. 1931 Oudh 99. If the act complained of against a judicial officer is in its nature judicial, and within his jurisdiction, he is not liable to be sued, even though the act was done maliciously. If, on the other hand, he acts without jurisdiction, his liability would depend, not on whether the act was malicious and without reasonable and probable cause, but on whether it was within the protection of the Act. (12 All. 115, Ref.) 1933 All. 749. (As to procedure for instituting criminal prosecution against judges and public servants, *see* Criminal Procedure Code Act V of 1898, S. 197). By S. 1 of the Act a judicial officer is protected if he made the order in the discharge of his judicial duties whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to pass the order. 'Jurisdiction' in the section is to be taken in the sense of authority or power to act in the matter and not in the sense of authority or power to act in a particular manner. Any person executing such an order within the 'jurisdiction' of a judicial officer is equally protected. An order of a Magistrate for the search of a shop and seizure of certain tins of oil, therein, though not in the prescribed form, and the carrying out of such an order by a police officer were held to be alike protected, even though the prosecution with reference to which the order was made, ultimately failed. I.L.R. (1938) 1 Cal. 581 =42 C.W.N. 50=1938 Cal. 177. The term "jurisdiction" means authority or power to act in a matter, and not authority or power to do an act in a particular manner. In the matter of warrants, the protection afforded by the section is not against suit for executing lawful warrants or orders, but against suits for executing warrants or orders, not lawful, provided that such warrants or orders have been issued by a judicial officer in a matter within his jurisdiction, and not merely in a matter in which such judicial officer has authority or power to issue the particular warrant. The term "jurisdiction" should not be construed as meaning authority or power to issue the warrant in a particular matter and in the particular manner in which it is issued. 12 A. 115. (10 M.L.J. 232 Diss.). *See also* 30 Bom. 241=7 Bom. L.R. 95; L.B.R. (1872-1892) 83; 8 C.L.J. 75; 2 M.H.C.R. 396; 36 Cal. 433=13 C. W.N. 458; 40 C.W.N. 500. An order of a Magistrate for the search of a shop and seizure of certain tins of oil, therein, though not in the prescribed form, and the carrying out of such an order by a police officer were held to be alike protected, even though the prosecution with reference to which the order was made ultimately failed. 36 Cal. 433. Act does not apply to acts of Governor in Council. 7 Mad. 466. Secretary of State not liable for acts of judicial officer. 59 P.W.R. 1908. Act protects a judicial officer from suits not only for acts done or ordered to be done by him in the discharge of judicial duties not only within the limits of his jurisdiction but also without the limits of his jurisdiction, provided that he, at the time of doing the act or ordering it to be done, believed himself, in good faith, to have jurisdiction to do or order the act complained of. 9 C.W.N. 591=1 C.L.J. 278; 1933 All. 749; 42 C.W.N. 50=I.L. R. (1938) 1 Cal. 581=1938 Cal. 177. The protection afforded to judicial officers rests on public policy. And though thereby a malicious Judge or Magistrate may be given a protection designed not for him, but for the public interest, it does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded. 7 Bom.L.R. 951. *See also* 30 Bom. 241. Where the Judge acting in his judicial capacity takes in good faith all the proceedings which the law permits him to take, he is protected. *See* 9 I.C. 535 (All.); 45 Bom. 1089=62 I.C. 93=23 Bom.L.R. 447. Extent of pro-

NOTES.

tection to judicial officers is the same as in English law. 2 M.I.A. 293. Municipal councillor acting as Magistrate under Bengal Act III of 1864 is judicial officer. 13 W.R. 340. When a Magistrate directs a general search of house in view of an enquiry under the Cr.P.Code in discharge of his judicial functions he may well appeal for protection under this Act. 39 Cal. 953=39 I.A. 163=23 M.L.J. 32 (P.C.), overruling 36 C. 433 =9 C.L.J. 298=13 C.W.N. 458. Plaintiffs sued a Magistrate on the allegation that the latter took him into custody and brought a false charge against him. The trial Court dismissed suit as barred by this Act. *Held*, that the allegation in the plaint disclosed a cause of action to which the Act did not apply. The defence under the Act is as much a defence on the merits as any other defence such as limitation, etc., and the Judge must before dismissing the suit take such evidence in a case as is necessary to bring the case within the Act. 39 A. 516= 39 I.C. 553=15 A.L.J. 541.

ILLUSTRATIVE CASES.—Where a Magistrate acts without jurisdiction in the *bona fide* belief that he has jurisdiction, he is protected by the Act, and no suit will lie. 10 M.L.J. 232. *See also* 12 A. 115. Act does not protect a Magistrate who has not acted with due care and attention. The mere absence of *mala fides* is no defence. A Magistrate cannot be said to have "in good faith" believed himself to have jurisdiction to do or order the act complained of, unless he, in arriving at that belief, acted reasonably, circumspectly and carefully. 13 W.R. 13; 16 W.R. 63. *See also* 3 B.H.C.R. (A.C.J.) 36. Where, after becoming *functus officio* a Judicial Officer adds a false statement to his order which is designed to help one of the parties, it will be a sufficient answer to a contention based upon the Judicial Officers Protection Act, S. 1 to say that it is impossible to believe that the defendant thought that he had jurisdiction to do the act complained of. 1942 A.L.W. 63. Suit for damages against Magistrate for false imprisonment. Magistrate had not acted in good faith believing himself to have jurisdiction, but carelessly, precipitately and without caution. This Act did not protect him from liability. 3 B.H.C.R. App. 1 (13 W.R. 13; 12 A. 115; 6 Bom. L.R. 131 Rel.) *See also* 9 C. 341 (P.C.). Where in connection with an application for transfer of a case pending before a Union Bench, a Magistrate calls for a report from the President of the Union Bench the report made by the President in accordance with the Magistrate's directions is made in due discharge of duty. The President is consequently entitled to protection under the Act. The fact that allegations which ought not to be made are inserted in it does not take away the protection. 40 C.W.N. 500. A Judge knowingly pronouncing illegal orders is responsible to the State only, and cannot be sued so long as he keeps within his jurisdiction, though he may, in certain cases and by a particular procedure, be held criminally responsible. A contrary system would produce great inconvenience by allowing "every losing party of whom there must be one in every suit, to bring an action against the Judge, and the Judge in his turn, if unsuccessful, suing the other Judge who had pronounced against him." L.B.R. (1872-1892) 83. The Act is for the protection of judicial officers acting judicially, and officers acting under their orders, and never for the protection of the Police or a Magistrate in the exercise of police duties. 9 C. 341=9 I.A. 152 (P.C.). There is no law which authorises the Police or a Magistrate in the exercise of Police duties or an officer in command of a cantonment, in consequence of a *bona fide* belief that a person is dangerous by reason of actual lunacy to put him into confinement, in order that he may be visited and examined by medicial officers, and to keep him in confinement, until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *a fortiori*, this cannot be done in the case of a *bona fide* belief of danger from impending lunacy; so that such officer would not be protected from liability in respect of such acts. 9 C. 341=9 I.A. 152 (P.C.). The act of issuing a warrant for the arrest of the complainant to hear an order which directed him to pay compensation to the accused is not an act within the "jurisdiction" of the Magistrate within the meaning of that word, as used in this Act. 10 M.L.J. 232. A Deputy Magistrate, who without reasonable cause, delays proceeding with the trial of persons whom he keeps in jail is liable, notwithstanding the above Act, to an action in damages if the prisoners are eventually acquitted. 11 W.R. (Cr.) 19. Local nuisance —Jurisdiction of Magistrate—A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order, the legality of which was then properly under the consideration of an appellate Court. 2 B.H.C.R. (Cr.) 384. A Magistrate acting *bona fide*, is not liable for anything done by him in the exercise of his duty, however wrong the act may be. This Act while freeing the agent, the person who actually commits the tort complained of and who would be the person primarily responsible, from all responsibility could not have intended to leave the principal liable. 9 C.W.N. 495=1 C.L.J. 355.

PERSONS EXERCISING JUDICIAL FUNCTIONS MUST BE IN AN ENTIRELY IMPARTIAL POSITION.—They ought not to have any interest, pecuniary or otherwise, in the subject-matter of the litigation, and they must not be in

THE KAZIS ACT (XII OF 1880).

PREFATORY NOTE.—The following are extracts from the Statement of Objects and Reasons annexed to the Bill and Proceedings in Council in connection with the passing of the Kazis Act:—

"Under the Muhammadan Law the Kazi was chiefly a judicial officer. His principal powers and duties are stated at some length in the Hedaya (Book XX). He was appointed by the State and may be said to have corresponded to our Judge or Magistrate. In addition, however, to his functions under the Muhammmadan Law, the Kazi in this county before the advent of British rule, appears to have performed certain other duties, partly of a secular and partly of a religious nature. The principal duties seem to have been preparing, attesting and registering deeds of transfer of property, celebrating marriages, and performing other rites and ceremonies. It is not apparent that any of these duties were incumbent on the Kazi as such. It is probable that the customary performance of them by him arose rather from his being a public functionary, and one known by his official position to be acquainted with the law than from his having, as Kazi, a greater claim to perform them than any one else. Such was the position of the Kazi in this country under the Muhammadan Government. On the introduction of the British rule, Judges and Magistrates took the place of Kazis, and the Kazi in his judicial capacity disappeared: but the British Government though no longer recognizing the judicial functions of the Kazi, did not abolish the office. By certain Regulation, *viz.*, Bengal Regulation (XXXIX of 1793) for Bengal, Bihar and Orissa; Bengal Regulation (XLIX of 1795) for Benares; Bengal Regulation (XLVI of 1803) for the Ceded Provinces; Madras Regulation (III of 1808) for Madras; Bombay Regulation (XXVI of 1827) for Bombay passed from time to time, the appointment of Kazi-ul-Kuzaat and Kazis by the State was provided for, and the performance of their non-judicial duties was recognized by law. In the case of Bengal, indeed certain additional duties were imposed on them. The duties of the Kazi under these Regulations comprised some or all of the following, *viz.*:—

(1) preparing and attesting deeds of transfer and other law-papers;
(2) celebrating marriages and presiding at divorces;
(3) performing various rites and ceremonies;
(4) superintending the sale of distrained property and paying charitable and other pensions and allowances.

In the course of subsequent legislation, the first and last of the above duties devolved on officers specially appointed for the purpose, and there remained nothing to be performed by the Kazi but the second and third, which were purely ceremonial. Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Accordingly, in 1864, by Act XI of that year, all the regulations relating to the appointment of Kazis by Government and the duties to be discharged by them were repealed, but in order that it might be clear that no interference with the ceremonial functions of these officers was intended, a section was added to that Act as follows:—"Nothing contained in this Act shall be construed so as to prevent a Kazi-ul-Kuzaat or other Kazi from performing, when required to do so any duties or ceremonies prescribed by the Muhammadan Law". (*See* section 2 of Act XI of 1864.)

Certain of his duties having thus survived the passing of Act XI of 1864, the Kazi is still a functionary of considerable importance in the Muhammadan community. What was originally in some sense an accidental adjunct of his judicial office has become his principal and only duty, and in some parts of the country at least the presence of a Kazi at certain rites and ceremonies appears now to be considered by the Muhammadans essential from their point of view.

Act XI of 1864 has, however, raised a difficulty of a sort which was not anticipated at the time it was passed. As mentioned above, the Kazi was under Muhammadan Law appointed by the State and it had been held by the Courts, both of Bombay and Madras,

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such a position, that any bias in favour of one side or the other can be imputed to him. Actual bias need not be proved if the relationship is such that bias may seem likely. It is impossible to say that a debtor is not, from the nature of the case, subject to bias in favour of a creditor who can call in his money. It is not enough for the Court to say it is satisfied that in a particular case no bias existed or was shown. It is necessary that the position be such that the general public may feel confident that justice has been done by an impartial tribunal, and it is of the highest importance that this principle should not be encroached upon. The Assistant Taxing Master of the High Court taxed three bills of costs of the respondent bank against the applicant. At the time he was a debtor of the respondent bank, but he did not disclose the fact at the time. *Held*, that the officer was not competent to entertain the taxation and the taxation was therefore bad *ab initio*. 40 Bom.L.R. 904=1938 Bom. 431=I.L.R. (1938) Bom. 829.

that the appointment cannot be made except by the State. But as, by Act XI of 1864, the State divested itself of the power of appointment the preamble of that Act declaring it was inexpedient that such appointment should be made by Government, it would seem that no valid nomination to the office can now be made.

The inconvenience resulting to Muhammadans from this state of things had been brought to the notice of the Government on several occasions by members of that community, and more particularly by the Muhammadans of the Madras Presidency. It was considered by the Government that the grant of the relief that was sought, *viz.*, that Government should once more undertake the appointment of Kazi was but a reasonable concession to the wants of the Muhammadan population.

With this object the Kazi Bill had been prepared. It extends in the first instance to Madras only, where the want of duly appointed Kazis appears chiefly to have been felt but it contains a clause empowering any other Local Government to extend to the territories administered by it, should the Muhammadans in those territories hereafter request its extension. It confers no legal rights or duties on Kazis. It simply in order to satisfy the wants of the Muhammadan community provides for the appointment of Kazis whatever these may be as they now are. To prevent any possible misapprehension on this point, a saving clause has been added to the effect that nothing in the Bill confers any judicial or other powers on a Kazi, or makes his presence necessary at any marriage or other ceremony at which his presence is not now necessary. (*See* Statement of Objects and Reasons.)

This Act is of a permissive character and it confers no official, administrative or judicial powers upon the Kazis. (See *Fort St. George Gazette*, Supplement, 27th July, 1880, p. 2.).

THE KAZIS ACT (XII OF 1880).[1]

[*N.B.*—Rep. in pt., Act X of 1914, Am., Act XIV of 1932.]

[*9th July*, 1880.

An Act for the appointment of persons to the Office of Kazi.

WHEREAS by the preamble to Act No. XI of 1864[2] (*An Act to repeal the law relating to the offices of Hindu and Muhammadan Law officers and to the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices*) it was (among other things) declared that it was inexpedient that the appointment of the Kazi-ul-Kuzaat, or of City, Town or Pargana Kazis, should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed; and whereas by the usage of the Muhammadan community in some parts of British India the presence of Kazis appointed by the Government is required at the celebration of marriages and the performance of certain other rights and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of Kazi; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE KAZIS ACT, 1880;

[3][* * * * * *]

Local extent.

It extends, in the first instance, only to the territories administered by the Governor of Fort Saint George in Council. But any other Provincial Government may from time to time, by notification in the Official Gazette, extend it to the whole or any part of the territories under its administration.

2. Whenever it appears to the Provincial Government that any consi-

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LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1880, Part V, p. 21; for the report of the Select Committee, see *ibid.*, Part V, p. 203; for discussions in Council, see *ibid.*, Supplement, pp. 345, 356 and 1203.

[2] Repealed by the Repealing Act (VIII of 1868).

[3] The words "and it shall come into force at once" were repealed by Act X of 1914.

NOTES.

Secs. 2 and 4.—The Act does not confer on the Kazi the exclusive right to perform the functions which his office requires him to discharge. 25 I.C. 898=37 M. 228 (1 B. H.C.R. App. 18; 13 B. 429; 17 M.L.J. 421, Dist.).

Power to appoint Kazis for any local area.

derable number of the Muhammadans resident in any local area desire that one or more Kazis should be appointed for such local area, the Provincial Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area.

If any question arises whether any person has been rightly appointed Kazi under this section, the decision thereof by the Provincial Government shall be conclusive.

The Provincial Government may, if it thinks fit, suspend or remove any Kazi appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the Provincial Government unfit, or personally incapable, to discharge the duties of the office.

Naib Kazis.

3. Any Kazi appointed under this Act may appoint one or more persons as his naib or naibs to act in his place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any naib so appointed.

When any Kazi is suspended or removed under section 2, his naib or naibs (if any) shall be deemed to be suspended or removed, as the case may be.

Nothing in Act to confer judicial or administration powers.

4. Nothing herein contained, and no appointment made hereunder, shall be deemed—

(*a*) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder; or

to render the presence of Kazi necessary; or

(*b*) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or

to prevent any one acting as Kazi.

(*c*) to prevent any person discharging any of the functions of a Kazi.

THE KHADDAR (NAME PROTECTION) ACT (VIII OF 1934).

[13*th March*, 1934.

An Act to regulate the use of the words "Khaddar" and "Khadi" when applied as a trade description of woven materials.

WHEREAS it is expedient to regulate the use of the words "Khaddar" and "Khadi" when applied as a trade description of woven materials; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE KHADDAR (NAME PROTECTION) ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) This section shall come into force at once, and section 2 shall come into force in any province on such date as the [1][Central Government] may, by notification in the Official Gazette, appoint in this behalf.

Words "Khaddar" and "Khadi" to be trade description.

2. The words "Khaddar" and "Khadi", whether in English or in any Indian vernacular language, when applied to any woven material shall be deemed to be a trade description within the meaning of the Indian Merchandise Marks Act, 1889, indicating that such material is cloth woven on hand-looms in India from cotton yarn hand-spun in India.

LEG. REF.

[1] Substituted for "Local Government" by A.O., 1937.

THE LAND ACQUISITION ACT (I OF 1894).

[Rep. in part by Acts I of 1938 and X of 1914; Amended by Acts IV of 1914; XVII of 1919; XXXVIII of 1920; XIX of 1921; XXXVIII of 1923 and XVI of 1933.]

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—"For several years past the amendment of the old Land Acquisition Act, 1870, has been under consideration by the Government of India in communication with Local Governments and before the passing of that Act the valuations of the lands, which it was found necessary to take up for the execution of public works, was entirely in the hands of arbitrators, from whose decision there was no appeal. This system led to a lamentable waste of the public money both because the arbitrators were incompetent and sometimes it is to be feared, corrupt, and also because the law, as it then stood, laid down no instructions for their guidance in the performance of their duties. This latter defect, among others, was remedied by the Act of 1870 which it is now proposed to amend, and which contains detailed instructions as to the matters which are to be considered, and which are to be neglected in awards of compensation for lands acquired under its provisions. The Act of 1870 provided for the abolition of the system under which uncontrolled discretion was entrusted to arbitrators; and, in lieu thereof required the Collector, when unable to come to terms with the persons interested in land which it was desired to take up, to refer the difference for the decision of a Civil Court, usually that of the District Judge. In the disposal of such references the Court is aided by assessors, and its finding is final if the Judge and one or more of the assessors agree. If, however, the Judge and the assessors disagree, an appeal is allowed, which usually lies to the High Court.

"The Act of 1870 has not, in practice, been found entirely effective for the protection, either of the persons interested in lands taken up or of the public purse. The requirement that the Collector shall refer for the decision of the Court every petty difference of opinion as to value and every case in which any one of perhaps a large number of persons fails to attend before him has involved in litigation, with all its trouble and delay and expense, a great number of persons whose interest in the land was extremely insignificant. It has, in fact frequently been the case that the owners of small pieces of land have had to pay Court costs to an amount far exceeding the value of the land itself. On the other hand, the provisions of the Act as to the incidence of costs, the whole of which fall on the Collector if the final award is ever so little in excess of the amount of his tender, are such as to encourage extravagant and speculative claims. The chances of altogether escaping the payment of costs is so great that claimants are in the position of risking very little in order to gain very much, and have therefore every motive to refuse even liberal offers made by the Collector and to try their luck by compelling a reference to the Court. Much the same may be said as to the provisions of the existing law regarding the payment of interest. No matter how fair the original offer of the Collector and how groundless the refusal to accept the compensation he has tendered, interest is payable on the amount of the award finally arrived at from the date of the Collector taking possession of the land. This may be for a period of two or three years and interest continues to run until the date of payment. All this costs very heavy and unnecessary expenses on the public purse.

"It is proposed therefore to amend the law by making the Collector's award final, unless altered by the decree in a regular suit. Persons interested in land taken up for public works will thus have the opportunity if they desire it, of preferring to an authority, quite independent of the Collector, their claims to more substantial compensation than the Collector has awarded; and will, in all cases, have a further right of appeal to the regular appellate Courts. They will no longer, however be encouraged to litigated by the feeling that they can hardly lose but may make a great gain by doing so.

"This change in the procedure for determining the valuation of land taken up for public works will also render it possible to dispense with the services of the assessors, who are now supposed to assist the Court. Considering the difficulty almost throughout the country, of obtaining the services of such assessors as are really qualified to form a sound opinion on the subject of the valuation of land, it is believed that the proposal to dispense with them and to leave the matter to the sole arbitrament, first of the Collector, and then of the Judge, will, in no way, diminish the efficiency of the Courts in inquiries in which the value of lands is in issue. It will certainly tend to shorten litigation and to diminish its expense."

CONTENTS.

PART I.
PRELIMINARY.
SECTIONS.
1. Short title, extent and commencement.
2. [*Repealed.*]
3. Definitions.
PART II.
ACQUISITION.
Preliminary Investigation.
4. Publication of preliminary notification and powers of officers thereupon.
5. Payment for damage.
Objections.
5-A. Hearing of objections.
Declaration of intended acquisition.
6. Declaration that land is required for a public purpose.
7. After declaration Collector to take order for acquisition.
8. Land to be marked out, measured and planned.
9. Notice to persons interested.
10. Power to require and enforce the making of statements as to names and interests.
Enquiry into Measurements, Value and Claims and Award by the Collector.
11. Enquiry and award by Collector.
12. Award of Collector when to be final.
13. Adjournment of enquiry.
14. Power to summon and enforce attendance of witnesses and production of documents.
15. Matters to be considered and neglected.
Taking Possession.
16. Power to take possession.
17. Special powers in cases of urgency.
PART III.
REFERENCE TO COURT AND PROCEDURE THEREON.
18. Reference to Court.
19. Collector's statement to the Court.
20. Service of notice.
21. Restriction on scope of proceedings.
22. Proceedings to be in open Court.
23. Matters to be considered in determining compensation.
24. Matters to be neglected in determining compensation.
25. Rules as to amount of compensation.
26. Form of awards.
27. Costs.
28. Collector may be directed to pay interest on excess compensation.
PART IV.
APPORTIONMENT OF COMPENSATION.
29. Particulars of apportionment to be specified.
30. Dispute as to apportionment.
SECTIONS.
PART V.
PAYMENT.
31. Payment of compensation or deposit of same in Court.
32. Investment of money deposited in respect of lands belonging to persons incompetent to alienate.
33. Investment of money deposited in other cases.
34. Payment of interest.
PART VI.
TEMPORARY OCCUPATION OF LAND.
35. Temporary occupation of waste or arable land.
Procedure when difference as to compensation exists.
36. Power to enter and take possession, and compensation on restoration.
37. Difference as to condition of land.
PART VII.
ACQUISITION OF LAND FOR COMPANIES.
38. Company may be authorized to enter and survey.
38-A. Industrial concern to be deemed company for certain purposes.
39. Previous consent of Provincial Government and execution of agreement necessary.
40. Previous enquiry.
41. Agreement with Provincial Government.
42. Publication of agreement.
43. Sections 39 to 42 not to apply where Government bound by agreement to provide land for companies.
44. How agreement with Railway Company may be proved.
PART VIII.
MISCELLANEOUS.
45. Service of notices.
46. Penalty for obstructing acquisition of land.
47. Magistrate to enforce surrender.
48. Completion of acquisition not compulsory, but compensation to be awarded when not completed.
49. Acquisition of part of house or building.
50. Acquisition of land at cost of local authority or company.
51. Exemption from stamp-duty and fees.
52. Notice in case of suits for anything done in pursuance of Act.
53. Code of Civil Procedure to apply to proceedings before Court.
54. Appeals in proceedings before Court.
55. Power to make rules.

THE LAND ACQUISITION ACT (I OF 1894).[1]

[2nd February, 1894.

An Act to amend the law for the acquisition of land for public purposes and for Companies.

WHEREAS it is expedient to amend the law for the acquisition of land needed for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisition; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE LAND ACQUISITION ACT, 1894;

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of March, 1894.

2. [*Repeal.*] *Rep. partly by the Repealing and Amending Act* (*X of* 1914), *S.* 3 *and Sch. II and partly by the Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1892, Part V, p. 32; for Report of the Select Committee, see *ibid.*, 1894, Part V, p. 23 and for Proceedings in Council, see *ibid.*, 1892, Part VI, p. 25; and *ibid.*, 1894, pp. 19, 24 to 42.

NOTES.

Sec. 1: SCOPE OF THE ACT.—The Act aims at protecting public interests. 29 B. 480=7 Bom.L.R. 497. Strict compliance with its provisions necessary. 97 I.C. 471 =1926 M. 1099=51 M.L.J. 338. *See also* 11 C.L.J. 612. Proceedings under this Act started with a view to gratify private spite or malice and not *bona fide* for a public purpose are not valid. (*Ibid.*) Burden of proving that an award made by a land acquestion officer is wrong lies on the claimant. 106 I.C. 909. As to *burden of proof* in case of rival claims to compensation, *see* 107 I.C. 347=47 C.L.J. 337 (P.C.). The Act refers only to one notice, one proceeding and one award given, taken and made regarding one holding and one ownership. 64 I.C. 577=33 C.L.J. 509. It contemplates acquisition of such interests as do not belong to Government. 9 I.C. 341=9 M. L.T. 272. No provision for refund. 63 I.C. 1. *See also* 21 I.C. 111=17 C.W.N. 1087; 35 B. 255=18 Bom.L.R. 259. Proceedings under the Act are only administrative and not judicial so far as the matter does not go to the Land Acquisition Judge. 36 I.C. 621=4 L.W. 535. *See also* 51 I. C. 501. The Act provides a speedy method of determining compensation payable and the persons to whom payable. 7 A. 817. It allows an appeal to High Court and also to Privy Council since Act XIX of 1921. Privy Council cannot interfere with the figures that have been settled by High Court (as the value to be allowed for certain compulsorily acquired land) unless it can be shown there has been some real mistake in law or some palpable omission which would invalidate the valuation. (52 I.A. 133; 52 I.A. 367, Ref. to.) 34 C.W.N. 1106=1930 P.C. 283=59 M.L.J. 392 (P.C.). Persons who have not come before Collector or Acquisition Judge can controvert the award of the Collector in a suit, and prove that they were the lawful owners of the property and were entitled to recover the amount of compensation awarded for it. [7 Cal. 388 (P.C.), Appr.] 160 I. C. 1010=1936 Pesh. 29.

CONSTRUCTION OF ACT.—Act should be expounded liberally in favour of the public and strictly against Government or company taking the land. 44 P.R. 1904; 9 I.C. 228 =9 P.W.R. 1911; 12 B.H.C.R. 250; 29 B. 480. In case of any error of procedure by any officer in applying the provisions of the Act, every presumption should be made in favour of the party likely to have been prejudiced by the error. 53 M. 921=1930 M. 836=60 M.L.J. 410. If there is any real doubt in the interpretation in matters of procedure under the Act, the benefit of doubt ought to be given to the party as against Government. 1931 M. 50=59 M. L.J. 911. Compensation for land cannot be awarded on two basis (as) both on the basis of a cocoanut tope and as a building site. 95 I.C. 577=23 L.W. 731. The *method of valuation of land* may be classified under there heads: (1) the opinion of valuators or experts; (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired or of the lands adjacent to the land acquired (*a*) the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth:

(*b*) the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land:

(*c*) the expression "Collector" means the Collector of a district, and includes a Deputy Commissioner and any officer specially appointed by the Provincial Government to perform the functions of a Collector under this Act:

(*d*) the expression "Court" means a principal Civil Court of original jurisdiction, unless the Provincial Government has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act:

(*e*) the expression "Company" means a Company registered under the Indian Companies Act, 1882, or under the (English) Companies Acts, 1862 to 1890, or incorporated by an Act of Parliament or [1][by an Indian law], or by Royal Charter or Letters Patent: [2][and includes a society registered under the Societies Registration Act, 1860, and a registered society within the meaning of the Co-operative Societies Act, 1912]:

LEG. REF.

[1] Substituted by A.O., 1937, for "of the Governor-General in Council."

[2] Inserted by S. 2, Act XVII of 1919.

NOTES.

and possessing similar advantages; and (3) a number of years' purchase of the actual or immediately prospective profits from the lands acquired. It is generally necessary to take two or all of these methods of valuation in order to arrive at a fairly correct valuation. 101 I.C. 269=1927 S. 168. As to valuation of property on rental basis, see *ibid*. As to valuation of residential property, *see* 101 I.C. 269. The special provisions of the Act, which govern appeals under the Act, should not be extended by analogy to vary the provisions of the Court-fees Act, a fiscal enactment which must be construed strictly. 15 Pat.L.T. 548=1934 P. 571 (S.B.).

BURDEN OF PROOF.—When Government are acquiring immovable property for a public purpose under the Act, it is for the person claiming compensation to establish his title to it affirmatively. 57 I.A. 339=58 C. 858 =60 M.L.J. 142 (P.C.). *See also* 66 I.A. 258=1939 P.C. 235=(1939) 2 M.L.J. 722 (P.C.); 106 I.C. 909.

Sec. 3 (a).—"Land," meaning of—Bungalow in cantonment limits. 45 B. 277=23 Bom.L.R. 148. *See also* 34 B. 618. Land includes trees. *See* 30 M. 151. Definition of "land" is wider than under T. P. Act. Expression includes buildings, trees and standing crops. I.L.R. (1940) Kar. 396=1940 Sind 58 and also bungalows. I.L.R. (1938) All. 994=1938 A.L.J. 1171=1938 All. 106. "Permanently fastened", meaning of. 54 C. 582=54 I.A. 137=53 M.L.J. 99 (P.C.). Machinery fastened to earth is permanent and not temporary fastening. 54 C. 582 (P.C.). Fishery rights are not land. 35 C. 525=12 C.W.N. 569. *See also* 35 I.C. 97.

Sec. 3 (b): "PERSON INTERESTED".—The expression includes a person claiming an interest in compensation to be made on account of the acquisition of the land. 37 B. 76=14 Bom.L.R. 507. The expression does not include the collector. 1933 R. 176=11 R. 344. The definition of a "person interested" is wide enough to cover the interest of a reversioner in the acquired land held by a widow on life estate, when he is entitled to succeed to the land on death of the widow: 116 I.C. 335=1929 L. 736. The term includes a presumptive *shebait*. 41 C.W.N. 464. Also a lessee with a fixed term to run. 18 P.R. 1902. Also party to a valid agreement for purchase of land. 18 P.R. 1917; 37 I.C. 822=28 P.R. 1917. Also yearly tenant. 28 C. 182. Also a ryot. 7 C. 585. Also attaching decree-holder. 49 M. 38=97 I.C. 496=1926 M. 307. Also company or person on whose behalf acquisition is made. 43 C.W.N. 973=1939 Cal. 669.

Sec. 3 (d).—"Court" mentioned in Cl. (*d*) is a Court subordinate to High Court and therefore amenable to its revisional jurisdiction. 56 A. 656=1934 A.L.J. 32=1934 A. 260 (F.B.). Collector or Deputy Collector acting under the Act not a Court. 30 C. 36; not a judicial officer and cannot administer oath. 27 C. 820; 8 O.C. 118. Chief Judge of the Small Cause Court appointed by Local Government as "special judicial officer" to perform the functions of a Court is a special Court and not "a principal Civil Court of original jurisdiction" within the meaning of S. 3 (*d*). 54 M. 722 =1931 M. 586=61 M.L.J. 312. Decision (*f*) the expression "public purpose" includes the provision of village sites in districts in which the Provincial Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision: and

(*g*) the following persons shall be deemed persons "entitled to act" as and to the extent hereinafter provided (that is to say)

trustees for other persons beneficially interested shall be deemed the persons entitled to act with reference to any such case, and that to the same extent as the persons beneficially interested could have acted if free from disability:

a married woman, in cases to which the English law is applicable, shall be deemed the person so entitled to act, and whether of full age or not, to the same extent as if she were unmarried and of full age; and

the guardians of minors and the committees or managers of lunatics or idiots shall be deemed respectively the persons so entitled to act, to the same extent as the minors, lunatics or idiots themselves, if free from disability, could have acted:

Provided that—

(*i*) no person shall be deemed "entitled to act" whose interest in the subject-matter shall be shown to the satisfaction of the Collector or Court to be adverse to the interest of the person interested for whom he would otherwise be entitled to act;

(*ii*) in every such case the person interested may appear by a next friend or, in default of his appearance by a next friend, the Collector or Court, as the case may be, shall appoint a guardian for the case to act on his behalf in the conduct thereof;

(*iii*) the provisions of Chapter XXXI of the Code of Civil Procedure shall, *mutatis mutandis,* apply in the case of persons interested appearing before a Collector or Court by a next friend, or by a guardian for the case, in proceedings under this Act; and

(*iv*) no person "entitled to act" shall be competent to receive the compensation-money payable to the person for whom he is entitled to act unless he would have been competent to alienate the land and receive and give a good discharge for the purchase-money on a voluntary sale.

PART II.

ACQUISITION.

Preliminary Investigation.

4. (1) Whenever it appears to the Provincial Government that land in

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NOTES.

of Sub-Judge on a reference by Collector under this Act is a decree and appealable. I.L.R. (1940) Mad. 791=51 L.W. 553=1940 Mad. 474=(1940) 1 M.L.J. 732 (F. B).

Sec. 3 (f).—To constitute a public purpose in taking land, it is not necessary that the land when taken should be made available to the public at large. 39 B. 279=42 I.A. 44=28 M.L.J. 179 (P.C.). *See also* 49 M. 237. The erection of residential quarters at moderate rentals for Government officers in a very crowded city is a "public purpose". 13 Bom.L.R. 1097. So also acquisition of land by municipality for widening road. 24 B. 600. Buildihg of quarters for Municipal servants. 27 Bom.L.R. 1130=1925 B. 538. For providing house-sites for Panchamas. 49 M. 237=48 M.L.J. 204=1925 M. 837; 1931 M. 361=131 I.C. 647; 1930 M. 798=59 M.L.J. 274. Land acquired for one purpose can be used for other authorized purposes. 104 I.C. 129=1927 C. 874: [18 C. 99 (P.C.), Rel. on.] "Village site", what is. *See* 49 M. 237=1925 M. 837=48 M.L.J. 204.

Sec. 4.—The need for the public purpose is the test and not the hardship on the owner. 29 B. 480; 30 C. 36. *See* 23 I.C. 765=38 B. 565.

As to *amendments* with which this sec-

Publication of preliminary notification and powers of officers thereupon.

any locality [1][is needed or] is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.

(2) Thereupon it shall be lawful for any officer, either generally or specially authorised[2] by such Government in this behalf, and for his servants and workmen,—

to enter upon and survey and take levels of any land in such locality;

to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

LEG. REF.

[1] Inserted by S. 2, Act XXXVIII of 1923.

[2] For officers specially authorized in Burma, *see* Bur.R.M., Vol. I.

NOTES.

tion should be read when land is required for the purposes of a company, *see* S. 38 (2). A *protected monument* may be acquired under this Act as if its preservation were a "public purpose" within the meaning of the Act. *See* S. 10 of the Ancient Monuments Preservation Act (VII of 1904).

Market value of land to be acquired is to be considered at the date of the publication of notification under S. 4. 25 S.L.R. 285=131 I.C. 222=1931 S. 52. Government issued a notification under S. 4 (1) in May, 1923, stating the need for acquiring certain lands in two named districts. It did not give the extent of the lands nor any specific description. Subsequently the Land Acquisition Act was amended by Act XXXVIII of 1923 and Government issued a second notification under S. 4 (1) in September, 1925, which contained full details of the lands to be acquired. *Held,* that the first notification was superseded by the second one and that the value of the lands should be determined as on date of the second notification. 1932 M.W.N. 853. Where Government owns some interest in property to be acquired, such interest may or may not be mentioned in the notification. 1936 Pesh. 217.

Secs. 4 and 6.—Acquisition proceedings cannot be held to be illegal and void by reason of the lapse of some years between the notification under S. 4 and the notification under S. 6. In the case of an elaborate and complicated scheme for which the acquisition is made, the detailed revision of which necessarily takes much time, there is bound to be delay and lapse of time; and in such a case it is not open to the Court to treat the notificaions and proceedings as illegal and void. 39 Bom.L.R. 1257=1938 Bom. 148. The Act postulates a public purpose, as to the existence of which Government is the Judge. The Act nowhere postulates identity in the scheme by means of which the public object is to be carried out. All that is legally necessary is that the lands which it is intended to acquire for a public purpose should be notified first under S. 4 and then under S. 6 of the Act. When that has been done the requirements of the Act are satisfied. Where the object of the scheme for which the acquisition is made is unchanged, the fact that there has been a change in the method of carrying out the scheme and financing it would not make it a new scheme so as to necessitate a fresh notification under S. 4 of the Act. 39 Bom. L.R. 1257=1938 Bom. 148. Under the Act, it is the Local Government that has to be satisfied as to the existence of a public purpose. In the case of an acquisition for a Municipality to enable it to carry out a scheme, Government is not deprived of the power to go on with the acquisition proceedings merely because in the interval between the issue of the first notifications and the final notifications the Municipality changes its mind as to the necessity for the scheme. If at the material time, that is to say, when the notifications are issued, the Municipality has approved of the scheme and has moved the Government to take action, and still approves of it, the fact that at some

Payment for damage.

5. The officer so authorised shall at the time of such entry pay or tender payment for all necessary damage to be done as aforesaid, and, in case of dispute as to the sufficiency of the amount so paid or tendered, he shall at once refer the dispute to the decision of the Collector or other chief revenue-officer of the district, and such decision shall be final.

[1][*Objections.*

Hearing of objections.

5-A. (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the Provincial Government, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the Provincial Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be inerested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.]

Declaration of intended acquisition.

Declaration that land is required for a public purpose.

6. (1) Subject to the provisions of Part VII of this Act, [2][when the Provincial Government is satisfied, after considering the report, if any, made under section 5-A, sub-section (2)] that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders:

LEG. REF.

[1] Inserted by Act XXXVIII of 1923, S. 3.

[2] Substituted for the words "whenever it appears to the Local Government" by S. 4.

NOTES.

time between the dates of the two notifications it was of a different opinion is irrelevant. The proceedings are not on that ground illegal or *ultra vires*. 39 Bom.L.R. 1257=1938 Bom. 148. No interest in favour of Government arises from the notification under S. 4. Although the date of the notification under S. 4 is the date at which values are to be considered, the identity of the property is determined by the notification under S. 6. If in the period between the two notifications a part of the property has ceased to exist, whether by act of the owner or by accident, the value of that part has not to be taken into consideration when making the award. I.L.R. (1940) Kar. 369 =187 I.C. 714=1940 Sind 58.

Sec. 5-A.—S. 5-A is not retrospective. 28 Bom.L.R. 582=1926 B. 369. Where a District Board passed a resolution to acquire certain land but there was want of good faith, Courts have jurisdiction to interfere at instance of owner of the land, and declare the resolution *ultra vires* and grant an injunction. The owner need not wait to seek remedy under this section. 40 C.W.N. 687 =1936 C. 225.

Sec. 6: SCOPE OF SECTION.—This section bars the Court from enquiring whether the purpose for which land, in respect of which a declaration has been issued, is public purpose or not. 45 A. 443=21 A.L.J. 338=1923 A. 523. Court has no jurisdiction to consider legality of acquisition on the reference. 24 L.W. 833=1927 M. 207; 49 M. 237= 1925 M. 837. *See* 1926 M. 1099=51 M.L. J. 338; 51 M.L.J. 819. *See also* Notes under S. 4 (*supra*). S. 6 (3) of the Act is not *ultra vires*, as it does not take away the right of suit from the subject but merely states that the Government declaration shall be conclusive evidence of the fact. 48 M. L.J. 204=1925 M. 837. Declaration is conclusive. 66 I.C. 600=48 C. 916. None of the provisions of the Act relating to compensation cover the case of acquisition of a highway used by the public with the consequential compensation to them. 41 B. 291 =21 C.W.N. 447=43 I.A. 310 (P.C.). Provisions of the Act to be strictly observ-

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(2) The declaration shall be published in the Official Gazette, and shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the Provincial Government may acquire the land in manner hereinafter appearing.

After declaration Collector to take order for acquisition.

7. Whenever any land shall have been so declared to be needed for a public purpose or for a Company, the Provincial Government, or some officer authorised by the Provincial Government in this behalf, shall direct the Collector to take order for the acquisition of the land.

Land to be marked out, measured and planned.

8. The Collector shall thereupon cause the land (unless it has been already marked out under section 4) to be marked out. He shall also cause it to be measured, and if no plan has been made thereof, a plan to be made of the same.

NOTES.

ed. 11 C.L.J. 612. *See also* 1926 M. 1099=51 M.L.J. 338. On this section, *see also* 50 M. 308; 105 I.C. 377. A notification would be conclusive evidence even where the notice had been issued subsequent to the filing of the suit for an injunction restraining Government from making the acquisition. The validity of a declaration cannot be called in question before it is in fact made. To find out if the requirement of the proviso to S. 6 has been fulfilled, Court should have regard to the state of things at the time of the declaration. Its validity cannot be made to depend upon some future contingent event. Where Government proposed to acquire house sites by advancing 80 per cent. of the cost in the first instance and recover the same from the grantees of the sites in the course of the next twenty years, *held*, the condition in the proviso to S. 6 (1) was fulfilled. 1930 M. 798=59 M. L.J. 274; 1929 M.W.N. 779=1930 M. 248. *See also* 1931 M. 361=1931 M.W.N. 126. A declaration under S. 6 (3) is ordinarily conclusive of the fact that the land is needed for a public purpose or for a company. It cannot be conclusive of the liability to acquisition, if it be found that any illegality was committed at the proceedings or if there was material violation of any of the provisions of the Act in any of the stages prior to the declaration. If the declaration says that the land is required for a public purpose, whereas in fact the land is admittedly required for a company, it is difficult to see how such a declaration can be conclusive of anything. It cannot be conclusive of the fact that the land is needed for a public purpose, since that is not so; and it can hardly be conclusive of the fact that the land is required for a company, if this is not stated. But where the parties are fully aware of the purpose for which the acquisition is made, a defect in the declaration will not vitiate the acquisition proceedings. 1939 A.L.J. 757=1939 All. 557. The validity of the acquisition proceedings under the Land Acquisition Act depends upon the existence of a public purpose and not upon the question whether the whole cost of the scheme could legally be debited to the Municipality or public body on whose behalf the acquisitions are made. A notification under S. 6 does not therefore become illegal because it seeks to acquire lands for the purpose of recouping the cost of the scheme. Where the Municipality or public body has power conferred upon it under the statute creating it, to acquire adjacent land for a particular purpose and to dispose of that land, the fact that the scheme is to be financed or partly financed out of the proceeds cannot make the acquisition illegal. 39 Bom.L.R. 1257=1938 Bom. 148. Public purpose—Proof—Notification not conclusive—Onus. *Held*, that, on the terms of the grant, the right to refuse compensation must depend on proof on the part of the Government that the land was required for a public purpose, for which purpose the Government might put in the notification as evidence on their side, but it was not conclusive for the purpose of defeating the claimant's right to compensation; that evidemie led could not be considered for the purpose of defeating the Government's right to issue the notification to acquire the land, but would be relevant only for the purpose of determining the claimant's right to compensation under the *kowl*. I.L.R. (1940) Bom. 492=42 Bom. L.R. 506=1940 Bom. 260. In 1919 Government resolved to acquire the claimant's land under the Act and by arrangement with

9. (1) The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.

Notice to persons interested.

(2) Such notice shall state the particulors of the land so needed, and

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the sutidars took possession of such land. It proceeded to erect certain building on the land. It proceeded to erect certain building on the land without the necessary notification which was not served until 4th November, 1920, when the Government notified under S. 6 of the Act that the lands were needed for a public purpose and the Collector took order for the acquisition thereof. *Held,* that the Government officials were in possession 'not as mere trespassers' but under such a colour of title that the building erected by them on the land ought not to be included in the valuation as having become the property of the land-owner. Justice of the case was met by holding that the claimant was entitled to compensation for occupation of the lands by the officials before notification of the 4th November, from the date when Government took possession. 56 I.A. 259=53 B. 589=57 M.L.J. 139 (P.C.). A declaration was made that a certain land was acquired for quarries in connection with the construction of a bridge. It contained a provision as follows: "Mines of coal, ironstone, slate or other minerals lying under the land or any particular portion of the land except only such parts of the mines and minerals as it may be necessary to dig or carry away or use in the construction of the work for the purpose of which the land is being acquired are not needed". On a reference to the Court as to whether the underground minerals had been acquired, *held*, (1) that under the declaration stones other than those required for the construction of the bridge vested in the owner of the land; (2) that the stones so required came under the category of "other minerals" mentioned in the declaration. 8 P. 742=1930 P. 112.

Sec. 9.—Object of. *See* 37 A. 69=26 I. C. 795=12 A.L.J. 139. *Attaching decree-holder* is a "person interested". 49 M. 38=97 I.C. 496=1926 M. 307. *"Claimant"* in the Act means claimant to compensation and does not include Government as the Government does not claim compensation. 9 M.L. T. 272=9 I.C. 341. An award of Collector not made in presence of and not communicated to applicant is no award at all. 22 I.C. 652=16 O.C. 374. *See also* 51 I. C. 501=16 A.L.J. 669.

Procedure.—Statement of claim by claimant is necessary. Merely sending certified copy of sale-deed is not same as a claim to the amount stated therein as sale price. *See* 7 L. 416=1926 L. 401. All that S. 9 requires is that a person claiming should (1) specify the interest he claims, (2) specify the amount he claims for such interest, and (3) give particulars of his claim to compensation. It does not require him to specify the amount of compensation he claims in respect of each of the six sub-heads referred to in S. 23 of the Act. Failure, therefore, to specify the amount claimed in respect of any particular sub-head of S. 23 is no bar to Judge reviewing the award of the L.A. Officer in respect of such sub-head. 1933 S. 21=146 I.C. 1040=27 S.L.R. 84. But *see* 1936 L. 733. where it was held that if an item is not specified, he will not be awarded compensation for it, merely because the amount awarded does not exceed the total amount claimed.

Notice.—Although notice under S. 9 is imperative, non-service of notice is not fatal to the proceedings if the party complaining has knowledge of the same. 1923 C. 513. *See also* notes under sub-Cls. (2) and (3). Collector's failure, when it is not wilful or perverse to serve notice of intended acquisition on the occupier or the owner as required by S. 9, Cl. (3), and in the manner laid down in S. 45. does not make the subsequest proceedings void. 32 S.L.R. 8=173 I.C. 100=1938 Sind 6. Compensation—Apportionment by Collector—Party dissatisfied—No right of suit. 26 C.W.N. 506=1922 C. 4. Interest should ordinarily be allowed on compensation awarded. 40 I.C. 274. In a suit for enhancement of compensation for land acquired by a public body for a public purpose, a claim for damages does not lie in the Civil Court unless originally raised before the Collector. 46 I.C. 906=145 P. W.R. 1918. *See also* 23 A. 376=8 A.L.J. 115. A notice which is addressed to all the *joint claimants* and served on some of them should be regarded as good service as against the persons not personally served. (45 I. A. 222, Ref.). 61 C. 245=38 C.W.N. 239=1934 C. 525. Where a person interested in the property sought to be acquired has had sufficient notice of the intended acquisition, he cannot make the absence of a special notice to him, a ground of complaint. 1939 A.L.J. 85=1939 All. 130. *See alslo* 1938 Sind 6. An occupancy raiyat in possession of a holding on whom a notice contemplated by S. 9 (3) has not been served is entitled to question correctness of the award. 1935 P. 42. As to service on servant, *see* 1936 L. 733.

Sec. 9, (2) and (3): Notice.—The provision that 15 days' time should be allowed shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

(4) In case any person so interested resides elsewhere, and has no such agent, the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business and registered under Part III of the Indian Post Office Act, 1866.

Power to require and enforce the making of statements as to names and interests.

10. (1) The Collector may also require any such person to make or deliver to him, at a time and place mentioned (such time not being earlier than fifteen days after the date of the requisition), a statement containing, so far as may be practicable, the name of every other person possessing any interest in the land or any part thereof as co-proprietor, sub-proprietor, mortgagee, tenant or otherwise, and of the nature of such interest, and of the rents and profits (if any) received or receivable on account thereof for three years next preceding the date of the statement.

(2) Every person required to make or deliver a statement under this section or section 9 shall be deemed to be legally bound to do so within the meaning of sections 175 and 176 of the Indian Penal Code.

NOTES.

is not repealed in Cl. (3) and therefore does not apply to a personal notice served under Cl. (3). 49 A. 145=98 I.C. 806=1927 A. 183. But *see contra* 1931 M. 50=59 M.L.J. 911. *See also* 34 C.W.N. 323=1930 C. 471=57 C. 837. Section does not require fifteen *clear* days' notice. Where notice was served on the 8th and the date was the 23rd, it is sufficient compliance with the statute. 12 P.L.T. 659. "To the same effect" in sub-S. (3), meaning of. 53 M. 921=1930 M. 836=60 M.L.J. 410. *See also* 39 A. 534=15 A.L.J. 450. A notice which calls upon the occupier to appear before Collector to inform the nature of the right he possessed in the lands and the amount due to him out of the compensation to be given for that right is a valid notice. It cannot be said to be ambiguous or defective merely for the reason that it did not call upon him to state the amount and particulars of his claim to compensation. 53 M. 921=1930 M. 836. A claimant cannot be said to have waived the irregularity of a short notice simply by reason of having appeared before Collector on the date fixed. It must further be shown that the claimant knew his legal rights to fifteen days' notice and that he prepared to renounce the benefit of it. 53 M. 921. Where the party served with notice failed to appear on the date fixed but subsequently he was permitted by the L. A. Officer to file two sale-deeds in respect of land close to the land under acquisition, *held*, that there was no valid compliance with the notice and that the officer was entitled under those circumstances to award compensation as he thought fit. In order to comply with S. 9 (2), claimant must put forward a claim for a specific amount and the filing of the sale-deeds of the adjacent land is not sufficient for the purpose. 53 M. 533=59 M.L.J. 33.

APPELLATE COURT—POWERS OF.—Appellate Court can consider the question as to whether the failure of the claimant to specify the amount of his claim was with or without sufficient cause and whether the omission could be condoned where the District Judge had failed to do so. Where a claimant failed to specify the amount in the belief that he was not required to do so, such belief would afford a sufficient ground for condonation, and more so, when the claimant had placed materials showing what his expert considered to be a fair compensation. 1933 S. 21=27 S.L.R. 84.

BURDEN OF PROOF.—Where a person receives some notice and appears before the

Enquiry and award by Collector.

11. On the day so fixed, or on any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any (person interested has stated pursuant to a notice given under section 9 to the measurements made under section 8, and into the value of the land [1][at the date of the publication of the notification under section 4, sub-section (1)] and into the respective interests of the persons claiming the compensation and shall make an award under his hand of—

(*i*) the true area of the land;

(*ii*) the compensation which in his opinion should be allowed for the land; and

(*iii*) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or whose claims, he has information, whether or not they have respectively appeared before him.

LEG. REF.

[1] Inserted by Act XXXVIII of 1923, S. 5.

NOTES.

Collector and receives the money, it is for such person to prove that he did not receive the notice required by S. 9. 1933 N. 322.

Sec. 11: SCOPE AND OBJECT.—*See* 123 P. R. 1908=4 I.C. 914. Ss. 11, 15 and 23 must be read with Ss. 30 and 31 *See* 34 B. 618=12 Bom.L.R. 34. Powers and duties of Collector and Court in land acquisition enquiry. 37 B. 76=15 I.C. 771=14 Bom.L.R. 507. L. A. Collector acting under this section is not a Court. 38 C. 230 =15 C.W.N. 87=8 I.C. 107. The proceeding under S. 11 is not a judicial proceeding. Collector is not limited in making the award, to the evidence taken before the opposite party or disclosed at the inquiry and the fact that he adjourned the inquiry several times for making the award does not also extend the time for making a claim, the date for which has been already fixed under S. 9. (30 C. 36, Ref.) 12 Pat.L.T. 659. Government claiming ownership—Duty of Collector. 9 M.L.T. 272=9 I.C. 341.

Sec. 11 (ii).—Owner can have the price of the land fixed with reference to its situation and the probable use it is likely to be put to in the near future. 61 P.W.R. 1916=35 I. C. 283. Compensation to be allowed under S. 11 (*ii*) means the total amount of compensation awardable for the land including all the considerations mentioned in S. 23. 22 M.L.J. 379=14 I.C. 270. Award is final only when filed. 59 I.C. 429=22 Bom.L.R. 1136. The correct *rule for determining the amount of compensation* is that the land to be acquired is to be valued in the first instance including all interests and the amount so ascertained has then to be apportioned amongst the parties interested according to their interests. (42 M. 644, Foll.) 55 C.L. J. 558=1933 C. 312. The opinion mentioned in S. 11 (*ii*) should be that of the Collector only and of no other person. Where award made by collector is based on "instructions" issued by the Commissiner, it cannot be sustained. 14 R. 209=162 I.C. 700=1936 R. 206. It would be *ultra vires* of any other authority to usurp the functions of collector under this section. 1936 Pesh. 217.

Sec. 11 (iii).—Where under an agreement between landlord and tenant, the tenant accepted a fixed sum as compensation, the landlord would be entitled to all *enhanced compensation*. 44 C.L.J. 1=1926 C. 1000. As to *compensation in case of occupancy lands, see* 1926 P. 16. Under the Land Acquisition Act, the amount of compensation is to be divided in proportion to the value of interests of all persons interested in the land. But the question of apportionment of the sum awarded between the several interests must not be based on hypothetical grounds. Any remote interest should not be taken into consideration. In the case of an inam village granted under a sanad providing that the inam should continue in the family so long as there may be in existence descendants of the original grantee in the male line, it cannot be said that the grantor Government has any interest which is saleable of which the law can take note and which could be made the basis of an apportionment of compensation on compulsory acquisition of the inam village. The interest of the Government is at best a remote contingent interest the change of the inam coming to an end by failure of the male line. Such an interest or chance can scarcely be appreciable by a money value or a money payment. The inamdar is therefore entitled to the whole compensation money without deduction. 176 I.C. 642=40 Bom.L.R. 432=1938 Bom. 325. *See also* 73 C.L.J. 595. According to the terms of S. 11 and the succeeding sections, it is clear that the Collector must, when he makes his award, take into account the interest of all parties assess the total amount of compensation and apportion it as between the claimants. A series of awards in respect of the same property is not contemplalted by the Act. If a person interested is not given anything by the apportionment, his remedy is to claim

Award of Collector when to be final.

12. (1) Such award shall be filed in the Collector's office, and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

Adjournment of enquiry.

13. The Collector may, for any cause he thinks fit, from time to time, adjourn the enquiry to a day to be fixed by him.

NOTES.

a reference challenging the award and not to ask for another award in his favour. 1939 A.L.J. 85=1939 All. 130.

AWARD BY LAND ACQUISITION OFFICER—CONTENTS OF.—The duty of the Collector under S. 11 is to make an award in regard to three matters, *viz.*, (1) area of the land included in the award; (2) total compensation to be allowed for that land; and (3) apportionment of that compensation among all the persons interested in that land. 59 I. A. 155=62 M.L.J. 682 (P.C.). Act does not contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto. Each award should contain within its four corners the fixing of value of the land with which it deals, and the apportionment of that value between the various persons interested in that land. 59 I.A. 155=1932 P.C. 102=62 M.L.J. 682 (P.C.). The Board of Trustees for Improvement of Calcutta has power to enter into a contract for settling the price of the land with the owner before proceedings under the Land Acquisition Act are started. In the land acquisition proceedings, the Collector is under no obligation to disregard the contract and to proceed to determine the market value under S. 11 of the Act. He should rather respect the contract and make an award on its basis. If a reference is made by the Collector under S. 18, the Improvement Tribunal is not bound to take evidence of market value and to award compensation on its basis. The contract between the owner and the Board which is a perfectly valid one and which can be enforced in a Civil Court would prevent the owner from leading any evidence relating to market value before the Improvement Tribunal or in proceedings upon any other footing than that of the contract. 41 C.W.N. 1291=66 C. L.J. 134=1937 Cal. 680.

Secs. 11 and 26: AWARD UNDER—DIFFERENCE.—Under S. 26 the award of the Court is not the same as an award by the Collector under S. 11. An award by the Collector under S. 11 must include the apportionment of the compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him. That forms no part of the award as defined in S. 26. Hence an award of Court under S. 26 cannot be deemed to be a decree executable against the Collector. 1933 R. 176=11 R. 344.

Secs. 11 and 34.—Although the Collector, after he has made his award under S. 11, is not competent to amend it or make a supplementary award, except in cases of clerical errors or other mistakes or omissions apparent on the face of the records, he is not in any way incompetent to enter into a compromise with the claimants who have got a reference under S. 18, Land Acquisition Act, and pay them an extra sum of money on the basis of such settlement on condition of their withdrawing the reference. An entry of such an order for payment in the award statement kept in Form A prescribed in Appendix 7 of the Civil Accounts Code does not amount to an amendment of the award itself. The award statement is, therefore, not inadmissible in evidence. 73 C.L.J. 595 =43 C.W.N. 1185.

Sec. 12.—The Local Government has power to appoint special Collector, but once appointed, it has no power to interfere with his award or ask him to substitute a smaller amount. 36 B. 599=14 Bom.L.R. 592. A separate suit for the recovery of the value of the land acquired is not maintainable. 48 I. C. 702=29 C.L.J. 53.

NOTICE.—Notice under S. 12 (2) is not properly served on the manager of the office of the receiver of an estate in the absence of the Receiver. The notice must be served in the way provided by S. 45 (3) of the Act. 33 M.L.J. 472=42 I.C. 235. *See also* 16 O.C. 374=22 I.C. 652.

ACQUIRING OFFICER'S AWARD—MODIFICATION—BURDEN OF PROOF.—The acquiring officer's award is strictly speaking not an award at all but an offer. But if his award is not accepted and the matter is taken into Court the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand

Power to summon and enforce attendance of witnesses and production of documents.

14. For the purpose of enquiries under this Act the Collector shall have power to summon and enforce the attendance of witnesses, including the parties interested or any of them, and to compel the production of documents by the same means, and (so far as may be) in the same manner, as is provided in the case of a Civil Court under the Code of Civil Procedure.

Matters to be considered and neglected.

15. In determining the amount of compensation, the Collector shall be guided by the provisions contained in sections 23 and 24.

Taking possession.

Power to take possession.

16. When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon [1][vest absolutely in the Crown], free from all encumbrances.

Special powers in cases of urgency.

17. (1) In cases of urgency, whenever the Provincial Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-

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LEG. REF.

[1] Substituted by A.O., 1937.

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and if he succeeds in showing *prima facie* that the award is inadequate, Government must support the award by producing evidence. 35 Bom.L.R. 763=1933 B. 361.

Sec. 14.—The Government is a person interested within the meaning of S. 14 in the amount of compensation paid to a *Gountia* in Sambalpur in respect of *bhogra* land and is also entitled to a share of the compensation. Leaving the tenant's portion, the landlord in such cases will be entitled to sixteen years' purchase of the annual rent. The simple method of apportioning this amount is to award one-fourth as the *Gountia's* share and the balance to the Government. 11 P.L.T. 374=1931 P. 131.

Sec. 15.—*See* Notes under Ss. 23 and 24. *See also* 33 B. 325; 11 I.C. 838=252 P.L.R. 1911; 103 P.L.R. 1909. The actual lay out of a site at the time of acquisition should be taken as the most lucrative way of utilizing it at that time. 1931 L. 364. On acquisition due allowance must be made for the probable use which would have given the dispossessed owner the best return and not merely its present use or disposition. The presumption must always be that a man makes the best use of his own property. It is not sufficient to rely on hypothetical building schemes but the owner must show that he was going to make a certain use of his property which would have brought him profits or that he would have made such use of it had he not been prevented by unavoidable circumstances if he wishes the Court to give an enhanced value to that property on acquisition by Government. (1931 L. 207, Foll.) 1931 L. 364.

Secs. 15, 23 and 24.—Even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's 'poramboke' value (*i.e.*) value of similar lands without its potentialities, in the former case than he is in the latter. 66 I.A. 104=I.L.R. (1939) Mad. 532=43 C. W.N. 557=1939 P.C. 98=(1939) 2 M.L. J. 45 (P.C.).

Sec. 16: SCOPE OF SECTION.—Acquisition of land under S. 16 vests the land in the Government free of all "incumbrances" which include a right of passage to the public. 41 B. 291=21 C.W.N. 447=43 I.A. 310 (P.C.). The word "encumbrances" in S. 16 has been understood to include easements. 46 C.W.N. 136. Making of an award and taking possession of the land by the Collector vest the property absolutely in the Government. 37 M. L.J. 618=53 I.C. 646. After the Government has taken possession of the land proposed to be acquired, it cannot withdraw from acquisition. It is bound to complete the proceeding, make an award and give compensation. 14 N.L.J. 17 (Rev.). Encumbrances include easement. Even an easement of necessity which comes into existence at the time of acquisition is extinguished. 6 L. 329=1925 L. 530; 1936 A.L.J. 1160=1936 A. 879. On this section, *see also* 22 M.L.J. 445.

section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon [1][vest absolutely in the Crown], free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the Provincial Government, enter upon and take possession of such land, which shall thereupon [1][vest absolutely in the Crown] free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

[2][(4) In the case of any land to which, in the opinion of the Provincial Government, the provisions of sub-section (1) or sub-section (2) are applicable, the Provincial Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1).]

PART III.

REFERENCE TO COURT AND PROCEDURE THEREON.

Reference to Court.

18. (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Inserted by Act XXXVIII of 1923, S. 6.

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Sec. 18: SCOPE OF SECTION.—Conditions precedent. 26 O.C. 324=1924 O. 127. The intention of Act is that Court should hold a separate inquiry and its proceedings are not a mere continuation of that of the Collector's. They are judicial proceedings and the decision must be based on evidence before Court or on admission made by the opposite party. Evidence before Collector cannot be considered as evidence before Court except with the consent of parties. 8 R. 364=127 I.C. 733=1930 R. 346. S. 18 of the Land Acquisition Act, dealing with reference to Court, contemplates four kinds of objection, which are set forth in sub-S. (1). Sub-S. (2) requires the claimant to state the grounds of his objection. There is a sufficient compliance with the provisions of S. 18 (2) if the application for reference states on which of the four heads of objection detailed in sub-S. (1) the applicant proposes to rely. Once it is ascertained that the objection taken is only to the amount of compensation, that alone, it is true, is the matter referred and Court has no power to determine or consider anything beyond it. But that does not mean that when an objection to the amount of compensation has been taken, the Court has no jurisdiction to work out the amount of compensation in a manner different from that which has been adopted in the statement of objections. The Court

(2) The application shall state the grounds on which objection to the award is taken:

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would have jurisdiction to award compensation on a different or new basis in a proper case, though no express objection was taken on that basis and no specific claim for compensation to that effect was urged before the land acquisition. The rule enacted in S. 18 (2) is *one of procedure rather than of jurisdiction*. 1937 M.W.N. 773=46 L.W. 492=1937 Mad. 902. *See also* (1939) 2 M.L.J. 98 (P.C.). Jurisdiction of Courts under the Act is a special one and is strictly limited by the terms of Ss. 18, 20 and 21. It only arises when specific objection has been taken to Collector's award, and it is confined to a consideration of that objection. Where the only objection taken is to the amount of compensation, that alone is the "matter" referred, and the Court has no power to determine or consider anything beyond it, as, for instance, an objection to the measurement of the land. 57 I.A. 100 =57 C. 1148=1930 P.C. 64=58 M.L.J. 223 (P.C.). If a claim for compensation for injurious affection on account of severance under the item thirdly in S. 23 has not been made in reply to a notice under S. 9 of the Act, such a claim cannot be made or allowed for the first time in a reference to the Court under S. 18 of the Act. I.L.R. (1941) Kar. 217=196 I.C. 285=1941 Sind 152. On a reference to a Court, the matters for decision may include either a question as to the total amount of compensation, a question in which the Collector is clearly interested, or a dispute between the parties claiming amongst themselves as to the person or persons to whom compensation should be paid, a question in which the Act does not consider the Collector to be interested. On such a reference the Court has not to decide whether or not the Collector had been so negligent that he should be required to pay the compensation twice over to different persons, and a question of that sort is one which can only be decided satisfactorily in a separate suit. 1933 R. 176=11 R. 344. Application not mentioning ground for reference, but mentioning that proceedings should be postponed till decision of suit regarding validity of acquisition and that compensation was low, is not application under S. 18, though Collector makes reference on such application; District Judge gets no jurisdiction to decide it. 49 A. 212=25 A.L.J. 35. *See also* 97 I.C. 566=1926 A. 766. But *see also* 99 I.C. 269=1927 M. 282. Proceedings under the Act resulting in an award are merely administrative and not judicial and the decision therein binds the Collector only. 51 I.C. 501=16 A.L.J. 669. *See also* 36 I.C. 621=4 L.W. 535. If the owner desires a judicial ascertainment of the value of his property, he can ask the Collector to do it according to S. 18. 51 I.C. 501=16 A.L.J. 669. No formalities are required in asking for a reference. A letter written by claimant to L.A. Officer stating his non-acceptance of amount awarded and requesting reference to High Court is sufficient. 155 I.C. 280=1935 M. 279 (2). Tenant or sub-tenant can claim to be heard even though he has no saleable interest. 1925 C. 197=39 C.L.J. 574. Where part of the property sought to be acquired was in the possession of a tenant and he had filed an objection setting out his claims, and an award is made in favour of the owner without any reference to the claims of the tenant and the tenant applies more than a year after the award for a consideration of his claims, which is summarily rejected on the ground that he should have appealed, this order of the Land Acquisition Officer does not amount to an award and no valid reference could be made in respect of it under S. 18. 180 I.C. 882=1939 A.L.J. 85=1939 All. 130. Under the Act there are two perfect and *distinct forms of procedure* contemplated. The first is necessary for fixing the amount of compensation and this is an award from which a limited right of appeal to High Court is given by S. 54. The second is when a question of title arises between conflicting claimants as regards the title to the compensation money in Court. 45 M. 320=43 M.L.J. 78=49 I.A. 129 (P.C.). When Collector on such dispute arising between the parties places the money under the control of the Court and the parties proceed to litigate their rights to the money, the decision of the Court on such dispute is a decree and is appealable to the High Court and the Privy Council. It is in no sense an award and the restriction on the right of appeal imposed by S. 54 does not govern the case. 45 M. 320 (P.C.).

APPLICATION OF THE SECTION.—S. 18 does not apply to the determination of the questions of title to and the investment of money. 13 I.C. 550=237 P.W.R. 1912. require particulars to be given. It requires only the grounds of the objection to be given, and by 'grounds' is meant such of the four grounds mentioned in S. 18 (1) as are relied upon. 66 I.A. 145=I.L.R. (1939) All. 460=1939 P.C. 133=(1939) 2 M.L.J. 98 (P.C.). Reference to Civil Court under the Act is the only remedy of the owners or claimants. 52 P.R. 1913 (Supp.)=17 I.C. 684. Where there is a dispute as to who is the actual claimant to the compensation the Divisional Judge can decide questions of title to the money. 13 I.C. 550= 237 P.W.R. 1912. A reference under S. 30 is made solely on the question of title by the acquisition officer of his own motion, whilst the reference under S. 18 is made on the application of person interested in the compensation money. 53 I.C. 589=97 P. R. 1919. A case referred under S. 18 is subject to the limitation contained in S. 26 and not merely any particular objection, and the District Judge has power and is bound to consider the question of the compensation

NOTES.

awarded in its entirely. 54 I.C. 920=69 P. W.R. 1921. The reference to the Court by the Collector relates to the total amount of compensation to be awarded by the Court and nothing in the Act prevents the Judge from awarding a less sum on any one of the items, though he cannot award a less sum in total than the Collector's award. 22 M. L.J. 379=14 I.C. 270. When a case is referred by the Collector to the Court, the whole case is referred and not any particular objection. 22 M.L.J. 379.

BURDEN OF PROOF.—In a reference to Court the award of the acquisition officer is *prima facie* evidence and the burden is on the claimant to show that the award is wrong. 96 I.C. 279=1926 M. 961; 1934 L. 97. *See also* 41 C.W.N. 1291=66 C.L.J. 134=1937 Cal. 680. No doubt, initially the burden of proving that the Collector's award is wrong is on the claimant, but where District Judge has assessed the value of land acquired by the Secretary of State at a particular rate and the Secretary of State is disputing the assessing value, burden of proving that assessing value is wrong is placed on Secretary of State. (1926 M. 961, Expl. and Dist.) 118 I.C. 541=1929 L. 112; 1934 L. 97. In cases of reference under S. 18, the Collector is a defendant and has to support his award. He must do so by producing evidence and establishing the facts upon which he relies. He cannot rely upon any statement in his award that the amount awarded per *katha* of land is based on the average price per *katha* contained in a number of *kabalas* or sale-deeds, without proving those *kabalas* on which he relies. The *kabalas* must be produced, and proved if not admitted by the other party, and evidence must be given on behalf of the Collector as to where the lands, which are the subject-matter of the *kabalas* are situate, and as to the nature of the lands. It is enough for the Collector to obtain information from the registration office about the average sale price of several *kabalas* relating to lands, without causing the *kabalas* themselves to be produced in Court. 21 Pat.L.T. 9=1940 Pat. 362.

PRESUMPTION.—In the absence of any definite evidence the Court may presume that the *interests of the landlord and of the occupancy tenant* exclusive of specific amounts spent on extraordinary improvements of the land are in the ratio of 10:6; but if there are other considerations, that presumption may be rebutted. 55 A. 897=1934 A.L.J. 8=1934 A. 239 (F.B.).

NECESSARY PARTY.—*See* 1940 Pat. 362. When the Collector acquired certain land on behalf of a Municipality and the Collector made a reference under S. 18 of the Act, *held*, that to such a proceeding the Municipality was not a necessary party. 7 R. 20 =117 I.C. 247=1929 R. 115. In proceedings under S. 18 wherein ownership is claimed by Government and denied by other parties having admittedly some interest, the Secretary of State need not be made a party. 9 M.L.T. 272=9 I.C. 341. As to addition of parties, *see* 31 C.W.N. 384=1927 C. 352. The principle of O. 1, R. 10 (2), C.P. Code, does not apply to proceedings under the section. 31 C.W.N. 384.

PERSONS INTERESTED.—Although Government can neither be a claimant nor 'person interested' under the Act, yet its title can be decided, if an adverse title is set up by a claimant. 1936 Pesh. 217. An award was with respect to three survey numbers which were in dispute in Civil Court between two claimants *A* and *B*. Prior to the notification in the acquisition proceedings *A* had obtained decree in trial Court against *B* with respect to two out of three survey numbers. *B* had appealed, but *A* had not but could have filed cross-objections with regard to the third survey number. *Held*, that *A* was a person, interested in the third survey number also. 1931 P.C. 39=60 M. L.J. 399 (P.C.). A presumptive *shebait* of *debutter* property is a 'person interested' and can ask for a reference under this section. 41 C.W.N. 464. Also company on whose behalf acquisition is made. 43 C.W.N. 973=1939 Cal. 669=I.L.R. (1939) 2 Cal. 669. As to right of heir of recorded tenant under C.P. Tenancy Act, to object to award of compensation, *see* 1936 P. 542. Where a case is referred to the District Judge on objections being raised to the award of the L.A. Officer and the case on appeal to the High Court by some of objectors is again remanded to the District Court, an objector who has not taken part in the proceeding before the District Judge and those who have not appealed from order of District Judge, are not entitled to intervene as objectors on remand. 1933 L. 948.

POWER OF COLLECTOR TO MAKE REFERENCE.—A Collector's authority to make a reference as the agent of Government is restricted by S. 18. 11 I.C. 590=7 N.L.R. 88. *See also* 1934 A.L.J. 32=1934 A. 260 (F.B.).

GROUNDS OF REFERENCE.—Grounds of reference, if should be stated in detail. 58 I.C. 631=24 C.W.N. 716. A highly *technical objection* that the application requiring the Collector to make a reference was not made by the proper person should be taken at the first opportunity when it might possibly have been met by making a fresh application, and if not so taken, must be considered to have been waived. 131 I.C. 332=1931 P.C. 39=60 M.L.J. 399 (P.C.). Where in respect of certain Bungalows, both the Government as well as the owner, claimed the ownership of the site and the Collector found the Government to be the owner of the site and awarded compensation for buildings alone, a reference to the District Judge in respect of that order

NOTES.

under S. 18 of the Land Acquisition Act is competent and the District Judge has jurisdiction to deal with such a reference. 1939 A. 34=1938 A.L.J. 1161.

Who can claim Reference.—As to whether a *Hindu reversioner* can claim a reference, *see* 105 I.C. 219=1927 M. 867. *See also* 41 C.W.N. 464 (Presumptive shebait). Person entitled defending proceedings under the Act—Another person found entitled in appeal can continue the proceedings. 1928 M. 89. Persons who have received notice and who have appeared before the Collector at the time of the apportionment of the compensation money must, if they object to that apportionment make an application under S. 18 of the Act and are not able to avail themselves of proviso (3), S. 31 (2) of the Act and are therefore debarred from filing a civil suit. 147 I.C. 877=30 N.L.R. 40. *See also* I.L.R. (1939) 2 Cal. 401=43 C.W.N. 973=1939 Cal. 669 (A company or local authority for whom land is acquired is a person interested and can claim a reference under this section).

Receiver.—An acceptance of the award by the receiver who is appointed by the Court to an estate and directed to accept the award on behalf of the claimants where the appointment was "without prejudice to the contentions of the parties" as to the inadequacy of the compensation money, will not take away the right of a claimant to make a reference. It would be so even under the general law relating to receivers. Though a party is not actually present when the award is drawn up and signed, when a receiver appointed by the Court for the estate is directed to accept the award on behalf of the claimants and he appears before the Collector on the date when the award is drawn up and signed and accepts the award, that is a sufficient representation of the parties concerned, and the party who is not actually present is also represented and comes within the terms of S. 18 (2) (*a*). 38 C.W.N. 844=61 C. 1041=1934 C. 758.

Limitation.—Under S. 18 (2) (*a*) of the Act, an award cannot be said to be made until it is drawn up and signed by the Collector. It is not "made" when it is settled what the award is going to be. Hence the starting point of limitation under S. 18 (2) (*a*) is the date on which it is so drawn up and signed. 38 C.W.N. 844=61 C. 1041 =1934 C. 758. The reference within six months of the date of the award is within time under S. 18 (2) (*b*). 40 I.C. 355. No extension of time is allowable on the ground of minority under S. 18. 64 P.R. 1914=25 I.C. 448. After a reference has been made by the Collector it is not open to the Secretary of State to plead before the Court that the application by the owner was barred by limitation and that the reference ought not to have been made. 1932 A.L.J. 752=1932 A. 597. The final determination of the question as to whether the application for a reference under S. 18 is barred by time or not must be made by the District Judge. The L. A. Officer has no jurisdiction to refuse to make the reference even if in his opinion the application is not in time under Cl. (*a*) or Cl. (*b*) of sub-S. (2) of S. 18 of the Act. 137 I.C. 68= 1932 O. 180. On this point, *see also* 1926 R. 135.

Award when valid.—An award signed by the Collector as L.A. Officer satisfies the requirements of the law as regards signature and official designation for the purposes of this Act. 48 P.R. 1914=24 I.C. 379. The actual payment of the compensation is not part of the Collector's award which is complete as soon as the Collector apportions the amount of the compensation between the parties. 17 I.C. 395. A Collector's award under the Act becomes complete on the very day on which it is made, not when it is afterwards directed to be paid to claimant. 14 I.C. 537.

Omission to claim.—Omission to claim —Failure of landlord to demand reference —Tenant obtaining extra—Rights of party. 38 C.L.J. 265=1924 C. 158. A person who though a party to a reference did not press his claim to any part of the compensation, is not entitled to reopen the question in a civil suit. 32 I.C. 922. In a land acquisition case, no question for which the objector has not asked the Collector to make a reference to the Civil Court under S. 18 can be mooted. 180 P.L.R. 1914=24 I.C. 903.

Appeal.—Where a District Judge directs the return of a reference made to him under S. 18, on the ground that he has no jurisdiction to deal with it, his order is not open to appeal to the High Court but the appeal, if preferred may be converted into a revision petition. 1938 A.L.J. 1161.

Revision—Conflict of Rulings.—The Collector making a reference or refusing to make a reference under S. 18 acts judicially and his proceedings are therefore subject to revision by the High Court or Chief Court. 67 P.R. 1916=36 I.C. 213; 38 C.W.N. 844 =1934 C. 748; 45 C.W.N. 792; 1938 A. L.J. 1181; 16 O.C. 374=22 I.C. 652; 1932 O. 180=137 I.C. 68; but *see contra* 47 B. 699=25 Bom.L.R. 398=1923 B. 290; 1932 A.L.J. 769=1932 A. 568 (F.B.); 54 A. 282=1932 A. 598; 1930 L. 242=127 I.C. 711 (2); 1933 L. 242; 26 N.L.R. 309=1930 N. 271; 1937 N. 12; 12 R. 275=1934 R. 118; 4 L.W. 535=36 I.C. 621; I.L.R. (1941) Lah. 100=1940 Lah. 299=43 P.L. R. 408; 1937 Nag. 12=168 I.C. 712; 41 C.W.N. 1301=1937 Cal. 705; 1938 A.L.J. 116. But a mandamus may be issued in a proper case directing him to do a particular act. 36 I.C. 621=4 L.W. 535.

Reference.—The jurisdiction of the Court to entertain the reference is not ousted though the compensation money awarded by

Provided that every such application shall be made—

(*a*) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(*b*) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

NOTES.

the Collector has been paid out. The Court has inherent power to re-call the money improperly paid out. 21 I.C. 111=17 C.W.N. 1087. *See also* 63 I.C. 1; 1930 Mad. 576=59 M.L.J. 30. Under S. 18 a reference can only be made by a written application to the Collector requiring that the matter be referred for the determination of the Court. 26 O.C. 324=1924 O. 127. Proceedings under Part III amount to a new inquiry by the District Judge and not an appeal. 36 M. 395=25 M.L.J. 17=12 I.C. 436. Can a District Judge ask the Collector to revise his award after reference to him under S. 30, (*Ibid.*)

REVIEW.—The Collector acting under S. 18, Land Acquisition Act, has no power to review his own order. 54 A. 282=1932 A. 598.

PAYMENT OF MONEY.—The right of a person to have a reference under S. 18 is not affected by the opposite party having taken out the money from the Collectorate behind his back. 1 Pat.L.T. 143=56 I.C. 125. The Collector should not permit the money to be withdrawn before the expiry of the term fixed by S. 18 for objecting to the award and applying for reference. 56 I.C. 125. L.A. Judge with whom a sum of money is deposited to a lunatic's credit cannot refuse compliance with the order of a District Judge in his lunacy jurisdiction directing payment of the money to the lunatic's natural guardian. 37 I.C. 110 =20 C.W.N. 975.

RIGHT OF SUIT—JURISDICTION.—In a land acquisition case party dissatisfied with award or with apportionment of compensation cannot have remedy by suit in Civil Court. 28 C.W.N. 506=1922 C. 4; 147 I.C. 877=30 N.L.R. 40. Where there is no adjudication by the Collector as to apportionment of compensation nor reference to District Court there is nothing to prevent a Civil Court from adjudicating a dispute between rival claimants. 92 I.C. 484=1926 L. 321.

Sec. 18, Proviso.—References which become absolutely barred by the proviso to S. 18 will only be those to which Government is a party. 43 P.L.R. 153=1941 Lah. 268.

Sec. 18 (2) (b).—The expression *"date of award"* being indefinite, the Legislature meant the date of the filing of the award to be the date contemplated in Cl. (*b*), sub-S. (2) of S. 18. If limitation is to start, it ought to start from the date of the filing of the award and not from the making of it. The date of the award is not the date on which it is filed. A comparison of Ss. 11 and 12 will show that the date of making an award is meant by the Act to be different from the date on which the award is to be filed. S. 18 (2) proviso refers to the former. The date of award is the date on which a formal declaration is made by the Collector of the amount of compensation and of the person to whom the same is payable. 27 A.L.J. 1186=1929 A. 769.

Secs. 18, 19 and 20: POWERS OF COLLECTOR AND COURT.—The decision on a question of limitation on an application under S. 18 rests with the Collector and not with the District Judge. S. 19 also indicates that the question of limitation is to be decided by the Collector. The District Judge cannot sit as a Court of Appeal over the Collector when the latter has come to the conclusion that the application is made within time. The function of the District Judge is confined to giving a decision on objections raised. 189 I.C. 534=1940 Pesh. 35. Making reference is an act within the jurisdiction and authority of the Collector. Having made the reference it is not open for the Collector or the Secretary of State to say that the reference was wrongly made, although ground for saying so may be that the application by the owner was belated. The "Court" does not sit on appeal over the Collector and the Act does not give any authority to the "Court" either in express terms or by implication to go behind the reference. 27 A.L.J. 1186=1929 A. 769.

Secs. 18 and 21: REFERENCE ON QUESTION OF AMOUNT OF COMPENSATION—QUESTION OF TITLE TO LAND ACQUIRED—IF RELEVANT.—The jurisdiction of the Court on a reference by the Collector is a special jurisdiction. If the only objection is to the amount of compensation, that alone is the matter referred to and the Court has no power to determine or consider anything beyond what is referred. The question of title to the land acquired is therefore not relevant in a reference on the question of the amount of compensation only, because in an inquiry as to the amount of compensation only the question is how much more the claimant is to get and how much more is the Government to pay. The only question is the additional amount of compensation. It does not involve the determination of the question of the right to claim or the liability to pay any additional compensation. 187 I.C. 364=44 C.W.N. 411=1940 Cal. 56.

Secs. 18 and 30.—The Collector must refer a question of title if required to do so by an application received within the prescribed time, but if an application is received after that time, he then has the option of

Collector's statement to the Court.

19. (1) In making the reference, the Collector shall state for the information of the Court, in writing under his hand,—

(*a*) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon;

(*b*) the names of the persons whom he has reason to think interested in such land;

(*c*) the amount awarded for damages and paid or tendered under sections 5 and 17 or either of them, and the amount of compensation awarded under section 11; and

(*d*) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.

(2) To the said statement shall be attached a schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested respectively.

Service of notice.

20. The Court shall thereupon cause a notice specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the following persons, namely:—

(*a*) the applicant;

(*b*) all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded; and

(*c*) if the objection is in regard to the area of the land or to the amount of the compensation, the Collector.

NOTES.

referring the matter to the District Judge or refusing to do so and if the Collector, while forwarding the reference himself mentions that the application is received after the prescribed time, it is to be presumed that he is intentionally making a reference under S. 30 of the Act. 43 P. L.R. 153=1941 Lah. 268.

DISTINCTION BETWEEN.—The three main points of distinction between Ss. 18 and 30 of Land Acquisition Act are that S. 30 leaves the Collector with a power of discretion in the matter, which he does not possess under S. 18; that the subject-matter of reference under S. 30 is limited to cases in which Government is not directly interested and that S. 18 alone contains a definite provision for limitation. 43 P.L.R. 153=1941 Lah. 268.

Secs. 18 and 31.—On a reference made to the Court under S. 18 or S. 31 of the Act, it is not open to the Court to decide the amount of compensation payable to a party who never asked for a reference and to give him a decree for anything more than what was awarded by the Land Acquisition Officer, in the absence of a reference made to the Court by the Land Acquisition Officer at the instance of such person. On a reference under S. 18, the jurisdiction of the Court is confined to considering and pronouncing upon the objection which has been raised in the written application for the reference. I.L.R. (1941) Mad. 753=1941 Mad. 660=(1941) 1 M.L.J. 527.

Secs. 19 (1) (d): BURDEN OF PROOF.—The onus is on the claimant to show that the award is calculated on a wrong basis, but if the award was made without taking any evidence, the Collector has to justify his award under S. 19 (1) (*d*). 24 I.C. 141=27 M. L.J. 106. As to mode of valuation, *see* 11 C.L.J. 612=6 I.C. 457. *See also* 36 C. 957; 33 C. 325.

Sec. 20: NOTICE TO COLLECTOR—WHEN NECESSARY.—Notice to Collector is necessary only in a case where the objection is in regard to the area of the land or to the amount of compensation. 1933 R. 176=11 R. 344. Reference to tribunal on question of amount of compensation—Tribunal declaring claimant *K* to be entitled to enhanced amount of compensation—Declaration based on compromise between claimants to property—Secretary of State for India is necessary party. 44 C.W.N. 411=1940 Cal. 56.

Sec. 20 (c).—Under S. 20 (*c*), the Secretary of State is not interested as a party in the distribution or apportionment of the compensation. 20 A.L.J. 604=1922 A. 438. If a person to whom a wrong award of compensation is alleged to have been made is not impleaded as a party respondent to the appeal by a claimant, the Court cannot award him any relief. 1922 A. 438.

Restriction on scope of proceedings.

21. The scope of the inquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection.

Proceedings to be in open Court.

22. Every such proceeding shall take place in open Court, and all persons entitled to practice in any Civil Court in the province shall be entitled to appear, plead and act (as the case may be) in such proceeding.

Matters to be considered in determining compensation.

23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

NOTES.

Sec. 21.—In compensation between landlord and tenant the reasonable course is to find the value of the land as a whole first. The rights between the landlord and tenant is to be raised subsequently as between them. The valuation of the land should be ascertained by considering cases of similar sales It is not a proper method of approach to value the different interests separately unless it is quite clear what the rights of the different parties are and unless the evidence affords instances of dealings in exactly the same rights as are in question. 58 C. 1345 =135 I.C. 438=1932 C. 143. *See also* 92 I.C. 484=1926 L. 321, cited under S. 18, *supra*.

Sec. 23.—S. 23 is not exhaustive. It does noto direct that no other matters than those specified in the section may be taken into account. In special casts the Court may take other matters into consideration. 44 Bom.L.R. 57.

MARKET-VALUE.—The market-value of land is roughly the price which an owner willing, and not obliged to sell, might expect from a willing purchaser. 18 I.C. 638=17 C.L.J. 34; 1926 M. 732=50 M.L.J. 566; 5 R. 799. *See also* 57 I.C. 301=23 O.C. 89. The expression 'market-value' in S. 23 means in the case of land, its valule measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions. 66 I.A. 104 =I.L.R. (1939) Mad. 532=43 C.W.N. 557=1939 P.C. 98=(1939) 2 M.L.J. 45 (P.C.). The market value referred to in S. 23 means the market value of the concrete piece of land to which the notification under S. 4 of the Act applies and not separate interests in it. The normal method is to take the market value of the land and then to apportion that amongst the different interests; bu the Act does not lay down any hard and fast rule and in special cases it may be desirablt to adopt a different method by valuing separately each interest in the land. 44 Bom.L.R. 57. Lands are bought and sold by bargaining. Land acquisition operations are carried on at places where for generations thtre has not been any sale of land whatsoever. The place is such where no one wants to buy land. In such cases where there is no prevailing price of land nor any standard of comparison, market value must be ascertained by finding out the income which the land was bringing to the owner and then capitalizing it on the principle of reinstatement. 1938 Pat. 618. In determining compensation under S. 23 what has to be done first is to find out what is the market-value of the land itself irrespective of any consideration as to how it is held. Next step would be to apportion the value among the several parties holding distinct and separate interess in the land. 27 A.L.J. 522=1929 A. 525. Methods of valuation of land acquired under the Act may be classified under three heads, *viz.*; (1) the opinion of experts, (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired of the lands adjacent to the land acquired and possessing similar advantages, (3) and a number of years' purchase of the actual or immediately prospective profit of the lands acquired. 1933 S. 57. *See also* 1938 Sind 225. The Privy Council is bound by the terms of the Act, which deals in Ss. 23 and 24 with the considerations that are to be taken into account in determining the value of the land. 33 C.W.N. 549=1929 P.C. 112=56 M.L.J. 760 (P.C.). Market-value—Determination of. *See* 33 A. 733= 11 I.C. 815. *See also* 41 C. 967=18 C.W.N. 884; 106 I.C. 909. Thert is no difference between the principles of English Law and Indian Law as to determining the market-value of lalnd compulsorily acquired. 5 R. 799. Market-value—Criteria for determining. 12 I.C. 202=4 Bur.L.T. 250. Market-value—Considerations — Speculation as a basis for determining market-value, how far allowable. 48 B. 190=25 Bom.L.R. 1182=1924 B. 161. *See also* 12 L.L.J. 280; 1931 S. 52. The market-value of a plot of land is to be determined as a whole having regard to the sales in the vicinity. 48 B. 190. *See aslo* 56 M.L.J. 127; 22 I.C. 78; 1931 S. 56. But sale of land for nominal sum influenced by religious and charitable motives cannot be taken as a criterion for the market-value of another plot. 1936 L. 599. The expression "market-value" means the value which a parcel of land would realise if sold in the market. 48 B. 190. Hypothe-

NOTES.

tical building schemes of development are the most clear basis of valution in case of compensation for compulsory acquisition. 16 Bom.L.R. 55 (P.C.). Hypothetical building schemes—Probable investment and return must be estimated through a surveyor. *See* 112 I.C. 797. As to lands purchased as prospective building plots, *see* 29 N.L.R. 155=1933 N. 290. In considering what is the fair market-value of the land it is right to take into account not only the use to which the land is being put at time of the acquisition, but its market-value laid out in the most lucrative and advantageous way in which the owners could dispose of it. Where it has a potential value which is not merely speculative, it ought to be taken into consideratio. 1935 R. 157; 1936 L. 599. Market-value—Price paid by owner—How far evidence of value. 23 I.C. 542. Market-value—Valuation of land—Schemes for development as basis for valuation. 24 Bom.L.R. 782=1922 B. 399. Market-valule—Adaptability for possible use in particular way, how far basis for valuation. 25 C.W.N. 1002=57 I.C. 25. Where property was leased two years after a declaration for its acquisition the present rent is not a conclusive test as to its market-value at the date of acquisition. 24 I.C. 65=18 C.W.N. 531. Alienation of property subject to lease—Rent reserved as the basis of valuation—Other circumstances which may be considered. *See* 112 I.C. 706=32 C.W.N. 421. Owner keeping land vacant after declaration—Claim for compensation on that ground—Maintainability—Lessee as owner for the purposes of the section. *See* 1929 C. 20. Potential value of the land to be considered. 44 C.L.J. 1=95 I.C. 459; 97 I.C. 775=1926 L. 618. On acquisition due allowance must be made for the probable use which would have given the dispossessed owner the best return and not merely its present use or disposition. The presumption must always be that a man makes the best use of his own property. It is not sufficient to rely on hypothetical building schemes but the owner must show that he was going to make a certain use of his proptrty which would have brought him in profits or that he would have made such use of it had he not been prevented by unavoidable circumstances if he wishes the Court to give an enhanced value to that property on acquisition by Government. 1931 L. 364=135 I.C. 183; 12 L. 117=1931 L. 207; 64 I.C. 146. Where the price paid for propertyy has been influenced by a boom which is followed by a fall in price, the Court should make a reasonable deduction while awarding compensation. 1933 S. 57=145 I.C. 795. The market-value of the property is to be determined with referernce to the future utility, but it must not be entirely conjectural. (3 I.C. 277, Ref.) 131 I.C. 222=1931 S. 52. *See also* 68 C.L.J. 90. If a Court puts a fictitious value on the property on account of its potentiality for building purposes, then it is an inclusive rate and nothing can be allowed in addition for the trees. 28 Bom.L.R. 548=95 I.C. 513=1926 B. 365. *See also* 1931 S. 52. Propriety of valuing land as a building site and at the same time upon on the footing of produce of trees. *See* 1926 M. 945. The value of the bare site and costs of the building may, in the case of a building used as the personal residence of the owner, be borne in mind, when estimating the market-value; it is only in rare insances that a reliable estimate will be obtained by adding the cost of the building to the value of the bare site. Land is a marketable commodity of one description and land with buildings on it is a marketable commodity of another and a different description. (34 B. 486; 60 P.R. 1918 and 10 Bom.L.R. 907, Rel. on.) 1933 S. 57=145 I.C. 795. In calculating, the value of the price previously paid for a portion of the same area affords infinitely the best material which can possibly exist if the prices remain stationary. 1922 L. 327. *See also* 57 M.L.J. 81 (P.C.). Building surrounded by garden land—Compulsory acquisition—Mode of valuation—Twenty times the net annual rental. 44 M.L.J. 132=1923 M. 332. In a case of acquisition of a site in a city, the market-value for purposes of S. 23 is the potential value of the property at the time of acquisition which would be paid by a willing buyer to a willing seller when both are actuated by the business principles prevalent in the locality at the time. The proper manner of determining the value is by capitalising the annual income. 5 L. 707=121 I.C. 898=1930 O. 223. The land acquired was an irregularly shaped piece by the sea and was covered by the sea at various times and for ordinary purposes was practically useless. It was, however, capable of being used for salt works. *Held* that the present market-value of that potentiality would decide the amount of compensation. 33 C.W.N. 549=1929 P.C. 112=56 M.L.J. 750 (P.C.). Buildings and land—Valuation—Repairs—Allowance for. 1923 M.W.N. 54=1923 M. 31. Market-value—Speculations as to effect of suggested development on prices—How far to be taken into account. 24 I.C. 141=27 M.L.J. 106. *See also* 1931 S. 61.

In determining the market-value four things have to be considered, *viz.*, firstly, the price paid within a reasonable time for the land itself; secondly, the rents and profits received on account thereof shortly before the acquisition; thirdly, the prices paid for adjacent land possessing similar advantages; and fourthly, the opinion of valuators or experts. 1933 S. 124=143 I.C. 699. The objection that averages may be influenced by coincidence when they are based on the sale of all and sundry kinds of property, is not applicable to inferences drawn from the suc-

NOTES.

cessive sales of the same property. 1933 S. 124=143 I.C. 699. The valuation with reference to one plot which is very close to the acquired land cannot form the basis of valulation with regard to the lands far apart; but where the distance between the plots is so negiligible as 75 yards it does not make any difference when valuing a land on the locality if the valuation is based on a document with reference to one plot in the locality which is of the same description with similiar advantages as the other plots. Similarly land outside the Municipal limits can be valued in the same way as land in close proximity to the Municipal area. 1933 C. 312=143 I.C. 367. The mere fact that the High Court has in a particular case given 16 years' purchase to a person claiming compensation under the Land Acquisition Act is not sufficient basis on which as a matttr of law and principle, the High Court should give 16 years' purchase in all such cases. The matter depends entirely upon the circumstances of each case. 175 I.C. 1007 =19 Pat.L.T. 774=1938 Pat. 266. Evidence—Expert opinion—Evidentiary value of. 1933 S. 124=143 I.C. 699. Where the so-called "expert witnesses" give no data in support of their opinions, their evidence should be rejected. (1924 L. 548 Foll.) 1931 L. 364=135 I.C. 183. *See also* 68 C.L.J. 90.

BASIS OF COMPENSATION.—*See* 66 I.A. 104=I.L.R. (1939) Mad. 532=1939 P.C. 98=(1939) 2 M.L.J. 45 (P.C.). Basis of compensation—*Toka* land—Compensation for interest of tenants—How fixed. 25 Bom. L.R. 794=1923 B. 417. Use to which land is put on date of notice is right basis of valuation. 26 A.L.J. 69 (F.B.). Wrongful act of Municipal Corporation—Owner deprived of facilities for irrigation—Land subsequently acquired by Corporation—Compensation to owner—Basis. 22 I.C. 306. Lands fit to be used as building sites —Municipality refusing to permit building on lands which it intends to acquire—Propriety—Valuation must be on basis of building sites and not otherwise. 39 Bom.L.R. 142=1937 B. 177.

HOUSE PROPERTY IN CANTONMENT AREA.—A return of 12 per cent. per annum, may be taken to be fair and reasonable for an investment of money in house property in a cantonment area; compensation payable in respect of such a property can be calculated on that basis. I.L.R. (1938) A. 994= 1939 A. 106=1938 A.L.J. 1171. *See also* 38 P.L.R. 1071=1936 Lah. 1010. Quarries —Apportionment of compensation—Interest of Government—*Toka* tenure. 47 B. 218= 24 Bom.L.R. 471=1922 B. 254. *See also* 56 M.L.J. 127 (P.C.). The special adaptability of the land acquired, for a particular purpose, cannot be ignored in determining its market-value. 25 C.W.N. 677=1922 C. 386. Market-value affords a good test for calculating value of lands to be acquired and the calculation should be based upon a prudent business method, such as the nature of the land and the purpose for which it was used and for which it is acquired. 252 P. L.R. 1911=11 I.C. 838. The rate at which nearest lands with similar advantages have been sold within a short period before and after the notification should be taken into account. (*Ibid.*) *See also* 9 I.C. 228=99 P.W.R. 1911. Under S. 23 in determining the market value of the land to be acquired, the sale prices of similar types of land in similar position in the past as well as after the notification under S. 4 (1) of the Act; the fact that the land was at the time of determining its value being used for building purposes; a proposal to convert the sub-division in which the land was situate into a district resulting in acceleration of high price for the land, can all be taken into account even though the aforesaid factors have come into being after the notification under S. 4 (1) of the Act. 194 I.C. 212= 1941 Pesh. 32. It is wrong to say that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The market value of the acquired land is to be ascertained from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity. (34 Cal. 599, Foll.) 193 I.C. 215= 1941 Pesh. 13. The owner is entitled to the value obtainable in open market for the land if put to its lucrative use. 45 M.L.J. 339= 1924 M. 252. The special adaptability for building purposes can be taken into consideration, where in the case of lands which are at the time of the acquisition agricultural in character—English and Indian law considered. (*Ibid.*) But *see* 165 I.C. 585= 1936 P. 542. As to compensation for severance, *see* 28 Bom.L.R. 576=96 I.C. 316= 1926 B. 372. Property ceasing to exist in between notifications under Ss. 4 and 6— Value cannot be taken into account. *See* I.L.R. (1940) Kar. 396=1940 Sind 58. In considering the claim of the owner, the value to be paid for is the valule to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Again the value to be assessed is the value to the old owner who parts with his property and not the value to the new owner who takes it over. Where the old owner takes the property subject to restrictions, it is necessary to inquire how far these restrictions affect the value. In determining the burden of the restrictions one circumstances to consider is the chance of such a restric-

NOTES.

tion being determined. When there was evidence to show that the area acquired was so situate as to make it possible that within a reasonable period some of it would become a building site, some allowance was made for such a possibility. 1933 M. 190=145 I.C. 604. Where the land acquired is intended to be used as a road, the claimant is entitled to compensation, for depreciation in the value of the rest of his land in consequence of such use. 1933 S. 21=146 I.C. 1040=27 S.L.R. 84. In estimating compensation for severance both the actual and prospective use of the land must be considered. 1933 S. 21. The potential value of the land as a building site could be taken into consideration in fixing the compensation. 131 I.C. 178=1931 S. 67; 68 C.L.J. 90. Amount claimed under each sub-head, if need be specified. 1933 Sind 21=143 I.C. 619. As to mode of valuation with reference to buildings in cantonment area, where owner is only a licensee in respect of the site, *see* 38 P.L.R. 1071=164 I.C. 408=1936 L. 1010. *See also* 1938 A.L.J. 1171. Where there is an *agreement between the Government and a person claiming compensation* under the Land Acquisition Act that the claimant would get the price of the holding calculated on a rental basis at a certain sum per month plus the statutory compensation, the price is to be calculated on the net value to the claimant of the property and such net value can be arrived at only after the usual deductions for cess and ground rent. 175 I.C. 1007=19 Pat.L.T. 774=1938 Pat. 266.

MARKET-VALUE, DATE OF.—The market-value is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired. 1931 S. 67 =131 I.C. 178; 163 I.C. 172=1936 R. 226; 40 C.W.N. 1143=1936 C. 688. *See also* 17 S.L.R. 288; 1940 Sind 58 (No compensation for portion of property lost before acquisition). The market-value of the land to be acquired is to be considered at the date of the publication of the notification under S. 4. 1931 S. 52=131 I.C. 222. "Value" means the market-value of the property. It may be affected by, but cannot be governed by, the procedure laid down in the lease for fixing renewal premia. 1933 S. 57. *See also* 56 I.A. 210=7 R. 227=56 M.L.J. 795; 56 M.L.J. 750=1929 P.C. 112 (P. C.). The market-value of the property is to be determined with reference to the future utility but it must not be entirely conjectural. 1931 S. 52. It depends on the circumstances of each case at what rate the property should be capitalized. 1931 S. 52. The Government on 31st May, 1922, published a declaration under S. 6 that the appellant's land was required for a public purpose. That declaration included besides the land which they desired to take from the appellants, certain land belonging to other people. The Government changed their mind about requiring the land of the other people and accordingly on 6th October, 1923, they published another declaration under S. 6, specifying the same land belonging to them, but at the same time, announcing that the former declaration was cancelled. *Held,* that the only notification which gave right to take this land was the second notification and therefore that date must be the date taken in determining the amount of compensation to be awarded. 56 I.A. 210=7 R. 227=1929 P.C. 126=56 M.L.J. 795 (P.C.). *See also* 1936 L. 599. Where some time after the publication of a notification under S. 4 (1), a second notification was issued on a later date which was wider than the first one, and embraced not only the land covered by it but more land of the claimant in addition and the earlier notification was neither cancelled nor superseded, it was held that as regards the proceedings under the Act, the market value of the property must be taken as from the date of the first notification in respect of land covered by it and not as from the date of the subsequent notification. But where under the Works of Defence Act an earlier declaration was cancelled by a later one, it was held that it was the date of the second notification which must be taken into consideration as regards the market value of the property concerned. 1941 Rang.L.R. 40=1941 Rang. 225.

COMPENSATION—PRINCIPES APPLICABLE.—The value of land should be calculated with reference to the most lucrative and advantageous way in which the land might be used. The special adaptability of the land acquired cannot be altogether ignored in the determination of its market-value. Such value consists of all advantages which the land possesses present or future, but it is the present value alone of such advantages that falls to be determined. The operative effect of special adaptability or future utility must be estimated not by idle speculation and unpractical imagination but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled had the land been exposed for sale when it was subjected to compulsory acquisition. 8 P. 793=1929 P. 733; 58 C.L.J. 38=1934 C. 97. If the owner wants compensation for the land irrespective of the consideration that it is a land used to grow a certain crop and then separately claims compensation for the loss of income from the crop, he cannot be penalized simply because he claimed under two heads what he ought to have claimed in the head of market value. The fact that the claim under one head was placed somewhat low and a higher

NOTES.

claim was made under another head, should not stand in the way of giving full market value to the owner which may be held to be fair market value in respect of these lands. 1938 Pat. 618. Where land was situated within municipal limits surrounded by three roads and a line of railway; *held*, the land near the railway godown possessed a high potential value and assessing its valule at four annas a yard was held not wrong. 118 I.C. 541=1929 L. 112. An owner of land is entitled to the value to himself of the property in its actual condition at the time of expropriation with all its then existing advantages and with all its future possibilities excluding only any advantages due to the carrying out of the scheme for the purposes for which the property is being acquired. 33 C.W.N. 458=1929 P.C. 92 =57 M.L.J. 81 (P.C.). Government should not reduce compensation payable, by merely announcing in advance its intention of acquiring a piece of land and thus throwing a 'cloud' on its market-price before issuing notifications required by the Act. 1936 L. 599.

MARKET-VALUE — GUIDING PRINCIPLES— POST-NOTIFICATION TRANSFERS—REFERENCE— PERMISSIBILITY.—In valuing immovable property Court is justified in taking a broad view as favourable to the owner as the evidence permits. But the findings must be based on evidence and legitimate deductions from it and if there is an appeal both the evidence and deductions are subject to reconsideration by the Court of appeal. In determining, the value of post-notification transactions need not necessarily be ignored. But if a considerable interval has elapsed the Court will attach little value to the subsequent sale. 35 Bom.L.R. 763= 1933 B. 361.

"LOSS OF BUSINESS," MEANING OF.—The expression "loss of business" does not mean mean the profit that a person will make by using the corpus (*e.g.*, in the case of manufacturing bricks) the result of which would be that after some lapse of time the property would be altogether valueless. It means that a man pursuing some trade or business is compelled to give it up or carry it on elsewhere which would give him less profit than what he was making at the former place. Where the owner claimed compensation on the ground that he intended to use a part of the land acquired for the purpose of making bricks but the operations themselves had not been begun and there was nothing to show that such operations could not otherwise be conducted in the vicinity, *held*, that the claim on the ground of alleged loss of business was not sustainable. 56 C. 819=1929 C. 826.

AGRICULTURAL LAND.—Compensation in respect of agricultural land should be allowed on the basis of 20 years' purchase, in a case where the average annual income of the land is expected in perpetuity and the owner obtains it without any effort other than signing of a lease. 134 I.C. 1002= 1931 S. 168. Per *Macpherson, J.*—Although in most of the decisions, the cost of cultivation to be deducted from the value has been taken to be one-third and the number of years purchase at twenty those rules which might have been appropriate to pre-war times cannot be applied to post-war conditions in Chota Nagpur. Having regard to the conditions of tenancy, the limited right of sale, lack of demand and several other adverse conditions, the cost of cultivation may well be fixed at one half and the multiplier of years purchase at fifteen. 1932 P. 134=12 Pat.L.T. 659. Per *Fazl Ali, J.*— "Once it is found that the main principle on which the lands have been valued is correct, it is neither usual nor proper for the High Court to lightly disturb the conclusion arrived at by the Courts which must be assumed to be familiar with the local conditions merely because more than one view is possible as to what are mere details". 12 Pat.L.T. 659. In awarding compensation based on rent actually received, regard should be had to the question whether the lease was one for a considerable period and the rent received was an amount which was likely to be received for a lengthy period. If it was a long lease or one which was not likely to be determined early, the rent may be taken as an index to the value. If, on the other hand, it is a short lease and the bargain was one such as the landlord was hardly ever likely to get once again, it cannot be made a basis for computing the market-value. 34 Bom.L.R. 1457=1933 B. 37.

Sec. 23 (1): SCOPE.—It depends on the circumstances of each case at what rate the property should be capitalized. 131 I.C. 222=1931 S. 52.

INAM LAND.—In determining the compensation payable for *inam* land under the Act, the element of non-transferability of the land cannot enter into consideration. The publication of the declaration under S. 6 has the effect of removing all restrictions on the rights of the owner and consequently lifts the embargo on its transferability. So after the declaration, the *inam* land stands on the same footing as any freehold land. 142 I.C. 364=1933 N. 208. *See also* 40 Bom.L.R. 432=1938 Bom. 325. Where the inam was granted in pre-British period to the ancestor of the present holder as remuneration for service as a *Kazi*, *held*, that even if the grant meant an assignment of revenue and not of land, it was capable of being regarded as an alienated land within the meaning of S. 4 (17), Berar Land Revenue Code, 1896 and S. 2 (2) of the Berar Land Revenue Code, 1928; and as the grant had been confirmed under R. 4

NOTES.

of the Berar Inam Rules tht grantee was a superior holder with an interest in the land and not a mere licensee. 142 I.C. 364. Even if no action is taken under S. 31 (3) of the Act, the fact that the land was service inam cannot be ignored, in computing the amount of compensation. S. 31 does not exclude the operation of S. 23; on the other hand it presupposes the determination of the pecuniary value of the right or interest in the land held by the claimant in accordance with the direction contained in S. 23; and S. 31 (3) comes into operation only at the time of awarding a money compensation. 142 I.C. 364.

HOUSE PROPERTY AND BUILDINGS.—Where the subject to be valued for purposes of compensation is a building apart from the site, the value of the building has to be fixed by ascertaining the cost of reproducing the building at the present time and then allowing for depreciation in consideration of the age of the building and for the costs of such repairs as might be required apart from depreciation. 44 C.W.N. 5=66 I.A. 258=50 L.W. 406=1939 P.C. 235=(1939) 2 M.L.J. 722 (P.C.). It has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed peoperty as equal to the profits made by investing money in gilt-edged securities. In arriving at the proper value of a site with building thereon for the purpose of awarding compensation under the Land Acquisition Act, the compulsory acquisition being at a time when the interest obtainable on Government securities is 3 per cent. the proper and correct course would be to capitalise the annual rental value of the property at 33 1|3 years' purchase. 54 L.W. 724=1941 Mad. 684=(1941) 2 M.L.J. 75. House property—Rent income—Compound appurtenant to house but in possession of cultivating tenant. 40 A. 367=44 I.C. 923=16 A.L.J. 301. House property—Onus—Principle of assessment, when based on rental value. 11 I.C. 62. House property—Valuation. 25 I.C. 393. In valuing house sites the value of the adjoining land, which is unfit for building purposes should not be taken as the basis. 14 I.C. 625=1912 M.W.N. 460. *See also* 1938 Cal. 75 (Premises abutting on common passage with an interest therein—Acquisition of path—Valuation). Where except for a small portion of land, the land in dispute had no value as a building site because the demand for buildings was limited, the value of the land should be assessed on the basis of what was its worth as an agricultural land. 1933 L. 508=146 I.C. 556.

FRONTAGE.—Frontage of 100 feet should be allowed. 112 I.C. 797=1928 L. 263 (33 B. 235, Rel. on). Where the value of the land in a populous locality, to be acquired under the Act, is to be determined, frontage, *i.e.*, immediate contiguity to highway and where there is no frontage, propinquity and easy access to high road are the powerful elements of the value to be taken into consideration, 1936 C. 346.

BUILDING—DIFFERENCE BETWEEN FRONTAGE AND BACK.—A differentiation may be made in the properties acquired between frontage and back but no ratio can be fixed between the values of the former and of the latter as each case will turn on its own merits. The depth of frontage is a matter of importance and it can be best settled by assuming that the owner of a property will make the best possible use of it and that the actual "lay out" of the property at the time of acquisition was in all the circumstances of the case the most advantageous and lucrative, it being open to the owner to show that, owing to special circumstances such as minority or litigation or poverty or unbusinesslike methods, full advantage had not been taken of the property, in which case assistance can be derived from the frontage or other buildings in the locality. 1931 L. 364=135 I.C. 183.

BUILDING WITH WALLS OF ARCHITECTURAL BEAUTY.—Where a land is acquired which contains walls of architectural beauty, the value of the walls cannot be assessed from that standpoint but only with regard to the materials used. 1933 L. 948. *See also* 1937 M.W.N. 1046.

RIGHT OF PRIVACY—INFRINGEMENT OF—COMPENSATION FOR.—The infringement of the right of privacy is an appropriate subject for compensation. 61 C. 245=38 C.W.N. 239=1934 C. 525.

BELTING SYSTEM—VALUE OF—FRONT AND BACK LANDS—SOUNDNESS OF DISTINCTION.—The value of belting system, though widely used, depends much on a variety of acts. It may be appropriate in the case of lands in populous and important towns, such as Calcutta. But in localities where land is sold by *bighas* or acres, and there is no real evidence of any proportionate diminution in value, the system must be regarded as unsatisfactory. Of course, there is a distinction in value between front lands and back lands everywhere, but that would not justify a recourse to the belting system in each and every case. It is a highly artificial system and cannot be resorted to as a hard and fast rule. 59 C. 921. *See also* 68 C.L.J. 90. A Municipality has no right or power under the District Municipal Act to refuse permission to build upon lands which the Municipality intends to acquire, and by this means prevent building sites from being used for building and thereby render them valueless, so that the Municipality may be enabled to acquire them under the Land Acquisition Act at a reduced valuation. In spite of the refusal of the Municipality to permit building, the lands must be valued on the basis of building sites and not otherwise; in other words the refusal of permission to build cannot be taken into account in valuing the lands for purposes of acquisition. 168 I.C. 705=39 Bom.L.R. 142=1937 Bom. 177.

NOTES.

Fruit-bearing Trees.—Fruit-bearing trees may be valued at twenty times the annual rental. 25 I.C. 393. In the case of cocoanut tope, ten years' income may be fixed as the market-value. 23 L.W. 336=93 I.C. 639=1926 M. 945. A land which has been assessed as a garden cannot also be assessed as an agricultural land. 1933 L. 948. *See also* 43 I.C. 17=2 P.L.J. 615.

Landlord and Tenant.—Where a claim to apportionment of compensation between landlord and tenant is involved, the reasonable course is to find the value of the land as a whole first. The right between the landlord and tenant is to be raised subsequently as between them and not between the Secretary of State and the tenants. The valuation of the land should be ascertained by considering cases of similar sales. It is not a proper method of approach to value the different interests separately, unless it is quite clear what the rights of the different parties are and unless the evidence affords instances of dealings in exactly the same rights as are in question. 58 C. 1345=135 I.C. 438=1932 C. 143. *See also* 55 A. 897 =148 I.C. 100=1934 A.L.J. 8=1934 A. 239 (F.B.); 1933 C. 312=143 I.C. 367; 13 P. 221=150 I.C. 27=1934 P. 168; 42 C. W.N. 1191=1938 Cal. 740. In cases of apportionment of the compensation amount between the landlord and the tenant, it is almost impossible to lay down any rigid rule of universal application. In vast majority of cases the apportionment is bound to appear arbitrary. The ratio of apportionment between them may be different in different cases and would depend on the particular facts admitted or proved. Where there is no evidence one way or the other it has to be made only on general considerations—namely to divide it according to the relative value of the interest of the landlord and tenant. It was held that the ratio of ten to six as between landlord and tenant was fair. 1941 N.L.J. 620. The value of the interest of the superior holder must be included in the award and not deducted from the value of the occupant's interest. 25 Bom.L.R. 480=1924 B. 54. *See also* 46 L.W. 877=(1937) 2 M.L.J. 744. Where the landlords are by local custom entitled to a share of one-fourth of the purchase-money on the transfer of an occupancy holding, the right should be taken into account when the occupancy holding is acquired by the Government and the landlord is entitled to receive one-fourth of the compensation paid to the *raiyat,* though unlike in the case of a private transfer, the landlord has no power to withhold his approval to the acquisition. 11 P. 485=13 P.L.T. 46=1932 P. 120. The occupancy tenants usually pay to their landlords land revenue plus *malikana* at different rates. If the Court should assume that land revenue was equal to half the rent paid by a non-occupancy tenant, the proportion of the interest of the landlord and the occupancy tenant may be fairly taken to be the same as that between the *malikana* and the land revenue. 132 I.C. 698=1931 L. 649. Landlord and tenant—Amount paid to occupancy tenant—Land valued at a certain amount—Surplus, whether zamindar entitled to—Valuation of zamindar's interest as to proper course—Unpaid surplus to go to Government—Considerations in assessing compensation for zamindar's interest. 27 A.L.J. 522=1929 A. 523. *See also* (1937) 2 M.L.J. 744.

Free hold and lease hold lands.—The difference between a freehold piece of land and a piece of land leased for 999 years at a nominal rent and with no restrictive covenants would be purely sentimental. But where there are restrictive covenants as time passes and the land changes hands, it becomes difficult to enforce the covenants between freeholders, while it is not difficult to enforce covenants against lessees. Covenants are more detrimental in the case of leaseholds than in the case of freeholds. 44 Bom.L.R. 57.

Orchard Land.—In valuing orchard land, regard is to be had—(1) to the recent selling price of a similar land in the neighbourhood; (2) to the suitability of the land for orchard purposes; and (3) to its situation with regard to the market. 43 I. C. 17=2 Pat.L.J. 615. *See also* 1933 L. 948.

Nursery.—Where land with nursery is acquired, valuation should include the value of plants in the nursery which have come into existence between the date of the publication of declaration of intention to acquire and the date on which Collector takes possession. 40 C.W.N. 1034.

Quarry.—The compensation payable in respect of quarry must be based on the amount of workable stone likely to be got therefrom taken at a rate to be determined from the evidence. 44 I.C. 1. Special adaptability of a land as quarry is an element for consideration when the land is compulsorily acquired and the basis is the present value of the expected output. 44 M. 264=39 M.L.J. 623. Land used for quarrying building stone—Rate of valuation —Circumstances to be considered. 31 Bom.L.R. 241=56 M.L.J. 127 (P.C.).

Inquiry as to other Property.—Where part of a person's land is acquired for sewage depot, the close proximity of the depot to the other adjoining land of the person would lower its value; and compensation may be awarded for damage likely to be sustained. 22 I.C. 354=18 C.L.J. 244. *See also* 106 I.C. 909. An owner of land acquired for public purposes is entitled to be compensated for injuries to other lands notwithstanding the benefits that might accrue to him from execution of the project. 31 I.C. 259.

Price accepted by other owners of adjacent lands, if a guide.—Where a Court ignores all the considerations pertinent to claimant's own lands and finds itself exclusively on the evidence as to the price accept-

NOTES.

ed for other plots (acquired at the same time) the conditions of which were not fully before it, the principle applied by the Court in awarding compensation on the basis of compensation accepted by the owners of other lands is erroneous. (1925 N. 292, reversed) 114 I.C. 587=1929 P.C. 92=57 M.L.J. 81 (P.C.).

DISTINCT INTERESTS.—It is competent to a judge to direct a portion of the compensation money to be paid towards the costs of the proceedings by which the money came to be awarded to an administratrix having a limited power of alienation. 65 I.C. 209 (39 C. 33, Ref.). The interest of the Government in Noabad hill lands is to be valued at 30 times the present rental. 24 I.C. 65 =18 C.W.N. 531. Distinct interests—Occupancy rights—Mode of assessment. 14 I.C. 163. Land acquired subject to occupancy rights of tenants—Mode of valuation. 42 M. 644=51 I.C. 656=36 M.L.J. 455. When there are distinct interests in the land *melvaram* and *kudivaram,* compensation must be awarded for both and not in respect of one alone. 29 I.C. 8. *See also* 1929 A. 525. Where there is a right of way over a plot of land the proper way to appraise the value is by fixing the value of the entire plot and deducting therefrom the cost, etc., incurred in making the roadway. 56 C. 989. Reversion—Value of. 108 I. C. 253. Where Government is seeking to acquire land which is subject to an easement, it has got to pay compensation to the landowner, *i.e.*, the owner of the servient tenement, and also to the owner of the easement; it is obvious that the value of the easement bears no relation to the value of the servient tenement. It cannot be assumed that the value of an easement or restrictive covenant to the person entitled thereto is the same as the amount by which the existence of that easement or covenants depreciates the value of the land subject thereto. 44 Bom.L.R. 57. If the owner of an easement claims compensation for the acquisition of the easement, he is clearly entitled to compensation under the Act and the compensation is the value of the easement to him. If it happens that the easement is of no great value, then Government may acquire both the servient tenement and the easement at a price which is less than the market value of the land free from the easement. The value of the whole is greater than the combined value of the parts, and the increased value arising from the union of interests necessarily belongs to Government in whose hands the union takes place. Easements or restrictive covenants must prejudicially affect the value of the land, and it is impossible to say that the existence of those covenants though they may be of no benefit to the person entitled to enforce them, depreciates the land by only a nominal sum. There is nothing in the Act to suggest that any person interested is to be paid for anything except the interest which he possesses. 44 Bom.L.R. 57. Where a possible contingent right to the land acquired is vested in a superior proprietor by way of reversion, even if the right is such as a right in embryo and may never fertilise, when Government compulsorily acquires the land from the usufructuary occupants whoever they are, the superior proprietor is entitled to a portion of compensation money in respect of his possible right of reversion which is cut off for ever by the compulsory acquisition. 128 I.C. 660=1933 P.C. 261 (P.C.).

BURDEN OF PROOF AND EVIDENCE.—Where a claimant challenges the valuation made by the Special Land Acquisition Officer, the burden of proof is on him to prove that the valuation is insufficient and unfair. The price paid within a reasonable time in *bona fide* transactions relating to the land is the most cogent evidence of market value under the Land Acquisition Act. So also great weight should be attached in arriving at the market value, to admissions in solemn deeds executed by parties to a litigation. No doubt evidence of offers in respect of the land has to be considered by the Court but the probative value of such evidence is very low, for, offers alleged in land acquisition proceedings are scarcely ever *bona fide.* They can easily be arranged without any loss or inconvenience to either party; so also, although the opinion of experts is evidence in such cases, its value is not great and it would not be possible to place reliance on this kind of evidence unless it is supported by or coincided with other evidence; and where such evidence is not only not supported by or coincident with the best evidence in the case, but there is such divergence or disagreement on material points between the evidence of the so-called experts, no reliance can be placed over it. Moreover, even experienced architects and municipal land surveyors cannot be regarded as valuators or experts merely because in course of their business or duty they have had an occasion to value some property here and there. 1938 Sind 225. The putting of written interrogatories to an expert witness for submission of written answers later on is an unusual procedure. 68 C.L.J. 90. Where in order to enable the determination of the market value of the acquired property, an award accepted by an owner of an adjacent property is produced in evidence, it is not obligatory on the part of the Government to examine such owner with reference to the circumstances under which the award came to be accepted. The Government using an accepted award, may or may not examine the owner or the person interested. 42 C.W.N. 27. That an award made by a L. A. Officer is wrong lies on the claimant. 106 I.C. 939. Compulsory acquisition of land—Rival claimants to compensation—Burden of proof. 107 I.C. 347=47 C.L.J. 337 (P.C.).

first, the market-value of the land at the date of the publication of the [1][notification under section 4, sub-section (1)];

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or teees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earning;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) *bona fide* resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

(2) In addition to the market-value of the land as above provided, the

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LEG. REF.

[1] Substituted for the words "declaration relating thereto under S. 6" by Act XXXVIII of 1923, S. 7.

NOTES.

QUESTION OF FACT.—Rule as to ascertainment of value is not a question of fact. 6 C. 989. It is for the appellant to show that the assessment of the L. A. Officer is too low. (106 I.C. 909; 34 C. 599, Rel. on.) 1931 L. 364.

MISCELLANEOUS.—The Court has to see in each case whether the evidence adduced displaces the amount awarded by the Collector. 46 I.C. 221=22 C.W.N. 659. Whether a public body acquiring land for one specific purpose can use it for other purposes. 22 I.C. 354=18 C.L.J. 244. A Subordinate Court cannot reduce the amount of compensation awarded by the Collector even though there was a mistake in his calculation. 16 L.W. 891=1923 M. 31. An award of compensation under the Act cannot be made on speculations and hypothetical schemes of the future development of land. 15 I. C. 672. *See also* on this point, 11 Bom. L. R. 1176=4 I.C. 278; 3 I.C. 273=10 Bom. L.R. 660=33 B. 325; 38 B. 37=21 I.C. 320=15 Bom.L.R. 845; 16 Bom.L.R. 55; 21 I.C. 270=309 P.L.R. 1913; 1928 L. 263. Owner keeping land vacant after declaration—Claim for compensation on that ground—Maintainability. 108 I.C. 251.

PRIVY COUNCIL, PRACTICE OF.—In an appeal under the Act from the decision of the High Court which reversed the judgment of the Special L. A. Judge and affirmed the award of the Collector, where the appellant was unable to make out that there was any wrong application of principle by the High Court in rejecting the evidence of an expert on which the Special Judge chose to act, or that any important point in the evidence was overlooked or misapplied, the P.C., refused to disturb the conclusions of the High Court. 57 I.A. 223=1930 P.C. 249 (2)=59 M.L.J. 70 (P.C.).

POWER TO ENFORCE CONTRACT IN ABSENCE OF CONTRACTING PARTIES.—From the provisions of S. 23, it is fairly clear that the L. A. Officer and the Court dealing with the matter on a reference from him have only to decide the market value of the property, subject to the considerations mentioned in that and the following sections. Neither the L. A. Officer nor the Court has got the power to enforce a contract as such in the absence of the contracting parties. 155 I.C. 280=1935 M. 279 (2).

S. 23, Clause fourthly: APPLICABILITY—"LOSS OF INCOME"—MEANING OF.—The loss of income which is contemplated in Clause *fourthly* of S. 23 is the loss of personal income to the owner of the land. It contemplates a case in which, on account of the acquisition of a certain land, the value of other properties of the owner has deteriorated or the owner has suffered loss of his own income not derived from the land itself. The claluse has no application in case the loss of income complained of is the loss of the income of the property itself which is being acquired. That loss of income is a factor to be taken into consideration in fixing the market value of the land itself which the owner is to get under Clause *firstly*, S. 23. The price of land is fixed on the basis that the owner should get full compensation for the loss of the income which he was getting from the land and this compensation is the market value of the land acquired. Therefore for the land itself the owner is not entitled to get anything more than the market-value of the land and the statutory compensation payable to him under the law. He cannot get the market value of the land and then compensation for the loss of income from the land itself. 1938 Pat. 618=17 Pat. 760=20 Pat.L.T. 293.

Sec. 23 (2).—*Award of* 15 *per cent. on*

Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition.

Matters to be neglected in determining compensation.

24. But the Court shall not take into consideration—

first, the degree of urgency which has led to the acquisition;

secondly, any disinclination of the person interested to part with the land acquired;

thirdly, any damage sustained by him which, if caused by a private person, would not render such person liable to a suit;

fourthly, any damage which is likely to be caused to the land acquired, after the date of the publication of the declaration under section 6, by or in consequence of the use to which it will be put;

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;

sixthly, any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or

seventhly, any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date of the publication of the [1][notification under section 4, sub-section (1)].

Rules as to amount of compensation.

25. (1) When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11.

LEG. REF.

[1] Substituted for the words "declaration under section 6" by Act XXXVIII of 1923, S. 8.

NOTES.

market value on compulsory acquisition is a statutory amount of compensation in addition to the market value; and the Court has no power to deprive a claimant of that amount on the ground that he has not previously claimed it specifically. 145 I. C. 526=1933 A. 742; 1936 L. 599. "Land" includes "trees" and 15 per cent. is to be allowed on the total value including "trees". 48 A. 498=24 A.L.J. 583=1926 A. 689. The provision of this sub-section is not applicable to acquisitions under the Land Acquisition (Mines) Act. 15 P. 510=17 Pat. L.T. 279=1936 P. 513. Ss. 23 to 25 are applicable to acquisition under Bombay Municipal Boroughs Act. *See* 39 Bom.L. R. 329=1937 Bom. 432.

Secs. 23 and 24: OBJECT OF.—These sections only lay down rules for determining the market value and do not create any right on the part of the owners of the lands or the holders of interest therein to obtain compensation on the footing of their respective rights as at the date of the declaration. 37 C.W.N. 14.

Secs. 23, 24 and 25.—Applicability—Proceedings under S. 198, Bombay Municipal Boroughs Act—15 per cent. in addition to compensation—Award of—Legality. *See* 39 Bom.L.R. 329.

Sec. 24.—If the owner of a land invests more capital in the land after the publication of notification, he does so at his risk. 51 I.C. 501=16 A.L.J. 669. Excess area not really existing, but appearing in revenue records is not to be paid for. 42 I.C. 905 =60 P.R. 1917. When agricultural land is acquired for *mandi,* the compensation should be assessed at the amount which similar land in the neighbourhood would fetch for purposes of agriculture. 57 P.R. 1913=17 I.C. 764.

Sec. 24 (5): MEANING OF.—Sub-S. (5) of S. 24 of the Land Acquisition Act means no more than this: that in valuing the land acquired, on the date of the notification under S. 4 (1) of the Act, it must be valued as it then stood, and not as it would stand when the land had been acquired and used for the purpose for which it was acquired. But it does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. 66 I.A. 104=I.L.R. (1939) Mad. 532=43 C.W.N. 557=1939 P.C. 98 =(1939) 2 M.L.J. 45 (P.C.). *See also* 46 L.W. 492=1937 Mad. 902.

Sec. 25.—Where after a reference was made to the Court and the party sought

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector.

Form of awards.

[1][26. (1)] Every award under this part shall be in writing signed by the Judge, and shall specify the amount awarded under clause *first* of sub-section (1) of section 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section, together with the grounds of awarding each of the said amounts.

LEG. REF.

[1] S. 26 was renumbered as sub-S. (1) of S. 26 by S. 2 of Act XIX of 1921.

NOTES.

before the Court to supplement his claim by addition of two new items, *held,* that the Court had no jurisdiction to entertain such newly preferred claims. 1930 M. 576=59 M.L.J. 30. Widow's claim before Acquiring Officer does not preclude reversioners from claiming larger amount before District Judge. 45 M. 421=42 M.L.J. 298=1922 M. 103. The word "applicant" in S. 25 is used to describe the person who puts in a written application under S. 18 for having his objection to the award referred for decision to a Civil Court. 45 M. 421. Claimants are estopped from getting more from the Judge than what they claimed before the Collector and on the same principle their local representatives will also be bound. 45 M. 421. *See also* 7 L. 416=1926 L. 401; 61 C. 245=38 C.W.N. 239=1934 C. 525. But *see also* 50 M.L.J. 566; 60 M.L.J. 410=53 M. 921. When Government made settlements in the Province of Agra, both permanent and temporary, as settlements of rights in the soil only, stone quarries were treated as a monopoly of Government and no rights of zamindars were recognized in stone quarries; and hence a zamindar whose land is acquired by Government under the Act cannot claim compensation for *kankar,* which comes under the definition of mineral, and which is essentially the property of Government. 1931 A.L.J. 660=1931 A. 394. Collector's award—District Judge—Power to modify award. 42 I.C. 905=60 P.R. 1917. *See also* 1933 S. 21=146 I.C. 1040. There is nothing in S. 25 (1) which precludes the District Judge from introducing variations in different items that make up the award so long as the total amount is not reduced. 159 I.C. 257=1935 L. 653; 1936 Pesh. 217. Where no sufficient reason is given for not putting forward a claim under S. 9, the Judge should not interfere with the award of the Collector. 37 A. 69=26 I.C. 795=12 A.L.J. 1319. Refusal or omission to appear according to S. 9 (2) without sufficient cause, disentitles claimant from getting a greater sum than that awarded by the Collector. 33 A. 376=9 I. C. 423=8 A. L. J. 115. Where the claimants did not put in their claims at the time required by the notice under S. 9. but did so later, the amount which the Court can award is governed by S. 25 (1). 1933 S. 124=143 I.C. 699. The fact that the Collector adjourned the inquiry *sine die* for making the award does not by itself extend the time for making the claim already fixed by the notice under S. 9. 12 Pat.L.T. 659. *See also* 22 M.L.J. 379=14 I.C. 270; 57 C. 837=34 C.W.N. 323=1930 C. 471. Omission to prefer claim—Effect. 9 I.C. 582=13 C.L.J. 159. *See also* 4 I.C. 1146=138 P.W.R. 1909.

Sec. 25 (1), (2) and (3) and S. 9 (3).—Even a personal notice under S. 9 (3) should give the occupier of land an interval of fifteen days for stating his claim for compensation. A notice fixing a shorter term is in contravention of the statute and amounts to a 'sufficient reason' within the meaning of S. 25 (3) for the omission of the claimant to make his claim and the stringent provisions of S. 25 (2) cannot be applied to such a case. (39 A. 534; 50 M. L.J. 566, foll.; 49 A. 145, not foll.) 53 M. 921=1930 M. 836=60 M.L.J. 410. *See also* 57 C. 837=34 C.W.N. 323=1930 C. 471. Per *Macpherson, J.*—Even though a notice issued under S. 9 may have been defective in several particulars regarding the date, the name or description of the area proposed to be acquired, that is not a sufficient reason for not making the claim, if, in pursuance of the notice, the party has appeared at the time and place specified and raised objections regarding measurement but failed to specify the amount claimed as compensation. 12 Pat.L.T. 659. Where the owner of a certain land failed to submit his claim for compensation in pursuance of the notice under S. 9 and the L.A. Officer awarded certain compensation but the owner preferred a claim for enhancement in the Civil Court. *Held,* that the Court was precluded by S. 25 (2) of the Act from enhancing the amount awarded by the officer. 53 M. 533=1930 M. 618=59 M. L.J. 33.

[1][(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of section 2, clause (2), and section 2, clause (9), respectively, of the Code of Civil Procedure, 1908.]

27. (1) Every such award shall also state the amount of costs incurred in the proceedings under this part, and by what persons and in what proportions they are to be paid.

Costs.

(2) When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or that he should pay a part of the Collector's costs.

LEG. REF.

[1] Inserted by S. 2 of Act XIX of 1921.

NOTES.

Sec. 26 (2).—The new sub-S. (2) of S. 26 of the Act does not have the effect of enabling an appeal to be taken to His Majesty in Council from a judgment and decree of the High Court, Calcutta, on appeal from an award of the Calcutta Improvement Tribunal in respect of land compulsorily acquired under the Calcutta Improvement Act. (39 I.A. 197, Ref.) 51 I.A. 259=1931 P.C. 149=61 M.L.J. 864 (P.C.). Under S. 26 (2), 'judgment' includes a decision of the High Court in a L.A. appeal from an award of the L.A. Judge. The decision in such appeal is appealable under Cl. 15, Letters Patent (Calcutta). 40 C.W.N. 1143=1936 C. 688. Where there were several connected references under the Act and they were all disposed of by single award, and appeals were preferred in all the cases; *Held,* that a copy of the award must accompany the memorandum in each appeal. 9 L. 76=94 I.C. 145=1925 L. 438; 104 I.C. 281. Although S. 26 requires the Judge to specify in his award the several particulars referred to therein, it is sufficient for the L.A. Officer under S. 11 to state what he considers to be fair compensation to be allowed for the whole of the land under acquisition and how it should be apportioned. S. 25 refers to the whole claim made by the claimant, and the whole amount of compensation awarded to him under S. 11, and empowers the Judge to alter the award of the L.A. Officer under any one or more of the sub-heads by either decreasing or increasing the amount awarded, provided he did not award less than the total amount awarded by the officer or more than the total amount claimed before that officer by the claimant. 1933 S. 21. Award under Ss. 11 and 26—Difference between. *See* 1933 R. 176=11 R. 344, cited under S. 11, *supra.*

Sec. 27.—The same method of calculating costs should be adopted in land acquisition cases as in ordinary suits. 37 I.C. 760=126 P.R. 1916. A claimant for compensation in a land acquisition matter is in the position of a plaintiff who has instituted a suit to recover a sum of money and when it is found that he is not entitled to success under the provisions of the law relating to the subject, there is no ground upon which the tribunal hearing the claim could deprive the opposite party, the Secretary of State, of the costs to which he would be entitled under the ordinary provisions of the law. There is no justification for refusing such costs on sentimental grounds. 1942 O.W.N. 131=1942 A.L.J. 141. For a case where Collector was ordered to pay claimant's costs though claim was extravagant, *see* 1928 L. 263. The word "persons" in S. 27 (1) of the Land Acquisition Act cannot be construed as referring only to persons who are parties to the proceedings. The language of S. 27 (1) is perfectly clear and very wide, and must on the face of it give power to the Court to order costs to be paid by a person whether he be an actual party or not. A person who is present before the Court as trustee of a devasthanam, though he has no personal interest in putting forward the claim, may be made liable for costs. S. 27 (1) in no way conflicts with or limits or restricts the provisions of S. 35, C.P. Code. Reading S. 27 (1) of the Land Acquisition Act with S. 35, C.P. Code, it must be held that the Court has jurisdiction in a suitable case to direct the cost to be paid by the trustee of a devasthanam personally although he merely represents the devasthanam in the proceedings, when he makes a most extravagant claim and acts recklessly and when it would be unjust to call upon the real party (devasthanam) to meet the burden of costs. 52 L.W. 660=1941 Mad. 198=(1940) 2 M.L.J. 753. Where the Collector awarded compensation at Rs. 26 a cent and the claimant appealed claiming at Rs. 31 and the Court awarded compensation at Rs. 28 but disallowed his costs. *Held,* that under the circumstances the Collector should have been directed to pay the claimant's costs, because the claim was not extravagant and there was no negligence in putting it forward. 1932 M.W.N. 853. *See also* 1937 M.W.N. 1006. The general rule is that costs should follow the event. The appellate Court should interfere with the exercise of discretion by the lower Court as to costs when there has been any misapprehension of facts, or violation of any established

Collector may be directed to pay interest on excess compensation.

28. If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

PART IV.

APPORTIONMENT OF COMPENSATION.

Particulars of apportionment to be specified.

29. Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award, and as between such persons the award shall be conclusive evidence of the correctness of the apportionment.

NOTES.

principle or where there has been no exercise of discretion at all. Where, in certain land acquisition proceedings, the Court refused to award costs to the Government, because the uncertainty of the market created by the boom and its aftermath were greatly responsible for the exaggerated demands put forward by the owners before the Judge. *Held*, that the reasons were inadequate to deprive the successful Government of their costs in the lower Court. 53 B. 178=30 Bom.L.R. 1622=1929 B. 63. Once a proper reference comes before the Court, the order passed is an award, whether the Judge gives an additional amount or not, or whether the Acquisition Officer's decision is not upheld for some other reason, and there should be a direction regarding the costs. Where the award of the Collector was not upheld by the Court because the Government had backed out of the acquisition after the reference was made. *Held*, that the claimant was entitled to his costs. 1931 M. 26 (1)=59 M.L.J. 682. S. 27 (2) is limited to the proceedings in the Court of first instance. Costs of the proceedings in the higher courts are at their discretion. 33 Bom.L.R. 1210=1931 B. 520.

Sec. 28.—Under S. 28, it is within the discretion of a Court to decree interest where a larger amount of compensation has been given than was awarded by the Collector. 1931 A.L.J. 660=1931 A. 394. The claimant is entitled to interest on the excess amount awarded by the District Court from the date of possession by the Collector up to the date of actual payment of such excess in Court and not up to the date of the award only. 1933 S. 21=146 I.C. 1040=27 S.L.R. 84. Interest can be awarded only from the date when Collector takes possession and not from the date of award. 1926 M. 732=50 M.L.J. 566. When the amount is enhanced by the District Judge, claimant is entitled to interest on the difference. 1928 L. 263=112 I.C. 797. *See also* 1940 A.L.J. 860=1941 All. 135 (Interest awarded under the section not chargeable to income-tax).

Sec. 29.—Principles of apportionment of compensation among *zamindar, jotedar* and *raiyat*. 40 C. 64=17 C. W. N. 1001=18 I.C. 551. Where the *jagirdar* or intermediate tenure-holder claims compensation to the extent of the amount which the *zamindar* had agreed to grant abatement in the rent, it is necessary for him to show that he has a permanent interest, that the landlord had parted with his *prima facie* right to enhance the rent and that the rent was *mokarari*. *Prima facie* the zamindar has the whole of the interest; it is for the tenure-holders to show what part of the interest the *zamindar* has divested himself in their favour. 140 I.C. 385=36 C.W.N. 866. In apportioning the compensation between landlord and tenant, the Court should proceed on the principle of ascertaining what is the value of the interest of the landlord on the one hand and that of the tenant on the other and apportion the compensation according to those values. 32 P.L.R. 864=1932 L. 123 (2). Apportionment of compensation—Objection not taken—Effect on award. 11 I.C. 304. On this section, *see also* 11 Bom.L.R. 674; 17 Bom.L.R. 192; 18 C. W.N. 531; 34 B. 618; 16 C.L.J. 301; 1 L.W. 767.

Secs. 29 and 30.—It is only common sense that as between lessor and lessee the acquisition should not place either party in a better or a worse position than he was before the acquisition. The acquisition transforms the property into a certain sum of money, but the rights of the parties relatively to this sum ought to be the same as they were with reference to the property. Where a property is subject to a lease, theoretically speaking, the total compensation for the property should be the sum total of the compensation payable in respect of the interests of lessor and lessee. If the total compensation is not however arrived at by separately calculating the interest of lessor and lessee, the amount should be divided between them in such proportions as would represent the value of their respective interests. It must follow on this basis that

Dispute as to apportionment.

30. When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court.

PART V.

PAYMENT.

31. (1) On making an award under section 11, the Collector shall tender

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NOTES.

whatever is obtained by one party, the other takes the balance, and this ensures to each payment of the proportionate value of his interest. In an apportionment between lessor and lessee, it ought not surely to make a difference whether the lessor's or the lessee's interest is first valued and paid for. 67 C.L.J. 532=42 C.W.N. 1191=1938 Cal. 740. Land and buildings thereon owned separately—*Principles of apportionment* discussed. *See* 54 I.A. 218=54 C. 669=53 M.L.J. 158 (P.C.).

Sec. 30: SCOPE OF.—The section deals with apportionment only and not with a claim to abatement of rent by a tenant part of whose tenure has been acquired. 50 I.C. 798. Difference between Ss. 30 and 18. *See* 43 P.L.R. 153=1941 Lah. 268. Apportionment of valuation among different interests in the land acquired. 35 A. 9=10 A.L.J. 403. Apportionment of compensation in case of occupancy holding. 13 I.C. 420. *See also* 1926 P. 16; 37 C.W.N. 702=146 I.C. 579=1933 C. 767; 29 N.L.R. 31=1933 N. 114. There is no general rule of general application applicable to apportionment between a landlord and a tenant with a permanent right of occupancy. What is sometimes called a rough and ready method has to be adopted, taking into consideration all the circumstances of the case. 40 C.W.N. 1143=1936 C. 688. Landlord's share — Apportionment — Malabar Law—"*Vilakku money.*" 28 I.C. 8=1 L.W. 767. An apportionment by the Collector between the Zamindar and his tenant which was referred to the Court on the application of the Zamindar cannot be disputed by the tenant. 25 I.C. 803=8 S.L.R. 18. Where the interests of the landlord and the tenant were separately assessed and landlord failed before the Collector to prove that the tenant was a tenant at will, the landlord could not claim anything out of the sum which has been assessed as the value of occupancy holding, unless he joined the Collector as a party and objected to the valuation made on the proprietary interest. 42 I.C. 787. The Collector can make a reference to the Civil Court after paying out compensation to one of the claimants. 33 I.C. 253=20 C.W.N. 816. Objection to award by one of the claimants—Other claimant if entitled to any portion of the excess amount allowed. 53 I.C. 238=23 C.W.N. 720; 40 C.W.N. 1143=1936 C. 688 (Case of landlord and tenant). Where the terms of a lease debar a pattidar from claiming any abatement of rent on account of compulsory acquisition of land in his tenure, he is entitled to the whole compensation. 17 I.C. 168=16 C.L.J. 209 (30 C. 801, Ref.). As to jurisdiction to entertain a suit, *see* 13 I.C. 651=1912 M.W.N. 163. The jurisdiction of the Court dealing with a reference under S. 30 of the Land Acquisition Act is confined to a consideration of the dispute that is expressly referred to it by the Collector. An addition of parties may indeed be made when the persons who desire to be added as parties do not raise any new dispute but want to place other materials before the Court in connection with the dispute that is referred to it by the Collector. But it cannot be permitted in a case where the question sought to be raised is entirely a new one and is not covered by the reference made by the Collector. I.L.R. (1941) 2 Cal. 394=45 C.W.N. 912. A *melvaramdar's* interest in a land cannot be valued merely at 20 years' purchase of the rent. 50 M. 706=1927 M. 489=52 M.L.J. 295. [*See also* notes under S. 23.] Where a reference is made by a Collector under S. 18, no other Civil Court can determine the same rights between the same parties. 52 P.R. 1913=17 I.C. 684. *See also* 43 P.L.R. 153.

RES JUDICATA.—Decision as to title to property acquired is *res judicata* in subsequent civil suit. (1941) 1 M.L.J. 408.

APPEAL.—The decision of a Court under reference made under S. 30 is a portion of an award and consequently an appeal lies under S. 54. 53 I.C. 539=97 P.R. 1919; 1933 B. 187=57 B. 314=144 I.C. 710=35 Bom.L.R. 276; 49 L.W. 238=1939 Mad. 716. (*See also* notes under S. 54.) The decision of a Subordinate Judge's Court on a reference made by the L. A. Officer under S. 30 is not an award within the meaning of that Act and consequently an appeal from that decision, where the subject-matter of the *lis* is less than Rs. 5,000, does not lie to the High Court but lies to the District Court. 52 M. 142=1929 M. 351=56 M.L.J. 357. *See also* 1929 M. 223=56 M.L.J. 387.

Sec. 31: DUTY OF GOVERNMENT.—It is the duty of Government under S. 31 to deposit in Court the whole of the compensation money which it may be required to deposit by the Act, free from any deduction. 37 B. 76=14 Bom.L.R. 507. Compensation paid to wrong person—Remedy of person entitled. 49 M. 519=93 I.C. 651=50 M.L.J. 412. Where the Collector has paid the

Payment of compensation or deposit of same in Court.

payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.

(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

NOTES.

amount of compensation, the Court cannot direct him to pay again to some one else, unless he has shown such negligence that he could be rightly held liable to do so. 1933 R. 176=11 R. 344. Karta of a joint Hindu family is allowed to withdraw the compensation money. 118 I.C. 851=1929 C. 379. Where the L. A. Officer, after a person is adjudicated an insolvent, erroneously pays to his mortgagee a certain amount as compensation instead of paying the same to Official Receiver who has no notice under S. 31 of the proceedings, the Official Receiver has a right to sue for the recovery of the amount paid. 121 I.C. 876=1930 S. 75. Default in payment of arrears of revenue—Acquisition by Government—Award setting off arrears of revenue—Subsequent sale—Relative rights of purchaser and prior proprietor to compensation. 37 C.W.N. 14. Where the Collector awards a compensation in L. A. proceedings, the persons awarded can bring an action in a civil suit for the portion of the compensation money, if the question has not been decided by the Collector. 83 P.R. 1919=49 I.C. 657. When the Civil Court comes to the conclusion that the Collector has paid compensation to the wrong party, the decree in favour of the right party should not be against Government, but should be against the party who had been paid by the Collector. 33 I.C. 253=20 C. W.N. 816. The Secretary of State is not necessary party to such suit. 165 I.C. 924 =1936 Pesh. 198. The proviso to sub-S. (2) clearly provides for such an emergency and makes the person who may have received the whole or any part of any compensation under the Act to pay the same to the person lawfully entitled thereto. (*Ibid.*) *See also* 1 Pat.L.T. 143=56 I.C. 125. Where a *malik makbuza* plot (in a mahal which had been leased in perpetuity) was acquired by the Government and the L. A. Officer allowed the perpetual lessee compensation for loss of the revenue and also a certain sum to the malguzar, *held*, that neither the L. A. Officer nor the Court to whom the matter of compensation was referred had any authority to decide what lease money should be paid in future and that the proprietor and the lessee should come to an agreement on the point or have the matter decided by a competent Court. 29 N.L.R. 31=1933 N. 114. Where rival claimants come before the Court on a reference under S. 31, the Court has a duty to decide which of the claimants is entitled to the money deposited in Court. There is no provision in the Act which authorizes the Court to refer the parties to a separate suit. 48 L.W. 450=1938 Mad. 955.

APPLICABILITY.—S. 31, Cl. (2) applies to the case of a *shebait*. 40 C. 895=22 I.C. 272=19 C.W.N. 652. The owner of an unenfranchised service inam is incompetent to alienate within the meaning of Ss. 31 (2) and 32 (1). 25 I.C. 600. So also holder of an impartible estate. 58 M. 442=1935 M. 215=68 M.L.J. 575.

APPEAL.—Though the order determining the apportionment of the compensation is not an award within the meaning of S. 54, it is in the nature of a decree and an appeal lies against it. 35 Bom.L.R. 276=1933 B. 187. *See also* 53 I.C. 589. An order of the District Judge allowing a Hindu widow to withdraw money deposited by Collector under S. 3 is not appealable under S. 54. 31 I.C. 677=19 C.W.N. 1290.

Sec. 31 (2).—In law all the co-sharers are entitled to enjoy and possess the common property jointly, and if one of them asserts an exclusive title to any portion of such property and ousts his co-sharers from enjoyment or possession of the same, the latter can certainly institute a suit for recovery of joint possession in respect of that particular item without being obliged to sue for partition of the entire joint estate. When a joint property is acquired under the Land Acquisition Act, the enjoyment, which the co-owners are entitled to under the Act, is to get proportionate shares of the compensation money that is given by the award. Consequently, if one co-sharer receives anything in excess of his share or the whole amount of the compensation money he is bound to refund it to the true owners, and this is a right which is recognized by the proviso to S. 31 (2). A suit by a co-sharer for his share of the compensation money falls under S. 31 (2) and cannot be regarded as a partition suit. 46 C.W.N. 212=1941 Cal. 635.

Sec. 31 (2), Proviso.—The Act creates a special jurisdiction and provides a special remedy for persons aggrieved with anything

Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section the Collector may, with the sanction of the Provincial Government, instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land-revenue on other lands held under the same title, or in such other way as may be equitable having regard to the interests of the parties concerned.

(4) Nothing in the last foregoing sub-section shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof.

LEG. REF.

NOTES.

done in the exercise of that jurisdiction. That jurisdiction is exclusive. A party who is served with notice under S. 9 of the Act is bound, if he is dissatisfied with the award, to apply for a reference under S. 18. If he disables himself from availing of it by accepting the compensation without any protest or, if for any other reason he does not apply under S. 18, he cannot be allowed to re-open the question of the right to the amount of compensation by means of a regular suit, against the persons alleged to have wrongfully received the same. 9 O.W.N. 1176. *See also* (1941) 1 M.L.J. 527; 1933 N. 322; 147 I.C. 877. When the Collector wrongly refuses to make a reference, the general liability will arise of the person taking the land for damages in the Civil Court. 37 P.L.R.J. & K. 8.

Sec. 31 (2), Proviso 3.—Applicability—Daughters of owner claiming share in compensation—Collector making reference to Court—Daughters and their assignees appearing—Assignment by consent recognized by Court—Claim of assignees for share in compensation adjudicated upon and rejected—Order not appealed against—Assignees have no right to bring separate suit. I.L.R. (1939) Kar. 152=180 I.C. 681=1939 Sind 66.

Sec. 31 (2), last proviso.—S. 31 (2), last proviso, apparently contemplates a civil suit. It does not create a right to get a refund of the money but simply recognizes the right which exists independently of the section. 46 C.W.N. 212=1941 Cal. 635.

Sec. 31 (4).—*See* 73 C.L.J. 595=43 C.W.N. 1185, cited under S. 11, *supra*.

Secs. 31 and 32.—As to persons who are competent to contract, *see* S. 11 of the Indian Contract Act (IX of 1872). A widow holding a life estate under the Customary Law is a "person not competent to alienate" within the meaning of Ss. 31 and 32 of the Act. 116 I.C. 335=1929 L. 736. *See also* 60 C.L.J. 88. Where land belonging to an impartible estate is acquired under the Act, the compensation money should not be paid over to the holder for the time being, but should be converted into other land to form part of the impartible estate which will not thus suffer from the acquisition and hence the acquisition officer is right in depositing the money under S. 31. 58 M. 442 =68 M.L.J. 575=1935 M. 215. The words "if there be no person competent to alienate the land" in S. 31 (2) must necessarily apply to a case where there is no present title in the person who has come forward as a claimant to the compensation fixed by the Collector. Ss. 31 and 32 provide for the case of persons who by reason of a personal disability have no absolute power to alienate and are intended to protect the interest of reversioners, when land is taken away from the possession of such persons who hold it only on a life-estate or similar limited estates, such as minors, lunatics, Hindu widows, administrators, etc., where the legal estate is in one person and the beneficial estate in another. In the case of inam granted as a personal inam to the family of the grantee, the grantee having a heritable estate in full proprietorship, the grant being of the soil and conveying a full interest in the land without any condition in restraint of alienation, the inamdar and his assigns are owners of the villages and have an interest in the land and are entitled to the benefit of that interest. Such a person cannot be said to have no power to alienate the land within the meaning of S. 31 (2) of the Act. Such an inamdar does not fall under Ss. 31 and 32. The amount of compensation awarded for acquisition of such inam lands cannot therefore be directed to be deposited in Government securities and interest alone directed to the inamdar. He is entitled to receive the full amount of compensation in cash. 40 Bom. L. R. 432 =1938 Bom. 325.

Investment of money deposited in respect of lands belonging to persons incompetent to alienate.

32. (1) If any money shall be deposited in Court under sub-section (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall—

(*a*) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or

(*b*) if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit;

and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same be applied—

(i) in the purchase of such other lands as aforesaid; or

(ii) in payment to any person or persons becoming absolutely entitled thereto.

NOTES.

Sec. 32: APPLICABILITY OF SECTION.—S. 32 applies to cases where the possessor of the land has a limited interest in it and does not govern the case of land incapable of alienation in whosoever hands it may be. 40 B. 254=33 I.C. 464=17 Bom.L.R. 1140. S. 32 does not vest the acquisition Court with such power as to retain the money in its possession in spite of the directions of a competent Civil Court. 107 I.C. 738. The case of a Hindu widow does not come within the purview of S. 32. 11 I.C. 304. Court can deal with application by *shebait* for grant of money for repairs. 39 C. 33 =10 I.C. 491.

Sec. 32 (1) (a): ENQUIRY AS TO VALUATION—PROCEDURE.—The President of the Calcutta Improvement Tribunal, acting under S. 32, is a Judge and is bound to exercise his functions in a judicial manner. Where he referred the question of valuation to an outside expert and, on receipt of his report, adopted it without giving the parties concerned an opportunity to examine or cross-examine him, *held,* that the procedure was illegal. 59 C. 1272=36 C.W.N. 848=1932 C. 844. The parties interested in the properties forming the subject-matter of investigation are not parties to the proceedings under the Act for appraising the offers. 59 C. 1272=36 C.W.N. 848=1932 C. 844.

Sec. 32 (1) (b) (ii): APPLICABILITY.—S. 32 (1) (*b*) (*ii*) contemplates a case where the disability has ceased or the estate vests absolutely in a full owner after the termination of the limited estate. It presupposes a valid deposit under S. 32 (1) and cannot have any reference to a case where the property is found not to belong either wholly or in part to the person in whose favour the award is made and in whose name the money lies deposited; but is found to belong to some other person who is not a party to the award at all. 46 C. W.N. 212=1941 Cal. 635. S. 32 of the Land Acquisition Act invests the Court with certain powers in regard to the moneys deposited under S. 31 (2). The section lays on the Court the duty to order the moneys deposited in the purchase of other lands, and, even in the case of moneys that have been invested in Government or other approved securities, the Court is also given power to have them re-invested in the purchase of other lands. It is a judicial function which has to be performed by it in accordance with the procedure usually attributed to it, after hearing the parties and taking the necessary evidence. The Court has to be satisfied as to the propriety of the purpose the value and title of the land before it can make an order for investment. It is no doubt true that the purchase has to be made through the Collector. The Court can refer the matter to the Collector and direct him to revive all the evidence and any information which the parties may place before him and to consider the same along with the information which he would independently obtain and to submit a report. On receipt of the report of the Collector the Court should hear the parties and pass appropriate orders. But the Collector's report is not final and conclusive. It is open to the Court to have the opinion of an expert taken as regards the valuation of the land, etc., if it thinks necessary; it is open to the Court to disregard the report of the Collector and arrive at an independent valuation after consideration of the report and direct the purchase accordingly. But the Collector's opinion regarding the purchase is not the final word on the matter. The order ultimately to be passed is a judicial order made by the Court. 1937 Mad. 948=(1937) 2 M.L.J. 429.

ILLUSTRATIVE CASES.—The land acquired by the Calcutta Improvement Trust tribunal belonged to a *Thakur* ordinarily managed by *Shebaits.* In a suit relating to that debutter estate, a receiver had been appointed by the Court to take possession of the

(2) In all cases of moneys deposited to which this section applies the Court shall order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the Collector, namely :—

(*a*) the costs of such investments as aforesaid;

(*b*) the costs of the orders for the payment of the interest or other proceeds, of the securities upon which such moneys are for the time being invested, and for the payment out of Court of the principal of such moneys, and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants.

NOTES.

properties. The Tribunal proposed to invest the compensation money in the purchase of other lands on the ground that there was no one competent to alienate the land. *Held,* that as the receiver represented not only the *Shebaits* but also the *Thakur* he was competent to alienate the land and so S. 32 was not applicable. Secondly, even otherwise under S. 32 (*b*), the receiver appointed by the Court was a person who had become absolutely entitled to the amount and to whom the Tribunal was consequently bound to pay and the Tribunal had no discretion to invest it on the purchase of other lands. 36 C.W.N. 370= 1932 C. 660. Under S. 32 (1) of the Act, the Calcutta Improvement Tribunal has jurisdiction, even after once adopting the alternative in S. 31 (1) (*b*), and has power, impliedly conferred on it, to order the money to be re-invested in the purchase of land. 59 C. 1272=36 C.W.N. 848=1932 C. 844. The effect of Murshidabad Act (XV of 1891 amended by Act XXV of 1923) is that, in spite of certain powers conferred on the Secretary of State, no right of ownership or disposition is conferred on the Secretary of State and the Nawab Bahadur continues as a limited owner but with the income intercepted in certain contingencies. Where such lands are proposed to be acquired, the tribunal has jurisdiction to act under S. 32 (1) of the Act. 59 C. 1272=36 C.W.N. 848=1932 C. 844.

MEANING OF TERMS.—The words "power to alienate" in S. 32 refer only to alienation to the Collector but not to alienations in general. 11 I.C. 304. Expenditure of money to save land comprised in the estate inherited by the widow from her husband, from an impending sale is not an investment "in the purchase of lands" within the meaning of the section. 41 I.C. 810=26 C.L.J. 123. Court-fee. *See* 39 C. 606=17 C. W.N. 933=14 I.C. 724.

ACQUISITION OF HINDU WIDOW'S INTEREST.—The President of the Calcutta Improvement has jurisdiction to re-invest money invested in G. P. Notes, being the compensation money in respect of the acquisition of the interest of a Hindu widow, in the purchase of other lands, and, in this matter, he acts as a Judge and must exercise his function in a judicial manner and in the interest of the person for whom the money is held in trust. The primary consideration for the Court is the interest of the person for whose benefit the legislature has given the power. 60 C.L.J. 88. *See also* 1929 L. 736.

PROCEDURE.—The Act does not lay down any procedure which is to be followed in the matter of re-investment in lands of money already deposited in G. P. Notes. But the Court should hear the person who is interested in the money, before it decides whether it is desirable or advantageous that the money which has remained invested in G. P. Notes, without any objection from any body, should be re-invested in the purchase of other lands in view of the grounds alleged by such person. 60 C.L.J. 88. The President of the Calcutta Improvement Tribunal has no jurisdiction under S. 32 of the Act to issue a notice to party to show cause why the compensation money invested in Government securities should not be re-invested in lands. Such a notice is also wrong in law. 60 C.L.J. 227. When there is an investment of the compensation money in Government securities, already made as far back as 20 years, S. 32 does not make a re-investment in land obligatory. 60 C. L.J. 227.

Sec. 32 (2): CONSTRUCTION—"REASONABLE CHARGES AND EXPENSES"—ATTORNEY.—As it was considered necessary to engage the services of an attorney for the purchase of lands advertised for sale by the Registrar of the High Court on the original side, by way of investment of money deposited in respect of acquired lands belonging to a person incompetent to alienate property, an attorney was engaged with the approval of the Special L.A. Judge. He made the necessary investigation as to the suitability, market-value and title, and did other things incidental to the completion of the purchase. The attorney having submitted a bill of costs, *held,* that he was entitled to reasonable remuneration for the work done by him by way of "reasonable charges and expenses" within the meaning of S. 32 (2) of the Act, and that the said charges and expenses were payable by the Collector, although the purchase was effected not immediately after the deposit but only subsequently. 39 C.W.N. 251=1935 C. 119.

APPEAL.—*See* 6 I.C. 157; 29 M. 117.

REVISION.—*See* (1937) 2 M.L.J. 429.

Investment of money deposited in other cases.

33. When any money shall have been deposited in Court under this Act for any cause other than that mentioned in the last preceding section, the Court may, on the application of any party interested or claiming an interest in such money, order the same to be invested in such Government or other approved securities as it may think proper, and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as it may consider will give the parties interested therein the same benefit therefrom as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be.

Payment of interest.

34. When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited.

PART VI.

TEMPORARY OCCUPATION OF LAND.

Temporary occupation of waste or arable land. Procedure when difference as to compensation exists.

35. (1) Subject to the provisions of Part VII of this Act, whenever it appears to the Provincial Government that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a Company, the Provincial Government may direct the Collector to procure the occupation and use of the same for such term as it shall think fit, not exceeding three years from the commencement of such occupation.

(2) The Collector shall thereupon give notice in writing to the persons interested in such land of the purpose for which the same is needed, and shall, for the occupation and use thereof for such term as aforesaid, and for the materials (if any) to be taken therefrom, pay to them such compensation, either in a gross sum of money, or by monthly or other periodical payments as shall be agreed upon in writing between him and such persons respectively.

(3) In case the Collector and the persons interested differ as to the sufficiency of the compensation or apportionment thereof, the Collector shall refer such difference to the decision of the Court.

NOTES.

Sec. 34.—The basis of this section is that the right to receive interest takes the place of the right to retain possession. 59 M. 433 =1936 M. 199=71 M.L.J. 69. A claimant is entitled to interest from the date on which the Collector took possession of the properties acquired up to the date on which compensation is paid or deposited. 106 I. C. 909. The award of a District Judge in L. A. proceedings has the same force as a decree of Civil Court. Where such award does not mention interest, the Court executing the award has no power to grant the same. 9 Mys.L.J. 55. 'Deposited' means the actual fact of deposit in the place indicated in S. 31 (2). The fact that a deposit made by the Collector was erroneous and was due to an error of judgment on his part as to whether the claimant is entitled to receive the money from his hands is immaterial. Even in such a case, no liability to pay interest would be incurred. 40 C. W.N. 989=165 I.C. 716 (2)=1936 C. 525. Under S. 34, the claimant is entitled to interest at 6 per cent. per annum from the time of possession by Government until the sum or compensation is paid or deposited and the mere existence of an agreement between the parties, that the claimant should take away the materials on the land to be acquired, does not disentitle the claimant to the statutory interest, unless it is shown that the consideration for that agreement was that the claimant should relinquish his statutory claim of interest. 19 Pat.L.T. 774 =1938 Pat. 266.

Secs. 35 and 36 (2).—Temporary occupation when assessable—Compensation. 30 I.C. 245=37 A. 347.

Power to enter and take possession, and compensation on restoration.

36. (1) On payment of such compensation, or on executing such agreement or on making a reference under section 35, the Collector may enter upon and take possession of the land, and use or permit the use thereof in accordance with the terms of the said notice.

(2) On the expiration of the term, the Collector shall make or tender to the persons interested compensation for the damage (if any) done to the land and not provided for by agreement, and shall restore the land to the persons interested therein:

Provided that, if the land has become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested shall so require, the Provincial Government shall proceed under this Act to acquire the land as if it was needed permanently for a public purpose or for a Company.

Difference as to condition of land.

37. In case the Collector and persons interested differ as to the condition of the land at the expiration of the term, or as to any matter connected with the said agreement, the Collector shall refer such difference to the decision of the Court.

PART VII.

ACQUISITION OF LAND FOR COMPANIES.

Company may be authorized to enter and survey.

38. (1) [1][* * * * * * * * *]. The Provincial Government may authorize any officer of any Company desiring to acquire land for its purposes to exercise the powers conferred by section 4.

(2) In every such case section 4 shall be construed as if for the words "for such purpose" the words "for the purposes of the Company" were substituted; and section 5 shall be construed as if after the words "the officer" the words "of the Company" were inserted.

Industrial concern to be deemed company for certain purposes.

[2][38-A. An industrial concern, ordinarily employing not less than one hundred workmen owned by an individual or by an association of individuals and not being a Company, desiring to acquire land for the erection of dwelling-houses for workmen employed by the concern or for the provision of amenities directly connected therewith shall, so far as concerns the acquisition of such land, be deemed to be a Company for the purposes of this part, and the references to Company in sections 5-A, 6, 7, 17 and 50 shall be interpreted as references also to such concern.]

LEG. REF.

[1] The words "Subject to such rules as the Governor-General of India in Council may from time to time prescribe in this behalf" were omitted by Act XXXVIII of 1920.

[2] Newly added by Act XVI of 1933.

NOTES.

Sec. 38-A.—The necessity for the insertion of this new S. 38-A has been explained as follows:—The L.A. Act, 1894, makes it possible, where the previous consent of the Local Government has been obtained, to acquire land compulsorily on behalf of companies, provided that the land is needed for a work "likely to prove useful to the public." The Royal Commission on Labour have recommended that the Act be so amended as to enable land to be thus acquired where it is needed for the housing of labour, either by companies or by other employers. They stated that, in a number of instances brought to their notice, land eminently suitable for the development of housing schemes had been held at random by the owners, fantastic values being placed upon it as a result of the construction of factories and other industrial concerns in the neighbourhood. The provision of adequate housing for workmen is one of the urgent needs of Indian industry, and the Bill seeks to give effect to the Commissioner's recommendation. (*Statement of Objects and Reasons.*)

Previous consent of Provincial Government and execution of agreement necessary.

39. The provisions of sections 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any Company, unless with the previous consent of the Provincial Government, nor unless the Company shall have executed the agreement hereinafter mentioned.

Previous enquiry.

40. (1) Such consent shall not be given unless the Provincial Government be satisfied [1][either on the report of the Collector under section 5-A, sub-section (2), or] by an enquiry held as hereinafter provided,—

[2][(*a*) that the purpose of the acquisition is to obtain land for the erection of dwelling-houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or

(*b*) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.]

(2) Such enquiry shall be held by such officer and at such time and place as the Provincial Government shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure in the case of a Civil Court.

Agreement with Provincial Government.

41. [3][* * * * * * * * * *] If the Provincial Government is satisfied [3][after considering the report, if any, of the Collector under section 5-A, sub-section (2) or on the report of the officer making an enquiry under section 40], that [4][the purpose of the proposed acquisition is to obtain land for the erection of dwelling-houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or that,] the proposed acquisition is needed for the construction of a work, and that such work is likely to prove useful to the public, it shall [5][* * * * * * * * * * * * * *] require the company to enter into an agreement with the [6][Provincial Government] providing to the satisfaction of the Provincial Government for the following matters, namely:—

(1) the payment to [7][the Provincial Government] of the cost of the acquisition;

(2) the transfer, on such payment, of the land to the Company;

(3) the terms on which the land shall be held by the Company;

LEG. REF.

[1] The words "either on the . . . or" were inserted by Act XXXVIII of 1923, S. 9.

[2] Substituted by Act XVI of 1933. The old sub-cls. (*a*) and (*b*) stood as follows:

(*a*) that such acquisition is needed for the construction of some work, and

(*b*) that such work is likely to prove useful to the public.

[3] At the beginning of this section the words "Such officer shall report to the Local Government the result of the enquiry, and" were omitted by Act XXXVIII of 1923, S. 10 and after the word "satisfied" the words "after considering the report . . . under S. 40" were inserted by the same Act.

[4] Inserted by Act XVI of 1933.

[5] The words "subject to such rules as the Governor-General of India in Council may from time to time prescribe in this behalf" were repealed by Act XXXVIII of 1920.

[6] Substituted by the A. O., 1937, for the words "Secretary of State for India in Council".

[7] Substituted by *ibid* for "Government".

NOTES.

Sec. 39.—In order to constitute a binding agreement the intention of the parties must be distinct and common to both. An agreement does not admit of difference. 58 C.L.J. 138. The L. A. Court gets jurisdiction only on a reference being made to it by the Collector, and its jurisdiction is confined to disposing of the matter so referred. It has no jurisdiction under the Act to consider the legality of acquisition or of the reference. 99 I.C. 530=1927 M. 114. *See also* 24 L.W. 833=1926 M. 207,

[1][(4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling-houses or amenities shall be erected or provided; and

(5) where the acquisition is for the construction of any other work, the time within which, and the conditions on which, the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work.]

Publication of agreement.

42. Every such agreement shall, as soon as may be after its execution, be published [2][* * * *] in the Official Gazette and shall thereupon (so far as regards the terms on which the public shall be entitled to use the work) have the same effect as if it had formed part of this Act.

Sections 39 to 42 not to apply where Government bound by agreement to provide land for companies.

43. The provisions of sections 39 to 42, both inclusive, shall not apply and the corresponding sections of the Land Acquisition Act, 1870, shall be deemed never to have applied, to the acquisition of land for any Railway or other Company, for the purposes of which, under any agreement [3][with such company, the Secretary of State for India in Council, the Secretary of State, or any Government in British India is, or was,] bound to provide land.

How agreement with Railway Company may be proved.

44. In the case of the acquisition of land for the purposes of a Railway Company, the existence of such an agreement as is mentioned in section 43 may be proved by the production of a printed copy thereof purporting to be printed by order of Government.

PART VIII.

MISCELLANEOUS.

Service of notices.

45. (1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under section 4, by the officer therein mentioned, and, in the case of any other notice, by or by order of the Collector or the Judge.

(2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.

(3) When such person cannot be found, this service may be made on any adult male member of his family residing with him; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the Court-house, and also in some conspicuous part of the land to be acquired:

LEG. REF.

[1] Substituted by Act XVI of 1933. The old cls. (4) and (5) stood as follows:—

(4) the time within which, and the conditions on which, the work shall be executed and maintained; and

(5) the terms on which the public shall be entitled to use the work.

[2] Omitted by A.O. 1937.

[3] Substituted by *ibid.*

NOTES.

Sec. 43.—In view of the provision in S. 43 of the Land Acquisition Act that Ch. VII of the Act does not apply to the case of acquisition of land for a railway, such land is presumably acquired by the Government under the earlier sections of the Act, and becomes the property of the Government and not the property of the Railway Company. I.L.R. (1937) All. 511=1937 A.L.J. 249=1937 All. 428.

Sec. 45 (3).—Temporary absence of a person to be served with notice, does not fall within the words "cannot be found" in cl. (3), S. 45. 50 I.C. 70=17 A. L. J. 268.

Provided that, if the Collector or Judge shall so direct, a notice may be sent by post, in a letter addressed to the person named therein at his last known residence, address or place of business and registered under Part III of the [1]Indian Post Office Act, 1866, and service of it may be proved by the production of the addressee's receipt.

Penalty for obstructing acquisition of land.

46. Whoever wilfully obstructs any person in doing any of the acts authorised by section 4 or section 8, or wilfully fills up, destroys, damages or displaces any trench or mark made under section 4, shall, on conviction before a Magistrate, be liable to imprisonment for any term not exceeding one month, or to fine not exceeding fifty rupees, or to both.

Magistrate to enforce surrender.

47. If the Collector is opposed or impeded in taking possession under this Act of any land, he shall, if a Magistrate, enforce the surrender of the land to himself, and, if not a Magistrate, he shall apply to a Magistrate or (within the towns of Calcutta, Madras and Bombay) to the Commissioner of Police, and such Magistrate or Commissioner (as the case may be) shall enforce the surrender of the land to the Collector.

Completion of acquisition not compulsory, but compensation to be awarded when not completed.

48. (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

LEG. REF.

[1] *See* now the Indian Post Office Act (VI of 1898).

NOTES.

Sec. 48.—The power of withdrawal given to the Government by S. 48 does not render the agreement void for want of mutuality. 44 B. 797=58 I.C. 621=21 Bom.L.R. 1014. S. 48 of the Land Acquisition Act does not apply to the case in which there is no voluntary withdrawal by the Government but the proceedings come to an end by reason of a decree declaring the proceedings invalid. In such a case the proceedings automatically drop and the aggrieved party is left to choose his remedy in the ordinary Civil Courts. The Act does not provide a cheap remedy for such a grievance. The jurisdiction exercised by the Civil Court under the Act is a restricted one and the Court has no right to widen it and to act in contravention of the Act. 177 I.C. 958=1938 N.L.J. 54=1938 Nag. 169. The power to award compensation under S. 48 (2) is conferred on the Collector and not on the Court; and the Court can have no jurisdiction unless the Collector in the first instance made an award and made a reference under Part III of the Act. 1938 N.L.J. 54=1938 Nag. 169. When proceedings are taken on behalf of a Municipal Board, the Board cannot withdraw, but the Government can. 51 I.C. 501=16 A. L.J. 659. There is nothing in this section to indicate or suggest that it is not open to the acquiring authority to make acquisition of any portion of the land in respect of which notice under S. 9 has been issued. 41 C.W.N. 437. After acquisition and taking over possession there can be no withdrawal—Property must be reconveyed by Government to the owner to reinstate him in its ownership. 1927 R. 14. *See also* 91 I.C. 291.

Sec. 49: RIGHT UNDER—WHEN AVAILABLE.—S. 49 requires that the claimant should be "owner" of the land to be acquired as well as of the house, manufactory or building of which he maintains it to be a part. Unity of ownership is a necessary pre-requisite. 45 C.W.N. 370=1941 Cal. 625.

MEANING OF TERMS.—'House' includes godowns pertaining to it and used for servants' dwelling. 37 I.C. 11=43 C. 665. An under-tenant is a person interested in the acquisition of land and so an "owner" for the purpose of S. 49 and is competent to apply for reference to the Civil Court. 13 I.C. 470=16 C.W.N. 927. The expression "owner" which occurs in S. 49 of the Act is nowhere defined in the Act, and though the expression "person interested" as explained in S. 3 (*b*) must obviously include "owner," the connotation of the two terms are by no means coincident. A "person interested" who cannot be strictly considered an owner, cannot avail himself of the rights conferred by S. 49. The rights of a zamindar, a tenure-holder, the holder of a building lease, an occupancy raiyat, may conceivably fulfil the conception of ownership within the meaning of S. 49 in certain circumstances. But each case must depend upon its own special facts. 45 C.W.N. 370=1941 Cal. 625. "Award" means compensation in some form or other, whether it be the amount or its disposal. 23 C.W.N. 378=50 I.C. 732=46 C. 861. The

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damages suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be to the determination of the compensation payable under this section.

Acquisition of part of house or building.

49. (1) The provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other building, if the owner desire that the whole of such house, manufactory or building shall be so acquired:

Provided that the owner may, at any time before the Collector has made his award under section 11, by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be so acquired:

Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined.

In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building.

(2) if, in the case of any claim under section 23, sub-section (1) *thirdly*, by a person interested, on account of the severing of the land to be acquired from his other land, the Provincial Government is of opinion that the claim is unreasonable or excessive, it may, at any time before the Collector has made his award, order the acquisition of the whole of the land of which the land first sought to be acquired forms a part.

(3) In the case last hereinbefore provided for, no fresh declaration or other proceedings under sections 6 to 10, both inclusive, shall be necessary; but

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NOTES.

decision of a preliminary question raised on a reference under S. 49 is not an award. (*Ibid.*) "Award or any part of the award" in S. 54 means the decision or any part thereof as embodied in a formal document and would not include the judgment on which it is based. So it does not include decision of the Court on a reference under S. 49. 17 I.C. 117 (27 M. 353; 30 A. 176; 10 C.W.N. 250, Cons.). A decision under S. 49 will not prevent a claimant from obtaining compensation for severance under S. 23, sub-section (1), cl. (3). 17 I.C. 117. Acquisition of a portion of land—Owner desiring acquisition of whole—Fresh declaration—Effect. 28 I.C. 489=17 Bom. L.R. 192.

Sec. 49 (1) and (2): APPLICABILITY AND SCOPE.—It cannot be held that S. 49 (2) only applies to houses or buildings. S. 49 (1) applies to acquiring a part of a house, manufactory or other building, and compels the Local Government to acquire the whole of the same if the owner desires it. It does not give them the option which under S. 49 (2) they possess in the case of an open plot of land. I.L.R. (1941) Kar. 217=196 I.C. 285=1941 Sind 152.

APPEAL.—No appeal lies to High Court from an order of the Judge on a reference under S. 49 which does not amount to an award. 23 C.W.N. 378=50 I.C. 732=46 C. 161. The order of Court on a reference by the Collector under S. 49, proviso, should be regarded as a decree from which an appeal lies to the High Court. 1931 M. W.N. 1266.

REVISION.—The refusal of a collector to make a reference to the Civil Court under the second proviso to S. 49, the question whether the land proposed to be acquired did or did not form part of the petitioner's house, is a ministerial act, and the Collector does not thereby constitute himself a Court subordinate to the High Court. His order is, therefore, not subject to revision by the High Court. 1938 Rang. L. R. 623.

the Collector shall without delay furnish a copy of the order of the Provincial Government to the person interested, and shall thereafter proceed to make his award under section 11.

Acquisition of land at cost of a local authority or company.

50. (1) Where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any Company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or Company.

(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation:

Provided that no such local authority or Company shall be entitled to demand a reference under section 18.

Exemption from stamp-duty and fees.

51. No award or agreement made under this Act shall be chargeable with stamp-duty, and no person claiming under any such award or agreement shall be liable to pay any fee for a copy of the same.

Notice in case of suits for anything done in pursuance of Act.

52. No suit or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends.

Code of Civil Procedure to apply to proceedings before Court.

53. Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act.

NOTES.

Sec. 50.—Company or other local authority is person interested and can ask for reference. I.L.R. (1939) 2 Cal. 401=43 C.W.N. 973=1939 Cal. 669. From S. 50, it is clear that the party for whom the land is acquired car only assist the Collector on the question of the amount of compensation to be paid to the claimant. It cannot apparently assist the Collector on the question of the area acquired, though this may affect the amount of the compensation. The Secretary of State through the Collector is therefore a necessary party to an appeal to the High Court as well as to the proceedings before the District Judge. 1936 L. 564. *See also* 13 C.W.N. 116=4 I.C. 332. Persons not made parties to reference need not be added by Civil Court. 7 I.C. 10. Purchaser of property at revenue sale added as a party—Revisional powers of High Court. *See* 6 I.C. 546=11 C.L.J. 420.

Sec. 50 (2) and S. 18.—A company or local authority on whose behalf land is being acquired is a "person interested" within the meaning of S. 3 (*b*) of the Act if it has an interest in the lands that are the subject of acquisition, and it has, therefore, a right to demand a reference under S. 18 of the Act. This right is not taken away by the proviso to S. 50 (2) of the Act. The proper interpretation of the proviso to S. 50 (2) is that it relates only to that subsection and makes it clear that a company or local authority has not been granted a power to demand a reference as to compensation, by virtue of the power given therein to appear and adduce evidence before the Collector or Court on the subject. It does not, therefore, take away the rights which the company or the local authority might enjoy as claimants or persons interested under S. 18 of the Act. I.L.R. (1939) 2 Cal. 401=43 C.W.N. 973=1939 Cal. 669.

Secs. 50 and 54.—Right of appeal—Acquisition at the instance of Municipal Committee—Proceedings on reference—Government discharged—Subsequent order of compensation under S. 48 against Municipal Committee—Appeal by latter—Is incompetent. *See* 1938 N.L.J. 54=1938 Nag. 169.

Sec. 52: APPLICABILITY OF SECTION.—S. 52 does not apply to proceedings commenced by an owner of property to restrain the Calcutta Corporation and Improvement Trust from taking further steps in some pending land acquisition proceedings. 66 I. C. 600=48 C. 916.

Sec. 53: SCOPE OF SECTION.—S. 53 has the operation of putting proceedings before the Court on the same footing as proceedings in a suit. 36 B. 360=15 I.C. 512=14 Bom.L.R. 325.

APPLICABILITY.—S. 53 applies to an earlier stage in the proceedings before an award and has nothing to do with an appeal

Appeals in proceedings before Court.

[1][54. Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court, and from any decree of the High

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LEG. REF.

[1] Substituted by Act X of 1921, S. 3.

NOTES.

from the High Court. 40 C. 21=23 M.L.J. 276=16 I.C. 188 (P.C.). An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by statute. 40 C. 21 (P.C.). The section confers on the High Court only an authority to hear appeals from awards. It does not confer any power to act as a Court of appeal from the decrees of the Court specially constituted under the Local Rules. 54 M. 722=61 M.L.J. 312=1931 M.W.N. 290=33 L. W. 528. In cases of acquisition of immovable property under S. 10 of the Ancient Monuments Preservation Act, 1914, an appeal lies from the award of the Court under Ss. 53 and 54 of the L. A. Act. 42 B. 100=43 I. C. 480=19 Bom.L.R. 937. Whether under the Act proceedings by way of execution can be taken to enforce the award, *see* 31 M.L.J. 827=38 I.C. 378=5 L.W. 472. On this section *see* 35 B. 146; 8 I.C. 166; 22 B. 802; 36 B. 360=14 Bom. L. R. 325 (Second appeal). Award under the Act is not a decree or order capable of execution under C. P. Code. 35 B. 149=8 I.C. 166 =12 Bom.L.R. 839.

AWARD AND DECREE—DISTINCTION—APPEAL.—An award is nothing but a statement of the area of land, the compensation to be allowed and the appointment among the persons interested in the land of whose claims the Collector has information. But when the sum has been deposited in Court under S. 31, sub-S. (2), the function of the award has ceased and the decision of a Court on the subsequent dispute between interested people as to the extent of their interest is not an award but a decree, from which no appeal is competent. 33 L. W. 528=54 M. 722. *See also* 56 M.L.J. 378. The decision of a Court as to the rights of the contending parties on a reference under S. 30 of the Act is not an "award" within the meaning of S. 54 of the Act and consequently an appeal does not lie to the High Court from such a decision under S. 54; but such a decision is a "decree" within the meaning of S. 2 (2) of the C. P. Code and an appeal lies from it under S. 96 of the same Code, which is made applicable to proceedings under the Act. As the appeal is under the C. P. Code and not under the L. A. Act, the forum of the appeal from such a decision of a Subordinate Judge will not always be the High Court, but will depend upon the amount involved in the appeal. [49 I.A. 129; 45 M. 320 (P.C.), Ref. to.] *See* 54 M. 722. The Court-fee payable on such an appeal is the *ad valorem* fee under Art. I of the Sch. I of the Court-Fees Act. S. 8 of the Act does not apply to such an appeal. 115 I.C. 345=1929 M. 223=56 M. L.J. 387. *See also* 52 M. 142=56 M.L. J. 357, cited under S. 30.

REVIEW.—Whether a L. A. Court can review an award passed by it under the Act. *See* 31 M.L.J. 837=38 I.C. 373. S. 53 applies to "the Court". It does not apply to proceedings before the Collectors under S. 18. 54 A. 282=1932 A. 598. A District Judge is competent to review his own order apportioning the compensation money paid on compulsory acquisition of land between the parties entitled to it. 1 P.L.T. 219=58 I.C. 510=5 P.L.J. 253. No provision of the Act forbids the application of the C. P. Code, O. 47, to the proceedings under the Act. (*Ibid.*)

REVISION.—In dealing with the acquisition of property the Calcutta Improvement Trust Tribunal is acting as a "Court" under the L. A. Act and under S. 115, C. P. Code, as well as under S. 107 of the Government of India Act, the High Court is entitled to interfere with the order passed by the President of the Tribunal. 139 I.C. 180=36 C.W.N. 370=1932 C. 660. (*See also* notes under S. 18, *supra* as to revision.)

PRIVY COUNCIL—INTERFERENCE BY—CONDITIONS.—In appeals involving questions of valuation, the decree complained of will not be interfered with by the Privy Council unless some erroneous principle has been invoked or some importance piece of evidence has been overlooked or has been misapplied. 1929 P.C. 92=57 M.L.J. 81 (P.C.). *See also* 59 I.A. 155=62 M.L.J. 682 (P.C.).

REFUND.—It is a rule of law that if a party wrongly takes from the Court moneys deposited by his opponent the Court can enforce refund of the amount with interest. 35 B. 255=10 I.C. 818=18 Bom.L.R. 259. But *see also* 63 I.C. 1. The power to recall for records from another Court is a power which is inherent in the Judge of L. A. Court. 43 C. 239=34 I.C. 263=20 C.W.N. 360.

Sec. 54.—An order under S. 54 is appealable. 37 I.C. 11=43 C. 665. *See also* 39 C. 393. [In view of the amendment of the section by Act XIX of 1921, S. 3, the decisions that stated that there was no right of appeal to Privy Council are no longer good law.] The Board will not review the decree of an Indian appellate Court in land acquisition proceedings merely upon questions of value, unless the judgment cannot be supported as it stands, either by reason of a wrong application of principle or be-

Court passed on such appeal as aforesaid an appeal shall lie to His Majesty in Council subject to the provisions contained in section 110 of the Code of Civil Procedure, 1908, and in Order XLV thereof.]

NOTES.

cause some important point in the evidence has been overlooked or misapplied. 59 I. A. 155=54 A. 286=62 M.L.J. 682 (P.C.). A decision in case of a dispute among rival claimants as regards title to compensation money is appealable to the Privy Council. 43 M.L.J. 78=49 I.A. 129=45 M. 320 (P.C.). *See also* 30 C.W.N. 386=1925 P.C. 211 (P.C.). There is nothing to exclude an appeal from an order relating to the distribution of compensation money under the Civil Procedure Code. I. L. R. (1939) Kar. 152=180 I.C. 681=1939 Sind 66. Only final award or part thereof is appealable. 7 L. 337=94 I.C. 249=1926 L. 442. A reference under S. 31 (2) of the Land Acquisition Act is made under S. 18 of the Act. When such reference is made, the Court makes an award under S. 26 and it has the force of a decree. It is an award of Court and appealable under S. 54 of the Act. 1941 O.W.N. 1325=1941 O.A. 1005. Order dismissing the case for default is neither award nor part of an award and, therefore, no appeal lies therefrom. 157 I. C. 382=1935 Pesh. 92. Though the order determining the apportionment of the compensation is not an award within the meaning of S. 54, it is in the nature of a decree and an appeal lies against it. 35 Bom.L.R. 276=1933 B. 187=144 I.C. 710. S. 54 does not give a right of appeal from an award of a single Judge on the original side of the High Court. 28 I.C. 260=8 L.B. R. 163. S. 54 does not affect the right of appeal from the judgment of a single Judge of the High Court to Division Bench under Cl. 10 of the Letters Patent. 3 L. 420=1923 L. 275. No second appeal lies to the High Court from an award by District Court on appeal from an award made by an Assistant Judge's Court under the Act. 36 B. 360=15 I.C. 512=14 Bom.L.R. 325. *See also* 38 B. 337=23 I.C. 614=16 Bom. L.R. 72. The decision of the High Court on an appeal under S. 54 is not a judgment within Cl. 15 of the Letters Patent and is not therefore open to appeal. 41 M. 943=35 M.L.J. 110=49 I.C. 27. An award under Part III of the Act is neither a decree nor an order. 28 I.C. 260=8 L.B.R. 163. S. 54 only gives an appeal to the High Court from an award or any part of an award. Where there was nothing as an award by the Civil Court, the High Court can only interefere by way of revision. 11 I.C. 690=7 N.L.R. 88. S. 54 indicates that an appeal shall be only from the award or any part of the award. The addition of the word "only" after appeal must be taken to signify that the Legislature intended that an appeal should not be from any order unless such an order can be construed as an award. The words "in any proceeding" in the section do not have the effect of extending the right of appeal. 54 C. 312=102 I. C. 479=1927 C. 533; 59 M. 554=1936 M. 514=71 M.L.J. 76. No appeal is competent under S. 54 from an order of the Divisional Court rejecting a reference under S. 18 on the ground that the application to the Collector was time-barred under sub-S. (2). Cl. (1) of that section. 104 I.C. 379 (and cases referred to therein). S. 54 makes no departure from the ordinary rule of the C. P. Code that the memorandum of objections should not be confined to the subject-matter of the appeal. 35 M.L.J. 83=48 I.C. 1003. Collector is a necessary party in an appeal to High Court. *See* 166 I. C. 575=1936 Lah. 564. New point not raised before District Judge cannot be raised in appeal to High Court. 21 Pat.L.T. 9=1940 Pat. 362.

SPECIAL CASES.—Where a District Judge dismissed a reference as time barred, no appeal lies to the High Court against this order. 39 I.C. 637. An order passed on an application for setting aside a decision by the L. A. Judge *ex parte* as the claimant was not present when the case was called is not appealable as the order is not an award. 15 I.C. 925=39 C. 393. No appeal lies from the dismissal of an application to set aside an *ex parte* award made in the course of L.A. proceedings. (39 C. 393 and 54 C. 312, Foll.; 11 C.W.N. 430, Diss.) 59 C. 1057=1932 C. 558. So the memorandum of an appeal from an application to set aside an *ex parte* award cannot be converted into a memorandum of appeal from the award itself, when the latter has become barred by time. 59 C. 1057=36 C.W.N. 352=1932 C. 558. An order directing refund of the money paid as compensation under the Act is not an award or a portion of an award within S. 54 and hence is not appealable. But it may be revised if the order be passed without jurisdiction. 63 I.C. 1=3 Lah. L.J. 421. Award giving compensation to three persons in certain shares—Objections by them regarding amount—Reference made by Collector—Two of them absent—Decree passed in favour of person who appeared and case of others dismissed for default—Restoration petition dismissed—Appeal—Revision. 1935 Pesh. 92. Order of Assistant Judge apportioning compensation money deposited in Court—Appealability—Subject-matter not exceeding Rs. 5,000—Forum—Appeal lies to District Judge, not to High Court. I.L.R. (1941) Kar. 133=1941 Sind 100.

LIMITATION.—The limitation for preferring an appeal to the High Court under S. 54 is that prescribed by Art. 156 of Limitation Act. 43 M. 51=37 M.L.J. 110=53 I. C. 405.

PARTIES TO APPEAL.—The only respondent

Power to make rules.

55. (1) The Provincial Government shall [1][* * *] have power to make rules consistent with this Act for the guidance of officers in all matters connected with its enforcement, and may from time to time alter and add to the rules so made:

[2][* * * * * * * *]

(2) The power to make, alter and add to rules under sub-section (1) shall be subject to the condition of the rules being made, altered or added to after previous publication.

(3) All such rules, alterations and additions shall [3][* * *] be published in the Official Gazette, and shall thereupon have the force of law.

THE LAND ACQUISITION (MINES) ACT (XVIII OF 1885).

Am., Act XXXVIII of 1920, Act XX of 1937.
Declared in force—
in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3;
in the Angul District, Reg. III of 1913, S. 3.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Land Acquisition (Mines) Bill:—

"The object of the Act is to provide for cases in which mines or minerals are situate under land which it is desired to acquire under the Land Acquisition Act, 1870.

Act XXII of 1863, which was repealed by the Land Acquisition Act, 1870, contained specific provisions (Ss. 51 and 52) for cases in which mines and minerals lay under land taken up under the Act. These provisions were not however re-enacted in the Act of 1870, which, as the Government is advised contemplates the acquisition of the underlying minerals as well as the surface of the land.

Hitherto this state of the law has caused no inconvenience. Now, however, owing to its being proposed to extend railways across districts where there is a certain amount of coal to be found, notice has been drawn to the inconveniences of the existing law which practically compels the Government either to purchase all the mines and minerals under the land over which it is proposed to construct a line or to abandon the undertaking altogether.

Under these circumstances, the present Bill has been prepared. It does not, however, simply re-enact the provisions of Act XXII of 1863, inasmuch as they do not appear to be adapted to the circumstances of the case. It follows rather the rules contained in the English Railway Clauses Consolidation Adt, 1845 (8 Vic., c. 20, Ss. 77 *et seq.*) which extends to the acquisition of lands for all purposes and not merely for the construction of railways.

It provides, first, that when a declaration is made by the Local Government under S. 6 of the Land Acquisition Act, the Local Government may, if it thinks fit, insert in the declaration a statement that any mines or minerals lying under the land to be acquired are not needed and that if any such statement is inserted in the declaration, the mines or minerals being under the land shall not, when the Collector takes possession of the land under S. 16 or 17 of the Act, vest in the Government. (*Vide* S. 2.)

It then declares that if the owner, lessee or occupier of any mines or minerals lying under any land so acquired is desirous of working the same, he shall give the Local Government notice in writing of his intention so to do thirty days before the commencement of working. (*Vide* S. 3.)

Next, the Bill empowers the Local Government to cause the mines or minerals to be inspected by it for the purpose. (*Vide* S. 4.)

LEG. REF.

[1] The words "subject to the control of the Governor-General in Council" which were inserted by Act IV of 1914 were omitted by Act XXXVIII of 1920, S. 2 and Sch. I.

[2] Proviso which was added by Act XXXVIII of 1920, S. 2 and Sch. I, was omitted by A.O., 1937.

[3] The words "when sanctioned by the Governor-General in Council" were omitted by Act IV of 1914, S. 2 and Sch., Part I.

NOTES.

in an appeal from land acquisition case is the Secretary of State, and if his name is omitted, there is in fact no appeal. 18 I.C. 37=59 P.R. 1913.

MISCELLANEOUS.—A decision that Government could take only that portion which they desired and they should not be compelled to take the whole holding is not an award but a preliminary decision decreeing no compensation. 21 I.C. 179=15 Bom.L.R. 802. Award—Amendment on ground of error—Appeal—Award by Court, amount of. 64 I.C. 624=44 A. 86.

If it appears to the Local Government that the working of the mines or minerals is likely to cause damage to the surface of the land or any works thereon, the Local Government may at any time before the expiration of thirty days from the receipt of the notice, offer either (*a*) to pay compensation for the mines or minerals to the owner, lessee, or occupier; or (*b*) to pay compensation to the owner, lessee or occupier of the mines or minerals, in consideration of his working or getting them in such manner and subject to such restriction as the Local Government may in its offer specify. (*Vide* S. 5.)

If the offer mentioned in Cl. (*a*) is made, then, the owner, lessee or occupier is prohibited from working the mines or minerals, whilst if the offer mentioned in Cl. (*b*) is made, then he may not work or get the mines or minerals, save in the manner and subject to the restrictions specified by the Local Government.

The Bill next provides for the manner in which the amount of compensation to be paid under S. 5 is to be determined. Should, however, the Local Government not offer to pay any compensation, S. 7 permits the owner, lessee or occupier of the mines or minerals to work the mines in a manner proper and necessary for the beneficial working thereof and according to the usual manner of working such mines in the local area where the same are situate. Should any damage or obstruction be caused by improper working of the mines, the section provides for the repairing of the damage or the removal of the obstruction by or at the cost of the owner, lessee or occupier.

Sections 8 and 9 provide for the inspection of mines for the purpose of ascertaining whether they are being worked so as to damage the land which has been acquired and S. 10 declares that, if any mines have been improperly worked, the Local Government may require the owner, lessee or occupier thereof to construct such works and to adopt such means as may be necessary for making safe the land acquired and preventing injury thereto.

Lastly, S. 11 makes the provisions of Ss. 3 to 10 applicable to cases where the land acquired has been transferred to a company and S. 12 defines what the term 'company' as used in the Act means. (*See* Statement of Objects and Reasons, Report of the Select Committee, and Proceedings in Council.)

THE LAND ACQUISITION (MINES) ACT (XVIII OF 1885).[1]

CONTENTS.

SECTIONS.

1. Short title, commencement and local extent.
2. Saving for mineral rights of the Crown.
3. Declaration that mines are not needed.
4. Notice to be given before working mines lying under land.
5. Power to prevent or restrict working.
6. Mode of determining persons interested and amount of compensation.
7. If Provincial Government does not offer to pay compensation, mines may be worked in a proper manner.
8. Mining communications.
9. Provincial Government to pay compensation for injury done to mines.
10. and also for injury arising from any airway or other work.
11. Power to officer of Provincial Government to enter and inspect the working of mines.
12. Penalty for refusal to allow inspection.
13. If mines worked contrary to provisions of this Act, Provincial Government may require means to be adopted for safety of land acquired.
14. Construction of Act when land acquired has been transferred to a local authority or company.
15. [*Repealed*.]
16. Definition of local authority and company.
17. This Act to be read with Land Acquisition Act, 1870.

[16*th October*, 1885.

An Act to provide for cases in which Mines or Minerals are situate under land which it is desired to acquire under the Land Acquisition Act, 1870.[2]

LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India,* 1885, Pt. V, p. 145; for Report of the Select Committee, see *ibid.*, Pt. IV, p. 264; and for Proceedings in Council, see *ibid.*, Supplement, pp. 336 and 1520; and *ibid.*, Extra Supplement dated 14th March, 1885, p. 41. This Act has been declared to be force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), S. 3, Ben. Code; in Angul and the Khondmals, *see* the Schedule to the Angul District Regulation (I of 1894).

[1] *See* now the Land Acquisition Act (I of 1894).

WHEREAS it is expedient to provide for cases in which mines or minerals are situate under land which it is desired to acquire under the Land Acquisition Act, 1870[1]; It is hereby enacted as follows:—

Short title, commencement and local extent.

1. (1) This Act may be called THE LAND ACQUISITION (MINES) ACT, 1885; and

(2) It shall come into force at once.

(3) It extends in the first instance to the territories administered by the Governor of Madras in Council and the Lieutenant-Governor of Bengal; but any other Provincial Government may, from time to time, by otification in the Official Gazette, extend this Act to the whole or any specified part of the territories under its administration.

Saving for mineral rights of the Crown.

2. Except as expressly provided by this Act, nothing in this Act shall affect the right of [2][the Crown] to any mines or minerals.

Declaration that mines are not needed.

3. (1) When the Provincial Government makes a declaration under section 6 of the Land Acquisition Act, 1870,[3] that land is needed for a public purpose or for a Company, it may, if it thinks fit, insert in the declaration a statement that the mines of coal, iron-stone, slate or other minerals lying under the land or any particular portion of the land, except only such parts of the mines or minerals as it may be necessary to dig or carry away or use in the construction of the work for the purpose of which the land is being acquired, are not needed.

(2) When a statement as aforesaid has not been inserted in the declaration made in respect of any land under section 6 of the Land Acquisition Act, 1870,[3] and the Collector is of opinion that the provisions of this Act ought to be applied to the land, he may abstain from tendering compensation under section 11[4] of the said Land Acquisition Act in respect of the mines, and may—

(*a*) when he makes an award under section 14[4] of that Act, insert such a statement in his award;

(*b*) when he makes a reference to the Court under section 15[5] of that Act, insert such a statement in his reference; or

(*c*) when he takes possession of the land under section 17[6] of that Act, published such a statement in such manner as the Provincial Government may, from time to time, prescribe.

(3) If any such statement is inserted in the declaration, award or reference, or published as aforesaid, the mines of coal, iron-stone, slate or other minerals under the land or portion of the land specified in the statement, except

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LEG. REF.

[1] *See* now the Land Acquisition Act (I of 1894).

[2] Substituted by A.O., 1937, for "the Government."

[3] *See* now S. 6 of the Land Acquisition Act (I of 1894).

[4] *See* now S. 11 of the Land Acquisition Act (I of 1894).

[5] *See* now S. 19 of the Land Acquisition Act (I of 1894).

[6] *See* now S. 17 of the Land Acquisition Act (I of 1894).

NOTES.

Sec. 1.—The principle of S. 23 (2) of the Land Acquisition Act is not applicable to acquisitions under this Act. 15 Pat. 510 =17 Pat.L.T. 279=1936 Pat. 513.

Sec. 3 (1): EXCEPTION TO RESERVATION —CONSTRUCTION.—The words "except only such parts as it may be necessary to dig . . . . . in the construction of the work, for the purpose of which the land is being acquired" in S. 3 (1) of the Land Acquisition (Mines) Act, should be narrowly constructed so as to include only such parts of the minerals as may be actually necessary to dig in constructing the work. I.L.R. (1941) 1 Cal. 189=45 C.W.N. 553=1941 Cal. 465. *See also* 8 Pat. 742=1930 Pat. 112.

as aforesaid, shall not vest in [1][the Crown] when the land so vests under the said Act.

Notice to be given before working mines lying under land.

4. If the person for the time being immediately entitled to work or get any mines or minerals lying under any land so acquired is desirous of working or getting the same, he shall give the Provincial Government notice in writing of his intention so to do sixty days before the commencement of working.

Power to prevent or restrict working.

5. (1) At any time or times after the receipt of a notice under the last foregoing section and whether before or after the expiration of the said period of sixty days, the Provincial Government may cause the mines or minerals to be inspected by a person appointed by it for the purpose; and

(2) If it appears to the Provincial Government that the working or getting of the mines or minerals, or any part thereof, is likely to cause damage to the surface of the land or any works thereon, the Provincial Government may publish [2][* * *] a declaration of its willingness, either—

(*a*) to pay compensation for the mines or minerals still unworked or ungotten, or that part thereof, to all persons having an interest in the same; or

(*b*) to pay compensation to all such persons in consideration of those mines or minerals, or that part thereof, being worked or gotten in such manner and subject to such restrictions as the Provincial Government may in its declaration specify.

(3) If the declaration mentioned in case (*a*) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person.

(4) If the declaration mentioned in case (*b*) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person save in the manner and subject to the restrictions specified by the Provincial Government.

[3][(5) Every declaration made under this section shall be published in such manner as the Provincial Government may direct.]

6. When the working or getting of any mines or minerals has been pre-

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LEG. REF.

[1] Substituted by A.O., 1937, for "the Government."

[2] The words "in such manner as the Governor-General in Council may from time to time, direct" were repealed by Act XXXVIII of 1920, S. 2 and Sch. I.

[3] Inserted by *ibid*.

NOTES.

Sec. 5.—*Dhavle, J.*—Whenever the Government makes a declaration under S. 5 (2), the working of the mines is restricted for all time and "by any person", and Government becomes liable to compensate all persons having an interest in the working of the mine and thus affected by the restrictions imposed. The compensation is thus in no case restricted to the actual worker. The restrictions which are imposed must *ex necessitate rei* be permanent. Having regard to the scheme of the Act, picemeal dealing with the total interest in the coal is not contemplated, and the embargo which is to be perpetual involves payment of compensation to all interests affected. The moment the declaration is made, the full amount of compensation becomes payable by reason of the coal coming under a perpetual embargo. 15 Pat. 510=17 Pat.L.T. 279=1936 Pat. 513.

Secs. 5 and 6: SCOPE AND EFFECT OF—COMPENSATION TO PERSONS INTERESTED—RIGHT OF.—The object of the Land Acquisition (Mines) Act is that all persons interested shall be compensated when the person entitled to work the mines has been restricted. The effect of Ss. 5 and 6 of the Act is merely to provide that the restriction shall not be imposed unless the Government be willing to compensate all persons interested. The obligation to compensate follows upon the imposition of the restrictions and is not dependant on an announcement by the Goverment that they are willing to pay such compensation. The effective part of the declaration is the restriction which would have effect against the whole world. 15 Pat. 510=17 Pat.L.T. 279=1936 Pat. 513.

Sec. 6: COMPENSATION—AWARD OF LUMP SUM OF ARBITRATION—EVIDENCE TO EXPLAIN —ADMISSIBILITY.—When the compensation

Mode of determining persons interested and amount of compensation.

vented or restricted under section 5, the persons interested in those mines or minerals and the amounts of compensation payable to them respectively shall, subject to all necessary modifications, be ascertained in the manner provided by the Land Acquisition Act, 1870[1] for ascertaining the persons interested in the land to be acquired under that Act, and the amounts of compensation payable to them, respectively.

If Provincial Government does not offer to pay compensation, mines may be worked in a proper manner.

7. (1) If before the expiration of the said sixty days the Provincial Government does not publish a declaration as provided in section 5, the owner, lessee or occupier of the mines may, unless and until such a declaration is subsequently made, work the mines or any part thereof in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the local area where the same are situate.

(2) If any damage or obstruction is caused to the surface of the land or any works thereon by improper working of the mines, the owner, lessee or occupier of the mines shall at once, at his own expense, repair the damage or remove the obstruction, as the case may require.

(3) If the repair or removal is not at once effected, or, if the Provincial Government so thinks fit, without waiting for the same to be effected by the owner, lessee or occupier, the Provincial Government may execute the same and recover from the owner, lessee or occupier the expense occasioned thereby.

Mining communications.

8. If the working of any mines is prevented or restricted under section 5, the respective owners, lessees and occupiers of the mines, if their mines extend so as to lie on both sides of the mines the working of which is prevented or restricted, may cut and make such and so many airways, headways, gateways or water-levels through the mines, measures or strata, the working whereof is prevented or restricted, as may be requisite to enable them to ventilate, drain and work their said mines; but no such airway, headway, gateway or water-level shall be of greater dimensions or section than may be prescribed by the Provincial Government in this behalf, and, where no dimensions are so prescribed, not greater than eight feet wide and eight feet high, nor shall the same be cut or made upon any part of the surface or works, or so as to injure the same, or to interfere with the use thereof.

LEG. REF.

[1] *See* now the Land Acquisition Act (I of 1894).

NOTES.

payable under S. 6 has been arrived at by arbitration proceedings and awarded in a lump sum, it is not permissible to go into evidence in order to explain the award, although it may well be that there has been an over-payment. 15 Pat. 510=17 Pat.L.T. 279=1936 Pat. 513.

MINES WORKED BY LESSEE UNDER ROYALTY HOLDERS — COMPENSATION FOR—RESPECTIVE RIGHTS OF PARTIES.—In the case of mines worked by a lessee under royalty holders, the amount of compensation jointly payable to the royalty holders and the lessee cannot exceed in the aggregate the value of the coal locked up, which would otherwise have been raised and sold, less the working costs. The value so ascertained has to be divided up amongst the claimants, each of the lessors or royalty holders taking out of such sum his appropriate royalty, and the balance going to the lessee working the mine as his profit. The payment by the Government of the whole amount of compensation to one of the several claimants is no defence against a claim by another claimant who has lost his profit by reason of the restrictions imposed by the Government. 15 Pat. 510=17 Pat.L.T. 279=1936 Pat. 513.

AMOUNT OF COMPENSATION — PRIVATE AGREEMENT AS TO — ENFORCEABILITY.—*Dhavle, J.*—Notwithstanding the provisions of S. 6, it is competent for the parties to enter into an agreement as to the amount of compensation payable under the Act, and an agreement so made can be enforced in the ordinary way. 15 Pat. 510=17 Pat.L.T. 279=1936 Pat. 513.

Provincial Government to pay compensation for injury done to mines;

9. The Provincial Government shall, from time to time, pay to the owner, lessee or occupier of any such mines extending so as to lie on both sides of the mines, the working of which is prevented or restricted, all such additional expenses and losses as may be incurred by him by reason of the severance of the lands lying over those mines or of the continuous working of those mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the surface or works, and for any minerals not acquired by the Provincial Government which cannot be obtained by reason of the action taken under the foregoing section; and if any dispute or question arises between the Provincial Government and the owner, lessee or occupier as aforesaid, touching the amount of those losses or expenses, the same shall be settled as nearly as may be in the manner provided for the settlement of questions touching the amount of compensation payable under the Land Acquisition Act, 1870.[1]

and also for inquiry arising from any airway or other work.

10. If any loss or damage is sustained by the owner or occupier of the lands lying over any such mines, the working whereof has been so prevented or restricted as aforesaid (and not being the owner, lessee or occupier of those mines), by reason of the making of any such airway or other works as aforesaid, which or any like work it would not have been necessary to make but for the working of the mines having been so prevented or restricted as aforesaid, the Provincial Government shall pay full compensation to that owner or occupier of the surface lands for the loss or damage so sustained by him.

Power to officer of Provincial Government to enter and inspect the working of mines.

11. For better ascertaining whether any mines lying under land acquired in accordance with the provisions of this Act are being worked, or have been worked, or are likely to be worked so as to damage the land or the works thereon, an officer appointed for this purpose by the Provincial Government may, after giving twenty-four hours' notice in writing, enter into and return from any such mines or the works connected therewith; and for that purpose the officer so appointed may make use of any apparatus or machinery belonging to the owner, lessee or occupier of the mines, and use all necessary means for discovering the distance from any part of the land acquired to the parts of the mines which have been, are being or are about to be worked.

Penalty for refusal to allow inspection.

12. If any owner, lessee or occupier of any such mines or works refuses to allow any officer appointed by the Provincial Government for that purpose to enter into and inspect any such mines or works in manner aforesaid, he shall be punished with fine which may extend to two hundred rupees.

If mines worked contrary to provisions of this Act, Provincial Government may require means to be adopted for safety of land acquired.

13. If it appears that any such mines have been worked contrary to the provisions of this Act, the Provincial Government may, if it thinks fit, give notice to the owner, lessee or occupier thereof to construct such works and to adopt such means as may be necessary or proper for making safe the land acquired, and the works thereon, and preventing injury thereto; and if, after such notice, any such owner, lessee or occupier does not forthwith proceed to construct the works necessary for making safe the land acquired and the works thereon, the Provincial Government may itself construct the works and recover the expense thereof from the owner, lessee or occupier.

LEG. REF.

[1] *See* now the Land Acquisition Act (I of 1894).

Construction of Act when land acquired has been transferred to a local authority or Company.

14. When a statement under section 3 has been made regarding any land, and the land has been acquired by the Government, and has been transferred to, or has vested, by operation of law, in a local authority or Company, then sections 4 to 13, both inclusive, shall be read as if for the words "the Provincial Government" wherever they occur in those sections [1][except in section 5, sub-section (5), and section 8,] the words "the local authority or Company, as the case may be, which has acquired the land", were substituted.

15. [*Pending cases.*] *Rep. by the Repealing and Amending Act (XX of 1937), S. 3 and Sch. II.*

Definition of local authority and Company.

16. In this Act—

(*a*) "local authority" means any municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of any municipal or local fund; and

(*b*) "Company" means a Company registered under any of the enactments relating to Companies from time to time in force in British India, or formed in pursuance of an Act of Parliament or by Royal Charter or Letters Patent.

This Act to be read with Land Acquisition Act, 1870

17. This Act shall, for the purposes of all enactments for the time being in force, be read with and taken as part of the Land Acquisition Act, 1870.[2]

THE LAND CUSTOMS ACT (XIX OF 1924).

No.	Year.	Short title.	Amendments.
XIX	1924	The Land Customs Act.	Amended, Acts XIX of 1931, III of 1937.

PREFATORY NOTE.—The following is the Report of the Select Committee:—

1. The principal matter for our consideration was the question whether, and to what extent, the machinery provided by the Bill should be applicable for the purpose of levying land customs duties on goods imported from, and exported to, Indian States, and we agree that the provisions of this Bill, which are more drastic than those of the Madras Act VI of 1844 and the Bombay Act XXIX of 1857, should be confined in their application only to the import and export of goods from and into foreign countries, including the European settlements in the Continent of India. As regards a further question whether the Madras and Bombay Acts should be kept in force for the purpose of providing machinery for the levy of land customs duties on goods passing between those provinces and the Indian States which are co-terminous with them, respectively, we think it is only reasonable to maintain the law as it exists at present. We understand that it is not the present intention or desire of Government to establish a customs barrier between British India and any of these States, but we realize that the preservation of machinery which could be used for the purpose of enforcing in respect of these States the power conferred by S. 5 of the Indian Tariff Act, 1894, is important, in view of the possibility, however remote, of an emergency necessitating the use of the power. We have decided, therefore, to leave the old Madras and Bombay Acts in force in case they are needed for such an emergency. In other words, we leave the law precisely as it stands at present as regards Indian States. This involves, besides minor amendments, an alteration in sub-clause (*f*) of clause (2), the substitution of a new clause for clause (10), and the omission of the Second Schedule.

2. We now proceed to refer in detail to the other amendments which we have made in the Bill.

Clause (5).—Whilst we agree that the possession of a permit is an essential condition to the import or export of any goods, whether dutiable or not, we see no reason

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LEG. REF.

[1] Inserted by S. 2, and Sch. I Act XXXVIII of 1920.

[2] *See* now Land Acquisition Act I of 1894.

to allow the confiscation of non-dutiable goods which are being passed across a foreign frontier without a permit, although we retain in clause (7) a small penalty for this infraction of the law.

Clause (7).—We agree that the abettor of an offence under this clause should be punishable, and have, therefore, inserted the amendment of which notice was given by the Hon'ble Sir Basil Blackett. We have further reduced the penalty in the case of non-dutiable consignments and provided that only dutiable goods should be liable to confiscation.

We discussed at some length a suggestion that the penalty provided by this clause should only be imposed after conviction of the offender by a Criminal Court. A majority of us are of opinion that such a departure from the ordinary methods of customs administration would be inadvisable, either in the interests of Government or of the offending party, both of whom would be put to considerable additional expense and inconvenience, by the adoption of such a procedure. Those of us who favour the rejection of the suggestion are further of opinion that Ss. 182 and 188 of the Sea Customs Act which are applied by clause (9) of the Bill confer ample guarantee of impartial justice to offenders.

Clause (9).—The only other alteration which we have made in the Bill is the omission from the Schedule of section 168 of the Sea Customs Act. In view of the fact that an abettor is punishable under clause (7) and that some members of our Committee feel that the section if applied might be open to abuse, we consider that the power to confiscate vehicles and animals used in the carriage of goods, liable to confiscation under the Bill, might be relinquished even though the power might in some cases be useful as an aid to the prevention of smuggling. (*Fort St. George Gazette,* Pt. III, dated 30th September, 1924, pp. 286 and 287.)

CONTENTS.

SECTIONS.

1. Short title, extent and commencement.
2. Definitions.
3. Appointment of Land Customs Officers.
4. Establishment of Land Customs stations and determination of routes.
5. Permit for goods passing across frontier.
6. Personal baggage.
7. Penalties.
8. Goods not to be passed on certain days or at certain times.
9. Application of Act VIII of 1878.
10. *Omitted.*
SCHEDULE.

[30*th September,* 1924.

An Act to consolidate, amend and extend the Law relating to the levy of duties of customs on articles imported or exported by land from or to territory outside [1][*British*] *India.*

WHEREAS it is expedient to consolidate, amend and extend the law relating to the levy of duties of customs on articles imported or exported by land from or to territory outside [1][British] India; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE LAND CUSTOMS ACT, 1924.[2]

(2) It extends to the whole of British India [3][* *].

(3) It shall come into force on such date[4] as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) any reference to the passing or import or export of goods "by land" shall be deemed to include the passing or import or export of goods by any inland water-way constituting a foreign frontier or part of a foreign frontier;

(*b*) "Chief Customs authority" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, and includes, in

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LEG. REF.

[1] Inserted by Act III of 1937.

[2] For Statement of Objects and Reasons, see *Gazette of India,* 1924, Pt. V, p. 112; and for Report of Select Committee see *ibid.*, p. 135.

[3] Words 'except Aden' omitted by A.O., 1937.

[4] This Act was brought into force on the 13th December, 1924, *see* Gen. R. & O., Vol. V, p. 616.

relation to any power or duty[1] which the Central Government may, by notification in the Official Gazette, transfer from the Central Board of Revenue [2][and entrust to a Provincial Government or an officer of a Provincial Government under section 124 (1) of the Government of India Act, 1935, that Government or officer as the case may be];

(*c*) "Collector of Land Customs" means a Collector of Land Customs appointed under section 3;

(*d*) "dutiable goods" means any article on which a duty of land customs is leviable by virtue of a notification issued under section 5 of the Indian Tariff Act, 1894;

(*e*) "foreign frontier" means the frontier separating any foreign territory from any part of British India;

(*f*) "foreign territory" means any territory [3][* *] which has been declared under section 5 of the Indian Tariff Act, 1894, to be foreign territory for the purposes of that Act;

(*g*) "land customs area" means any area adjoining a foreign frontier for which a Collector of Land Customs has been appointed under section 3; and

[4][* * * * *]

Appointment of Land Customs Officers.

3. (1) The Central Government may, by notification in the Official Gazette, appoint,[5] for any area adjoining a foreign frontier and specified in the notification, a person to be the Collector of Land Customs and such other persons as [2][it] thinks fit to be Land Customs Officers.

(2) The Central Government may delegate [6][* *] to the Chief Customs authority any power conferred upon [2][it] by sub-section (1) and [6][* *] the Chief Customs authority may delegate[7] to any Collector of Land Customs any power to appoint Land Customs Officers which has been so delegated to it.

Establishment of land customs stations and determination of routes.

4. The Chief Customs authority may, by notification[8] in the Official Gazette,—

(*a*) establish land customs stations for the levy of land customs in any land customs area, and

(*b*) prescribe the routes by which alone goods, or any class of goods specified in the notification, may pass by land out of or into any foreign territory, or to or from any land customs station from or to any foreign frontier.

Permit for goods passing across frontier.

5. (1) Every person desiring to pass any goods, whether dutiable goods or not, by land out of or into any foreign territory shall apply in writing, in such form[9] as the Chief Customs authority may by notification in the Official Gazette prescribe, for a permit for the passage thereof, to the Land Customs Officer in charge of land customs station established in a land customs area adjoining the foreign frontier across which the goods are to pass.

(2) When the duty on such goods has been paid or the goods have been found by the Land Customs Officer to be free of duty, the Land Customs Officer

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LEG. REF.

[1] For the transference of such powers and duties to the Local Government of Burma, Gen. R. & O., Vol. V., p. 616.

[2] Substituted by A.O., 1937.

[3] Words 'other than territory forming part of a State in India' omitted by Act III of 1937.

[4] Cl. (*h*) defining 'Official Gazette' omitted by A.O., 1937.

[5] For Notification making such appointments, *see* Gen. R. & O., Vol. V, pp. 616-617.

[6] Words referring to Local Government omitted by A.O. 1937.

[7] For Notifications making such delegations, *see* Gen. R. and O., Vol. V, p. 617.

[8] For such Notifications, see *ibid.*, pp. 618-620.

[9] For Notification prescribing such form, *see* Gen. R. & O., Vol. V, p. 620.

shall grant a permit certifying that duty has been paid on such goods or that the goods are free of duty, as the case may be.

(3) Any Land Customs Officer, duly empowered by the Chief Customs authority in this behalf, may require any person in charge of any goods which such Officer has reason to believe to have been imported, or to be about to be exported, by land from, or to, any foreign territory to produce the permit granted for such goods; and any such goods which are dutiable and which are unaccompanied by a permit or do not correspond with the specification contained in the permit produced, shall be detained and shall be liable to confiscation:

Provided that nothing in this sub-section shall apply to any imported goods passing from a foreign frontier to a land customs station by a route prescribed in that behalf.

(4) The Chief Customs authority may, by notification[1] in the Official Gazette, direct that the provisions of this section, or any specified provisions thereof, shall not, in any land customs area specified in the notification, apply in respect of goods of any class or value so specified.

Personal baggage.

6. A Land Customs Officer empowered in this behalf by the Chief Customs authority shall pass free of duty any goods imported or exported by land by any passenger, if he is satisfied that the goods are the passenger's personal baggage in actual use.

Penalties.

7. [2][(1)] Any person who—

(*a*) in any case in which the permit referred to in section 5 is required, passes or attempts to pass any goods by land out of or into any foreign territory through any land customs station without such permit; or

(*b*) conveys or attempts to convey to or from any foreign territory or to or from any land customs station any goods by a route other than the route, if any, prescribed for such passage under this Act; or

(*c*) aids in so passing or conveying any goods, or, knowing that any goods have been so passed or conveyed, keeps or conceals such goods or permits or procures them to be kept or concealed;

shall be liable to a penalty not exceeding, where the goods are not dutiable, fifty or, where the goods or any of them are dutiable, one thousand rupees, and any dutiable goods in respect of which the offence has been committed shall be liable to confiscation.

LEG. REF.

[1] For such a Notification, *see* Gen. R. & O., Vol. V, p. 621.

[2] Sec. 7 has been numbered as sub-S. (1) and sub-Ss. (2) and (3) newly added by Act XIX of 1931.

NOTES.

Sec. 7: CARRYING NON-DUTIABLE GOODS WITHOUT PERMIT—ENQUIRY INTO OFFENCE.—Where a person carries non-dutiable goods from foreign territory to British territory without a permit, the offence if any, would be one to be dealt with only by the Land Customs Officer himself under S. 7 and would not constitute an offence for which a complaint could be made to a Magistrate. 1933 M. 888=65 M.L.J. 837.

Sec. 7 (1) (c): ONUS.—For a conviction under S. 7 (1) (*c*), the onus is on the prosecution to prove that the goods were taken by land from foreign territory to British territory at a time when such goods are dutiable. 1933 M. 888=65 M. L. J. 837. When a person is charged for an offence under S. 7 (1) (*c*) of the Land Customs Act the onus is on the prosecution to show that dutiable goods had been taken by land from a foreign territory. Where the case for the prosecution was that the accused had previously purchased certain bars of silver in Karaikal, had arranged to bring them to a place in British India and was caught in the process of removing them from that place to another place in British India. It was *held* (1) that the accused was not liable to be convicted in the absence of proof that the goods had been passed by land from the French territory into British India, (2) that in the case of non-dutiable goods, for which the accused had no permit, the offence could be dealt with only by the land Customs Officer under S. 7 and would not constitute an offence for which a complaint could be made to a Magistrate. Where the confession of the accused is the only evidence against him, it must be taken as a whole and nothing can be read into it which is not contained there. 65 M.L.J. 837.

[1][(2) Where any dutiable goods, or any goods in respect of which a notification under section 19 of the Sea Customs Act, 1878, prohibiting the bringing or taking by land of such goods into British India or any specified part thereof, has been issued, are passed by land out of any foreign territory and the Land Customs Officer is of opinion that an offence under sub-section (1) has been committed in respect of such goods and that the penalty provided in that sub-section is inadequate, he may make a complaint to a magistrate having jurisdiction.

(3) Such magistrate shall thereupon inquire into and try the charge brought against the accused person and, upon conviction, may sentence him to imprisonment of either description for a term which may extend to six months, or to fine not exceeding one thousand rupees, or to both, and may confiscate the goods in respect of which the offence has been committed.]

Goods not to be passed on certain days or at certain times.

8. No goods other than personal baggage or goods belonging to [2][the Crown] or mails shall be delivered or passed at any land customs station, except with the special permission of the Land Customs Officer in charge thereof,—

(*a*) on any public holiday within the meaning of section 25 of the Negotiable Instruments Act, 1881, or on any day on which the passage and delivery of goods at such land customs station has been prohibited by the Chief Customs authority by notification, in the Official Gazette; or

(*b*) on any day except between such hours as the Chief Customs authority may, by a like notification,[3] appoint.

Application of Act VIII of 1878.

9. (1) The provisions of the Sea Customs Act, 1878, which are specified in the Schedule, together with all notifications, orders rules or forms issued, made or prescribed thereunder, shall, so far as they are applicable, apply for the purpose of the levy of duties of land customs under this Act, in like maner as they apply for the purpose of the levy of duties of customs on goods imported or exported by sea.

(2) For the purpose of such application the said provisions, notifications orders, rules and forms may be construed with such alterations as may be necessary or proper to adapt them for the said purpose, but not so as otherwise to affect the substance thereof, and in particular—

(*a*) references to bills of entry and to shipping bills shall be deemed to be references, respectively, to applications for permits to import and applications for permits to export such as are referred to in section 5;

LEG. REF.

[1] *See* foot-note 2, p. 3235.

[2] Substituted for 'Government' by A.O., 1937.

[3] For such Notifications, *see* Gen. R. & O., Vol. V, pp. 622-623.

NOTES.

Sec. 7 (2).—Under S. 7 (2) a Land Customs Officer is competent to make a complaint to a Magistrate. In view of the Notification of the Governor-General in Council under S. 3 (1) of the Act, appointing all Sub-Inspectors of Customs to be Land Customs Officers, a Sub-Inspector of Customs is competent to prefer a complaint under S. 7 (2), because he is a Land Customs Officer. 47 L.W. 576=1938 Mad. 712=(1938) 1 M.L.J. 815. Where two persons were charged and convicted by a sub-Magistrate for offences under Ss. 7 (1) (*a*) and (*c*) respectively of the Land Customs Act because certain goods were smuggled into British India from the adjoining French territory by them, but the Sub-divisional Magistrate on appeal though confirmed the findings of fact held that the complaint filed by the Sub-Inspector of Land Customs was not competent in order to adjudicate upon the value of the goods exceeding Rs. 50. *Held,* that by the Government Notification under S. 3 (1) the Sub-Inspector under S. 7 (2) was a Land Customs Officer and hence competent to make the complaint to Magistrate. Therefore the convictions and sentences were right. (1938) 1 M.L.J. 815=47 L.W. 576 =1938 Mad. 712.

(*b*) references to a Chief Customs Officer shall be deemed to be references to a Collector of Land Customs;

(*c*) references to a Customs Collector shall be deemed to be references to a Land Customs Officer for the time being in charge of a land Customs station or duly authorised to perform all, or any special, duties of an officer so in charge;

(*d*) references to a custom-house shall be deemed to be references to a land customs station;

(*e*) references to a customs-port shall be deemed to be references to a land customs area;

(*f*) references to a foreign port shall be deemed to be references to foreign territory;

(*g*) references to goods brought by sea to, and to goods shipped or brought for shipment at, a customs port shall be deemed to be references respectively to goods brought across a foreign frontier into a land customs area and to goods brought to a land customs station for export;

(*h*) references to Officers of Customs shall be deemed to be references to Collectors of Land Customs or Land Customs Officers appointed under this Act;

(*i*) references to persons on board of any vessel or boat in any port or to persons landing shall be deemed to be references to persons who have entered a land customs area from foreign territory; and

(*j*) references to "this Act" shall be deemed to be references to the Sea Customs Act, 1878, as applied for the purposes of this Act, or to this Act, as the case may require.

10. [*Omitted by Act III of* 1937.].

THE SCHEDULE.

(*See Section* 9.)

Provisions of the Sea Customs Act 1878 *which are made applicable for the purpose of the levy of duties of land customs.*

Sections 4, 8 to 10, 21, 23, 25, 26, 29 to 36, 37 (except the proviso), 38 to 40 [1][Section 88,] Section 167, Nos. 1, 8, 9, 37 to 40 and 72 to 80, Sections [2][168] to 176, 178 to 181; 182 to 184, 186 to 197 and 200 to 204.

N.B.—Extracts from the Land Customs (*Amendment*) *Act* (*III of* 1937).—The following extracts from the Land Customs (Amendment) Act (III of 1937) may also be read in connection with this Act:—

Repeals. Section 6. (1) The Acts mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

(2) All notifications published and all rules and orders made, or deemed to have been made, under any of those Acts and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the Land Customs Act, 1924, be deemed to have been published and made under that Act. [*Vide* Section 6 of Am. Act III of 1937.]

THE SCHEDULE.

ENACTMENTS REPEALED.

[*See Section* 6 (1).]

Year.	No.	Short title.	Extent of repeal.
		Acts of the Governor-General in Council.	
1844	VI	The Madras Inland Customs Act, 1844.	So much as has not been repealed.
1857	XXIX	The Bombay Land customs Act, 1857.	So much as has not been repealed.

LEG. REF.

[1] Inserted by Act III of 1937.

[2] Substituted for '169' by Act III of 1937.

Year	No.	Short title.	Extent of repeal.
1874	XV	The Laws Local Extent Act, 1874.	So much of the Second Schedule as relates to Act VI of 1844.
1901	XI	The Amending Act, 1901.	So much of the First Schedule as relates to the Madras Inland Customs Act, 1844, and the Madras Inland Customs (Amendment) Act, 1893.
1920	XXXVIII	The Devolution Act, 1920.	So much of the First Schedule as relates to Act XXIX of 1857.
		Acts of the Indian Legislature.	
1934	XIV	The Sugar (Excise Duty) Act, 1934.	Sub-section (2) of section 6.
1934	XXXII	The Indian Tariff Act, 1934.	Section 7.
		Madras Act.	
1893	II	The Madras Inland Customs (Amendment) Act, 1893.	The whole.
		Bombay Acts.	
1915	III	The Bombay Decentralization Act, 1915.	The Second Schedule.
1921	II	The Bombay Short Titles Act, 1921.	So much of the Schedule as relates to the Bombay Land Customs Act, 1857.

THE LANDHOLDERS' PUBLIC CHARGES AND DUTIES ACT (II OF 1853).[1]

Short title given, Act XIV of 1897.
Declared in force—
throughout British India except as regards the Scheduled Districts Act XV of 1874, S. 3;
in the Sonthal Parganas Reg. 3 of 1872, S. 3 as amended by Reg. 3 of 1899, S. 3;
in Upper Burma (except the Shan States) Act XIII of 1898, S. 4.

[4*th February,* 1853.

Act to remove doubts as to the liability of all subjects of Her Majesty to the same jurisdiction as Natives in respect of public and Police duties and public charges incident to the holders of land or their local Agents or Managers.

Preamble.

WHEREAS by virtue of Act No. IV of 1837 it is lawful for any subject of Her Majesty to acquire and hold in perpetuity, or for any term of years, property in land, or in any emoluments issuing out of land, in any part of the territories under the Government of the East India Company;

and whereas doubts have arisen whether all subjects of Her Majesty acquiring or holding property in land or in any emoluments issuing out of land, or acting as local agents or managers of such property, are subject to the same jurisdictions as Natives for enforcing the discharge of public and police duties incident to the holding of such property, or for the enforcement of public charges and assessments upon or in respect thereof;

and whereas it is just and reasonable that all persons who may think fit to hold such property, or to be the local agents or managers thereof, should be liable to the public burthens and duties incident thereto, and in case of neglect

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LEG. REF.

[1] "The Landholders' Public Charges and Duties Act, 1853." *See* the Indian Short Titles Act XIV of 1897.

or refusal to discharge the same, should be subject to the same jurisdictions as Natives;

It is therefore declared and enacted as follows:—

Non-exemption from public charges or duties of landholders, etc., by reason of place of birth or of descent.

1. No person whatever, being the owner, holder or farmer of any property in land or in any emoluments issuing out of land, in any part of the said territories, whether in perpetuity or for a term, or, being a local agent or manager of any such property, is, by reason of his place of birth, or by reason of his descent, exempt from any public charge or assessment, or from any duty connected with the police, or with the salt or opium revenue, or from any duty whatsoever of a public nature, to which he would otherwise be subject, as the owner or holder of such property, or as a local agent or manager thereof.

Amenability to laws, etc., for default in respect of such charges and duties.

2. For the non-payment of any such public charge or assessment, or for the breach of any such duty as aforesaid, or for any neglect or misconduct in the discharge thereof, every person, whatever may have been his place of birth, or his descent, shall be subject to the same laws, regulations and procedure, and to the same jurisdictions, as if he were a Native of the said territories.

THE LAND IMPROVEMENT LOANS ACT (XIX OF 1883).[1]

Year.	No.	Short title.	Amendments.
1883	XIX	The Land Improvement Loans Act, 1883,	Repealed in part, XII of 1891; XVI of 1908. S. 93. Repealed in part and amended, VIII of 1906. Amended, XVIII of 1889; IV of 1914.

PREFATORY NOTE.—The following are extracts from the Statement of Objects and Reasons:—

"The law under which advances can be made for the improvement of land is Act XXVI of 1871, as amended by Act XXI of 1876. The object of the Act was to define the improvements for which advances could be made by Government, to provide for the security as a first charge on the land improved, and to lay down the conditions on which advances were to be made. It was hoped by the Government when the Act was passed, that it would be largely used, and that the benefit to the country would be considerable. The hope has not been realised. In section 3, Chapter IV of the second part of their report, the Famine Commissioners write:—The evidence we have received regarding the working of this Act renders it unquestionable that it has failed to realise the intention of promoting improvements, and that there is a very general reluctance to make use of its provisions. The sums which have been advanced under the Act are extremely small and bear no proportion whatever to the need which the country has of capital to carry out material improvements.

In accordance with the suggestion of the Famine Commissioners, the Government of India called for the opinions of the Local Governments on the working of the Act and the causes of its failure.

There was in the replies received an almost unanimous consensus of opinion that both the Act and the rules under it require simplification.

It has accordingly been decided to bring forward a Bill to consolidate and amend the present law. For the somewhat complicated provisions of Ss. 6 to 13 of Act XXVI of 1871, the Bill proposes to adopt the simpler rule that advances may be made to any person who is entitled, under the law for the time being in force to make improvements on his

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LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India,* 1882, Pt. V, p. 954; for Report the Select Committee, see *ibid.*, 1883, Supplement, p. 1296; for proceedings in Council, see *ibid.*, 1882, Supplement, pp. 494 and 1697; *ibid.*, 1883, Supplement, p. 2071.

land. For the rest, everything which it is not absolutely necessary to provide for in the body of the law is left to rules to be framed by the Local Governments. The objections sometimes taken to this method of legislation do not seem to apply to this case, as the only interests which can be affected by the rules are those of the Government, and it may be presumed that sufficient care will be taken to guard them.

The local conditions and peculiarities of the several parts of India are so varied that it is only leaving great discretion to the Local Governments that rules suitable to the working of the Act of this kind can be framed.

If this Bill is passed the Legislature will have done all that it can to remove the obstacles alleged to stand in the way of the success of the measure. There is reason however to fear that the owners of land will not resort to Government for advances of this description to any large extent. It is impossible for the District officials to have any intimate knowledge of the character and means of each applicant, and therefore a certain amount of inquiry and consequently of delay and trouble must precede the payment of money from the public treasury.

It is possible that private companies may be established whose agents will be able to offer more facilities to applicants. It is proper, therefore, to take advantage of the present opportunity to provide encouragement to private enterprise in this field.

Provisions have accordingly been inserted in the Bill to enable the Government to authorise companies or associations of approved character to make advances for the improvement of lands. A company or association so authorised will be bound to transact its business on principles and conditions laid down by the Government for its guidance, and advances made in accordance with those principles and conditions will be considered advances under the Act, and will be secured and recoverable in the same manner as if they were loans from the Government treasury." (*See* Statement of Objects and Reasons.)

CONTENTS.

SECTIONS.
1. Short title.
Local extent, Commencement.
2. Acts XXVI of 1871 and XXI of 1876 repealed.
3. "Collector" defined.
4. Purposes for which loans may be granted under this Act.
5. Mode of dealing with applications for loans.
6. Period for repayment of loans.
7. Recovery of loans.

SECTIONS.
8. Order granting loan conclusive on certain points.
9. Liability of joint borrowers as among themselves.
10. Power to make rules.
11. Exemption of improvements from assessment to land revenue.
12. Certain powers of Provincial Government to be exercisable by Board of Revenue or Financial Commissioner.

THE LAND IMPROVEMENT LOANS ACT (XIX OF 1883).

[12th *October*, 1883.

An Act to consolidate and amend the law relating to loans of money by the Government for agricultural improvements.[1]

WHEREAS it is expedient to consolidate and amend the law relating to loans of money by the Government for agricultural improvements; It is hereby enacted as follows:—

Short title.

1. (1) This Act may be called THE LAND IMPROVEMENT LOANS ACT, 1883.

Local extent, Commencement.

(2) It extends to the whole of British India, but shall not come into force in any part of British India, until such date as the Provincial Government [2][* * *] may by notification in the Official Gazette, appoint in this behalf.

LEG. REF.

[1] Instruments executed by persons taking loans or by their sureties, as security for the repayment of such loans, are exempted from stamp-duty—*see* the Indian Stamp Act, 1889, Sch. I, Art. 40. Exemption (1), General Acts, Vol. V and Notification undes S. 9, Gen. R. and O. and S. 2 (2) of this Act.

[2] The words "with the previous sanction of the Governor-General in Council" in Ss. 1 and 4 were repealed by S. 2 of the Land Improvement and Agriculturists' Loans (Amendment) Act, 1906 (VIII of 1906), General Acts, Vol. VI.

Acts XXVI of 1871 and XXI of 1876 repealed.

2. (1) The Land Improvement Act, 1871, and Act XXI of 1876 (*An Act to amend the Land Improvement Act,* 1871), shall, except as regards the recovery of advances made before this Act comes into force and costs incurred by the Government in respect of such advances, be repealed.

(2) When in any Act, Regulation or Notification passed or issued before this Act comes into force, reference is made to either of those Acts, the reference shall, so far as may be practicable, be read as applying to this Act or the corresponding part of this Act.

"Collector" defined.

3. In this Act, "Collector" means the Collector of land-revenue of a district, or the Deputy Commissioner, or any officer empowered by the Provincial Government by name or by virtue of his office to discharge the functions of a [1]Collector under this Act.

Purposes for which loans may be granted under this Act.

4. (1) Subject to such rules as may be made under section 10, loans may be granted under this Act, by such officer as may, from time to time, be empowered in this behalf by the Provincial Government, for the purpose of making any improvement, to any person having a right to make that improvement, or, with the consent of that person, to any other person.

(2) "Improvement" means any work which adds to the letting value of land, and includes the following, namely:—

(*a*) the construction of wells, tanks and other works for the storage, supply or distribution of water for the purposes of agriculture, or for the use of men and cattle employed in agriculture;

(*b*) the preparation of land for irrigation;

(*c*) the drainage, reclamation from rivers or other waters, or protection from floods or from erosion or other damage by water, of land used for agricultural purposes or waste land which is culturable;

(*d*) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;

(*e*) the renewal or reconstruction of any of the foregoing works, or alterations therein or additions thereto; and

(*f*) such other works as the Provincial Government [2][* * * * * *] may, from time to time, by notification in the Official Gazette, declare to be improvements for the purposes of this Act.

Mode of dealing with application for loans.

5. (1) When an application for a loan is made under this Act, the Officer to whom the application is made may, if it is, in his opinion, expedient that public notice be given of the application, publish a notice, in such manner as the

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LEG. REF.

[1] *Cf.* S. 3 (10) of the General Clauses Act (X of 1897). For officer empowered in Sind, see *Bombay Gazette,* 1901, Pt. I, p. 1094.

[2] The words with the previous sanction of the Governor-General in Council" omitted by Act (VIII of 1906), S. 2.

NOTES.

Sec. 4.—The words of S. 4, are unambighous and can only be held to apply to improvements which have not been effected at the time when the loan was granted and cannot be held to apply to improvements which had already been carried out at the time when the loan was made. Therefore the Government cannot be allowed to have priority in respect of advances applied for and made after the improvements were carried out with funds belonging to a private individual. A comparison of S. 4 of the Land Improvement Loans Act and S. 4 of the Agriculturists' Loans Act would show that if a loan would be granted under the Land Improvement Loans Act, it would not be granted under the Agriculturists' Loans Act. I.L.R. (1939) Mad. 1017=1939 Mad. 711=(1939) 2 M.L.J. 23. A mortgagee under the Land Improvement Loans Act cannot be given priority in respect of lands other than those for whose benefit the loan was granted. There is no justification for giving priority in respect of a mortgage of properties which are not intended to be benefited by the loan granted under the Act. 1938 M.W.N. 280=1938 Mad. 583. A loan granted for the purpose of weeding the land and for making a stone

Provincial Government may, from time to time, direct, calling upon all persons objecting to the loan to appear before him at a time and place fixed therein and submit their objections.

(2) The Officer shall consider every objection submitted under sub-section (1), and make an order in writing either admitting or overruling it:

Provided that, when the question raised by an objection is, in the opinion of the officer, one of such a nature that it cannot be satisfactorily decided except by a Civil Court, he shall postpone his proceedings on the application until the question has been so decided.

Period for repayment of loans.

6. (1) Every loan granted under this Act shall be made repayable by instalments (in the form of an annuity or otherwise) within such period from the date of the actual advance of the loan, or, when the loan is advanced in instalments [1][from the date of the advance of the last instalment actually paid] as may, from time to time, be fixed by the rules made under this Act.

(2) The period fixed as aforesaid shall not ordinarily exceed thirty-five years.

(3) The Provincial Government [2][* * * * *] in making [2][* * * *] the rules fixing the period, shall, in considering whether the period should extend to thirty-five years, or whether it should extend beyond thirty-five years, have regard to the durability of the work for the purpose of which the loan is granted, and to the expediency of the cost of the work being paid by the generation of persons who will immediately benefit by the work.

Recovery of loans.

7. (1) Subject to such rules as may be made under section 10, all loans granted under this Act, all interest (if any) chargeable (thereon) and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely:—

LEG. REF.

[1] Substituted for "from the date of the actual advance of the last instalment" by S. 2 of Act XVIII of 1899.

[2] The words "and Governor-General in Council" and the words "and sanctioning" were repealed by S. 3 of Act VIII of 1906.

NOTES.

pavement in a part of it is one for a purpose which falls under the Land Improvement Loans Act. A loan for such a purpose does not come under the Agriculturists' Loans Act. 41 Bom.L.R. 257=1939 Bom. 183.

Sec. 7.—The effect of S. 7 (1) (*c*) is to create a charge upon the property for the benefit of which the loan is taken. 1939 N.L.J. 235. *See also* 69 P.R. 1869; 25 Mad. 572. A loan advanced under the Land Improvement Loans Act is, subject to the proviso to S. 7 (*c*) a first charge on the land for the improvement of which the loan is advanced; and the statutory charge created by S. 7 is enforceable against the land even in the hands of a *bona fide* purchaser for value without notice of the charge. The purchaser cannot seek to exempt the land he has purchased from the charge by relying on S. 100, T.P. Act. 41 Bom.L.R. 257=1939 Bom. 183. The words of the proviso to S. 7 clearly mean that the interests of third parties (*e.g.*, the rights of an occupancy tenant) are protected, but that the interest of the borrower and the interest of a mortgagee or charge holder from the mortgagor with regard to the property would be extinguished by a sale under S. 7 (1) (*c*) even though the mortgage may have been created before the date of the loan. 195 I.C. 849=43 Bom.L.R. 600=1941 Bom. 300. The Government has a first charge on the land for the takavi loan granted to the agriculturist for improving that land. 26 N.L.R. 340=1930 N. 195=13 N.L.J. 23; 1926 All. 574. Proceedings of Collector in recovering loans under S. 7 (1) "as if they were arrears of land revenue" is neither a "suit" nor execution of decree of Court. 109 I.C. 145=5 Rang. 806=1928 Rang. 81. The non-inclusion of condition 14 of the conditions appended to form I annexed to the rules under the Land Improvement Loans Act, in a bond for a takavi loan under the Act, as provided by R. 12 of the rules, does not have the effect of depriving the Collector of the power to proceed under S. 7 (1) (*c*) of the Act. 182 I.C. 635. 41 Bom.L.R. 257=1939 Bom. 183. It is clear on a perusal of S. 7 that it was the intention of the Legislature that the liabi-

(*a*) from the borrower—as if they were arrears of land-revenue due by him;

(*b*) from his surety (if any)—as if they were arrears of land-revenue due by him;

(*c*) out of the land for the benefit of which the loan has been granted—as if they were arrears of land-revenue due in respect of that land;

(*d*) out of the property comprised in the collateral security (if any)—according to the procedure for the realization of land-revenue by the sale of immovable property other than the land on which that revenue is due:

Provided that no proceeding in respect of any land under clause (*c*) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest and, where the loan is granted under section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest.

(2) When any sum due on account of any such loan, interest or costs is paid to the Collector by a surety or an owner of property comprised in any collateral security, or is recovered under sub-section (1) by the Collector from a surety or out of any such property, the Collector shall, on the application of the surety or the owner of that property (as the case may be), recover that sum on his behalf from the borrower, or out of the land for the benefit of which the loan has been granted, in manner provided by sub-section (1).

(3) It shall be in the discretion of a Collector acting under this section to determine the order in which he will resort to the various modes of recovery permitted by it.

Order granting loan conclusive on certain points.

8. A written order under the hand of an officer empowered to make loans under this Act granting a loan to, or with the consent of, a person mentioned therein, for the purpose of carrying out a work described therein, for the benefit of land specified therein, shall, for the purposes of this Act, be conclusive evidence—

(*a*) that the work described is an improvement within the meaning of this Act;

(*b*) that the person mentioned had at the date of the order a right to make such an improvement; and

(*c*) that the improvement is one benefiting the land specified.

NOTES.

lity for the takavi loan should rest primarily on the land for the benefit of which the loan was taken. Sub-Cl. (3) of S. 7 gives the Collector absolute discretion to determine the order in which he should resort to the various modes of recovery permitted by the section. 41 Bom.L.R. 257=1939 Bom. 183. The failure of the Collector to send a copy of the order to the Sub-Registrar for registration as required by S. 89 of the Registation Act cannot affect the operation of S. 7 of the Land Improvement Loans Act. The Registration Act itself provides no penalty for non-compliance with the provisions of S. 89. There is also no provision in the Land Improvement Loans Act which requires that a copy of the order sanctioning the loan should be sent to the Sub-Registrar. 41 Bom.L.R. 257=1939 Bom. 183. S. 161, U. P. Land Revenue Act has to be read with S. 7 of this Act. 24 A.L.J. 718=1926 All. 574.

Secs. 7 and 12.—Under S. 7 the land for which the advance is made for improvement is a security to the Government for the purpose of securing the repayment of the advance. 27 I.C. 391. Where the certificate executed by the Collector at the time of granting loan and registered under S. 12 stated that, for repayment of the loan with interest, the immovable property specified in the margin and the land on which the improvement was to be made was hypothecated to the Government, the Government obtains a perfectly good charge on the land and is entitled to enforce the charge by sale in the ordinary manner. 27 I.C. 391. The language of the proviso to S. 7 (1) shows the intention of the Legislature to give land improvement loans priority over existing encumbrances. 18 N.L.J. 193.

Liability of joint borrowers as among themselves.

9. When a loan is made under this Act to the members of a village community or to any other persons on such terms that all of them are jointly and severally bound to the Government for the payment of the whole amount payable in respect thereof, and a statement showing the portion of that amount which as among themselves each is bound to contribute is entered upon the order granting the loan and is signed by each of them and by the officer making the order, that statement shall be conclusive evidence of the portion of that amount which as among themselves each of those persons is bound to contribute.

Power to make rules.

10. The Provincial Government [1][* * * * * *] may, from time to time, by notification in the Official Gazette, make rules consistent with this Act to provide for the following matters, namely:—

(*a*) the manner of making applications for loans;

(*b*) the officers by whom loans may be granted;

(*c*) the manner of conducting inquiries relative to applications for loans, and the powers to be exercised by officers conducting those inquiries;

(*d*) the nature of the security to be taken for the due application and repayment of the money, the rate of interest at which, and the conditions under which, loans may be granted, and the manner and time of granting loans;

(*e*) the inspection of works for which loans have been granted;

(*f*) the instalments by which, and the mode in which, loans, the interest to be charged on them and the costs incurred in the making thereof, shall be paid;

(*g*) the manner of keeping and auditing the accounts of the expenditure of loans and of the payments made in respect of the same; and

(*h*) all other matters pertaining to the working of the Act.

Exemption of improvements from assessment to land-revenue.

11. When land is improved with the aid of a loan granted under this Act, the increase in value derived from the improvement shall not be taken into account in revising the assessment of land-revenue on the land:

Provided as follows:—

(1) Where the improvement consists of the reclamation of waste-land, or of the irrigation of land assessed at unirrigated rates, the increase may be so taken into account after the expiration of such period as may be fixed by rules to be framed by the Provincial Government [2][* * * * * *];

(2) nothing in this section shall entitle any person to call in question any assessment of land-revenue otherwise than as it might have been called in question if this Act had not been passed.

Certain powers of Provincial Government to be exercisable by Board of Revenue or Financial Commissioner.

[3][12. The powers conferred on a Provincial Government by sections 4 (1), 5 (1) and 10 may, in a Province for which there is a Board of Revenue or a Financial Commissioner, be exercised in the like manner and subject to the like conditions by such Board or Financial Commissioner, as the case may be: Provided that rules made by a Board of Revenue or Financial Commissioner shall to be subject to the control of the Provincial Government.]

LEG. REF.

[1] The words "subject to the control of the Governor-General in Council" were omitted by Act IV of 1914, S. 2 and Sch., Part I.

[2] The words "with the approval of the Governor-General in Council" omitted by Act VIII of 1906, S. 5.

[3] Inserted by Act IV of 1914, S. 2 and Sch., Part I.

THE INDIAN LAW REPORTS ACT (XVIII OF 1875).[1]

Year.	No.	Short title.	Amendments.
1920	XVIII	The Indian Law Reports Act, 1875.	Repealed in part, XII of 1876. Amended, XXXVIII of 1920; XXXII of 1925 and XXXIV of 1926.

[13*th October*, 1875

An Act for the improvement of Law Reports.

[*Preamble.*] *Omitted by the Government of India* (*Adaptation of Indian Laws*) *Order*, 1937.

Short title.

1. This Act may be called THE INDIAN LAW REPORTS ACT, 1875.

Local extent.

It extends to the whole of British India;

Commencement.

and it shall come into force on such day as the Central Government notifies in this behalf in the Official Gazette.

2. [*Repeal of Act II of* 1875.] *Rep. by the Repealing Act*, 1876 (*XII of* 1876).

Authority given only to authorised reports.

3. No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case [2][decided on or after the said day but any Court in British India which is a High Court for the purposes of the Government of India Act, 1935] other than a report published under the authority of [3][any Provincial Government].

Authority of judicial decisions.

4. Nothing herein contained shall be construed to give to any judicial decision any further or other authority than it would have had if this Act had not been passed.

THE LAWS LOCAL EXTENT ACT (XV OF 1874).

Year.	No.	Short title.	Amendments.
1874	XV	Laws Local Extent Act	Repealed in part, VIII of 1875; XII of 1876; XVIII of 1877; VI of 1878; XI of 1878; XXVI of 1881; X of 1882; VIII of 188[illegible]; IX of 1887; VII of 1889; XIII of 1889; VIII of 1890; XII of 1891; IV of 1894; IX of 1894; XI of 1901; I of 1903; IV of 1922; XXI of 1923; XII of 1927; III of 1937 and I of 1938. Amended, XII of 1891.

LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India*, 1875, Pt. V, p. 139; for Proceedings in Council, see *ibid.*, Extra Supplement, dated 31st July, 1875, p. 5, and *ibid.*, Extraordinary, dated 25th October, 1875, p. 1.

[2] Substituted by A.O., 1937 for "decided by any of the said High Courts or by the Chief Court of Oudh on or after the said day".

[3] Substituted by A.O., 1937 for "any Local Government".

NOTES.

Secs. 3 and 4.—Object of S. 3, *see* 28 C. 289; 4 C.W.N. 732; 28 C. 171 (duly certified copy of a law report decision is ad-

THE LAWS LOCAL EXTENT ACT (XV OF 1874).[1]

CONTENTS.

PREAMBLE.

SECTIONS.

1. Short title.
2. Interpretation-clause.
3. Local extent of Acts in first schedule.
4. Local extent of enactments in second schedule.
5. Local extent of enactments in third schedule.
6. Local extent of enactments in fourth schedule.
7. Local extent of enactments in fifth schedule.
8. Savings.
9. [*Repealed.*]

SCHEDULES.

FIRST SCHEDULE.

Enactments in force throughout the whole of British India, except the Scheduled Districts.

SECOND SCHEDULE.

Enactments in force throughout the whole of the territories subject to the Government of the Governor of Fort Saint George in Council except the Scheduled Districts.

THIRD SCHEDULE.

Enactments in force throughout the whole of the territories subject to the Government of the Governor of Bombay in Council, except the Scheduled Districts.

FOURTH SCHEDULE.

Enactments in force throughout the whole of the territories subject to the Government of the Lieutenant-Governor of Bengal except the Scheduled Districts.

FIFTH SCHEDULE.

Enactments in force throughout the whole of the territories subject to the Government of the Lieutenant-Governor of the North-Western Provinces, except the Scheduled Districts.

SIXTH SCHEDULE.

PART.

I. Scheduled Districts, Madras.
II. Scheduled Districts, Bombay.
III. Scheduled Districts, Bengal.
IV. Scheduled Districts, North Western Provinces.
V. Scheduled Districts, Punjab.
VI. Scheduled Districts, Central Provinces.
VII. The Chief Commissionership of Coorg.
VIII. The Chief Commissionership of the Andaman and Nicobar Islands.
IX. The Chief Commissionership of Ajmer and Merwara.
X. The Chief Commissionership of Assam.
XI. [*Repealed*].
XII. [*Repealed.*]
XIII. [*Repealed.*]

SEVENTH SCHEDULE.

[*Repealed*]

[8*th December,* 1874.

An Act for declaring the local extent of certain Enactments, and for other purposes.

Preamble.

WHEREAS it is expedient to declare the local extent of certain Acts passed by the Governor-General of India in Council, the Legislative Council of India, and the Council of the

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LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India,* 1870, Pt. V. p. 153; and for proceedings in Council, see *ibid.*, 1871, Supplement, pp. 1074 and 1218; and *ibid.*, 1874, Supplement, pp. 1885 and 1976.

NOTES.

missible). Unauthorized reports are on the same footing as unreported cases. 24 O. C. 319. But *see also* 4 Rang. 146=1926 Rang, 164 (F.B.) (Decision reported in a private publication not authorized by any Local Government is not absolutely binding). The Court has a discretion to hear a case cited from an unauthorised report. In exercising its discretion in any particular occasion, the Court should give due weight to the practice prevailing in the Courts with reference to any particular report the decision from which is cited at the bar. 130 I.C. 190=1931 M. 71. *See also* 1930 M. W.N. 955. The Act has no application to a decision of the Privy Council, and a Court is at liberty to refer to an unauthorized report of a decision of the Privy Council, and if satisfied that it is a correct report, it is bound to follow it. 48 M. 846=1926 M. 20=49 M.L.J. 498. A view expressed in a judgment of a High Court which has not been officially published even without reasons is entitled to respect, and any examination of it ought to start with the assumption that it is correct and has good reasons behind it. But it is not to be followed blindly, like one that is officially published, though good reasons must be found for not following it. 1925 N. 414=8 N.L.J. 153=93 I.C. 850. Digest of Civil Rulings is no authority. 26 N.L.R. 178=1930 N. 270. It is reprehensible of compilers of law reports to omit to report the judgment of the appellate Court reversing the decision in a case which

Governor-General of India assembled for the purpose of making Laws and Regulations;

And whereas it is also expedient to consolidate the laws relating to the local extent of certain Acts and Regulations in the Presidencies of Fort St. George and Bombay, and in the Lower and the North-Western Provinces of the Presidency of Fort William in Bengal;

It is hereby declared and enacted as follows:—

Short title.

1. This Act may be called THE LAWS LOCAL EXTENT ACT, 1874.

Interpretation-clause.

2. In this Act the expression "Scheduled Districts" means the territories mentioned in the sixth schedule hereto annexed.

Local extent of Acts in first schedule.

3. The Acts mentioned in the first schedule hereto annexed are now in force throughout the whole of British India, except the Scheduled Districts.

Local extent of enactments in second schedule.

4. The enactments mentioned in the second schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Governor of Fort Saint George in Council, except the Scheduled Districts subject to such Government.

Local extent of enactments in third schedule.

5. The enactments mentioned in the third schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Governor of Bombay in Council, except the Scheduled Districts subject to such Government.

Local extent of enactments in fourth schtdule.

6. The enactments mentioned in the fourth schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Lieutenant Governor of Bengal except the Scheduled Districts subject to such Government.

Local extent of enactments in fifth schedule.

7. The enactments mentioned in the fifth schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Lieutenant Governor of the North-Western Provinces of the Presidency of Fort William except the Scheduled Districts subject to such Government.

Savings.

8. Nothing herein contained shall—

(*a*) bar the power of the Central Government or the Provincial Government, under any law for the time being in force, to extend to any place any Act mentioned in the said first schedule;

(*b*) extend any Act empowering the Provincial Government to extend the same or any part thereof, or affect in any manner the exercise of such power;

(*c*) affect the operation of any Act or Regulation heretofore extended to or declared to be in force in any of the Scheduled Districts;

NOTES.

they have reported. A decision in second appeal should rarely be reported until any appeal preferred against it under the Letters Patent has been determined. 10 P. 622=12 Pat.L.T. 308. Subordinate Courts are bound to follow decision of Bench of High Court. 48 All. 432=24 A.L.J. 430=1926 All. 346.

(*d*) revive any enactment which has been repealed either generally or with reference to some special subject;

(*e*) [*Rep. by Act VIII of* 1887];

(*f*) [*Rep. by the Amending Act* (*XII of* 1891)];

(*g*) [*Rep. by the Guardians and Wards Act* (*VIII of* 1890)];

(*h*) [*Rep. by Act VIII of* 1887];

(*i*) [*Rep. by the Repealing and Amending Act* (*IV of* 1894)];

(*j*) extend to any of the Towns of Calcutta, Madras and Bombay any law not now in force therein;

[1][(*jj*) extend to Pargana Bhadohi or Pargana Kera Mangror in the Mirzapur District, or to Pargana Kaswa Raja in the Benares District, any law not now in force therein];

(*k*) affect the operation of any enactment not mentioned in any of the schedules hereto annexed.

9. [*Enactments repealed.*] *Rep. by the Repealing Act* (*XII of* 1876).

FIRST SCHEDULE.[2]

(*See* section 3.)

ACTS OF THE SUPREME COUNCIL.

Year and Number.		Subject.
1837,	IV	Power to acquire land.
1838,	XXV	Wills executed before the 1st January, 1866.
1839,	XXIX	Dower, when marriage was contracted before 1st January, 1866.
1839,	XXX	Inheritance, where descent took place before 1st January, 1866.
„	XXXII	Interest.

LEG. REF.

[1] Inserted by S. 15 of the Benares Family Domains Act (XIV of 1881).

[2] Act XV of 1874 having been repealed, so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule:—

Enactments omitted. Acts.	Repealing Acts. Acts.
XXVI of 1836	XII of 1927.
VI of 1840	XXVI of 1881.
XI of 1841	VIII of 1887.
XVIII of 1841	XI of 1878.
XIX of 1841	XII of 1927.
IX of 1842	XII of 1891.
XII of 1842	VIII of 1887.
XX of 1847	XII of 1927.
XXXIV of 1850	The A.O., 1937.
XXX of 1852	XII of 1927.
XXXIII of 1852	VIII of 1887.
XVIII of 1854	XII of 1891.
III of 1858	The A.O., 1937.
I of 1859	XXI of 1923.
III of 1859	VIII of 1887.
VIII of 1859	XII of 1891.
XV of 1859	
XIV of 1859, S. 15	
XXVII of 1860	VII of 1889.
IX of 1861	VIII of 1890.
XXIII of 1861	XII of 1891.
VI of 1863	
VI of 1864	XII of 1927.
XI of 1865	IX of 1887.
XXI of 1865	XII of 1927.
V of 1866	
X of 1866	XII of 1891.
X of 1867	IX of 1887.
X of 1868	XII of 1891.
XV of 1869	XII of 1927.
I of 1870	

Year and Number.		Subject.
1841,	X	Registration of Ships.
1843,	V	Slavery.
1850,	V	Coasting Trade.
,,	XI	Navigation Laws.
[1]1850,	XII	Default of Public Accountants.
,,	XVIII	Protection of Judicial Officers.
,,	XIX	Binding of Apprentices.
,,	XXI	Non-forfeiture of rights by loss of Caste.
,,	XXXVII	Inquires into the behaviour of Public Servants.
1853,	II	Burdens on land.
1854,	XXXI	Barring entails: Conveyances by married women.
1855,	XI	Mesne profits and improvements.
,,	XII	Executors and Administrators.
,,	XIII	Compensation for loss occasioned by death caused by actionable wrong.
,,	XXIII	Administration of mortgaged estates in cases of descents occurring or devises made before the 1st January, 1866.
,,	XXIV	Penal servitude.
,,	XXVIII	Interest.
1856,	IX	Bills of Lading.
,,	XI	Desertion by European Soldiers.
,,	XV	Marriage of Hindu Widows.
[2]*1857,*	*XI*	*Offence against the State.*
[2] ,,	*XXV*	*Forfeiture by Mutineers.*
[3] ,,	XXXV	*Estate of Lunatics not subject to jurisdiction of Supreme Courts.*
,,	[3]XXXVI	*Lunatic Asylums.*
1859,	IX	Sections 16, 17, 18 and 20—Forfeitures.
1860,	XXI	Registration of Societies.
1862,	III	Government Seal.
1863,	XVI	Excise Duty payable on Spirits used in Arts and Manufactures.
,,	XXIII	Claims to waste-lands.
,,	XXXI	Gazette of India.
1864,	III	Foreigners.
1865,	III	Common Carriers,
,,	XV	Marriage and Divorce among Parsees.
1866,	XXI	Dissolution of Marriages of Native Converts.
,,	XXVIII	Trustees and Mortgagees' Powers.
1867,	XXV	Printing Presses, etc.

SECOND SCHEDULE.[4]

(*See* section 4.)

LEG. REF.

[1] Act XII of 1850 is repealed locally in Assam by the Assam Land Revenue Regulation, 1886 (I of 1886), Assam Code.

[2] These Acts were repealed by S. 3 and Sch. of Act IV of 1922.

[3] These Acts were repealed by the Indian Lunacy Act, 1912 (IV of 1912).

[4] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from the schedule:—

Enactments omitted.	Repealing Acts.
Mad. Reg.	Acts.
III of 1802, S. 11	XII of 1891.
Acts.	Acts.
V of 1802, S. 30	XI of 1901.
XIII of 1802	Do.
I of 1805	
II of 1807	XII of 1891
IV of 1816	
IX of 1816, S. 43	
XIV of 1816	
V of 1816	XII of 1927
I of 1819	
II of 1819	The A.O., 1937
IV of 1821, S 4	XII of 1876
III of 1831	XII of 1876
VII of 1832	VI of 1878.
XI of 1832	
XIV of 1832	XIII of 1889.

(*a*).—MADRAS REGULATIONS.

Year and Number.	Subject.
[1] 1802, III (S. 1, part of S. 16 only).	Procedure of Çivil Courts.
[1] „ XIX (S. 2)	Covenanted Civil Servants forbidden to lend.
[1] „ XXV	Settlement of Land-revenue
[1] „ XXVI (Ss. 1, 2 and 3 only).	Registration of malguzari land.
[1] „ XXIX	Karnams.
[1] 1803 I	Board of Revenue.
[1] „ II	Conduct of Collectors, etc.
[2] 1804, V	Courts of Wards.
1806, II[3][(S 7, cl. second])	Collectors and Karnams.
[4] 1808 VII	*Martial law.*
1816, XI	Sections 8, 9, 10—Heads of villages: section 11, cl. 1—Stolen property: Section 13—Discovery of corpses: Section 14—Register of persons confined by heads of villages; and Section 47—Magistrates charged with maintenance of peace
[5] „ XII	Reference of claims regarding land and produce to Villages and District Panchayats.
1817, VII	Maintenance of Bridges, etc: Escheats.
„ VIII (S. 9 only)	Sale for arrears of revenue of estate belonging to Native Officer or Soldier.
1822, IV	Explanation of Madras Regulation XXV of 1802.
„ VII (cl. 1 of S. 3 only)	Native Officers in Revenue and other Public Departments.
„ IX	Embezzlement by public servants and malversation in revenue-matters.
1823, III	
1828, VII	Powers of Subordinate and Assistant Collectors.
1829, V	Hindu Wills and Estates.
1830, I	Prohibition of Widow burning.
1831, V (S. 7, cl. 2 only)	Liability of Ministerial Officers for reception of improperly stamped document.
[6] „ VI	Hereditary Village Offices.
[7] „ X	Prohibition of Sale of Estate of Minors for Arrears of Revenue.
1832, III	Limitation for Suits against orders of Revenue Authorities under Madras Regulation VII of 1828.

LEG. REF.

[1] This Regulation has been repealed locally by Madras Act II of 1894.

[2] Act XV of 1874, so far as it relates to the portions of Madras Regulation V of 1804, which were repealed by the Guardians and Wards Act, 1890, is repealed by the latter Act. The Regulation was repealed by Madras Act I of 1902 (Madras Court of Wards Act).

[3] Parts of Ss. 1 and 7 were originally referred to in this schedule. Of the entire Regulation only the second clause of S. 7 is now in force, *see* Pt. III of the Schedule to the Repealing Act, 1876 (XII of 1876).

[4] Repealed by S. 3 and Sch. of Act IV of 1922.

[5] Madras Regulation XII of 1816 has been repealed by Madras Act IV of 1897 (the Madras Survey and Boundaries Act) so far as it applies to cases of claims to lands or crops, the validity of which claims may depend upon the determination of an uncertain and disputed boundary or land-mark.

[6] Repealed by Madras Act III of 1895 (Madras Hereditary Village Offices Act),

[7] Act XV of 1874, so far as it relates to Madras Regulation X of 1831, S. 3, is repealed by the Guardians and Wards Act, 1890 (VIII of 1890). So much of the Regulation as is now in force is printed in the Madras Code, Vol. I.

(*b*).—ACTS OF THE SUPREME COUNCIL RELATING TO THE LOWER PROVINCES.[1]

Year and Number.		Subject
[2] 1837,	XXXVI	Criminal Jurisdiction of Collectors.
[2] 1839,	VII	Tahsildars.
[2] 1840,	VIII	Awards of Panchayats.
[3] 1846,	I	Pleaders.
[2] 1849,	X	Commissioners of Revenue.
[3] 1853,	XX	Pleaders.
[2] 1857,	VII	Uncovenanted Agency.
[2] 1858,	I	Compulsory Labour.
[2] 1859,	XXIV	Police.

THIRD SCHEDULE.[4]

(See *section* 5.)

(*a*).—BOMBAY REGULATIONS.

Year and Number.		Subject.
[6] 1827,	II	Section 21 (caste questions) ; [5] * * *
[6] ,,	IV	Section 26[5] (law applicable to suits); section 69[6] c auses *second* and *third*[6] (attachment and distraint of crops).
[6] ,,	V	Preamble; section 9 (acknowledgments of debt): section 14 (interest): section 15 (mortgages and pledges).
[6] ,,	VIII	Administr ation of Estates.
[6] ,,	XII	Second 19 (Magistrate's power to make rules :)

LEG. REF.

[1] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule :—

Enactments omitted. Acts	Repealing Acts. Acts
XII of 1838	VI of 1878.
XVII of 1840 VII of 1852	XII of 1891.
VI of 1844	III ot 1937.
IX of 1846	XII of 1927.
X of 1855, S. 10	XI of 1901.
XIV of 1855	VIII of 1887.
XXI of 1855. VIII of 1856	XII of 1927.
XIV of 1858	VIII of 1890.
XXVIII of 1860	XII of 1927.
XI of 1869	XII of 1891.
XXIV of 1869	XVIII of 1877.

[2] Repealed by Madras Act I of 1902 (Madras Court of Wards Act).

[3] As to the repeal of Acts I of 1846 and XX of 1853 in the Madras Presidency, *see* Ss. 1 and 42 of the Legal Practitioners' Act, 1879 (XVIII of 1879).

[4] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule :—

Enactments omitted. Bom. Reg.	Repealing Acts. Acts.
XII of 1827, preamble XVI of 1827 XXI of 1827, Ss. 1-16, 46, 54-73.	XII of 1891.
XXII of 1827, Ss. 18-20, 45-47.	XIII of 1889.
XXV of 1827	The A.O., 1937.

[5] Certain words were omitted by S. 2 and Sch. of the Repealing Act, 1927 (XII of 1927).

[6] Bom. Code.

Year and Number.		Subject.
		section 20 (standards of weights and measures): section 27, clause 2 (supervision of suspected persons): section 37, clauses *first* and *second* (responsibility of villages for robberies).
[1] 1827,	XIII ..	Section 34, clause *third* (letter substituted for summons).
,,	XXII ..	Sections 40, 41, 42, 43 (passage of troops).
[2] 1830,	V ..	Section 1 (Revenue Commissioners): section 2, clauses 1, 2, 3 (Collectors and Sub-Collectors).
[1] ,,	XIII ..	Civil jurisdiction of Jagirdars.
[2] 1831.	XV ..	Village Patels.
1832,	II ..	Realization of Revenue.
1833,	V ..	Hereditary Officers.

(*b*).—ACTS OF THE SUPREME COUNCIL RELATING TO THE BOMBAY PRESIDENCY.[3]

Year and Number.		Subject.
1838,	XVI ..	Judiciary.
[4] ,,	XVIII ..	Sureties.
1838,	XIX ..	Coasting Vessels.
1839,	XX ..	Revenue.
1840,	XV ..	Agents of Foreign Sovereigns.
[4] 1842,	XIII ..	Revenue.
[4] ,,	XVII ..	Revenue Commissioners.
1844,	XIX ..	Abolition of Town Duties.
[5] 1846,	I ..	Pleaders.
[4] ,,	III ..	Sections 1 5 and 6—Boundary Marks.
[5] 1853,	XX ..	Pleaders.

FOURTH SCHEDULE.[6]

(See *section* 6.)

(*a*).—BENGAL REGULATIONS (LOWER PROVINCES).

Year and Number.		Subject.
[7]1793	I ..	Perpetual Settlement.
,,	II ..	Collection of Land-revenue.

LEG. REF.

[1] Bom. Code.

[2] Bom. Reg. IV of 1827, S. 69 and Bom. Regs. V of 1830, XV of 1831, II of 1832 and V of 1833, are repealed locally by the Bombay Land Revenue Code, 1879 (Bom. Act V of 1879), Bom. Code.

[3] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule:—

Enactments omitted. Acts		Repealing Acts. Acts.
XI of 1843	..	XII of 1891.
III of 1852	..	
XXI of 1852	..	
X of 1855, S. 10	..	XI of 1901.
VIII of 1856	..	IX of 1894.
XX of 1864	..	VIII of 1890.

[4] Acts XVIII of 1838, XIII and XVII of 1842 and III of 1846 are repealed locally by the Bombay Land-Revenue Code, 1879 (Bom. Act V of 1879), Bom. Code.

[5] As to the repeal of Acts I of 1846 and XX of 1853 in the Bombay Presidency, *see* Ss. 1 and 42 of the Legal Practitioners' Act, 1879, (XVIII of 1879).

[6] Act XV of 1874 having been repealed so far as it relates to the following enactments,

[7] Ben. Code.

Year and Number.		Subject.
1793,	VIII	Rules for Decennial Settlement.
„	XI	Native laws of inheritance to Revenue-paying land.
„	XIX	Title to lands exempt from Revenue.
„	XXXVIII	Title to lands exempt from Revenue under badshahi grants.
„	XXXVIII	Section 1—Preamble: Section 2—Prohibition of loans by Covenanted Servants.
1794,	III	Sections 13, 16, 17, 18, 19 and 20—Arrears of Revenue
1799,	V	Wills and Intestacies of Natives.
1800,	VIII	Pargana Register of Lands.
1801,	I	Arrears of Revenue: Division of Joint Estates.
[1]*1804,*	*X*	*Punishment by Courts-martial of certain State offences.*
1806,	XI	Passage of Troops.
1810,	XIX	Maintenance of Bridges, etc., Escheats.
1812,	V	Collection of Land-revenue.
„	XI	Removal of Foreign Emigrants.
1817,	XX	Section 29—Criminal process in Salt and Opium Departments: Section 30, clauses 1, 2 and 5—Building forts; Collecting sepoys and stores; Encroaching on roads.
[3] 1819,	II	Resumption of Revenue-free lands.
1821,	IV	Powers of Collectors and Magistrates.
[2]*1822*	*III*	*Boards of Land-revenue.*
„	XI	Section 36—Khas management of purchases by Government: Section 38—Non-liability of Government for errors of Courts.
1823,	VI	Indigo Contracts.
„	VII	Prohibition of loans to Covenanted Civil Servants.
1825,	VI	Passage of Troops.
„	IX	Defaulting Malguzars.
„	XI	Alluvion and diluvion.
„	XIII	Settlement of resumed Lakhiraj land.
„	XIV	Authority to confirm Lakhiraj tenure: Native grants.
1827,	III	Section 5—Evidence.
„	V	Management of Estates under attachment.
1828,	III	Appeals from decisions of Revenue Authorities.
„	IV	Section 1 and section 2, clause 4—Time during which Collectors are to be considered engaged in making settlements.
1829,	I	Commissioners of Revenue and Board of Revenue.
„	XVII	Widow-burning.
1830,	V	Sections 1 and 5—Indigo Contracts.

LEG. REF.

by the Acts noted against each, the references to those enactments have been omitted from this schedule:—

Enactments omitted.	Repealing Acts.
Beng. Reg.	Acts.
XLVIII of 1793	XII of 1891.
III of 1794, S. 12	
LVIII of 1795, Ss. 3 & 4	XII of 1876.
XV of 1797	XII of 1891.
I of 1798	
XVII of 1806, Ss. 7 & 8	
XX of 1810	XIII of 1889.
XI of 1811	XII of 1891
XIX of 1814	
V of 1817	VI of 1878.
XX of 1817, Ss. 28 & 32.	XII of 1891.
III of 1818	The A.O., 1937.
VI of 1819	XII of 1891.
XX of 1825	X of 1882.
IV of 1829	XII of 1876.

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[1] Repealed by S. 3 and Sch. of the Special Laws Repeal Act, 1922 (IV of 1922).

[2] Repealed by the Bengal Board of Revenue Act, 1913 (Beng. Act II of 1913), Beng. Code.

[3] Ben. Code.

(*b*).—ACTS OF THE SUPREME COUNCIL RELATING TO THE MADRAS PRESIDENCY.[1]

Year and Number.			Subject.
1836,	X	..	Indigo Contracts.
,,	XXI	..	Creating Zilas.
1841,	XII	.	Section 2—No Interest on arrears of Land-revenue.
1847,	IX	..	Assessment of new lands.
1848,	XX	..	Land-revenue.
[2]*1850,*	*XLIV*	..	*Board of Revenue.*
[3]1855,	XXXII	..	Embankments.
1856,	XII	..	Civil Court Amins.
1857,	XIII	..	Opium.
1858,	XXXI	..	Settlement of Alluvion.
1859,	XI	..	Sales for Arrears of Fevenue.

FIFTH SCHEDULE.

(See *section* 7.)

(*a*).—BENGAL REGULATIONS (NORTH-WESTERN PROVINCES).[4]

	Year and Number.			Subject.
[5]	1793,	XXXVIII	..	Section 1—preamble: Section 2—prohibition of loans by Covenanted Servants.
	1799,	V	..	Wills and Administration to Natives.
	[6]*1804,*	*X*	..	*Punishment by Courts-martial of certain State Offences.*
	1866	XI	..	Passage of Troops.
	1812	XI	..	Removal of Foreign Emigrants.
	1822,	XI	..	Section 38—Non-liability of Government for errors of Courts.
	1823,	VI	..	Indigo Contracts.
	,,	VII	..	Prohibition of loans to Covenanted Civil Servants.
	1825,	VI	..	Passage of Troops.
	,,	XI	..	Alluvion and Dereliction.
	1827,	III	..	Section 5—Evidence.
	,,	V	..	Management of Estates under Attachment.
	1829,	XVII	.	Widow-burning.
	1830.	V	..	Sections 1 and 5—Indigo Contracts.
	1831,	XI	..	Sections 1, 2, 5, 6, Police powers of Tahsildars.
	1833,	IX	..	Deputy Collectors.

LEG. REF.

[1] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this Schedule:—

Enactments omitted. Acts.		Repealing Acts.
XX of 1836	..	XII of 1891.
XI of 1838	..	
XIX of 1853, S. 26	..	I of 1903.
XX of 1856	..	XII of 1891.
XXI of 1856	..	
XL of 1858	..	VIII of 1890.
XXIII of 1860	..	XII of 1891.

[2] Repealed by the Bengal Board of Revenue Act, 1913 (Bengal Act II of 1913), Beng. Code.

[3] Act XXXII of 1855 has been repealed locally in Bengal by the Bengal Embankments Act, 1873 (Bengal Act VI of 1873).

[4] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule:—

Enactments omitted. Beng. Reg.		Repealing Acts. Acts.
I of 1798	..	XII of 1891.
XVII of 1806, Ss. 7 & 8.		
XIX of 1810	..	
XX of 1810	..	XIII of 1889.
V of 1817	..	XII of 1891.
III of 1818	..	The A.O., 1937.
VI of 1819	..	XII of 1891.
XX of 1825	..	X of 1882.
VI of 1831, S. 6	..	XII of 1891.
XI of 1831, Ss. 4 & 8.		
I of 1833	..	VIII of 1875.

[5] U. P. Code.

[6] Repealed by S. 3 and Sch. of the Special Laws Repeal Act, 1922 (IV of 1922).

(*b*) ACTS OF THE SUPREME COUNCIL RELATING TO THE NORTH-WESTERN PROVINCES.[1]

Year and Number.		Subject.
1836,	X ..	Indigo Contracts.
1854,	XVI ..	Police.
1856,	XII ..	Civil Court Amins.
[2] ,,	*XX* ..	*Chaukidars.*
1857	XIII ..	Opium.

SIXTH SCHEDULE.

(See *sections* 2, 3, 4, 5, 6 *and* 7.)

PART I.

SCHEDULED DISTRICTS, MADRAS.

I.—In Ganjam.

(1) The Gumsur Maliahs, including Chokapad.

(2) The Surada Maliahs.

(3) The Chinna Kimedi Maliahs.

(4) The Pedda Kimedi Maliahs.

(5) The Bodaguda Maliahs.

(6) The Surangi Maliahs.

(7) The Parlakimedi Maliahs.

(8) The Muttas of Korada and Ronaba (otherwise called Srikarma).

[(9) *The Chighatti Maliah.*] *Rep. by the Repealing and Amending Act,* 1891 (*XII of* 1891).

(10) The Jurada Maliah.

(11) The Jalantra Maliah.

(12) The Mandasa Maliah.

(13) The Budarashinghi Maliah.

(14) The Kuttingia Malia.

II.—In Vizagapatam.

(1) The Jeypur Zamindari.

(2) Golconda Hills, west of the River Boderu.

(3) The Madugol Maliahs.

(4) The Kasipur Zamindari.

(5) The Panchipenta Maliahs.

(6) Mondemkolla, in the Merangi Zamindari.

[3] [(7) The Konda Mutta of Merangi.]

(8) The Gumma and Konda Muttas of Kurpam.

(9) The Kottam, Ram and Konda Muttas of Palkonda.

III.—In the Godavari District.[4]

(1) The Bhadrachalam Taluq.

(2) The Rakapilli Taluq.

(3) The Rampa Country.

IV.—In the Indian Ocean.

The Laccadive Islands, including Minicoy.

PART II.

SCHEDULED DISTRICTS, BOMBAY.

I. The Province of Sindh.

II. [*The Panch Mahals.*] *Rep. by the Panch Mahals Laws Act,* 1885 (*VII of* 1885), *with effect from the* 1st *May,* 1895.

III. Aden.[5]

IV. The villages belonging to the following Mehwassi Chiefs:—

(1) The Parvi of Kathi.

(2) The Parvi of Nal.

(3) The Parvi of Singpur.

(4) Walwi of Goahalli.

(5) The Wassawa of Chikhli.

(6) The Parvi of Nawalpur.

PART III.

SCHEDULED DISTRICTS, BENGAL.

I. The Jalpaiguri and Darjeeling [1][Districts.]

II. The Hill Tracts of Chittagong.

III. The Sonthal Parganas.

IV. The Chutia Nagpur Division.[2]

V. The Mahals of Angul and Banki.[3]

LEG. REF.

[1] Act XV of 1874 having been repealed so far as it relates to the following enactments, by the Acts noted against each, the references to those enactments have been omitted from this schedule:—

Enactments omitted. Acts.	Repealing Acts. Acts.
XXI of 1836 ..	I of 1903.
XIX of 1853, S. 26 ..	
XL of 1858 ..	VIII of 1890.

[2] Act XX of 1856 has been repealed in United Provinces by United Provinces Act II of 1914, S. 41.

[3] This clause was substituted for the original clause ("(7) The Konda Mutta of Belgaum") by the Repealing and Amending Act, 1891 (XII of 1891).

[4] The Ducharti and Guditeru Muttas in the Golconda Hills have been transferred from the Vizagapatam to the Godavari District. *See* Fort St. George Gazette, 1881, Pt. I, p. 336.

Certain villages and estates in the Godavari District became Scheduled Districts for the purposes of the Scheduled Districts Act, 1874, but they are not "scheduled districts" within the meaning of the Laws Local Extent Act, 1874.

[5] Aden ceased to be part of British India from 1st April, 1937.

PART IV.

SCHEDULED DISTRICTS, NORTH-WESTERN PROVINCES.

I. [*The Jhansi Division, comprising the Districts of Jhansi, Jalaun and Lalatpur.*] *Rep. by the North-Western Provinces and Oudh Act,* 1890 (*XX of* 1890), *S.* 8 (1), *with effect from the* 1st *April,* 1891.

II. The province of Kumaun and Garhwal.

III. The Tarai Parganas, comprising—Bazpur, Kashipur, Jaspur, Rudarpur, Gadarpur, Kilpuri, Nanak-Mattha and Bilheri.

IV. In the Mirzapur District—

(1) The tappas of Agori Khas and South Kon in the Pargana of Agori.

(2) The tappa of British Singrauli in the Pargana of Singrauli.

(3) The tappas of Phulwa, Dudhi and Barha in the Pargana of Bichipar.

(4) The portion lying to the South of the Kaimor Range.

[V. *The Family Domains of the Maharaja of Benares, comprising the following parganas:—Bhadohi and Kheyra Mangror in the Mirzapur District; Kaswa Raja in the Benares District.*] *Rep. by the Benares Family Domains Act,* 1881 (*XIV of* 1881), *S.* 14, *with effect from the* 24*th September,* 1881.

VI. The tract of country known as Jaunsar Bawar in the Dehra Dun District.

PART V.

SCHEDULED DISTRICTS, PUNJAB.

The Districts of [4]Hazara, Peshawar Kohat, Bannu, Dera Ismail, Khan, Dera Ghazi Khan, Lahaul and Spiti.

PART VI.

[5]SCHEDULED DISTRICTS, CENTRAL PROVINCES.

Chattisgarh Zamindaris.

1. Khariar.
2. Bindra Nawagarh.
3. Sahezpur.
4. Gandai.
5. Silheti.
6. Barbaspur.
7. Thakurtola.
8. Lohara.
9. Gondardehi.
10. Fingeswar.
11. Pandaria.
12. Pendra.
13. Matin.
14. Uprora.
15. Kenda.
16. Lapha.
17. Chhuri.
18. Korba.
19. Chapa.
20. Bora Sambhar.
21. Phuljhar.
22. Kolabira.
23. Rampur.

Chanda Zamindaris.

1. Ahiri.
2. Ambagarh Chauki.
3. Aundhi.
4. Dhanora.
5. Dudhmala.
6. Gewarda.
7. Jharapapra.
8. Khutgaon.
9. Koracha.
10. Kotgal.
11. Muramgaon.
12. Panabaras.
13. Palasgarh.
14. Rangi.
15. Sirsundi.
16. Sonsari.
17. Chandala.
18. Gilgaon.
19. Pawi Mutanda.
20. Pategaon.

Chhindwara Jagirdaris.

1. Harai.
2. Chhater.

LEG. REF.

[1] Substituted for "Divisions" by the Amending Act, 1891 (XII of 1891).

[2] The Thanas of *Raipur and Khattra,* which formerly formed portion of the Chutia Nagpur Division, transferred to the District of Bankura, and ceased to be a Scheduled District on the 1st October, 1879. *See* the Raipur and Khattra Laws Act, 1879 (XIX of 1879), Beng. Code.

THE ESTATE OF PORAHAT now forms part of the Chutia Nagpur Division Scheduled District for the purposes of the Scheduled Districts Act, 1874, *see* the Porahat Estate Act, 1893 (II of 1893), S. 3 (B. and O. Code); but it is not a "scheduled district" within the meaning of the Laws Local Extent Act, 1874.

[3] The Mahal of Banki ceased to be a Scheduled District on the 1st April, 1882, *see* the Banki Laws Act, 1881 (XXV of 1881) (B. and O. Code); and that Act declared that all enactments then in force in Cuttack but not in Banki, should forthwith be in force in Banki, and that all enactments then in force in Banki, but not in Cuttack should thereupon be deemed to have been repealed as regards Banki.

The KHONDMALS in Orissa, which now form part of the Angul District, *see* the Angul Laws Regulation, 1913 (III of 1913) B. and O. Code, have become a Scheduled District for the purposes of the Scheduled Districts Act, 1874 (XIV of 1874), *see* Appendix B to that Act, printed, *supra*: but they are not "scheduled districts" within the meaning of the Laws Local Extent Act, 1874.

[4] Portions of the districts of Hazara, Bannu and Dera Ismail Khan and the districts of Peshawar and Kohat now form the N. W. Frontier Province, *see* Gazette of India, 1901, Pt. I, p. 857.

[5] The taluks of Nugur, Albaka and Cherla which were transferred to the Madras Presidency with effect from 1st July, 1909, had, from the 17th January, 1905, become scheduled districts within the meaning of the Scheduled Districts Act, 1874.

3. Gorakhghat.
4. Gorpani.
5. Bakhtagarh.
6. Bardagarh.
7. Pachmarhi.
8. Partabgarh.
9. Almod.
10. Sonpur.
11. Bariam Pagara.

PART VII.

The Chief Commissionership of Coorg.

PART VIII.

The Chief Commissionership of the Andaman and Nicobar Islands.[1]

PART IX.

The Chief Commissionership of Ajmer and Merwara.

PART X.

The Chief Commissionership of Assam.[2]

[*Part XI:—The Hill Tracts of Arakan*] *Rep. by A.O.*, 1937.

[*Part XII:—The Pargana of Manpur.*] *Rep. by the Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

[*Part XIII:—The Cantonment of Morar.*] *Rep. by the Amending Act* (*XII of* 1891).

SEVENTH SCHEDULE:—

Enactments.

Repealed]. *Rep. by the Repealing Act* (*XII of* 1876).

THE LEGAL PRACTITIONERS ACT (I OF 1846).[3]

Year.	No.	Short title.	Amendments
1846	I.	Legal Practitioners' Act.	Repealed in part XVI of 1874; XII of 1876; XII of 1861: Repealed (locally) XX of 1865; IX of 1884, S. 9. Repealed in part and amended XII of 1891. Amended XX of 1853, S. 4.

CONTENTS.

SECTIONS.
1, 2 & 3. [*Repealed.*]
4. Office of pleader open to persons duly certificated.
5. Right of barrister to plead in all Courts.
6. Enactment to cease to have force, except for specified purposes.
SECTIONS.
7. Private agreement between parties and pleaders. Calculation of pleaders' fees out of costs awarded in regular suits.
In other cases.
8. Enforcement of private agreements.
9. Remuneration for opinions.

LEG. REF.

[1] The Little Cocos Island has been transferred to the administration of the Governor of Burma and ceased to be a Scheduled District on the 29th November, 1882, *see* the Little Cocos and Preparis Islands Laws Act, 1883 (VIII of 1883), Bur. Code.

[2] The Lushai Hills, which include the North and South Lushai Hills and the Mokokchang Sub-division of the Naga Hills District have now become Scheduled Districts for the purposes of the Scheduled Districts Act, 1874 (XIV of 1874), *see* Appendix B to that Act, *supra,* but they are not Scheduled Districts within the meaning of the Laws Local Extent Act, 1874.

[3] Short Title "The Legal Practitioners Act, 1846", *see the* Indian Short Titles Act, 1897 (XIV of 1897), General Acts, Vol. IV. This Act has been declared, by the Laws Local Extent Act, 1874 (XV of 1874), S. 4, to be in force in the Madras and Bombay Presidencies, except as regards the Scheduled Districts. It has been declared, by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the Scheduled Districts of Sind. See *Gazette of India,* 1880, Pt. I, p. 672. It has been declared under S. 3 (*b*) of the same Act that Act I of 1846 is not in force in the Scheduled Districts of Ganjam and Vizagapatam, see *Fort St. George Gazette,* 1898, Pt. I, p. 667 and *Gazette of India,* 1898, Pt. I, p. 872. It is repealed in places to which the Pleaders, Mukhtars and Revenue Agents Act, 1865 (XX of 1865) is extended by S. 3 of that Act, and in places to which the Legal Practitioners' Act, 1879 (XVIII of 1879), applies by the Legal Practitioners' Act, 1884 (IX of 1884), S. 9. It has been repealed, in so far as it applies to Burma, by the Burma Laws Act, 1898 (XIII of 1898), S. 18 (1) and Sch. B, Bur. Code.

SECTIONS.
10. Power of Sadr Amin to fine pleader. Appeal.
11. Rules applied.
12. Power of Munsiff to fine pleader. Appeal.
13. Act not to affect certain vakils.

THE LEGAL PRACTITIONERS ACT (I OF 1846).

[*7th January*, 1846.

An Act for amending the Law regarding appointment and remuneration of Pleaders in the Courts of the East India Company.

1, 2 & 3. [*Repeal of enactments.*] *Rep. by the Repealing Act*, 1874 (*VI of* 1874).

Office of pleader open to persons duly certificated.

4. [1][* * * *] The office of pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion: Provided that no person shall be admitted a pleader in any of those Courts unless he have obtained a certificate in such manner as shall be directed by the Sadr Courts that he is of good character and duly qualified for the office, any law or regulation to the contrary notwithstanding:

Right of barrister to plead in all Courts.

5. Provided, [2][* * * *] that every barrister of any of Her Majesty's Courts of Justice in India shall be entitled as such to plead in any of the Sadr Courts of the East India Company, subject, however to all the rules in force in the said Sadr Courts applicable to pleaders whether relating to the language in which the Court is to be addressed or to any other matter.

Enactment to cease to have force, except for specified purposes.

6. [1][* * * *] [3][* * * *] Section 52, Regulation II, 1827 of the Bombay Code, shall cease to be enforced, excepting for the purpose specified in section 7 of this Act.

Private agreement between parties and pleaders.

7. [1][* * * *] Parties employing authorized pleaders in the said Courts shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services, and [4][*] it shall not be necessary to specify such agreement in the vakalatnama:

Calculation of pleaders' fees out of costs awarded in regular suits.

In other cases.

Provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules contained in [5][the section of the Regulation] specified in section 6 of this Act; and that when costs are awarded in other cases the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

Enforcement of private agreements.

8. [1][* * * *] Private agreements between parties and their pleaders respecting the remuneration to be paid for professional services shall not be enforced otherwise than by a regular suit.

LEG. REF.

[1] The words "And it is hereby enacted that" repealed by Act XVI of 1874.

[2] The words "nevertheless, and it is hereby enacted" repealed by *ibid*.

[3] The words and figures "Section 25 . . . Madras Code, and" repealed by Act XII of 1891.

[4] The word 'that' repealed by Act XII of 1876.

[5] Substituted by Act XII of 1891 for "the sections of Regulations".

NOTES.

Sec. 4.—S. 4 does not extend to barristers and attorneys of the Supreme Courts. *See* S. 4 of the Pleaders Act, 1853 (XX of 1853).

Sec. 6.—Object of this Act is to bring legal practitioners under the control of the Court, so that they may not be able to oppress people by extortion. *See* 15 C. 638. *See also* 1 B.H.C. (A.C.) 102.

Remuneration for opinions.

9. [1][* * *] [2][* * *] Persons taking [3][*] opinions from authorized pleaders shall be at liberty to settle with them by private agreement the remuneration to be paid for such opinions.

Power of Sadr Amin to fine pleader.

10. [1][* * * *] Whenever a pleader has rendered himself liable to a fine in the Court of a principal Sadr Amin or Sadr Amin, it shall be competent to such Principal Sadr Amin or Sadr Amin to impose such fines: Provided that an appeal from all orders imposing such fines shall lie to the Zila or City Judge, whose decision thereon shall be final.

Appeal.

Rules applied.

11. [1][* * * *] The rules applicable to pleaders in the Courts of the Zila and City Judges shall henceforth be applicable, so far as they are capable of application, to pleaders in the Munsif's Courts.

Power of Munsif to fine pleader.

12. [1][* * * *] Whenever a pleader has conducted himself in such a manner in the Court of a Munsif as would have rendered him liable to a fine if he had so conducted himself in the Court of a Zila or City Judge, it shall be competent to such Munsif to impose such fine: Provided that an appeal from all orders imposing such fine shall lie to the Zila or City Judge, whose decision thereon shall be final.

Appeal.

Act not to affect certain vakils.

13. [1][* * * *] Nothing in this Act contained shall apply to vakils who may be employed in the Courts of the Village Munsifs, or before the Village or District panchayats, or before the Collectors of Zilas, under the provisions of Regulations [4]IV, V, [5]VII and XII, 1816, of the Madras Code.

THE LEGAL PRACTITIONERS ACT (XX OF 1853).[6]

Year.	No.	Short title.	Amendments.
1853	XX	The Legal Practitioners Act, 1853	Repealed in part, XIV of 1870. Repealed (locally), XX of 1865; IX of 1884, S. 9.

LEG REF.

[1] The words "And it is hereby enacted that" repealed by Act XVI of 1874.

[2] The words and figures "so much...... and that" repealed by Act XII of 1876.

[3] The word 'such' repealed by *ibid*.

[4] For Reg. IV of 1816, the Madras Village Courts Act I of 1888 should now be read wherever that Act is in force, *see* S. 2 (3) of that Act.

[5] Reg. VII of 1816 repealed by the Madras Civil Courts Act (III of 1873).

[6] Short title. "The Legal Practitioners Act, 1853." *See the* Indian Short Titles Act, 1897 (XIV of 1897).

The Act has been declared to be in force in the Madras and Bombay Presidencies, except as regards the Scheduled Districts, by

NOTES.

Sec. 10.—A pleader who presses a Court to put a question which the Court considers improper, and insists on a note being made of his request, is not liable to fine under Act I of 1846. No opinion was offered on the point whether such conduct on the part of a pleader amounted to an offence under S. 228 of the Penal Code. Where the pleader under the above circumstances was fined for an offence under S. 228 without being called on to make a statement in his defence, *held,* that the procedure was irregular and that though there was no appeal from the order, the High Court could in revision interfere with the order on account of such irregularity. 7 B. H. C. (A.C.J.) 102.

[8*th December*, 1853.

An Act to amend the Law relating to Pleaders in the Courts of the East India Company.

WHEREAS it is expedient to amend the law relating to Pleaders in the Courts of the East India Company; It is enacted as follows:—

1. [*Repeal of enactments.*] *Rep. by the Repealing Act,* 1870 (*XIV of* 1870).

Pleader not bound to attend Court except at hearing of cause in which he is employed.

2. [1]No pleader shall be bound to attend in any of the Courts of the East India Company, on any day fixed for the transaction of civil business, or to notify to the Court his inability to attend, unless he shall be employed in some cause or business which, according to the practice of the Court, may be heard or transacted therein on that day, anything in any law or regulation to the contrary notwithstanding.

Right of Supreme Court attorneys to plead in all Sadr Courts.

3. Every attorney on the roll of any of Her Majesty's Supreme Courts of Judicature in India shall be entitled as such to plead in any of the Sadr Courts of the East India Company, subject however to all the rules for the time being in force in the said Sadr Courts respectively, applicable to barristers pleading therein, whether relating to the language in which the Court is to be addressed or to any other matter.

Barristers and attorneys of Supreme Courts not required to produce certificate of character, etc., but may plead in all subordinate Courts.

4. That part of section 4, Act No. I of 1846 which provides that no person shall be admitted a pleader in any of the Courts of the East India Company, unless he have obtained a certificate in such manner as shall be directed by the Sadr Courts that he is of good character and duly qualified for the office, shall not extend to barristers or attorneys of any of the said Supreme Courts; but every such barrister and attorney shall be entitled as such to plead in any of the Courts of the East India Company subordinate to the Sadr Courts, subject to all the rules in force in the said subordinate Courts respectively applicable to pleaders therein, so far as such rules relate to the language in which the Court is to be addressed or to any other matter connected with pleading therein.

THE LEGAL PRACTITIONERS ACT (XVIII OF 1879).

Year.	No.	Short title.	Amendments.
1879	XVIII	The Legal Practitioners Act, 1879.	Amended IX of 1884; IX of 1896; I of 1903; I of 1908; XV of 1926; XXXVIII of 1926. Repealed in part, XVIII of 1919; XI of 1923; XXI of 1926; I of 1938.

LEG. REF.

the Laws Local Extent Act, 1874 (XV of 1874), Ss. 4 and 5.

It has been declared by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the Scheduled District of Sindh. *See* Gazette of India, 1880, Pt. I, p. 672, and in the Scheduled Districts in Ganjam and Vizagapatam, *see, ibid.*, 1898, Pt. I, p. 870.

It has been repealed in places to which the Pleaders, Mukhtars and Revenue Agents Act, 1865 (XX of 1865), is extended, *see* S. 3; and in places to which the Legal Practitioners Act, 1879 (XVIII of 1879), applies by the Legal Practitioners Act, 1884 (IX of 1884), S. 9. Act XX of 1865 was repealed by Act XVIII of 1879.

It has been repealed, so far as it applies to Burma, by S. 18 (1) of the Burma Laws Act, 1898 (XIII of 1898), Bur. Code, Vol. I.

[1] S. 2 of this Act has been repealed in Bombay by the Bombay Pleaders Act, XVII of 1920, Bom. Code, Vol. V.

THE LEGAL PRACTITIONERS ACT (XVIII OF 1879).[1]

CONTENTS.

PREAMBLE.

CHAPTER I.

PRELIMINARY.

SECTIONS.

1. Short title.
Commencement.
Local Extent.
2. [*Repealed.*]
3. Interpretation-clause.

CHAPTER II.

OF ADVOCATES, VAKILS AND ATTORNEYS.

4. Advocates and Vakils.
5. Attorneys of High Court.

CHAPTER III.

OF PLEADERS AND MUKHTARS.

6. Power to make rules as to qualifications, etc., of pleaders and mukhtars.
Publication of rules.
7. Certificates to pleaders and mukhtars.
8. Pleaders on enrolment may practise in Courts, and revenue offices.
9. Mukhtars on enrolment may practise in Courts.
10. No person to practise as pleader or mukhtar unless qualified.
Revenue-agents may appear, plead and act in Munsif's Courts in suits under Bengal Act VIII of 1869.
11. Power to declare functions of mukhtars.
12. Suspension and dismissal of pleaders and mukhtars convicted of criminal offence.
13. Suspension and dismissal of pleaders and mukhtars guilty of unprofessional conduct.
14. Procedure when charge of unprofessional conduct is brought in subordinate Court or revenue office.
Suspension pending investigation.
15. Power to call for record in case of acquittal under S. 14.
16. Power to make rules for mukhtars on Appellate Side of High Court.

CHAPTER IV.

OF REVENUE AGENTS.

17. Power to make rules as to qualifications, etc., of revenue-agents.
Publication of rules.
18. Certificates to revenue-agents.
19. Enrolment of revenue-agent.
20. No person to act as agent in revenue offices unless qualified.

SECTIONS.

21. Dismissal of revenue-agent convicted of criminal offence.
22. Suspension and dismissal of revenue-agents guilty of unprofessional conduct.
23. Procedure when revenue-agent is so charged in subordinate office.
24. Power to Chief Controlling Revenue authority to call for record.

CHAPTER V.

OF CERTIFICATES.

25. Fee for certificates.
26. Dismissed practitioners to surrender certificates.

CHAPTER VI.

OF THE REMUNERATION OF PLEADERS, MUKHTARS AND REVENUE-AGENTS.

27. High Court and Chief Controlling Revenue-authority to fix fees on civil and revenue proceedings.
Exception as to agents mentioned in S. 20.
28-31. [*Repealed.*]

CHAPTER VII.

PENALTIES.

32. On persons illegally practising as pleaders, mukhtars or revenue-agents.
33. On suspended or dismissed pleader, etc., failing to deliver certificate.
34. On suspended or dismissed practitioner practising during suspension or after dismissal.
35. Revision of fines.
36. Power to frame and publish lists of touts.

CHAPTER VIII.

MISCELLANEOUS.

37. Provincial Government to appoint examiners.
38. Exemption of High Court practitioners from certain parts of Act.
39. Suspension or dismissal of person holding mukhtar and revenue agent's certificates.
40. Pleaders, etc., not to be suspended or dismissed without being heard.
41. Power for certain High Courts to enrol advocates.
42. [*Repealed.*]

THE FIRST SCHEDULE.—[*Repealed*].
THE SECOND SCHEDULE.—VALUE OF STAMPS FOR CERTIFICATES.

[29*th October,* 1879.

An Act to consolidate and amend the Law relating to Legal Practitioners.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to Legal Practitioners in the Lower Provinces of Bengal, the North-Western Provinces, the Punjab, Oudh, the

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LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India,* 1878, Pt. V, p. 381. For Reports of the Select Committee, *see ibid.*, 1879, Pt. V, pp. 51 and 841; for Civil Rules of Practice made by the High

Central Provinces and Assam, and to empower[1] each of the Local Governments of the rest of British India to extend to the territories administered by it such portions of this Act as such Government may think fit; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, commencement.

1. This Act may be called THE LEGAL PRACTITIONERS ACT, 1879, and shall come into force on the first day of January, 1880.

LEG. REF.

Court of Madras under this Act, the Code of Civil Procedure and certain other Acts, for observance by Subordinate Civil Courts in that Presidency except the Madras Small Cause Courts. *See Fort St. George Gazette,* 1905, Supplement, p. 1. *See* now Civil Rules and Circular Orders, 1928 by Madras High Court. This Act has been declared in force in Angul and the Khondmals by the Angul District Regulation, 1894 (I of 1894), S. 3, Ben. Code, and by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), in the Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum, see *Gazette of India,* 1881, Pt. I, p. 504. The District of Lohardaga (now called the Ranchi District *Calcutta Gazette,* 1899, Pt. I, p. 44) included at this time the District of Palamu which was separated in 1894. The whole Act, except S. 36 as substituted by S. 4 of Act XI of 1896, is repealed in the North-Western Frontier Province by the N.-W.F. Province Law and Justice Regulation, 1901 (Reg. VII of 1901), S. 5, Sch. III, P. and N. W. Code.

[1] Under this power the Act has been extended, subject to certain omissions, and so far only as it relates to judicial Courts, Civil and Criminal to the Madras Presidency, except the Scheduled Districts, from 1st April, 1882, *see Fort St. George Gazette,* 1881, Pt. I, pp. 491 and 707. Ss. 3 and 4 of the Act have been extended to the Regulation Districts of the Bombay Presidency, *see Bombay Government Gazette,* 1885, Pt. I, p. 290. Sections [except clauses (*a*), (*b*), (*c*), (*d*) and (*f*) thereof] 34, 36 and 40 have been extended to the whole of the Bombay Presidency, except the Province of Sind (*Bombay Gazette,* 1904, Pt. I, p. 1635), and to the Province of Sind (*Ibid.,* 1905, Pt. I, p. 634).

Ch. I, S. 40, Sch. II, and so much of Chs. III, V, VI and VII as relates to pleaders, have been extended to Coorg, see *Mysore Gazette.* 1879, Pt. I, p. 355; *see also* Notification No. 44, dated 11th November, 1891, *Coorg District Gazette, see* 1899, Pt. I, p. 122, extending Ss. 3, 13 and 36 as amended by Act XI of 1896 so far as they relate to pleaders. S. 3 and Chs. II, III, V to VIII, and the second schedule were extended to Lower Burma, with effect from 16th April, 1900, see *Burma Gazette,* 1900, Pt. I, p. 320, Bur.R.M. *Burma Gazette,* 1908, Pt. I, p. 18 (extending S. 20). Ss. 4 and 41 were extended to Ajmer-Merwara by the Chief Commissioner's Notification No. 28 C.C., dated 21st April, 1927. *See Gazette of India,* 1927, Pt. II-A, p. 214.

NOTES.

Sec. 1: CONSTRUCTION OF ACT AND SCOPE—(Per *Full Bench*).—The Act does not merely consolidate pre-existing law but also amends it, which implies both addition to and derogation from the pre-existing law. It is a complete Code in itself as regards the subject it deals with. 1930 A.L.J. 402 =1930 All. 225 (F.B.). (Per *Full Bench*): Inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861 and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of their professional or other misconduct. 1930 A.L.J. 402= 1930 All. 225 (F.B.). No minor can appoint an attorney and if he does, the attorney has no valid appointment under which he can act. 1934 A.L.J. 387=35 Cr. L.J. 1053=1934 All. 589.

JURISDICTION OF HIGH COURT TO REINSTATE DEBARRED PLEADER—CONSIDERATIONS.—The High Court has jurisdiction, in the exercise of its general power of superintendence over pleaders, to reinstate on the Roll and to re-admit a pleader who had been struck off the Roll for professional misconduct. I.L.R. (1937) Bom. 99=38 Bom. L.R. 1161=1937 Bom. 48. As to the considerations to be had by the High Court in cases of reinstatement after disbarment, *see* I.L.R. (1937) B. 99; 1939 Rang. 78; I.L. R. (1937) All. 411=1936 A. L. J. 1396= 1937 All. 50 (F. B.); 14 Rang. 390 =1936 Rang. 368 (S.B.); I.L.R. (1939) Bom. 99=38 Bom.L.R. 1161; 1939 Rang. 142=1939 Rang.L.R. 213 (S.B.); 45 M. L.J. 639; I.L.R. (1940) Mad. 81; I.L.R. (1940) Mad. 84; 1940 Rang. 32; (1939) 2 M.L.J. 630 (F.B.).

DUTIES OF LEGAL PRACTITIONERS.—When a solicitor takes up a case and undertakes to conduct it he is bound, whether his client is rich or poor, to proceed with due diligence, and honestly to prosecute or defend the claim, even if he is not put in funds: for it is open when he takes up the case to assure

Local extent.

This section and section 2 extend to the whole of British India.

The rest of this Act extends, in the first instance, only to the territories respectively administered by the Lieutenant-Governors of the Lower Provinces of Bengal, the North-Western Provinces and the Punjab, and the Chief Commissioners of Oudh, the Central Provinces and Assam. But any other Provincial Government may from time to time, by notification in the Official Gazette, extend all or any of the provisions of the rest of this Act to the whole or any part of the territories under its administration.

NOTES.

himself whether his client is a person of substance, or if necessary to insist on a sufficient advance at the outset to cover all probable costs. 34 Bom.L.R. 703=138 I.C. 257=1932 Bom. 363. It is an unwritten rule of the bar that where two counsels have been briefed in a case appearing on the daily board, one or other counsel must return his briefs in good time if there is a chance of neither being able to attend when the case is called on. 34 Bom.L.R. 1425=1932 Bom. 634. A resolution by the Bar Association that no member thereof should appear for the prosecution in any criminal case against any other member is a flagrant and unwarranted interference with the rights of legal practitioners, contrary to the best traditions of the Bar and to all accepted notions of forensic propriety. 36 C.W.N. 294=1932 Cal. 370. It is incumbent on counsel to prepare cases before coming to Court. The time of the Court should not be taken by search for relevant passages during trial in Court; client should also supply counsel with the necessary copies and records. 1939 A. L.J. 118.

Duty of Legal Practitioners—Clients with Conflicting Interest.—There is no such thing as a general agency between pleader and client. The contract of agency becomes complete when the Vakalat is executed and ends with the termination of the suit. 50 M. 249=1927 Mad. 157=51 M. L.J. 804. *See also* 12 Mys.L.J. 222=39 Mys.H.C.R. 203. A pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding. The pleader in the mofussil is not merely an Advocate. He is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors. A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings. 14 Bom.L.R. 700=16 I.C. 788=36 Bom. 606. *See* 1939 Rang. L.R. 514=1939 Rang. 183 (S.B.).

Authority to compromise.—An advocate has no authority to compromise the suit without a power of attorney from his client. 8 R. 290=127 I.C. 604=1930 R. 313. A vakalatnama which empowers a pleader to *file* a compromise cannot be held to empower him to *enter* into a compromise and sign it for the party. 125 I.C. 171=1930 O. 112. But *see* 58 M.L.J. 551 (P.C.). Although vakalat gives power to pleader to compromise still if the compromise is purported to be entered into not on the basis of such power, the compromise would not be binding on the client. 161 I.C. 919=1936 Cal. 68. The power to compromise a suit is inherent in the position of an advocate. The implied authority can however be countermanded by the express directions of the client. Where a legal practitioner was engaged by a pardanashin lady in an application for the appointment of receiver but it appeared that the client had in fact conferred a general authority on the counsel and was also aware of the negotiations leading to the compromise, *held,* that the advocate could compromise the suit by virtue of his implied authority and that the compromise was binding on the client. 57 I.A. 133=57 C. 1311=58 M.L.J. 551 (P.C.); 17 Lah. 456=1936 Lah. 199. But *see* 29 S. L.R. 437=163 I.C. 240=1936 Sind 59; I.L. R. (1939) Lah. 433=1939 Lah. 439 (Counsel should personally satisfy himself by reference to the lady herself whether she is agreeable to the compromise or confession of judgment).

Admissions by Legal Practitioners.—Admission of counsel on a point of law is not binding on his client. 1933 C. 513=144 I.C. 701; 144 I.C. 610; 1935 L. 71; 12 Mys.L.J. 190=39 Mys.H.C.R. 156. Any admission or concession on the part of a pleader on a pure question of law will not estop the party from questioning it in appeal or revision. 35 L.W. 393=1932 M. 409. *See also* 11 Mys.L.J. 71. An admission by counsel of a point of law, cannot be binding upon a Court and a Court need not consider itself precluded from deciding the rights of the parties on a true view of the law. 187 I.C. 770=1940 P.C. 90 (P.C.). *See also* 1938 L. 368. An admission by a counsel on a mixed question of fact and law is not final and binding on the client and the question can be re-opened on appeal when there is no question of springing a surprise on the other party. 137 I.C. 349=1932 O. 172; 151 I.C. 376=36 Bom.L.R. 334=1934 B. 156. An admission by counsel, even if it is one purely of fact, does not bind the client, if it is made under a misapprehension. 38 Bom.L.R. 1058. Although an admission by an Advocate on a point of law is not binding upon a party, if on the basis of such an admission a decree has been passed, the

NOTES.

decree is binding upon the party unless it is set aside under the procedure prescribed by law. 181 I.C. 721=20 P.L.T. 685=1939 Pat. 580.

COUNSEL'S POWER TO MAKE ADMISSION IN OR REFER TO ARBITRATION OR COMPROMISE SUITS.—A counsel's powers to make admissions in or refer to arbitration or compromise suits in which he is instructed are as follows: (1) A counsel has authority to make admissions in Court on behalf of his client on matter of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client. (2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client. (3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed. (4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. (5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point. (6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client. 1935 A.L.J. 953 =1935 All. 626. *See also* 58 B. 447=1934 B. 101; I.L.R. (1940) Kar. 467; 1940 A. L.J. 18; 185 I.C. 669; 40 P.L.R. 664=1938 Lah. 766; 1941 A.M.L.J. 80. Where the power-of-attorney expressly confers the authority to settle the suit by a compromise it is not necessary for an advocate to consult his client before entering into the compromise if he acts in good faith. 15 L. 626=151 I.C. 786 (2)=1934 L. 393. Counsel in India have the same implied authority to compromise an action as have counsel in the English Courts. But if such authority is invoked to support an agreement of compromise the circumstances must be carefully examined. In the first instance the authority is an actual authority implied from the employment as counsel. It may however be withdrawn or limited by the client; in such a case the actual authority is destroyed or restricted; and the other party if in ignorance of the limitation, could only rely upon ostensible authority. But if in fact counsel has had his authority withdrawn or restricted, the Courts will not feel bound to enforce a compromise made by him contrary to the restriction, even though the lack of actual authority is not known to the other party. 62 I.A. 196=14 P. 545=1935 P.C. 119. In an action by transferee challenging a mortgage as collusive, a compromise to the effect that mortgagee should buy out the plaintiff for agreed price, cannot be entered into by counsel as it is a *matter collateral to the suit*. 62 I.A. 196=1938 P. C. 119. Where a vakalatnama gives power to a vakil, to enter into a compromise, a compromise entered into by him is binding on his client especially when the compromise is eminently fair and reasonable one. 1933 A. 955. Where a vakalatnama given by a party to his pleader merely authorises the latter to sign a compromise petition and does not give any specific authority to the pleader to negotiate with the other party and settle the terms of the compromise, any compromise entered into by the pleader without the consent of his client, which results in a decree, must be held to be unauthorized. 41 Bom.L.R. 994=1939 Bom. 490. Where the vakalatnama which was executed by a client contained among other things the following clause *"avasyamanal* (if necessary or expedient) you are to compromise the suit or raise contest." *Held,* that to decide whether it was necessary or expedient to compromise the suit, was within the discretion of the pleader, and not the Court, and that a compromise entered into by him was binding on his client. 146 I.C. 219=38 L.W. 341=1933 M. 734.

AGREEMENT TO ABIDE BY OATH—OFFER OF SPECIAL OATH TO OTHER SIDE—CLIENT—IF BOUND.—A pleader who holds a vakalatnama which distinctly authorizes him to file a petition of compromise with or without the signature of his client, to withdraw the suit by putting in petition without the party's signature, and to take whatever steps the pleader considers necessary in the suit has clearly authority to agree to the case being decided on the oath taken by the other side in a special manner. It is not open to the party to plead that he is not bound by the act of his pleader, because he has not himself signed the oath of agreement or to say that the pleader had no authority. 182 I.C. 791=20 P.L.T. 131=1939 Pat. 222. Pleaders should be careful not to make any offer on behalf of their clients to be bound by any special oath except in the presence of the party or on express written authority to that effect. 172 I.C. 421=I.L.R. (1940) Nag. 310=1938 Nag. 64.

ABANDONMENT OF PLEA.—Counsel for the defendant definitely gave up the plea regarding limitation after the evidence of all the issues had been taken, the question was held to be one of law, that the party was not bound by the statement of his counsel and that as the opposite party was not pre-

NOTES.

judiced, the plea can be taken in appeal by the party. 1933 L. 404. *See also* 147 I.C. 95=1934 P. 25 [Abandonment of claim for damages. *See also* 25 M. 367 (P.C.)]. If counsel deliberately abandons questions which are mixed questions of law, custom and facts, it is not open to the litigant to go behind the admission and re-agitate the same points in the Court of second appeal. 13 L. 185=1932 L. 343. *See also* 1935 L. 71=16 L. 328. Where in the trial Court an *issue is not pressed by the counsel and subsequent to that there is an authoritative decision on the point,* the *party is not bound by the admission of his counsel* in the trial Court and can raise the point in appeal. 1940 O.W.N. 1249. As to power to *compromise* or *withdraw plea in income-tax proceedings,* see 1940 I.T.R. 482.

AUTHORITY TO ACT—APPEARANCE WITHOUT VAKALATNAMA—PROCEDURE.—When an accused is represented by a pleader without vakalatnama in an appeal, the proper course is to adjourn the hearing of the appeal until it is produced and thus afford the accused an opportunity of being represented by a pleader. 56 I.C. 61=21 Cr.L.J. 413. A mukhtar though appearing in trial Court cannot file an appeal unless his power of attorney authorises him to do so. Mere general words in power are not sufficient (132 I.C. 895, Dist.) 1933 L. 504. As to Advocate accepting vakalat and failing to appear at the hearing, *see* 1939 M.L.R. 16 (C.). It is ordinarily the duty of an advocate to be present, or to make suitable arrangements for the conduct of the case, and the Courts are not to be inconvenienced by the postponement of cases until the proper advocate is available. 1939 Rang. 1= 1939 Rang.L.R. 514=182 I.C. 77.

AUTHORITY — CONSTRUCTION — GENERAL POWERS FOLLOWED BY SPECIFIC INSTANCES OF SPECIAL AUTHORITY.—Per *F.B.* (*Mukerji, J., dissenting.*)—In the case of an appointment of a vakil by vakalatnama to conduct a case, it is *prima facie* implied that he has full power to conduct the case in the way he considers best and therefore such a document should be construed liberally. If the vakalatnama confers very wide powers in very general terms on the vakil, and authorizes him to conduct the case and to take other proceedings and expressly states that whatever is done by the vakil should be accepted by the litigant and then it goes on to specify certain particularly important powers like those of appointing arbitrators and compromising disputes, etc., unless there is a special clause excluding his authority to act in a particular way in the course of the suit, such an authority should be implied. The mere fact that certain important powers are emphasised in particular does not in any way derogate from the general authority conferred upon him. It follows, therefore, that when general authority to conduct a case is conferred upon a vakil and it is followed by special powers to compromise a case and to refer the dispute to arbitration, the power to abide by the oath of a witness whether under the Oaths Act or by way of an agreement or compromise is necessarily implied. 146 I.C. 84=1933 A.L.J. 1127=1933 A. 861 (F.B.).

AUTHORITY—PRESUMPTION OF—ISSUE OF NOTICE.—When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption, until the contrary is proved, that the letter is written under instructions. 144 I.C. 996=1933 R. 147.

ACTS REQUIRED FOR PROPER CONDUCT OF TRIAL—IMPLIED AUTHORITY OF PLEADER.—A counsel appearing in the case from the very nature of his duties and for the purposes of a proper conduct of the case must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witness and do such other acts which are required for the proper management and conduct of the trial. 14 Luck. 723=1939 Oudh 257.

STATUS OF BARRISTER PRACTISING AS AN ADVOCATE IN INDIA.—The right of a Barrister-at-Law to appear in the High Court or in the Courts subordinate to it arises from his enrolment as an Advocate and not otherwise. The peculiar position of a Barrister-at-Law in England disappears here on his enrolment as an Advocate; his rights, duties and disabilities are the same as those of any other non-Barrister Advocate. He can see the client, settle his fees, and act for him, with or without the intervention of a solicitor. A Barrister practising as an Advocate in the High Court can accordingly sue his client for recovery of fees due. (25 A. 509, overruled.) 55 All. 570=1933 A. L.J. 451=1933 A. 417 (F.B.).

ADVOCATES AND PLEADERS—NO DISTINCTION.—Though the methods of appointment of advocates and higher or lower grade pleaders are different and the discipline by which they are controlled arises from different sources, their duties as representing their clients are similar and the principles applying in one class of legal advisers ought to be applied in the case of another. 1939 Rang.L.R. 514=1939 Rang. 183 (S.B.).

ETIQUETTE—MEMBER OF CO-OPERATIVE SOCIETY—APPEARANCE FOR SOCIETY.—Merely because a legal practitioner is a member of a Co-operative Society he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is a member. There can be no impropriety in his doing so provided that his engagement is not directly due to his being a member. But it is improper for a legal practitioner who is a Director to appear for remuneration for the Society in its legal business. 56 M. 970=1933 M. 682=65 M. L.J. 367.

DUTIES AND OBLIGATION ON DRAFTING PLEADINGS—GRAVE AND SERIOUS ALLEGATIONS.—

NOTES.

Per *Thom, J.*—No counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness box but at the conclusion of the evidence which he has led he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led if accepted establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them he is not entitled to make grave and serious allegations. 1935 All. 425 (F. B.). Per *Iqbal Ahmad, J.*—It is in the interest of administration of justice that too rigid a test of the conduct of an advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegation in the pleadings, but it is equally their duty to embody the case of their clients in the pleadings fearlessly, provided the instructions received from the clients justify the case in the pleadings. While on the one hand a counsel is expected to be careful and not reckless in drafting the pleadings, he cannot, on the other hand assume the role of a Judge and refuse to embody allegations that his clients instruct him to make unless and until he has examined the evidence on the subject. A counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity. Per *Allsop, J.*—On the one hand counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in these interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded. 155 I.C. 1043=1935 A. 425 (F.B.).

PRIVATE PLEADER.—A District Magistrate has no authority to direct other subordinate Magistrates to exercise their judicial discretion of allowing a person to practise as a private pleader in their Courts. Any person aggrieved by the refusal of any Magistrate to allow him to appear as a private pleader in any particular case should move the High Court in revision. 16 L. W. 879=1923 M. 183. Authority to counsel "to act and appear for the party in the *trial Court or any other Court*" includes authority to present an appeal. 33 P.L.R. 34. A mukhtar though appearing in trial Court cannot file an appeal unless his power-of-attorney authorises him to do so. Mere general words in power are not sufficient. (132 I.C. 895, Dist.) 1933 L. 504.

COSTS—LIABILITY OF LEGAL PRACTITIONER FOR — CIRCUMSTANCES JUSTIFYING ORDER AGAINST PLEADER.—There is no justification for the assumption that S. 35, C. P. Code, is not intended to cover any case where the act of a legal practitioner comes within the term 'misconduct' within the meaning of the Legal Practitioners and the Bar Councils Acts. A pleader may therefore be liable for costs of the proceedings taken by him in cases where the costs occasioned to his client are the direct result of the initiation and prosecution of the proceedings by him. Where an application for review purports to be made by a pleader personally on his own behalf and not on behalf of his client the minor or his guardian, on grounds wholly untenable, there is no justification for his action and he can be asked to pay the costs personally. 1942 Oudh 279=1942 O.W.N. 68.

AUTHORITY TO APPEAR.—Counsel who has not filed any vakalat from his client has no authority to appear for him. 12 Mys.L.J. 383.

APPEARANCE OF COUNSEL AGAINST INTEREST OF HIS CLIENT—IF PERMISSIBLE.—A counsel should not be allowed to appear against the interests of a person who has briefed him at one or other stage of the case. It is absolutely necessary for taking opinion that the party should lay all his cards before the counsel concerned, and it is only after he has thoroughly gone into the facts of the case that a lawyer can be in a position to advise his client. In the circumstances it would be unfair to allow the counsel to appear against the same person later on, and an assurance on the part of that individual would also be of no avail in the matter. 1935 Pesh. 65 (1). It is undesirable for a member of the Bar to plead in a case concerning which he has a personal interest. 39 C.W.N. 274.

TRANSFER OF BRIEF—PLEADERS APPEARING FOR ANOTHER.—*As to duty of pleader to be in attendance at time of hearing of case,* see 1940 Rang. 162 (F.B.). Where a pleader appears for another who is unable at the moment to attend Court, he ought to let the Court know that he is so appearing. 33 I.C. 831=20 C.W.N. 283. As to failure of pleader to make careful arrangements for conduct of case, *see* 183 I.C. 580=1939 Rang. 262. A question relating to the rival claims of different sections of the legal prac-

NOTES.

titioners of the High Court cannot be settled by a single Judge or a Division Bench of the Court. 25 C.L.J. 401=41 I.C. 313=21 C.W.N. 654. Proceedings under the Act are *quasi* criminal, and are barred by acquittal in previous criminal proceedings. 88 I.C. 279=26 Cr.L.J. 1111=1925 R. 110.

ACCEPTING BRIEF FOR OPPOSITE PARTY AGAINST PREVIOUS CLIENT—DUTIES.—*See* 38 M. 650; 8 R. 446; 9 Mys.L.J. 166.

APPEARANCE—POWER OF COURT TO RESTRAIN —PLEADER LIKELY TO BE WITNESS IN CASE—DUTIES OF PLEADER.—That a Judge or Magistrate has authority to restrain a pleader from appearing for either party in a case, when it would be manifestly improper for the pleader to do so, cannot be gainsaid but a very strong case must be made out before an order restraining a pleader from acting in a particular case is passed. The mere *fact that the defence asserts that the pleader for the prosecution will be required as a witness for the defence,* and that the Magistrate himself thinks that he will be a material witness for the defence, are not sufficient grounds for restraining the pleader from appearing in the case for the prosecution. A pleader who is conducting a case is nevertheless a competent witness therein and there is no harm in his giving evidence in a case in which he is appearing. But it is desirable that a pleader should not appear in a case if he knows or has reason to believe that he will be an important witness in the case. If he accepts the brief not knowing or having reason to believe that he will be such a witness but discovers subsequently that he is a witness on a material question of fact, he should retire from the case. 1939 Rang.L.R. 224=1939 Rang. 342. Accused has a right to choose any advocate he wants. Prosecution cannot fetter that choice by summoning the advocate as a witness. On the other hand the Court is bound to sec that the administration of justice is not in any way embarrassed. If an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by doing so he will embarrass the Court or the client. If a Court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate who has been called as a witness by the other side, and if, notwithstanding the Court's expression of its opinion, the advocate refuses to withdraw, in such a case the Court has inherent jurisdiction to require the advocate to withdraw. But the prosecution or the party calling the opposite party's advocate as a witness must in such a case establish to the satisfaction of the Court that the trial will be materially embarrassed if the advocate continues to appear as advocate for his client. 41 Bom.L.R. 282=1939 Bom. 150. *See also* 48 L.W. 276=(1938) 2 M.L.J. 446.

FEES.—When an Advocate enters into a contract with his client, it is appropriate that in order to avoid any future misunderstanding as to the amount of the fees to be charged for various works, there should be a clear written contract between the parties and the amount charged should be clearly mentioned and agreed to by the client. 1936 A.L.J. 300=1936 All. 359 (F.B.). Before relationship of advocate and client arises by concluding a contract of service, it is open both to the client and the advocate to bargain for services in such methods as may deem proper. But after the relationship arises, the advocate should not use his privileged and responsible position to obtain anything more than a fair and just remuneration. 1937 Rang. 299. In India as at English Common Law, a solicitor has a *particular lien* which does not depend on actual possession of the property, as distinguished from possessory lien. This lien is not liable to be defeated on the ground that the assignee of a decree or the attaching creditor of the solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of a solicitor's lien. (51 B. 855, Foll.) 60 M.L.J. 133=1931 M. 183. *See also* 1940 Cal. 179=I.L.R. 1939) 1 Cal. 212=43 C.W.N. 290 (This lien is not defeated by the insolvency of the party). The lien of an attorney or solicitor is really an equity claimed on his behalf and is subject to all the equities between the attorney's client and any other party or parties interested in the property over which the lien is claimed. An attorney has no higher rights than his client. A plaintiff's right to set-off costs payable to him by the defendant against the sum found due from him to the defendant on the taking of accounts in the same suit is not affected by the defendant's solicitor's lien. The Courts in India have complete discretion to allow a set-off, whether in the same action or in different actions, and it extends to the setting off of costs against costs and also in a proper case to the setting off of debt or damages against costs and *vice versa*. The discretion has to be exercised judicially, having regard to the facts and circumstances of each case. The circumstances considered by the Court are matters relating to the attorney whose lien is sought to be affected irrespective of his client because as between the parties themselves there can hardly be a ground for resisting a set-off. After a set-off has already been allowed an attorney's lien is not protected. 41 Bom.L.R. 1091=I.L.R. (1940) Bom. 692=1939 Bom. 518. Where a *solicitor is engaged by the next friend* of a minor plaintiff, the client is the next friend and not it is to the next friend, and not to the minor, that the solicitor looks for his costs. Though the solicitor has a *lien enforcible against the next friend, the lien does not exist against the minor.* Where, therefore, there is a change of next friend and a new next friend comes in, the

NOTES.

solicitor engaged by the former next friend is bound to hand over to the new next friend the papers and documents, etc., though he may not have received his costs of the suit from the old next friend. He cannot withhold the documents, etc., from the new next friend by pleading his lien. I.L.R. (1938) Bom. 749=40 Bom.L.R. 694=1938 Bom. 418. General and special lien distinguished, *see* 34 Bom.L.R. 703. The solicitor's lien never precludes a fair and honest arrangement between the parties unless the solicitor is in a position to prove that there was a fraudulent intention on the part of the plaintiff and defendant to cheat him of the costs payable to him by the party. 34 Bom.L.R. 721. Nature of an advocate's lien, *see* 55 M. 455=62 M.L.J. 185. The question whether an attorney's lien should or should not be allowed to intercept a set off between the parties to the suit is in India a matter of discretion. The lien has no overriding priority. 34 Bom.L.R. 1429=1932 B. 619. The sum deposited by a party under O. 45, R. 7, C.P. Code, to be available for the payment of the costs of the respondents in case their Lordships of the Privy Council ordered such costs to be paid is not the subject-matter of dispute or the part of the action and therefore after the appeal is allowed a lien cannot be claimed on that amount by a legal practitioner appearing for the appellant before the High Court. *Quaere.*—Whether an Advocate is entitled to claim the same lien which an ordinary Solicitor would be entitled to in any land. 1932 A.L.J. 764=1933 A. 3. Pleader's fees are to be allowed to a party on the basis of what is actually paid, or what might reasonably have been paid, whichever is less. 1928 N. 289=111 I.C. 843. A pleader including in his fee certificate the fee promised but not actually paid to him, under a misapprehension of law and not dishonestly cannot be said to be guilty of misconduct. 58 A. 307=38 Bom.L.R. 731=40 C.W.N. 933=1936 P.C. 176=71 M.L.J. 631 (P.C.). There may be cases in which the fee due to a vakil may be adjusted otherwise than by actual payment of money. Such an adjustment, however, should be something more than a mere agreement to pay. When a promissory note, especially, a negotiable instrument, is given, it may be equivalent to payment. A certificate may not be dishonest even if no fee was received and it may be too strong an expression to describe such a certificate as a false certificate. It is doubtful if Note (*ii*) to R. 30 of the Legal Practitioners' Rules is strictly correct. 30 L.W. 977=57 M.L.J. 780. *Fees of junior counsel*—Two-thirds scale adopted for taxation purposes. *See* 58 C. 505=1931 C. 523. According to the rules, only such sum can be taxed as legal practitioner's fee as has been actually paid and certified by the legal practitioner to whom it has been paid. Where a receiver of an insolvent's estate who happens to be a legal practitioner conducts his own case and does not pay any fees to any legal practitioner, the Court cannot direct any legal fees to be taxed as costs. 163 I.C. 831=1936 A.L.J. 698=1936 All. 489. Where several pleaders are engaged by a party to a litigation, in the absence of any agreement as to the amount of their fees, each pleader is entitled to his fees up to the full fee assessed at the hearing. It is not the rule that all of them should divide among them a single hearing fee of the amount assessed as pleader's fee in the case. 20 Pat.L.T. 352=18 Pat. 213. Where undue *influence* is not apparent, and a *solicitor has agreed to accept taxed costs in the event of success so as to lighten the burden on his client in the event of failure,* the agreement cannot be looked upon with disfavour, and the Court will respect the terms of such an agreement of employment. Where a solicitor for a respondent to a Privy Council appeal agrees to accept a reduced fee, stipulating that in the event of the client's success in the appeal he should be paid the full taxed costs that agreement cannot be regarded as invalid or unenforceable either in practice or in law. It is competent to the solicitor to recover the amount covered by his bill of costs from the amount of security deposited by the appellant. The High Court has power to pass a summary order directing payment out of such amount to the solicitor to whom costs are due from the respondent. I.L.R. (1939) Bom. 307=41 Bom.L.R. 410=1939 Bom. 250. Where there is an agreement to pay a Counsel a certain sum for his fee, and a certain sum as his *munshi's* remuneration, the Counsel is clearly entitled to sue for his fee and also for the *munshiana*. 40 P.L.R. 12=1938 Lah. 306.

SUIT FOR ACCOUNTS.—Even if there is no "general agency" between a counsel and client, nevertheless a suit for accounts can be maintained by the client against his counsel in respect of the moneys entrusted to the latter in the several suits in which he was engaged. (50 M. 249, Foll.). 140 I.C. 564=33 P.L.R. 1074=1933 L. 60.

TRANSACTIONS BETWEEN ADVOCATE AND CLIENT.—A pleader advanced moneys to his client and obtained a mortgage in favour of his son. In a suit on the mortgage it is incumbent on the plaintiff to prove utmost good faith; and all evidence regarding it should be preserved. Pleaders who deal with their clients must take care not only that the transaction is fair, but also that they are in a position to prove that it was fair. 1936 O.W.N. 1033=164 I.C. 945. Transactions of mortgage between a solicitor and client to secure the repayment of money advanced at the time are not ordinarily subjected by Courts to the same jealous scrutiny as, for instance, a gift from a client to a solicitor, or purchases or sales at under-value between a solicitor and client. If the money was sorely needed and was paid, the mortgagor had its benefit, the rate

2. [*Repeal of enactments*] *Rep. by the Repealing Act* (I *of* 1938), S. 2 and Sch.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

NOTES.

of interest was reasonable and the terms neither excessive nor onerous there is no reason why the transaction should not stand as a valid mortgage between the parties. 191 I.C. 94=52 L.W. 777=1940 P.C. 204 (P.C.). R. 13 of the rules of Court framed under the Legal Practitioners Act prohibits a practitioner from purchasing any interest in any decree either from their clients or any other person. Such a purchase, and execution of such a decree for a sum known to him to be in excess of that which was actually due, amount to a grave professional misconduct. I.L.R. (1938) Mad. 399=1938 Mad. 276 (F.B.). Where the relationship between legal practitioner and his client becomes that of debtor and creditor, the pleader being allowed to retain and use the client's money as a loan, failure by the debtor to pay the money on demand does not amount to professional misconduct. Lawyers should not, except in very exceptional cases, accept loans from their clients. Where a lawyer has withdrawn money for a client and has been permitted to retain it, a document evidencing the transaction should in every case be drawn up. It is essential, in cases where the relationship of pleader and client has been changed to one of debtor and creditor, that the clearest evidence of such a change should be obtainable. But once the relationship of pleader and client is changed into one of debtor and creditor, no question of misconduct can arise, because failure by the debtor to pay the money on demand does not amount to professional misconduct. To borrow money from the client who places confidence in the pleader, when the latter is aware that it would be extremely difficult for him to repay it is most reprehensible. No lawyer should ever borrow money from a client unless he is sure that he can repay it when the client demands repayment. 18 Pat. 580=20 P.L.T. 607=1939 Pat. 343 (S.B.).

OBLIGATION OF COUNSEL NOT TO MAKE STATEMENTS BASED ON SURMISES.—When counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification and it is an honourable obligation of the Bar and of great value in the administration of justice. It is therefore improper on the part of Counsel to make statements of fact before the Court which are based on mere surmises or guesses. I.L.R. (1940) Kar. (F.C.) 52=(1940) 1 M.L.J. (Supp.) 28.

Sec. 3: LEGAL PRACTITIONER.—The right of a Barrister-at-Law to appear in the High Court or in the Courts subordinate to it arises from his enrolment as an Advocate and not otherwise. The peculiar position of a Barrister-at-Law in England disappears here on his enrolment as an Advocate; his rights, duties and disabilities are the same as those of any other non-Barrister Advocate. He can see the client, settle his fees, and act for him, with or without the intervention of a solicitor. A Barrister practising as an Advocate in the High Court can accordingly sue his client for recovery of fees due. (25 A. 509, overruled.) 55 A. 570=1933 A. 417=1933 A.L.J. 451 (F.B.).

SOLICITOR—PERSONAL LIABILITY FOR COSTS.—Once a solicitor is on record, the opposing party is entitled to look to him, if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. (Case-law discussed.) 145 I.C. 641=1933 B. 317=35 Bom.L.R. 554.

CARE IN CHOOSING CLERKS—CHECK ON THEM.—There is a duty cast upon members of a monopolist profession, like the legal profession, to exercise care and due diligence in the persons whom they employ, and if they choose to employ a person known by them to be irresponsible without taking adequate steps to keep a close personal check upon his actions, then they are themselves at fault and will become liable to be called to account. 1938 Nag. 370.

TOUT.—To declare a person a tout it must be proved that he gets the employment in any legal business from any practitioner for moving for such practitioner. Merely looking after people's cases and writing petitions does not make a person a tout. 62 I. C. 829=22 Cr.L.J. 589. A person to be a tout must have been paid or proposed to be paid for bringing a client. 6 P. 567=102 I. C. 340=1927 P. 282. *See also* 28 I.C. 918. A munsif may refuse to recognize a person as pleader's clerk, if he be not a *bona fide* clerk. 10 C.W.N. 49. If the enquiry is entrusted to a Subordinate Court it is the Subordinate Court which must be satisfied that the person proved to be a tout. Where the Joint Magistrate held on enquiry that the person was not a tout but the District Magistrate without further enquiry and without notice to the party declared him a tout, *held,* that the order was illegal. 1930 A.L.J. 961=1930 A. 641. It is a reasonable and legitimate inference of fact that if a man attends Court every day, works after the cases of clients, even pays to pleaders and realizes costs and engages pleaders and also realizes their fees, he is not rendering gratuitous service such as a casual friend or acquaintance may do. 56 C. 800=115 I.C. 602 (2)=1929 C. 196.

"Judge" means the presiding judicial officer in every Civil and Criminal Court, by whatever title he is designated:

"Subordinate Court" means all Courts subordinate to the High Court, including Courts of Small Causes established under Act No. IX of 1850[1] or Act No. XI of 1865:[2]

"Revenue office" includes all Courts (other than Civil Courts) trying suits under any Act for the time being in force relating to landholders and their tenants or agents:

"legal practitioner" means an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue agent:

[3] ["tout" means a person—

(*a*) who procures, in consideration of any remuneration moving from any legal practitioner, the employment of the legal practitioner in any legal business; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or

(*b*) who for the purposes of such procurement frequents the precincts of Civil or Criminal Courts or of revenue-officers, or railway stations, landing stages, lodging places or other places of public resort].

CHAPTER II.

OF ADVOCATES, VAKILS AND ATTORNEYS.

Advocates and Vakils.

4. Every person now or hereafter entered as an advocate or vakil on the roll of any High Court under the letters patent constituting such Court or [4][under section 41 of this Act], [5][or enrolled as a pleader in the Chief Court of the Punjab under section 8 of this Act], shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered, and in all revenue-offices situate within the local limits of the appellate jurisdiction of such Court, subject, nevertheless, to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or revenue-agents; and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, [6][or in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act] in any High Court on whose roll he is not entered, and in any revenue-office:

Provided that no such vakil [7][or pleader] shall be entitled to practise under this section before a Judge of the High Court, Division Court or High Court exercising original jurisdiction in a Presidency-town.

LEG. REF.

[1] Now Act XV of 1882.
[2] Now Act IX of 1887.
[3] Substituted by Act XV of 1926, S. 2.
[4] Substituted by Act IX of 1884, S. 2.
[5] Inserted by Act I of 1908, S. 2 (*a*).
[6] Inserted by the Bar Councils Act, XXXVIII of 1926, S. 19 and Sch.
[7] Inserted by Act I of 1908, S. 2 (*b*).

NOTES.

ATTORNEY—CHANGE BY LITIGANT—RIGHT OF ATTORNEY IN RESPECT OF COSTS.—A litigant has the right to employ any attorney he likes and to change him for another attorney in the course of the same proceeding if he so wishes, provided that he does not thereby cause delay or injustice to any other party or inconvenience to the Court. If he has not paid costs to the attorney whom he wishes to discharge that would affect his right to obtain papers and documents on which the attorney might claim a lien for his unpaid costs. But it is not open to an attorney to say that his client shall continue to employ him in the suit or proceeding until all the costs due to him are paid. 35 Bom.L.R. 298=1933 B. 182. No order for change of attorney should be made unless provision is made for payment of costs

Attorneys of High Court.

5. Every person now or hereafter entered as an attorney on the roll of any High Court shall be entitled to practise in all the Courts subordinate to such High Court and in all revenue-offices situate within the local limits of the appellate jurisdiction of such High Court, and every person so entered who ordinarily practises in the Court on the roll of which he is so entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court established by Royal Charter on the roll of which he is not entered and in any revenue-office.

The High Court of the province in which an attorney practises under this section may from time to time, make rules declaring what shall be deemed to be the functions, powers and duties of an attorney so practising.

NOTES.

to the attorney subject of course to this that no such provision will be made where the attorney has by his own conduct or misconduct discharged himself. 60 C. 1273=37 C.W.N. 998.

ATTORNEY—LIEN—KINDS OF—PASSIVE OR RETAINING LIEN—NATURE OF.—The rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been diminished or increased by statute. A solicitor in England is entitled to three kinds of lien to protect his right to recover his costs from his client, namely: (*i*) a passive or retaining lien; (*ii*) a common law lien on property recovered or preserved by his efforts; (*iii*) a statutory lien enforceable by a charging order. Indian statutory law contains no provision for the last mentioned lien but the other two kinds of lien are available in India. The lien on property recovered or preserved by the efforts of the solicitor is a particular lien and not a general lien and it is not available for the general balance of account between the attorney and his client but extends only to the costs of recovering or preserving the property in suit. The passive or retaining lien is not affected or curtailed by S. 171 of the Contract Act. This lien enures in favour of the solicitor in respect of all deeds, papers or other personal chattels which come into his possession in the course of his professional employment. This is a general lien but with reference to moneys recovered by the solicitor for his client, he has no such *general* lien. Whether he obtains possession of the money which is the fruit of his exertions or whether it is still in deposit in Court, in either case, his lien or right to be paid out of those funds is confined to the costs incurred in respect of those funds, subject only to this, that he has the ordinary rights of set off which one creditor has against another. 60 C. 1442=149 I.C. 331=1934 C. 341.

Secs. 3 and 4.—Where the fee payable is not settled with the client under S. 3, then under S. 4 the pleader is entitled only to such fee as would come to on computation, in accordance with the law for the time being in force in regard to the computation, of the costs to be awarded to a party in respect of the fee of his legal practitioner. 1931 P. 137=9 P. 865.

"PRACTICE".—Includes right to appear, plead and act. 4 P. 766. Vakils have no right of audience in the Insolvency Court at Presidency-town of Madras. 48 M. 331=1925 M. 385=48 M.L.J. 36 (F.B.). S. 4 was not intended to override the special provisions relating to insolvency in the Presidency-town. 48 M. 331. Insolvency Court is not subordinate to High Court. 48 M. 331. Vakil of Allahabad High Court admitted as first grade pleader in Oudh, effect of. 89 I.C. 187=1925 O. 412. When there are several gentlemen retained by a client in the same vakalatnama, each of the vakils is entitled to claim from his client the full fee stipulated for by him and not merely a share in the single fee allowed as against the losing party. 9 P. 865=1931 P. 137. In Burma an Advocate is not precluded from suing for his fees. 1930 R. 243. A client engaged a pleader and filed a vakalatnama in his favour but it was not signed by the pleader. *Held,* that, whether the vakalatnama has been signed or not, the pleader is entitled to his remuneration for the work done by him on the principle of *quantum meruit*. 1931 P. 137=9 P. 865.

Sec. 5.—An attorney acting for a firm and having the power to conduct a suit has no power to refer a matter to arbitration unless he is authorised specifically for that purpose. 36 C.W.N. 8=1932 C. 343. The retainer of an attorney ordinarily comes to an end when the suit is ended. After the suit is over the attorneys are *ipso facto* discharged so far as the suit is concerned and would need fresh authority from their clients to act for them in execution proceedings. 138 I.C. 320=34 Bom.L.R. 615=1932 B. 337. If a suit has been compromised by the guardian *ad litem* improperly without the leave of the Court, that may be a ground for appropriate proceedings by the minor on attaining majority or by another guardian during minority. But the attorneys who received their instructions from the guardian cannot go behind them and continue to represent the minor. 34 Bom.L.R.

CHAPTER III.

OF PLEADERS AND MUKHTARS.

Power to make rules as to qualifications, etc., of pleaders and mukhtars.

6. The High Court may, from time to time make rules[1] consistent with this Act as to the following matters (namely) :—

(*a*) the qualifications, admission and certificates of proper persons to be pleaders of the subordinate Courts, and of the revenue-offices situate within the local limits of its appellate jurisdiction, and, in the case of a High Court not established by Royal Charter [2][in respect of which the Indian Bar Councils Act, 1926, is not in force] of such Court;

(*b*) the qualifications, admission and certificates of proper persons to be mukhtars of the subordinate Courts, and, in the case of a High Court not established by Royal Charter, [2][in respect of which the Indian Bar Councils Act, 1926, is not in force] of such Court;

(*c*) the fees to be paid for the examination and admission of such persons; and

(*d*) suspension and dismissal of such pleaders and mukhtars.

Publication of rules.

All such rules shall be published in the Official Gazette, and shall thereupon have the force of law: provided that, in the case of rules made by a High Court not established by Royal Charter, such rules have been previously approved by the Provincial Government.

Certificates to pleaders and mukhtars.

7. On the admission, under section 6, of any person as a pleader or mukhtar, the High Court shall cause a certificate, signed by such officer as the Court, from time to time appoints in this behalf, to be issued to such person, authorizing him to practise up to the end of the current year in the Courts and, in the case of a pleader, also the revenue-offices specified therein.

At the expiration of such period, the holder of the certificate, if he desires to continue to practise, shall, subject to any rules consistent with this Act which may, from time to time, be made by the High Court in this behalf, be entitled to have his certificate renewed by the Judge of the District Court within the local limits of whose jurisdiction he then ordinarily practises, or by such officer as the High Court, from time to time, appoints in this behalf.

LEG. REF.

[1] For rules made under this section, *see* the various Local Rules and Orders.

[2] Inserted by the Bar Councils Act, XXXVIII of 1926, S. 19 and Sch.

NOTES.

614=138 I.C. 312=1932 B. 401 (1). Per *C. C. Ghose, J.*—Where an attorney has employed a counsel under the authority given to him by the party in the retainer filed in the Court he is bound to pay the fees paid to the counsel on taxation. It is only when the client has instructed the attorney not to brief a particular counsel that the client would be under no obligation to pay fees paid to that particular counsel. 52 C. L.J. 197=1930 C. 651 (F.B.). *See also* I.L.R. (1939) Kar. 422=1939 Sind 125 (right to sue for fees). As to *taxation of costs,* see also 1932 A.L.J. 272. As to *practice regarding change of attorney,* see 1932 B. 363=34 Bom.L.R. 703; 35 Bom.L. R. 298=1933 B. 182. It is the duty of a solicitor entrusted with the moneys of his client for investment, before investing the amount upon the mortgage of a farm, to have a proper valuation made. If he chooses to rely mainly on his own general knowledge of farms in his vicinity, he does so at his own risk and if his judgment is shown to have been at fault he is liable for the loss traceable to his breach of duty to his client. 1932 P.C. 194=137 I.C. 531 (P.C.). Mere presence in Court of the client, when he does not make his presence known to the Counsel, does not affect the ostensible authority of the Counsel, who can compromise the suit without consulting his client. 59 C. 31=35 C.W.N. 674=1932 C. 231.

Sec. 7.—Renewal of certificate cannot arbitrarily be refused. *See* 13 C. W. N. 415=1 I.C. 334. The High Court has not delegated to District Judges the power to suspend legal practitioners pending the receipt of their renewed certificates. Any order in regard to suspension must proceed from the High Court. So an order of the District Judge suspending a practitioner pending the receipt of his renewed certificate is illegal. 54 M. 574=1931 M. 688=60 M.L.J. 588.

On every such renewal, the certificate then in possession of such pleader or mukhtar shall be cancelled and retained by such Judge or officer.

Every certificate so renewed shall be signed by such Judge or officer, and shall continue in force up to the end of the current year.

Every Judge or officer so renewing a certificate shall notify such renewal to the High Court:

[1][Provided that, on the admission as a pleader of any person who has been previously entered as a Vakil or attorney on the roll of a High Court established by Royal Charter, the High Court may, in its discretion, issue to such person a certificate authorizing him to practise permanently in the Courts, and in the offices specified therein, and a certificate so issued shall not require to be renewed under this section.]

Pleaders on enrolment may practise in Courts and revenue-offices.

8. Every pleader holding a certificate issued under section 7 may apply to be enrolled in any Court or revenue-office mentioned therein and situate within the local limits of the appellate jurisdiction of the High Court by which he has been admitted; and, subject to such rules[1] consistent with this Act as the High Court or the Chief Controlling Revenue authority may, from time to time, make in this behalf, the presiding Judge or officer shall enrol him accordingly, and thereupon he may appear, plead and act in such Court or office and in any Court or revenue-office subordinate thereto.

Mukhtars on enrolment may practise in Courts.

9. Every mukhtar holding a certificate issued under section 7 may apply to be enrolled in any Civil or Criminal Court mentioned therein and situate within the same limits; and, subject to such rules as the High Court may from time to time make in this behalf, the presiding Judge shall enrol him accordingly; and thereupon he may practise as a mukhtar in any such Civil Court and any Court subordinate thereto, and may (subject to the provisions of the Code of Criminal Procedure)[2] appear, plead and act in any such Criminal Court and any Court subordinate thereto.

No person to practise as pleader or mukhtar unless qualified.

10. Except as provided by this Act or any other enactment for the time being in force, no person shall practise as a pleader or mukhtar in any Court not established by Royal Charter unless he holds a certificate issued under section 7 and has been enrolled in such Court or in some Court to which it is subordinate:

Revenue-agents may appear, plead and act in Munsiffs' Courts in suits under Bengal Act VIII of 1869.

Provided that persons who have been admitted as Revenue-agents before the first day of January, 1880, and hold certificates, as such, under this Act in the territories administered by the Lieutenant-Governor of Bengal, may be enrolled in manner provided by section 9 in any Munsif's Court in the said territories, and on being so enrolled may appear, plead and act in such Court in suits under Bengal Act VIII of 1869[3] (*to amend the procedure in suits between Landlord and Tenant*) or under any other Act for the time being in force regulating the procedure in suits between landholders and their tenants and agents.

LEG. REF.

[1] Inserted by Act I of 1908, S. 3.

[1] For rules made by the High Court at Madras, *see* those quoted in the footnote on previous page, which were also made under S. 8. For rules by the Chief Court, Punjab, *see* Punj. R. and O.

[2] Now Act V of 1898.

[3] *See* now Bengal Tenancy Act (VIII of 1885).

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Sec. 8.—Appellate jurisdiction, meaning of. *See* 24 A. 348 (F.B.).

Power to declare functions of Mukhtars.

11. Notwithstanding anything contained in the Code of Civil Procedure[1] the High Court may, from time to time, make rules declaring what shall be deemed to be the functions, powers and duties of mukhtars practising in the subordinate Courts, and, in the case of a High Court not established by Royal Charter, in such Court.

Suspension and dismissal of pleaders and mukhtars convicted of criminal offence.

12. The High Court may suspend or dismiss any pleader or mukhtar holding a certificate issued under section 7 who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or a mukhtar, as the case may be.

LEG. REF.

[1] Now Act V of 1908.

NOTES.

Sec. 12: SCOPE OF SECTION.—The High Court has jurisdiction under this section to take action against a pleader who has been convicted of a criminal offence, though the offence was not one committed in his professional capacity. 59 M. 732=1936 Mad. 318=70 M.L.J. 498 (F.B.). The use of word "may" in S. 12 after the words "the High Court" shows that the discretion of the High Court in each particular case is absolute. 33 C.W.N. 829=1929 C. 771. It is not sufficient for the applicability of the section that the pleader has been convicted of a criminal offence. Though the Court cannot in the exercise of its disciplinary jurisdiction question the propriety of the conviction, it has yet to inquire into the nature of the crime in order to decide whether the offence was such as to imply defect of character rendering him unfit to continue in the profession. 12 Pat. L. T. 773=1931 P. 369 (F.B.). *See also* 1938 Rang. 394; 1938 Rang. 125. Where a legal practitioner has been convicted of a criminal offence and his case is sent to the Bar Council for enquiry to determine if any disciplinary action was called for, the Bar Council should merely record the conviction and should call on the legal practitioner to show cause why action should not be taken against him. It is not open to it to justify the action of the legal practitioner. 1938 Rang. 394. A legal practitioner was convicted of criminal breach of trust and abetment thereof, in respect of certain monies of a client. It was found that he was to a certain extent the victim of his senior. He paid the amount of defalcation after his conviction. High Court in consideration of the fact that he was victim of circumstances and had expressed his repentance and assured to lead honourable life, suspended the practitioner for one year. 33 C.W.N. 829=1929 C. 771. S. 12 has no application unless the conviction alone shows the convict to be unfit to be a pleader. 27 N.L.R. 29=1931 N. 33 (S.B.). The words "criminal offence" used in S. 12 mean an offence punishable under Penal Code as well as any act or omission made punishable by any law for the time being in force which is indictable and punishable criminally by Courts of justice. 12 Pat.L.T. 773=1931 P. 369 (F. B.). S. 12 contains no implication that disciplinary action against a pleader convicted of an offence cannot be based on his conduct when such conduct includes the commission of any offence for which he has been punished. Disciplinary action is not taken by way of punishment, but on consideration whether the person formerly admitted to practice is a proper person to continue to practise or not. No one can be admitted to practice until he makes a solemn declaration, and the inference is that one who has contravened this declaration and is likely to do so in future is not such a person. The fact that the motive of the pleader in taking part in a Civil Disobedience movement was to draw attention to the dissatisfaction with the forest policy of Government is no justification nor is the fact he was only a participant and not a leader in the movement material in considering the necessity for disciplinary action. 27 N.L.R. 29=1931 N. 33 (S. B.). A pleader who was 60 years old and who had been of unblemished character was convicted under S. 409, I. P. Code for embezzlement of client's money. *Held,* that the pleader was liable to be removed from the rolls notwithstanding his age and previous good character. 1938 Rang. 288. *See also* (1939) 2 M.L.J. 632; 176 I. C. 752. But *see* 165 I.C. 601=1936 Lah. 717. A pleader is not entitled to go behind the conviction in order to show that his conviction was not justified either in law or on facts and that he committed no offence. 27 N.L.R. 29=1931 Nag. 33 (S.B.). Conviction of legal practitioner is sufficient without any further enquiry to justify the High Court in taking proceedings under S. 12. It is not permissible to go behind the conviction and the pleader cannot be allowed to have indirect appeals, against the judgment of conviction. 1929 C. 771; 59 M. 732=1936 M. 318=70 M.L.J. 498 (F. B.). Though it is not incompetent for the High Court to deal under Art. 8, Letters Patent, with charges of a criminal nature against a practitioner unless and until these have been investigated by a Criminal Court, it is eminently fitting that in such cases the criminal prosecution should precede any disciplinary decision. 58 I.A. 152=53 A. 183=61 M. L.J. 130 (P.C.). The charges of profes-

NOTES.

sional misconduct must be clearly proved and should not be inferred from mere ground of suspicion however reasonable or from what may be a mere error of judgment or indiscretion. 1939 R.D. 641 (2)=1940 A. W.R. (B.R.) 5 (1). Where the allegations against a legal practitioner amount to a criminal charge, the proper procedure is to prosecute him criminally in the first instance before bringing proceedings under the Legal Practitioners Act. Otherwise he is likely to be prejudiced inasmuch as these are summary proceedings in the nature of a summons trial. 178 I.C. 456=I.L.R. (1938) 2 Cal. 138=1938 Cal. 783. *See also* 54 M. 857=61 M.L.J. 148 (F.B.).

Conviction of Pleader—Conviction by a Foreign Court.—The conviction of a legal practitioner for perjury is good ground for striking off his name from the roll of practitioners. Where the *conviction is by a foreign Court,* but the law is the same as in India and there has been a fair trial, the same principles will apply. An *order of disbarment is not conclusive for all time; if circumstances change and the Court is convinced that the delinquent has been brought to a higher sense of honour and duty, the order can be cancelled.* Disbarment of a member of the English Bar by the Benchers of his Inn does not *ipso facto* lead to his being struck off the rolls of an Indian High Court. The matter would have to be decided under the discretion given by the Letters Patent. 45 M.L.J. 639=46 M. 903=1924 M. 265 (F.B.). Legal practitioners are officers of the Court and it is their clear duty to respect law themselves and to get it respected by others. If a *legal practitioner disobeys an order promulgated by a public servant lawfully empowered to promulgate such order,* his action amounts to defiance of law, and he is, therefore, liable to be dealt with under the disciplinary jurisdiction of the High Court. 42 P. L. R. (J. and K.) 77.

No Distinction on principle can be made between political offences and other kinds of law-breaking.—Pleader convicted of waging war against the King under S. 121, I. P. Code has 'defect of character' which unfits him to continue in practice. 59 M. 732=1936 M. 318=70 M.L.J. 498 (F. B.). Where a pleader wilfully breaks the law upon one or two isolated occasions it may not be necessary for the Court to take any action under S. 12 of the Legal Practitioners Act. Where, on the other hand, it is shown that the pleader has wilfully and habitually broken the law, then the Court may quite reasonably come to the conclusion that his acts imply such a defect of character as to render him unfit for practice as a pleader and in such a case the Court may dismiss him from practice. Where the acts of the pleader fall midway between the two extremes, then the Court may take a more lenient view and may think it sufficient to warn the pleader by inflicting upon him a period of suspension or otherwise, that if he persists in breaking or defying the law, such conduct will inevitably lead the Court to the conclusion that he is totally unfit to practise in the Courts which have been established to enforce the law. 38 C.W.N. 276. A pleader was prosecuted three times and convicted twice for semi-political offences. *Held,* that the case fell within the mediate position and warning with suspension was sufficient. 35 Cr.L.J. 592=148 I. C. 57=1934 C. 242 (2). An order binding over a pleader under S. 118, Cr. P. Code, may not be a conviction for an offence. But a pleader who is convicted under S. 17 (2) of the Criminal Law Amendment Act is guilty of nothing short of an open and defiant violation of law. Seeing that it is the duty of the members of the legal profession to assist the Courts to maintain and enforce obedience to law, such conduct in a pleader is such a defect of character as would unfit him to be a pleader, and make him liable to action under S. 12 of the Act. 152 I.C. 943=1934 C. 808. Where a pleader was convicted under the Defence of India Rules for uttering a slogan to the effect that none should assist the British Government in their war efforts as it was the duty of everybody to resist all wars by non-violence. *Held,* that in the circumstances of the case the exercise of disciplinary jurisdiction under S. 12 was not called for. 46 C.W.N. 405. In order to see whether disciplinary action under S. 12 of the Legal Practitioners Act should be taken against a pleader who has been convicted under R. 38 read with R. 34 (6) *(e)* of the Defence of India Rules, 1939, the Court must not merely accept the fact that he has been convicted but must consider the material upon which he has been convicted. Where the speech for which he has been convicted incites others to break the law which it is the duty of the Courts to administer, and to do acts tending to subvert order, the Court is entitled to take disciplinary action against him. I.L.R. (1941) Lah. 736 (F.B.).

Illustrations.—*Per* Mitter, J.—Where a pleader has been convicted of criminal offences for misconduct committed strictly in his professional character that *prima facie* renders him unfit to be a member of the profession. That however does not mean that wherever a pleader has been so convicted the Court is bound to strike him off the rolls. The use of the word "may" in S. 12 shows that the discretion of the Court is absolute. 33 C.W.N. 829. Contempt of Court by pleader in his capacity as a suitor can be punished professionally. 1933 A.L.J. 251= 1933 A. 224; *see contra* 1932 A. 492 (S.B.). Conviction under S. 288, I. P. Code for improper behaviour and using improper words to a Magistrate was held to render pleader liable to suspension for 3 months. 162 I.C. 534=1936 Rang. 175. Conviction

Suspension and dismissal of pleaders and mukhtars guilty of unprofessional conduct.

[1][13. The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid—

LEG. REF.

[1] Substituted by Act XI of 1896, S. 2.

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under Burma Village Act for not removing stack of hay from the pleader's compound, does not involve any defect of character which unfits him to practise. 162 I.C. 534 =1936 Rang. 175.

TEMPORARY MISAPPROPRIATION.—1925 C. 238. Conviction under the Salt Act for certain activities in pursuance of Civil Disobedience. 12 P.L.T. 61. A pleader convicted under S. 3, Police Incitement to Disaffection Act and under S. 17, Criminal Law (Amendment) Act. 134 I.C. 945=12 Pat. L.T. 773=1931 P. 369 (F.B.). The mere fact of conviction of any criminal offence implying moral turpitude can be a sufficient basis in law for an order of suspension or dismissal of a pleader or mukhtar only but not of a vakil whose cases of misconduct are not provided for by the Legal Practitioners Act, but by paragraph 8 of Letters Patent. 8 O. W. N. 267=1931 O. 161 (F.B.).

CONVICTION FOR KEEPING A COMMON GAMBLING HOUSE.—42 M. 111=35 M.L.J. 650 =48 I.C. 341 (S.B.). The conviction of a pleader under the Gambling Act can hardly be looked upon by itself as sufficient reason for disciplinary action. 1929 R. 352. But *see* 42 M. 111=35 M.L.J. 650.

CONVICTION FOR CONDUCTING LOTTERY.—A pleader of good character and about thirty years of age, who was permitted to engage in business barked upon a scheme which the Courts decided was nothing less than a lottery and the pleader was convicted for taking part in the lottery. When the question came before the High Court whether he should be debarred from practising as a pleader. *Held*, that the pleader behaved very foolishly in acting as he did, but taking into consideration his young age, his name should not be struck off the register. 164 I.C. 350=37 Cr.L.J. 1118=1936 Rang. 382.

Secs. 12 and 13.—The High Court can act upon the report submitted to it by the District and Subordinate Courts or *suo motu* take action for either suspension or dismissal of a pleader. 12 Pat.L.T. 773=1931 P. 369 (F.B.).

Secs. 12 to 14: DISCIPLINARY JURISDICTION—HIGH COURT'S DISCRETION—IF CAN BE FETTERED BY LOCAL GOVERNMENT.—The Local Government have no *locus standi* in any way to fetter the discretion of the High Court to take or not to take any action under Cl. 8, Letters Patent, or under the Legal Practitioners Act against any legal practitioner; the matter is one which is entirely within the discretion of the High Court. As the Local Government is not competent to claim that action should be taken against any particular legal practitioner, it has also no right or power either to abandon any proceedings or to condone the conduct of the legal practitioner so far as it comes within the purview of the disciplinary jurisdiction of the High Court so as to bind it in any way. 15 L. 354=1934 L. 251 (S.B.).

Sec. 13: SCOPE OF SECTION.—*See* 44 C. 639. The jurisdiction of Court is not vindictive. 45 M.L.J. 718 (F.B.). Notice is necessary before taking action. 19 M.L. J. 504. Enquiry may be made by a Court subordinate to the High Court. 44 C. 639. The Court cannot act on mere suspicion. 1 P.L.T. 372=57 I.C. 460 (F.B.). Charges of professional misconduct must be clearly established and not be inferred from mere ground for suspicion. 1930 L. 947, following 58 M.L.J. 635=34 C.W.N. 534 (P. C.). Charge of "unprofessional conduct" against a pleader—Precision in statement and strictness in proof —Necessity. 1930 P.C. 60=58 M.L.J. 483 (P.C.). "When evidence has been given in one case upon the issues raised in that case, nothing can be more dangerous than to take that evidence and apply it to another case in which other issues arise." 1929 M. W. N. 384 (F.B.). The proceedings under S. 13 are of a *quasi* criminal nature, it is the duty of the applicant who is more or less in the position of complainant to go into the witness-box and substantiate his allegation before producing any other witnesses and what is more important to submit himself to cross-examination. 1930 L. 947. Provisions of the C. P. Code are applicable to proceedings under S. 13 of this Act. 21 C.W.N. 564; 23 C. W.N. 560. In a case a misappropriation of client's money by the Advocate, and the same has been brought to the notice of the Court, the charge cannot be permitted to be squared up or withdrawn. 1937 Mad. 696= (1937) 2 M.L.J. 160 (F.B.).

DISCIPLINARY ACTION BY HIGH COURT—CONSIDERATIONS.—The point to be considered in all cases of disciplinary action against a member of the Bar is whether his conduct involves unfitness on his part for the exercise of his profession. Moral turpitude which would entitle the Court to take action must be such as is connected with the pleader's profession or consists of any attack upon the system of which the Court forms part or embarrasses in any way the administration of justice by the Courts. A speech of a vakil alleged to injure the feelings of an important sect of the Mohammadans does not fall in any of these categories and is, therefore, not one which would induce the High Court of Jammu and Kashmir to take any action against him. The State imposes suitable penalties for the infringement of its loss and provides proper sanctions for (*a*) who takes instructions in any case except from the party on whose behalf he is retained, or some person who is the recognised agent of such party within the meaning of the Code of Civil Procedure, or some servant, relative or friend authorised by the party to give such instructions, or

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the enforcement of such penalties and there is no reason why the disciplinary jurisdiction vested in the High Court should be employed merely in aid of the Criminal Law. 37 P.L.R.J. & K. 16.

Professional Misconduct.—*Per* Krishnan, J. The Legal Practitioners Act, 1879, deals with the Pleader only in his professional capacity and not in his private capacity though misconduct other than professional may fall under cl. (*f*). 38 M.L.J. 230=55 I.C. 198 (F.B.). Under S. 13 the impropriety must be such as would render the continuance of the pleader in practice undesirable or unfit him for being a member of the profession. 38 M.L.J. 230. *See also* 88 I.C. 279=26 Cr.L.J. 1111=1925 Rang. 110. Failure to make proper arrangements for conduct of case in his absence though it should not be encouraged by Courts is not misconduct deserving punishment under this section. 1939 Rang. 262.

Misconduct—Test—Rules for guidance. The principles to be applied in considering whether certain conduct amounts to misconduct or not are as follows: (1) that the mere holding of certain views and expression of such views in language however emphatic or strong is no ground for taking disciplinary action against a legal practitioner; (2) that mere conviction for an offence is not sufficient but the Court must look into the nature of the act on which the conviction is based to decide whether the legal practitioner is an unfit person to remain in the profession; (3) that a legal practitioner is a part of the machinery provided for the maintenance of order and the enforcement of the law of the land; it is therefore inconsistent with his duties as legal practitioner to incite others either to boycott the Courts or to break the law which it is the duty of the Courts to administer; those who live by the law cannot preach the breaking of the law; (4) that organized breach of the peace, incitement to acts tending to subvert order is a reasonable cause to suspend or remove a legal practitioner; and (5) that acts involving moral turpitude or which imply general infamy make a legal practitioner unfit to remain on the rolls of the Court. 15 Lah. 354=1934 Lah. 251 (S.B.). A legal practitioner is not merely a lawyer but also a moral agent. As such he is a Judge of right and wrong, and an advocate of what is right. Search for truth is to be his ideal. The practice of law is a personal right or privilege limited to selected persons of good character. It is a franchise which may be revoked for misconduct, the test being whether the misconduct is such as shown him to be unfit or unsafe to discharge the duties of his office, or unworthy of confidence, no legal practitioner can disclaim responsibility for his acts. Just as he is entitled to enjoy the privileges of his profession, he has also peculiar obligations and responsibilities attached. 12 Mys. L. J. 292=39 Mys.H.C.R. 380. In an enquiry into charges of professional misconduct, it is the duty of the legal practitioner concerned to be absolutely candid with the Court. He may unwisely maintain a stolid silence and take up the position that the case against him must be completely proved. In such case he runs a grave risk. On the other hand, if he elects to state his defence, it ought not to be a perversion of truth. 12 Mys. L. J. 222=39 Mys. H. C. R. 203. Misconduct is not necessarily the same thing as conduct involving moral turpitude. 15 Lah. 354=1934 Lah. 251 (S. B.). The motive of the informer in starting disciplinary action against an advocate is immaterial. 15 Lah. 354 (S.B.).

Sec. 13 (a): Accepting Vakalatnamas.—Duty of a pleader. 33 I.C. 831=20 C.W.N. 283. Advocate accepting vakalats for withdrawal of money or for any such serious responsibility should satisfy themselves as to the *bona fides* of the person who offers it; and this is necessary even if there be no apparent circumstances to justify any suspicion. 16 Pat. 488=17 Pat.L.T. 407=1937 Pat. 433 (S.B.); 16 Pat. 123=17 Pat. L.T. 948=1937 Pat. 137 (S.B.). If a pleader acts *bona fide* in accepting *Vakalatnama* but makes a serious mistake, there is no need for the Court to take up the matter again after a long time has elapsed. The rules should be strictly observed by pleaders in accepting *Vakalatnama*. 65 I. C. 417=1922 Cal. 178. *See also* 19 Cr.L.J. 227=43 I.C. 819 (C.). Where an *advocate appeared in certain criminal proceedings without filing a vakalatnama,* though required by the rules of the Court, *held,* though the rules requiring the filing of a vakalatnama or mukhtarnama in criminal proceedings is an arbitrary rule having no moral sanction behind it, it is a rule which an officer of the Court must comply with but a disobedience of that rule did not amount to professional misconduct in the particular case. 12 Pat. 843=14 Pat.L.T. 709=1933 Pat. 571 (S.B.). *See also* 13 Mys.L.J. 34; 12 Mys.L.J. 383. Advocate's name appearing in the decree—He is entitled to assume that a vakalat has been filed—Appearance in execution without vakalat is no professional misconduct. 12 Pat. 843=1933 Pat. 571 (S.B.).

Receiving Instructions—Directly from clients or their duly authorized agents.—Gross negligence tantamount to misconduct is attributable to a *mukhtar* who receives and acts on a mukhtarnama from an (*b*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

NOTES.

unauthorized person without proper inquiry. 37 I.C. 492=2 Pat.L.J. 36. *See also* 34 I.C. 645=20 C.W.N. 1016 (F.B.). When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption, until the contrary is proved, that the letter is written under instructions. 1933 Rang. 147. Criminal trial—Advocate raising plea that prosecution story was concocted—Same put forward without client's instructions—Propriety. *See* 10 Pat.L.T. 703=9 P. 31=1931 P. 195.

ALTERING A VAKALATNAMA after execution by inserting name of mukhtar actually engaged at the request of party's agent, conduct if improper. 17 I.C. 718=17 C. W.N. 328.

PROFESSIONAL MISCONDUCT of a solicitor or pleader must be judged by the rules and standard of his profession. 115 I.C. 318=30 Cr.L.J. 445=1929 Sind 121 (F.B.). A pleader who obtains adjournment of a case on grounds which, to his knowledge, were false is guilty of improper conduct. 54 M. 520=1931 M. 422=60 M.L.J. 393 (F.B.). Taking a personal interest in the litigation (as) financing the same and bargaining for a share of the profits may amount to misconduct on the part of an advocate. 1932 L. 584. A solicitor acting for a client in any transaction, should not have a personal interest in that transaction without making full disclosure of the nature and extent of the interest to the client. 44 L.W. 315=163 I.C. 434=1936 P. C. 224 (P. C.). Where, a solicitor occupying the position of a trustee of an estate, while entering into certain transaction relating to the estate, considers his own interests in preference to and to the detriment of the interest of the beneficiaries of the estate of which he is a trustee, his action is such as would reasonably be regarded as disgraceful and dishonourable by his professional brethren of repute and competency and he is guilty of professional misconduct. 163 I.C. 434=44 L.W. 315=1936 P.C. 224 (P.C.).

Sec. 13 (b): GROSSLY IMPROPER CONDUCT—APPEARING ON OPPOSITE SIDES.—A professional gentleman should as far as possible stick to the side who first employed him. 28 I.C. 996=16 Cr.L.J.420 (All.). *See also* 58 M.L.J. 635 (P.C.). In order to prevent a counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have such confidential instructions from one of the parties as would make it improper for him to appear for the other party. 1939 R.D. 641 (2)=1940 A.W.R. (B.R.) 5 (1). When he has once been retained and received the confidence of a client he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in same controversy. 37 C.L.J. 48=72 I.C. 22=1923 Cal. 106. A pleader who acts for both the parties in the suit at one stage or other is guilty of professional misconduct. 45 I. C. 614=3 Pat.L.J. 390. Where a pleader accepted a brief against his standing clients at a time when his exclusive retainer by that party was still running the pleader acted not only in violation of the principles which govern the conduct of a legal adviser but also of the ordinary principles of good faith as between man and man and was guilty of grossly improper conduct. 32 Bom. L. R. 556=1930 P.C. 60=58 M.L.J. 483 (P.C.). *See also* 1932 A.L.J..755=140 I.C. 62=1932 All. 536. Every practitioner is bound to see before accepting a *vakalatnama* that he has not already been engaged on the other side. To recklessly sign a *vakalatnama* very nearly amounts to misconduct. 14 Cr.L.J. 44=18 I.C. 268 (A). Legal practitioners receiving instruction from a prospective client, subsequent appearance for the opposite party, whether professional misconduct. 8 R. 446=128 I.C. 354 (2)=1930 Rang. 355. A legal practitioner had acted for the appellant in a prior suit wherein the appellant asked that an award by an arbitrator in a dispute in respect of a conveyance should be set aside. A plea was therein filed that the respondent persuaded the appellant to execute a conveyance wherein the consideration was falsely stated. The later suit related to the same conveyance and the prayer of the appellant therein was that it should be set aside on the ground of fraud and failure of consideration. *Held,* that though the conduct of the legal practitioner in appearing for the respondent in the latter proceeding was not dishonest, the Court could, considering the possibility of mischief to the other party, direct that he should not take any further part in the proceeding. 125 I.C. 262=8 R. 44=1930 Rang. 185. *Pleader appointed on commission* in the case cannot act as vakil for one of the parties. 100 I.C. 309=1927 Cal. 203. The mere fact that a lawyer is cited as a witness by the prosecution would not disqualify him from appearing as counsel for the accused in the case. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused. But the mere citing of an Advocate as a witness by the Police does not operate as a disqualification. 48 L.W. 276=(1938) 2 M.L.J. 446. Pleader entering record-room without permission of Judge-in-charge in defiance of standing order of District Judge not proper—Duty of pleader and of Judge-in-charge. 17 Pat. 261=1938 Pat. 385 (S.B.).

APPEARING FOR THE OPPOSITE PARTY WHEN NOT MISCONDUCT.—Pleader acting for one party in one proceeding. He is not debarred from appearing against that party in another proceeding unless his services were sought by the party in the latter case and (*c*) who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader or mukhtar, or

(*d*) who, directly or indirectly, procures or attempts to procure the employment of himself as such pleader or mukhtar through, or by the intervention of, any person to whom any remuneration for obtaining such employment has been given by him, or agreed or promised to be so given, or

(*e*) who accepts any employment in any legal business through a person who has been proclaimed as a tout under section 36, or

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NOTES.

refused by pleader on insufficient grounds. 1928 M. 592. *See also* 13 A.L.J. 475=30 I. C. 145 (F. B.); 1938 M.W.N. 220=1938 Mad. 276 (S.B.). It cannot be said that there is anything professionally wrong in acting for an opposite party when the proceedings are different. I.L.R. (1938) Mad. 399=1938 Mad. 276. That a pleader was merely consulted by complainant at one stage, does not preclude him from appearing for the accused in proceedings regarding a totally different incident. 8 L. 671=1928 L. 65. *See also* 128 I.C. 354=1930 Rang. 355. In order to prevent counsel appearing for the other party, he must have a definite retainer, with a fee paid, or he must have such confidential instructions from one of the parties as would make it improper for him to appear for the other party. In the absence of either, it cannot be said to be unprofessional on the part of the counsel to appear for the other party. 11 O.W.N. 23=1934 Oudh 58 (S.B.). A Hindu pleader allowed his father to purchase the very property in respect of which he was working for his client. The transaction took place with the knowledge and consent of his client. But in spite of this knowledge the client allowed the same pleader to continue to work for him. Further, when the pleader appeared for his father against him in a case arising out of the sale transaction, he did not raise any objection against the conduct of the pleader for more than 18 months. *Held*, that though the pleader did not act up to the standard of propriety which was expected of a member of the legal profession, who must enjoy the complete confidence of the litigant public and the Court and though technically his appearing subsequently against him was improper, yet no disciplinary action was justified. 1938 Pat. 28=1938 P.W.N. 115=172 I.C. 849 (S. B.).

SEPARATE APPEARANCES FOR SAME PARTY IN DIFFERENT CAPACITIES—PROPRIETY.—A solicitor appearing for a client who is interested in two different capacities can state the case of his client in respect of each capacity, but he cannot appear separately for the same person. Nor is the same party entitled to appear by separate counsel or separate solicitors in different capacities. 37 Bom.L.R. 49=1935 B. 119.

PLEADER ACTING AS ARBITRATOR.—Where a pleader who had been engaged by the plaintiff withdrew on behalf of defendant money, which he knew was payable to the plaintiff, and took a conspicuous part as arbitrator in a matter in which he was seriously and personally concerned, he was guilty of professional misconduct. 41 I.C. 328=2 P.L.J. 259. Pleader getting himself appointed arbitrator holding out promise to a party is guilty of serious misconduct. 132 I.C. 576 =1936 Pesh. 113.

PLEADER LIKELY TO BE WITNESS IN A CASE.—As to whether such vakil can accept brief, *see* 8 P.L.T. 510=1927 P. 61; 117 I.C. 66; 48 L.W. 276=(1938) 2 M. L. J. 446. Though it is undesirable that a lawyer should appear in a case in which he knows or has reason to believe that he would be an important witness there is no harm in his giving evidence in a case in which he is appearing. 12 Pat. 359=1933 Pat. 306.

PLEADER COLLECTING EVIDENCE FOR CLIENT.—A pleader helping his clients by collecting evidence for them to be used on their behalf does not exceed his duties as their counsel. 134 I.C. 515=1931 L. 246.

ABANDONMENT OF CASE.—A pleader acts improperly in abandoning his client's case while in the midst of the client's examination-in-chief. After once taking up his client's case he ought to have seen that it was terminated. 14 Cr.L.J. 379=20 I.C. 139 (C.). *See also* 35 C.L.J. 403=26 C. W.N. 580.

ABANDONMENT OF ISSUE.—A vakil's general power in the conduct of a suit includes the abandonment of an issue, which in his discretion he thinks it inadvisable to press. 1935 L. 71.

WILFUL NEGLECT TO APPEAR NOT EXCUSED BY NON-PAYMENT OF FEES.—It is not proper for Counsel either in the High Court or in the Courts below to merely state to the Court that he has no instructions. He should clearly specify what is the reason for his failing to proceed with the case. It may be that he has not received his fees; it may be that his instructions have been withdrawn or it may be some other reason. But what ever the reason is, he should clearly state it to the Court. 1936 A.L.J. 902=1936 All. 670. A pleader is guilty of misconduct if after receipt of full fees he wilfully neglects to appear and conduct a case. 37 M. 238=23 M.L.J. 447. *Per* Sankaran Nair, J.—In the absence of such an agreement or

NOTES.

at least notice to the party in time, a vakil, must appear and conduct the case though the fee or a portion thereof remains unpaid. 37 M. 238=23 M.L.J. 447. *See also* 10 P.L.T. 723=1929 P. 337 (F.B.). When the client is, for some reason or other, putting off the settlement and payment of fee a legal practitioner would be well advised if he served a registered notice upon him in good time intimating to him that if the client did not settle and pay his fee he would repudiate all his responsibility as a pleader. 1930 L. 947. *Per* Curiam.—When a pleader accepts a *vakalatnama* in the ordinary form, he must attend Court on every occasion to protect the interest of the client concerned. Any limitations on his obligation by special agreement must be proved and the onus lies on the pleader. Non-payment is no justification for refusal to attend. 49 C. 732=26 C.W.N. 589=71 I.C. 81 (F. B.). Where a pleader signs a *vakalatnama* on the distinct understanding that a sum paid to him is really in the nature of a part-payment, and that the client will settle the proper fee afterwards and if the client fails to do so, it follows that mere acceptance of *vakalatnama* cannot cast upon the pleader the duty of defending the case. 129 I.C. 301=1930 L. 947. Taking fees as a pleader in a case where he is in fact a party is grossly improper conduct. 1925 O. 130.

Failure to make careful arrangements in a case shows a laxity in conduct which deserves no encouragement. 183 I.C. 580 =1939 Rang. 262.

Supplemental Fees.—To agree with a client for a present over and above his fees in the case of success, is disgraceful for an advocate. The failure of a barrister in exacting money as supplemental fee does not absolve him from his original obligation to his client and the Court. 16 I.C. 780= 14 Bom.L.R. 691 (F.B.). In the absence of a special contract to the contrary the fees accepted by an Advocate must be taken to be for the whole case. A writing to evidence the terms of engagement between the advocates and the client is always desirable. 16 Cr.L.J. 707=30 I.C. 995.

Giving Improper Advice to Client.—Pleader advising payment of moneys from minor's estate to the sureties as consideration, *held*, there was no cause for proceeding against the pleader under S. 13 (*b*) or (*f*). 38 M.L.J. 58=54 I.C. 163. A vakil of the High Court was suspended from practice for two years by the High Court under Cl. 10 of the Letters Patent (Madras) for professional misconduct arising from the following acts he did, *viz.*, (1) giving improper advice and getting a nominal sale for a low value; (2) pleading a false defence; (3) giving false evidence and suborning perjury. 39 I.C. 289=40 M. 69.

Putting irrelevant Questions in Cross-examination.—Protracted examinations of witnesses with questions which are quite irrelevant to the suit, and only tend to swell the size of the record, must be deprecated. It is an abuse which enormously increases the cost of litigation without any corresponding benefit to the parties and it is clearly within the powers of the High Court to direct inquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals. 1932 A.L.J. 198=1932 P.C. 69=62 M.L.J. 457 (P.C.). As to *defamatory suggestion* against witnesses, *see* 29 N.L.R. 24=1933 N. 47.

Error of Law.—Error of law is no professional misconduct. 20 C.W.N. 278=23 C. L. J. 237=43 C. 685.

Misappropriation by Vakil of the client's money amounts to professional misconduct. 42 I.C. 135. *See also* 145 I.C. 278=34 Cr. L.J. 954=1933 L. 575 (S.B.); 15 I.C. 785 =13 Cr.L.J. 513=5 S.L.R. 222. Thus if money is paid for payment of stamp fees it is not open to the legal practitioner to appropriate the same or any part of it towards fees due to him. 1930 M.W.N. 216. It is the duty of every advocate who receives money on behalf of his client to conduct litigation with to keep an account of how that money has been applied. 1930 M. W. N. 216. *See also* I.L.R. (1941) Mad. 286= 1941 Mad. 63=(1940) 2 M.L.J. 1031 (F. B.). Vakil dishonestly appropriating clients' monies —Repentance and plea of indebtedness—Standard of professional conduct. 88 I.C. 360=1925 M. 797 (F.B.). A legal practitioner received money from the Court on behalf of his client and retained it in his own hands without any authority from the client so to retain it. Subsequently he chose to treat it as loan and gave security which he felt himself at liberty to withdraw at his own will and pleasure. *Held*, that this was a grave offence which amounted to professional misconduct. 32 L.W. 435=129 I.C. 233=1930 M. 927 (F.B.). *See also* 1933 L. 575=145 I. C. 278 (S.B.); 142 I.C. 593=1933 S. 45. Where a pleader to whom money is given by his client for payment to an arbitrator appropriates that money towards his fees, his conduct is gravely improper and calls for disciplinary action. 1938 Lah. 248=175 I. C. 29. *See also* I.L.R. (1941) Lah. 731= 1941 Lah. 384 (F.B.). While misappropriation by a legal practitioner of monies belonging to his client is a very grave act of professional misconduct which would. not make it possible to allow him to continue practising in the profession, the Court is not precluded from re-instating the practitioner when adequate punishment has been imposed and he has shown that he has re-habilitated himself in such a manner that he is fitted to be admitted into the profession again. 1939 Mad. 906=(1939)9 2 M.L.J. 632 (F.B.). *See also* I.L.R. (1940) Mad. 81; I.L.R. (1940) Mad. 84.

Purchasing Property in Court Auction in execution of his client's decree is guilty of (*f*) for any other reasonable cause.]

NOTES.

professional misconduct, equally so if he purchases the property for other persons. 13 Cr.L.J. 795=17 I.C. 539 (A.). *See also* I.L.R. (1938) Mad. 399=1938 Mad. 276 (F.B.). Purchasing from their clients or others any interests in any decree passed by the Court in which the pleaders practised is misconduct. 1938 M.W.N. 220=1938 M. 276 (F.B.). *See also* 52 L.W. 777=1940 P.C. 204=67 I.A. 431=43 Bom.L. R. 465=73 Cal. L. J. 121 (P.C.).

TAKING MORTGAGE IN LIEU OF FEES at exorbitant terms may amount to professional misconduct. 12 P. 843=14 Pat.L.T. 709=1933 P. 571 (S.B.).

MUKHTAR STANDING BAIL FOR ACCUSED IN CRIMINAL CASE AND TAKING INDEMNITY FROM PERSON NOT ACCEPTED AS SURETY.—There is nothing against a legal practitioner becoming a surety for an accused in a criminal case. But where a *mukhtar* enters into a contract of indemnity with, and receives money from, a third person, who has been rejected as a surety, becoming a surety, such an agreement constitutes public mischief, being opposed to public policy, and the *mukhtar* is guilty of unprofessional and highly improper conduct; and when the *mukhtar* further attempts to conceal the agreement from the knowledge of the Court, it has to be viewed as a serious aggravation of the original offence rendering him liable to suspension from practice. 155 I.C. 430=16 P.L.T. 223=1935 P. 195 (F.B.).

NEGLIGENCE OF PLEADER.—Mere negligence does not found a petition for professional misconduct against a pleader. There must be moral delinquency in addition to negligence before a charge of unprofessional conduct can be brought home. Nor is there anything unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks, but does not insist that any clerk should be registered. (1938) 2 M.L.J. 661=1938 M. 965 (F.B.). *Mere negligence is not sufficient in itself to found a charge of professional misconduct.* Where a legal practitioner failed to certify the realisation of certain decree amounts, and it was found that it was due either to stupidity or to negligence or to both but that there was no element of moral delinquency, it was held that it did not amount to professional misconduct. I. L.R. (1940) All. 386=1940 A.L.J. 306=1940 All. 889 (F.B.). Negligent management of his office and permitting the clerks to cheat the clients and mislead them as to the progress of the case, is misconduct for which he might be suspended from practice. 35 M. 543=39 I.A. 191=23 M. L. J. 114 (P.C.). [On appeal from 22 M.L.J. 276=14 I.C. 965]. *See also* 114 I.C. 137=30 Cr.L.J. 256 (2); 62 C. 158 (S.B.). Counsel failing to appear in murder case but engaging another counsel on smaller fee is guilty of grave impropriety in the discharge of his duty. 108 I.C. 257=29 Cr.L.J. 362=1928 L. 448. Pleader engaged in two cases throwing away interests of unimportant client in favour of important client is guilty of professional misconduct. 10 Pat. L.T. 664=116 I.C. 764=1929 Pat. 153 (F.B.). A vakil who put before the Sessions Judge a statement which purported to be a petition from his clients and drafted on their instructions but which was in fact entirely his own invention and contained statements made recklessly without reasonable grounds is guilty of misconduct. 18 A.L. J. 419=56 I.C. 501=42 All. 450. An advocate in the exercise of his profession is bound to exercise reasonable skill and prudence but he is not expected to be infallible and unless the Court is satisfied that the act complained of was such that could not reasonably have been done by an advocate exercising reasonable skill and care, a suit for negligence is not maintainable against the advocate. 9 R. 575. A *bona fide* mistake on the part of the pleader may be condoned but gross negligence in his part cannot justifiably be condoned so as to extend time under S. 5 of the Limitation Act. The remedy of the client is only against the defaulting legal adviser. 1931 Rang. 80. Withdrawal of money on behalf of guardian and payment to his relation is negligence and not grossly improper conduct. 1925 Cal. 146. Where it is shown that the judgment-debtor obtained copies of documents and gave them to his pleader and the latter did not produce the same at the proper time the Court may refuse to admit the same in appeal. The remedy of the party, if any, is to file a suit for damages against the pleader. 32 P.L.R. 813. A pleader filed an application for withdrawal of money in Court deposit, and it was found that the money was already withdrawn, but the pleader had checked the account books of his client to ascertain the amount withdrawn from the Court. *Held,* that though the pleader should have been more careful it did not amount to misconduct or gross negligence. 1936 Cal. 658.

FAILURE TO KEEP ACCOUNTS.—Even if a legal practitioner has not much work, he is bound to keep accounts for whatever work he may have, and failure to keep accounts amounts to professional misconduct. (1940) 2 M.L.J. 1031=1941 Mad. 63=I. L. R. (1941) Mad. 286 (F.B.).

Sec. 13 (*f*): MISCONDUCT OTHERWISE THAN PROFESSIONAL.—The phrase "for any reasonable cause" in the residuary cl. (*f*) of S. 13 is not to be understood in an *ejusdem generis* sense but it covers cases other than those of professional misconduct in the ordinary sense, but which unfits a pleader for the practice of his profession, for instance conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of Court. 38 M.L.J. 23=11 L. W. 192=55 I.C. 198 (F.B.). *See also* 36

NOTES.

C.W.N. 294. The jurisdiction under S. 13, sub-S. (*f*) is not confined to acts done in a professional capacity. Taking part in an organised resistance to law and assisting a movement involving grave danger to the public peace by a pleader may not have been done in a professional capacity but they are such as to render it necessary to enquire into the expediency of allowing him to continue practice. [49 C. 845 (P.C.), Foll.] Also where a pleader holds the view that it is desirable to disobey the law he is likely to advise his clients to break the law and it is undesirable in the public interests to allow one who sets a bad example to occupy the privileged position of a pleader. 27 N.L.R. 29=1931 Nag. 33 (S.B.). *See also* 1931 Pat. 369 (F.B.). The mukhtar who advised his clients who had been acquitted in a criminal case to present some gratification to the Magistrate is guilty of misconduct, positively deplorable. Mukhtar suspended for one year. 13 Pat.L.T. 574 =1932 Pat. 356 (S.B.). Where a pleader was convicted under Penal Code for intimidating and assaulting a woman in a most reprehensible manner, the conviction was not by itself sufficient to show defect of character which unfits him to be a pleader within the meaning of S. 12. Though the words "any other reasonable cause" in S. 13 seems to be wide enough to include the case, still the conduct was not such as to justify suspending him from practice. 1929 R. 352 (1). S. 13 (*f*) is not confined to the misconduct of a pleader as such but also covers his misconduct as a party to suit. 18 P.R. 1915=28 I.C. 722. Entering deliberately into a false defence, with intent to defraud others, is a ground of action under Ss. 13 and 14. 9 I.C. 362=12 Cr.L.J. 67 (C.). *Pleader as suitor* committing contempt of Court—Disciplinary action may be taken. 55 A. 148=1933 A.L.J. 251=1933 All. 224. But *see also* 1932 All. 492 (S.B.). *Imputing dishonesty against officer of Court* would amount to professional misconduct. 143 I.C. 359=56 C.L.J. 595=1933 Cal. 344. Also *imputation of partiality and unfairness* to judicial officer. 142 I. C. 828=1933 Rang. 34.

General Rule for accepting or rejecting Cases.—A lawyer must as a general rule take up a case for any member of the public if (1) a fair and proper fee is tendered to him; (2) adequate instructions are given; and (3) the case is of a class which the lawyer is accustomed to do. He can legitimately decline to take up the case, if he has an out-station engagement, or is engaged in some social function, is incapacitated by ill-health or any reason which a sensible man would recognize adequate. But to refuse to take up a case simply and solely on the ground that the advocate will not appear against a brother practitioner, or put forward untrue excuses is, in each case, professional misconduct and should be dealt with as such. 1929 All. 367. *See also* 27 A.L.J. 1047=117 I.C. 104; 27 A.L.J. 616 =30 Cr.L.J. 522.

Filing a false suit is misconduct. A pleader can be dismissed or suspended. The words "and other reasonable cause" in S. 13, cl. (*f*) are not to be construed *ejusdem generis* with causes enumerated in Cls. (*a*) to (*e*). They include personal misconduct distinguished from professional one. 12 I.C. 838=4 Bur.L.T. 275; 39 M. 1045 =32 I.C. 326.

False Statements.—*See* 121 I.C. 297= 1929 Lah. 803; (1940) 1 M.L.J. (Supp.) 28. Where a pleader retained in his service a suspected tout without dismissing him even after notice from the Bar Council and thereafter gave a false statement that he had dispensed with the services of that tout and stuck to that statement deliberately in a subsequent enquiry, he was guilty of professional misconduct under S. 13 (*f*). 27 I.C. 156 (F.B.). It is the duty of the Court not only to protect the members of the public against disreputable members of the profession but it is also its duty to protect the profession itself against the loss of reputation brought upon it by the conduct of such members. It is not part of the etiquette of the members of the profession to tell lies in Court or to give perjured evidence on behalf of their clients. Where the mukhtar informed the Court that accused could not appear in Court as he was unwell that day, whereas in fact the accused had come to Court that day and had been talking to the mukhtar, *held*, that the conduct of the mukhtar was highly unworthy of a member of his profession and that he should be removed from the rolls. 15 P.L.T. 63= 1934 P. 142 (S.B.). *See also* 16 P.L.T. 231 (S.B.). Duty to be scrupulously honest in giving evidence—Giving evasive and shuffling answers—Misconduct. 11 P.L.T. 665=1930 P. 493 (F.B.). A legal practitioner who makes one statement before the police in the course of an investigation of an offence and a diametrically opposite statement in the witness-box in the trial is guilty of the grossest misconduct. 121 I.C. 297=1929 L. 803 (2). An Advocate having regard to his education and training and in particular the profession in which he is engaged is expected to exercise greater degree of caution and rectitude than ordinary persons in making statements on oath in a Court of law. Where therefore an Advocate was convicted of perjury and disciplinary proceedings were started against him, the High Court marked their sense of disapprobation of the Advocate's conduct by ordering him to be suspended from practice for six months. 8 O.W.N. 267=1931 O. 161. A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with for making them under the disciplinary jurisdiction. It was contended in his behalf that the statements made by him in defence

NOTES.

must be regarded as having been made by an accused and were therefore protected, *held,* that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him. 14 Bom.L.R. 700=16 I.C. 788=36 B. 606. Where a pleader in order to recover fees due to him from his client for work done, made certain statements which, if true, would expose him to criminal prosecution. *Held,* that the conduct of the pleader though improper was not such as to call for action being taken under this Act. 14 I.C. 208=15 C.L.J. 224. The fact that a man is going to be injured professionally if he does not speak the truth is no valid excuse for telling a lie; but it is an attitude which is not uncommon and which is not of the most serious character. It is very different from the case of a professional man telling a lie fraudulently in the sense of wishing to assist his client, in deceiving the Court or even wishing to assist his client in a claim that he is making against another. In this case, the conduct of the pleader was disapproved but no action taken. 17 L.W. 358=73 I.C. 329=1923 M. 485. *Mukhtar* having no practice as such but acting as professional identifier—Unprofessional conduct — False identification—Liability to be struck off the roll. 16 Pat. 121=17 Pat.L.T. 951=1937 Pat. 138 (S.B.).

GIVING FALSE INFORMATION TO CLIENT.—A pleader who gives his client false information that a certain order has been passed by a Court when no such order has been passed at all, is guilty of "fraudulent and grossly improper conduct in the discharge of his professional duty" within the meaning of S. 13 (*b*) of the Act. 39 C.W.N. 283. Where a charge against a pleader is that he was engaged by a certain client to file a criminal revision petition but he did not do so, and that in reply to a post-card sent to him by the client, his clerk falsely informed him, under the pleader's instructions, that the said revision had been filed, but there is no material on record beyond the bare word of the pleader's clerk that the false information in the post-card was given under the instructions of the pleader, the pleader cannot be held guilty of improper conduct. 163 I.C. 975=1936 Lah. 1013.

FALSE IDENTIFICATION.—A legal practitioner is guilty of professional misconduct if he identifies a person not known to him. 21 Cr.L.J. 635=57 I.C. 818 (F.B.). *See also* 1941 P.W.N. 417=22 Pat.L.T 679=1941 Pat. 179 (S.B.). It is not enough for a legal practitional who comes forward as an identifier to rely merely upon the fact that he has been told by his clerk that he identifies the person. That does not entitle the mukhtar to pose as an identifier. The identification must be a genuine identification. Cases of *careless identification by legal practitioners* must be dealt with great severity as they involve not only an offence on the part of the legal practitioner against the duties of his profession but also an offence against the state and public funds. 10 Pat.L.T. 641=1929 P. 339 (F.B.). *See also* 1930 P. 495 (1).

FALSE ATTESTATION.—*See* 13 I.C. 397=14 C.L.J. 606.

FILING FALSE FEES CERTIFICATE.—It is very serious matter for a pleader or an advocate to file a false fees certificate with regard to fees which he has not received and the Court will take strong disciplinary action in any such case coming to its notice. 1941 Mad. 905=(1941) 2 M.L.J. 663 (S.B.).

PERJURY.—*Perjury by members of the legal profession,* apart from the question that it is criminal offence, is a very serious matter from the point of view of the profession. Apart from the fact that it harms the profession, it sets a very bad example to the general public and is a great block in the administration of justice. Therefore, if and when cases of perjury by members of the legal profession are discovered the member concerned deserves the most severe punishment which the High Court can give in the exercise of its disciplinary jurisdiction on the legal profession. Where the perjury was committed by a young inexperienced pleader which showed that it was not intended to deceive the Court or to practise any fraud upon it. *Held,* that suspension from practice for six months was sufficient. 1935 Pat. 249=16 P.L.T. 231 (S.B.).

CRIMINAL CONVICTION (*see* Notes under S. 12, *supra*).—Where the person committing the offence does not bring the fact to the notice of the High Court at the time of his admission, as a pleader, when required to give all necessary information at the time of his enrolment, he commits another serious offence of deceiving the authorities and the High Court is entitled to take him to task for it. Persons applying for being admitted to be pleaders should fully and frankly disclose all the circumstances of their past career with the knowledge that the High Court would take into consideration every matter which ought properly to be dealt with by it. 175 I.C. 124=1938 Rang. 159. Even if a person is convicted of a criminal offence it is necessary for the Court, before taking disciplinary action, to know whether his conduct necessitates such action. Where the judgment in the criminal case does not disclose what exactly the conduct of the practitioner was, the Court may give the accused the benefit of doubt. 15 N.L.J. 90. When criminal proceedings are taken against a pleader or an advocate and finally concluded, they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings his offence has been one implying a defect of character which

NOTES.

unfits him to be a pleader or advocate. Such a defect of character normally involves moral turpitude. 1938 Rang.L.R. 125 (S. B.). In a case where an advocate was convicted of the offence of defamation, the High Court, while holding that no disciplinary action was called for on their part, observed that responsible citizens, when afforded the opportunity of making charges against persons (whether known to them or not) of which they had not ascertained the truth, should be careful not to aggravate the defamatory nature of the matter by lending their support to an implied acceptance of it without careful investigation into its nature. 1938 Rang. L. R. 125 (S. B.). A person who is convicted of so serious an offence as of receiving stolen goods, even though the property may not be of very great value, is not fit to be a pleader. 175 I.C. 126=1938 Rang. 160. An offence of the character of one under S. 377, I. P. Code, committed by a pleader or advocate cannot be ordinarily condoned. Where, however, the offence was committed very early in life, it ought not to debar the person committing it, who is making an honest attempt to reform, from ever seeking respectable society or from being a member of an honourable profession. 175 I.C. 124=1938 Rang. 159. A pleader convicted of criminal breach of trust may come under this section. 1940 Rang. 242. A pleader who was suspended for six months after a conviction for breach of Salt Act did not apply for restoration of certificate but was again convicted under S. 17, Criminal Law Amendment Act. He made no appearance to notice under S. 14. *Held*, that his name should be removed from rolls. 140 I.C. 295 (1)=1932 Pat. 300 (S.B.).

ALTERING DOCUMENT AFTER EXECUTION.—Where with a view to avoid paying a penalty as required by the stamp law a solicitor altered a deed materially after its execution, he was struck off the rolls. 31 M. L.T. 107 (P.C.). Fabrication of documents by mukhtar. 13 Pat.L.T. 552=1932 Pat. 289 (S.B.). Altering survey number in petition is misconduct. 87 I.C. 843.

TAMPERING WITH COURT'S RECORDS.—To tamper with the Court's records is a serious matter and a pleader would be acting without due care and caution and without sense of responsibility in allowing it to be done by his clerk. 36 I.C. 874=20 C.W.N. 1069. Conduct of the pleader in tampering with Court records cannot be easily excused. Such misconduct deserves suspension from practice, though the pleader concerned happens to be young and inexperienced. 15 Pat. 652=17 Pat.L.T. 266=1936 Pat. 418 (S.B.). The removal from the Court by a mukhtar of a complaint amounts to gross misconduct. 43 I.C. 93. A pleader by virtue of his position is an officer of the Court and it is his duty to protect all minor officials of the Court from any temptation; consequently a pleader should not induce a peshkar of the Court to take a document which has been filed in the Court to the pleader's house for the inspection of his clients. 10 Pat.L.T. 715=1929 Pat. 338 (S.B.).

TAMPERING WITH EVIDENCE.—Advocates and pleaders retained in a case ought to be extremely careful in approaching and questioning persons who to their knowledge have been approached are cited with the other side for the purpose of giving evidence so as to give no room for any suspicion that they are attempting to tamper with the evidence or with the witnesses. 1929 M.W. N. 384 (F.B.). *See also* 46 I.C. 819; 171 I.C. 503=1937 Rang. 345. Where a pleader bribes certain witnesses who are likely to be summoned by the opposite side in connexion with an election petition, into swearing affidavits to the effect that they do not know anything about the matter and also tries, during hearing of the petition, to tamper with other witnesses by offering them bribes his conduct is such as disentitles him to remain on the roll of pleaders. 1938 Rang. 294. Visiting handwriting expert and talking about criminal case under investigation on behalf of person involved in case—Propriety—Liability to suspension. 17 Pat.L.T. 348=1936 Pat. 433 (S.B.).

RETENTION OF CLIENT'S MONEYS.—*See* 1933 Sind 65. *See also* 1933 Lah. 575; 1933 Sind 45; 39 Mys. H. C. R. 553.

BRIBERY.—The High Court dismissed a mukhtar for having received a sum of money from one of the persons against whom a case is pending for the purpose of bribing the police acting as a go-between. 39 I.C. 305=21 C.W.N. 516. For a legal practitioner to suggest that an official or any one should be bribed amounts to professional misconduct, and professional misconduct of a grave nature. The fact that bribes of this nature have been given by others is no excuse. *See* 47 L.W. 156=(1938) 1 M.L. J. 410 (F.B.). The fact that proceedings in respect of such offence are instituted against a pleader as the result of a grudge makes no difference to the gravity of the offence and cannot be pleaded in excuse. 1938 Mad. 264=(1938) 1 M.L.J. 410 (F. B.); 17 Pat.L.T. 263=1936 Pat. 337 (S. B.). *Bribery or attempted bribery by advocate* is grossest professional misconduct and an advocate found guilty of an offence like bribery or attempted bribery cannot in any circumstances suffer so slight a penalty as suspension for four years. It is an offence which can necessarily only be purged after strenuous efforts and after a long period during which he has tried his best to reinstate himself in society. No doubt the door is not inevitably and permanently shut to persons who are disbarred: they may after the lapse of a suitable period of time, provided their conduct has been uniformly satisfactory, ultimately reach reinstatement. But reinstatement is not a matter of course and it is not something which can be hoped for

NOTES.

within a brief period of time. 1939 Rang. L.R. 213=1939 Rang. 142 (S.B.). Where a pleader bribes certain witness who are likely to be summoned by the opposite side in connexion with an election petition, into swearing affidavits to the effect that they do not know anything about the matter and also tries, during hearing of the petition, to *tamper with other witnesses by offering them bribes,* his conduct is such as disentitles him to remain on the roll of pleaders. 177 I.C. 731=1938 Rang. 294.

Forgery.—If a pleader is found guilty of endeavouring to appear on behalf of a person by whom he had never been instructed and seeks to justify his conduct by the *production of a forged document,* it would not be a matter for suspension for a month or a year: he would be totally unfitted to exercise the responsible duties of a pleader and would have to be struck off the rolls of pleaders forthwith. 183 I.C. 756=1939 Rang. 312.

Taking Part in Politics.—The jurisdiction of the High Court to take action against legal practitioners is not confined to acts in professional capacity but may extend to other activities, *e.g.*, organized resistance to payment of tax which entails grave danger to the public peace. 49 C. 845=49 I. A. 319=44 M.L.J. 32. As to *criticism of administration,* see 38 M.L.J. 230=55 I.C. 198=1920 M. W. N. 105 (F.B.). As to conviction for sedition, *see* 15 Lah. 354=35 Cr.L.J. 1010=1934 Lah. 251 (F.B.).

Civil Disobedience.—Where certain practising barristers and pleaders joined the movement called the Satyagraha Sabha and signed a pledge whereby they undertook to refuse civilly to obey such laws as a committee to be hereafter appointed may think fit. *Held*, that the barristers and pleaders had, by signing the pledge, rendered themselves amenable to the disciplinary jurisdiction of the High Court, but that under the circumstances a warning was enough. 22 Bom.L.R. 13=54 I.C. 679=44 B. 418. *See also* 145 I.C. 316 (expression 'defect of character' in S. 12 includes acts other than those of moral turpitude): 1933 C. 731; 27 N.L.R. 29=1931 N. 33). Certain pleaders had collectively agreed upon abstention from Court to assist the boycott movement. *Held*, that the pleaders were guilty of unprofessional conduct within the meaning of S. 13 (*b*) and (*f*). Order for suspension for three months passed. (49 C. 732, Ref. to.) 132 I.C. 900=35 C.W.N. 223=1931 C. 706. Practising pleaders wishing to remain on the rolls must remember that those who live by the law should keep the law and not encourage others in its breach by publicly extolling and glorifying persons sentenced and by showing hearty sympathy towards seditious and disloyal movement. 1931 S. 33. A pleader who gives formal and public expression of his approval of the breach of the laws of the land is not a proper person to hold office of the pleader. 1931 S. 33=140 I.C. 233.

Speech inciting breaking laws and defying dispersal Orders.—The speech inciting the audience to break those laws which the All-India Congress Committee might declare should be broken and the speech in which the speaker exhorts the audience to resist orders for dispersal attract the disciplinary jurisdiction of the High Court. 15 L. 354=1934 L. 251 (S.B.).

Taking Part in Unlawful Association.—It is not necessary for the exercise of this jurisdiction that the act of the Vakil should have subjected him to anything like general infamy or imputation of bad character. 12 Pat.L.T. 725=1923 P. 185.

Intimidating a Witness.—To prevent from giving evidence is professional misconduct. 19 Cr.L.J. 803=46 I.C. 819 (F. B.). *See also* 1929 M.W.N. 384. As to *display of temper by counsel, see* 12 Mys. L.J. 292=39 Mys.H.C.R. 380.

Counsel issuing election manifesto.—It is a well-recognised rule of etiquette in the legal profession that no attempt should be made to advertise oneself directly or indirectly. The issuing of circular letters or election manifestoes by a lawyer with his name, profession and address printed thereon, appearing to the members of his profession practising in the lower Court, who are of course in a position to recommend clients to counsel practising in the High Court, is obviously an indirect way of advertisement. It does not however amount to any professional misconduct, but only to a breach of a professional etiquette. 1934 A. 1067=153 I.C. 667 (S.B.).

Attempt to bring influence on Judge.—A pleader attempting to bring influence on a Judge, before whom he is arguing an appeal through a relative of the Judge, is guilty of gross misconduct. His act is highly reprehensible and it is in the interest of the legal profession that serious notice should be taken of such acts and severe punishment is called for in such a case. 164 I.C. 384=1936 Lah. 732. Where however the pleader concerned is inexperienced, and expresses his penitence at once and makes no denial of what he had done, and the offence is not viewed by the public with that disfavour it should, he need not be censured and warned and ordered to pay the costs of the proceedings. 1936 Lah. 732.

Contempt of Court by Legal Practitioner.—No power to punish for contempt of an inferior Court now exists independently of the I. P. Code and the Contempt of Courts Act and no disciplinary power over legal practitioners or power to punish for contempt outside the provisions of I. P. Code is vested in the subordinate Courts. 125 I.C. 477=52 A. 619=1930 A. 225 (F. B.). A mukhtar who addressed certain letters to a Magistrate in connection with a copy for which he had applied, and the contents of the letters were grossly insulting

NOTES.

the mukhtar could be proceeded against under S. 13 (*f*). 52 I.C. 798=42 A. 86=17 A.L.J. 1050. *See also* 38 I.C. 980=44 C. 639=20 C.W.N. 1284. As to procedure in case of contempt by legal practitioner, *see* 27 C.W.N. 88=71 I.C. 673=1922 C. 550. A legal practitioner who writes a letter to a judicial officer abusing him in a particular manner is guilty of grossly improper conduct. 44 I.C. 123=161 P.L.R. 1917. Letter by a pleader which contains vulgar abuse of Magistrate and a demand for an apology apparently followed by the threat of further proceedings is highly improper. 25 Bom.L.R. 264=73 I.C. 353=1923 B. 234. Imputing racial antipathy to a Judge and charging him with having allowed such feelings to influence him in passing unfavourable orders. A belated apology in the High Court was held to be insufficient. 67 I.C. 504; 23 Cr. L.J. 408 (L.). A pleader addressing a letter to a Commissioner appointed to investigate a case to report in his client's favour is guilty of professional misconduct. 18 P.R. 1915=28 I.C. 722. Where a pleader addressed to the Commissioner of the District a most disrespectful letter and circulated it free among his subordinates, he was guilty of misconduct though the matter is one of a private nature between the pleader and that officer. 28 I.C. 722. *See also* 147 I.C. 330=35 Cr.L.J. 433=1934 A. 317; 12 Mys.L.J. 292=39 Mys.H.C.R. 380; 61 C. 522=152 I.C. 58=1934 C. 723. A letter published by a pleader alleging that a certain Judge is indolent and takes credit for cases not tried but compromised even if written in good faith and even if it does not constitute the offence of libel, amounts to misbehaviour. 44 I.C. 338=41 S.L.R. 81 (F.B.). *See also* 35 C.L.J. 403=26 C.W.N. 580=1923 C. 252; 1933 R. 34. An advocate deliberately making false allegations involving imputations upon the fairness and impartiality of judicial officers in proceedings connected with an execution case to which he was himself a party cannot be punished under the disciplinary side under Bar Councils Act. 1932 A.L.J. 773=1932 A. 492 (S. B.) *See also* 1934 P. 598 (S.B.). Instructions from a client are no excuse whatever for a pleader exceeding his duty towards the Courts. A conditional apology is valueless. 25 Bom. L.R. 264=73 I.C. 353=1923 B. 234. *See also* 33 P.L.R. 785. Although it is perfectly true in one sense that a legal adviser must accept statements of fact from his client, yet in applications for transfer statements imputing prejudice or unfairness or corruption to Magistrate should not be made unless the statements of the client as tested by the adviser are found sustainable. 8 P. 575=10 Pat.L.T. 711=1929 P. 151 (F.B.). A statement made by a counsel before the Judges of a Full Bench to the effect that his instructions are that his client does not wish the matter to be argued before the Bench as constituted, amounts to a contempt of Court. 33 P.L.R. 872. As to making reckless allegations in pleadings, *see* 152 I. C. 313=13 P.L.T. 560 (S.B.). Pleader as suitor committing contempt of Court is liable for disciplinary action. *See* 55 A. 148=1933 A.L.J. 251=1933 A. 244; 1932 A. 492 (S.B.).

CONDUCT OF CASE—INTIMIDATION BY JUDGE—DUTY OF COUNSEL TO PROTEST.—It is the duty of the members of the Bar if their clients are prematurely threatened from the Bench, not to adopt an attitude which may appear pusillanimous but to protest then and there that they resent such observations, and if necessary, after consultation with their attorney instructing them to apply for a transfer of the case to the list of another Judge. 60 C.L.J. 179=39 C. W.N. 61.

TRYING TO KNOW THE EFFECT OF A JUDGMENT BEFORE ITS DELIVERY AMOUNTS TO PROFESSIONAL MISCONDUCT.—*See* 75 I.C. 728=5 Pat.L.T. 350=1924 Pat. 131.

ACTS NOT AMOUNTING TO MISCONDUCT.—Where a pleader allowed another person to sign in the name of his client an application filed in Court, as his client had a swollen hand and could not himself sign it, he committed a breach of his professional duty, but in the circumstances it is not necessary that the Court should take disciplinary action against him. 14 Rang. 152=1936 Rang. 177. Pleader employing unregistered clerk, against R. 978 (2) (*iii*) of the Calcutta High Court is not guilty of misconduct under S. 13 (*f*) so long as this clerk is not employed in doing the work of the registered clerk and is not allowed to have access to the Court staff. 41 C.W.N. 929=170 I.C. 251=1937 C. 408. Where a solicitor acting for a plaintiff who had been refused a warrant for the detention of the defendant by a Court started a criminal process on the same subject-matter obtained his warrant from a different Court, almost as a matter of course, his conduct does not necessarily involve any punishable contempt of the Civil Court. The law does not restrict a litigant to a single form of remedy and he may pursue all the legal remedies appropriate to his grievance. 14 Bom.L. R. 471=23 M.L.J. 194=15 I.C. 72 (P. C.). Where a solicitor substituted the name of two witnesses in a summons on the ground that the persons originally summoned were totally ignorant of the facts of the case. *Held,* no misconduct. 15 I. C. 72 (P.C.). Adjournment asked for in good faith to apply for transfer—Subsequent finding that sufficient grounds for transfer did not exist—Pleader responsible for the transfer application is not necessarily guilty of misconduct. 1928 A. 396 (1924 A. 253, Dist.). Where a pleader who is one of the trustees of an institution fails to give information to the police when he finds that a co-trustee of his has misappropriated

14. If any such pleader or mukhtar practising in any subordinate Court

NOTES.

the trust money but rather prefers to deal with his co-trustee mercifully and makes himself morally responsible for the defalcation and undertakes responsibility for the defalcation which had arisen, he cannot be held to be guilty of any kind of misconduct justifying disciplinary action, even though he may have been negligent in his duties as trustee. 175 I.C. 156=1938 Rang. 158.

DEMAND OF EXORBITANT FEES cannot by itself amount to professional misconduct. 58 M.L.J. 635=34 C.W.N. 534=1930 P. C. 144 (P.C.). *See also* 1937 Rang. 299. Where a legal practitioner deliberately ignores the language of the fee certificate prescribed by the High Courts by R. 1, Ch. 21 and adopts fee certificate form of his own which materially and substantially differs from the form prescribed by the High Court and which entirely nullifies the object of the High Court in prescribing the form of the certificate, he is guilty of serious professional misconduct. 1934 A. L. J. 333=1934 A. 109 (2) (S.B.). Where an advocate retains the judgment of the trial Court with the intention of getting himself engaged in appeal without any valid excuse for retaining the judgments, the advocate is guilty of professional misconduct. 12 P. 843=14 P.L.T. 709=1933 P. 571 (S.B.). The filing of a memorandum of appeal on the last day of limitation without sufficient Court-fee, knowing full well that it is understamped and hoping that the Court would be persuaded to accept the deficiency later is certainly not in consonance with the high traditions of the profession to which the advocate belongs. An advocate who is approached by a client to so file an appeal should refuse to file it unless the full amount of the Court-fee was first paid. The High Court will not tolerate practice of this nature. Per *Mockett, J.*—It is undesirable for practitioners to lend themselves to the practice of deliberately filing appeals understamped. 1938 M.W.N. 1169=48 L. W. 702 (F.B.).

PRIVILEGE—EXTENT OF.—*See* 35 Bom.L.R. 910=1932 B. 490; 34 Bom.L.R. 443=1932 B. 199. A civil suit for damages for a defamatory statement made on oath or otherwise by counsel, party or witness in a judicial proceeding is governed not by S. 499 of the Penal Code but by the principles of justice, equity and good conscience, which are identical with the corresponding rules of English Common Law. The protection under the law extends to all statements made by a party, pleader or witness in the suit, no matter whom it may relate to, whether it is the opposite party or his witness, so long as it is not irrelevant to the matter in hand. (40 A. 341; 48 C. 388, Ref.). 141 I.C. 362=1933 N. 47.

PLEADING PRIVILEGE FOR PROFESSIONAL COMMUNICATION.—A pleader cannot be charged for misconduct for refusing to disclose to the Court a professional communication made to him by his client. 14 Cr.L.J. 438=20 I.C. 598.

BOYCOTT OF COURTS.—49 C. 732=35 C.L.J. 356=26 C.W.N. 589 (F.B.); 25 C.W.N. 580=69 I.C. 209=1923 C. 212; 35 C.W.N. 344.

BURDEN OF PROOF.—In proceedings against a legal practitioner the burden of proving the charges against the practitioner is on the complainant. The complainant's evidence in such cases needs corroboration. 54 M. 857=61 M.L.J. 148 (F.B.).

DEFIANCE TO LAWS—VAKIL TAKING LAW INTO HIS OWN HANDS.—72 I.C. 875=1923 P. 185 (F.B.). Persistence in conduct and advising non-payment of taxes or boycott of Courts and breaking law and order would justify proceedings under this section. 45 M.L.J. 684=75 I.C. 997=1924 M. 129. *See also* 42 P.L.R. (J. & K.) 77.

LAWYER BLINDLY FOLLOWING CLIENT'S INSTRUCTIONS.—When their clients ask them to write in a pleading or petition accusations of dishonesty, criminality, etc., against anybody, or instruct them to ask questions of that nature the lawyers are not to blindly follow the instructions. They must satisfy themselves that apart from the relevancy of those accusations or questions, there are materials on which those accusations can be made or questions asked, and that the accusations and suggestions are not recklessly made. If they do not do so, they are guilty of professional misconduct. 1934 P. 398 (S.B.). *See also* 1935 A.L.J. 29=1935 A. 117. If however the pleader acts in good faith and with due care and caution, he will be protected. *See* 152 I.C. 313=15 P.L.T. 160 (S.B.). The pleader was addicted to drinking. In defending an accused, he came to Court in so drunken a condition that he was unable to conduct the case on behalf of his client. On another occasion, he came to Court "hopelessly drunk" and not properly dressed and insulted the Court; again on another occasion, he assaulted the bench clerk. *Held,* that he was not fit to be entrusted with the responsible duties of the legal profession and that his name should be struck off the list of the pleaders. 12 Rang. 180=150 I.C. 236=1934 Rang. 156. Practice and Procedure where a Court has reason to believe that a practitioner is guilty of professional misconduct; it cannot allow proceedings to be dropped as a result of an agreement between the practitioner and the complainant. I.L.R. (1940) Mad. 433=51 L.W. 197=1940 Mad. 370=(1940) 1 M.L.J. 259 (F.B.).

Sec. 14: SCOPE OF SECTION—NATURE OF PROCEEDINGS UNDER THE SECTION.—The procedure under the Act is neither criminal nor civil but purely designed for the purpose of discipline. Such disciplinary proceedings under S. 14 are not proceedings of a Court of civil jurisdiction and S. 141, C. P. Code, Procedure when charge of unprofessional conduct is brought in subordinate Court or revenue-office.

or in any revenue-office is charged in such Court or office with taking instructions except as aforesaid, or with any such misconduct as aforesaid, the presiding officer shall send him a copy of the charge and also a notice that, on a day to be therein appointed, such charge will be taken into consideration.

NOTES.

cannot apply to them. 1 P.L.J. 576=37 I. C. 484. *Woodroffe, J.*—Proceedings under this section are *quasi* criminal proceedings and pleader may be examined on oath. 49 C. 732=26 C.W.N. 589=1922 C. 515 (F. B.). *Mookerjee, J.*—The proceedings are neither civil nor criminal in their nature. They are special proceedings resulting from the inherent power of the Court over its officers and are regulated by S. 14. 1922 Cal. 515=49 Cal. 732. *See also* 2 R. 491. Pleader whether can be put on oath during inquiry against him. False statements during enquiry—Effect—Procedure. 115 I. C. 318=1929 S. 121 (F.B.). In a case in which a legal practitioner is charged with professional misconduct the enquiry should proceed on formulated charges. 34 C. W. N. 534=1930 P.C. 144=58 M.L.J. 635 (P.C.). Applicability of S. 107 of the Government of India Act, 1915, to proceedings under S. 14 of the Legal Practitioners Act discussed. 1 P.L.J. 576=37 I.C. 434. It is only where, in the course of proceedings before it, a Subordinate Court has reason to suppose that a pleader has been guilty of misconduct, that the Subordinate Court can inquire as to the misconduct without reference to the High Court. He cannot do so if the alleged misconduct has taken place before proceedings have been started in the Court. 171 I.C. 503=1937 Rang. 345.

PLEADER GUILTY OF CRIMINAL OFFENCE.—Proceedings under the Act being summary proceedings a pleader should not be proceeded thereunder for what are in reality grave criminal charges. 1 P.L.T. 571=58 I.C. 150=5 P.L.J. 601. *See also* 57 I.C. 931 =24 C.W.N. 755; 31 C.W.N. 584=54 C. 721=1927 C. 536; 115 I.C. 318=1929 S. 121.

STANDARD OF PROOF.—The standard of proof of guilt under Legal Practitioners Act is not different from other legal proceedings and should be such as to leave no reasonable doubt in the mind of the Court that the offence has been committed. 1 P.L.T. 372 =57 I.C. 460 (F.B.). *See also* 1939 Pat. 343 (S.B.). (Necessity for strict proof—Mere suspicion not sufficient. *See also* 18 Pat. 580=20 Pat.L.T. 607=1939 Pat. 343 (S.B.). Where the point for enquiry was whether a pleader signed and filed a satisfaction, of a mortgage execution case without instruction, and the Court finds that the charge is not established beyond reasonable doubt no action could be taken against the pleader under the Legal Practitioners Act. 152 I.C. 43=59 C.L.J. 419=1934 C. 794. Charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion. 58 M. L.J. 635=34 C.W.N. 534=1930 P.C. 144 (P.C.), followed in 1930 L. 947. Where the allegation against a legal practitioner amounts to a charge of criminal prosecution the correct procedure to be followed is to launch a criminal prosecution and not to proceed under the Legal Practitioners Act. 38 C.W.N. 87=1934 Cal. 272; I.L.R. (1938) 2 Cal. 138. A pleader intentionally concealing his conviction in his application for admission is liable to be dismissed. 25 I. C. 339=11 Bur. L. T. 304. Under the Legal Practitioners Act, the High Court will not go into the merits of conviction but will ordinarily accept the findings of Criminal Courts as final. 17 I. C. 811=5 Bur.L.T. 191. It is not, however necessary for the High Court to exercise its jurisdiction that any offence should have been committed, nor is it necessary that what the pleaders have done should have subjected them to anything like general infamy or imputation of character. 22 Bom. L.R. 13=54 I.C. 679=44 B. 418. *See also* 72 I.C. 875 (F.B.).

RE-INSTATEMENT.—The High Court has power to re-instate a legal practitioner who had been dismissed for misconduct of any description. Before doing so it should be clearly convinced by actual facts that the delinquent has reformed his character. 1 P. 684=71 I.C. 122; 14 C.L.J. 113=11 I.C. 997=16 C.W.N. 337; considerations justifying re-instatement of debarred pleader. I.L.R. (1937) Bom. 99=38 Bom. L. R. 1161=1937 Bom. 48; I.L.R. (1937) All. 411=1936 A.L.J. 1396=1937 All. 50 (F. B.). *See also* 1939 Rang.L.R. 213=1939 Rang. 142 (S.B.); 45 M.L.J. 639=1924 Mad. 265 (F.B.); I.L.R. (1940) Mad. 81; I.L.R. (1940) Mad. 84. Where persons are struck-off the roll, the door is not irrevocably shut behind them, but after years of industry straightforwardness of life, and conduct which shows repentance and determination to amend, they may ultimately find their way back to the honourable profession which they once disgraced. That leniency of outlook results from the consideration that it is impossible to shut out from a man of education, who has once borne a good character, the hope that he may rise again. But it does not mean that persons who have been properly removed from the rolls should come again and again with repeated applications within months, or even

Such copy and notice shall be served upon the pleader or mukhtar at least fifteen days before the day so appointed.

On such day, or on any subsequent day to which the enquiry may be adjourned, the presiding officer shall receive and record all evidence properly produced in support of the charge, or by the pleader or mukhtar, and shall proceed to adjudicate on the charge.

NOTES.

within a few short years, after the event. *See also* 1939 Rang. L. R. 213=1939 Rang. 142; 41 Cr.L.J. 272=1940 Rang. 32. Before the Court could re-admit an Advocate who has been struck off the rolls for misappropriation of monies belonging to his client, the Court must be fully satisfied that the Advocate has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. The Court would require solid facts and cogent reasons. Mere opinion is not sufficient. An Advocate can only be re-admitted if he can show that he has become worthy to act as an Advocate. His re-admission does not depend on the fact that he has been suspended or struck off the rolls for several years. In deciding such matters the Court has a duty to the public, and where the Advocate has been guilty of misappropriation it must be shown that there is no likelihood of such an offence being committed again. I.L.R. (1940) Mad. 81=1939 M. 906=(1939) 2 M. L.J. 632 (S.B.); I.L.R. (1940) Mad. 84= 1939 Mad. 917=(1939) 2 M.L.J. 630 (F. B.). There is inherent power in the High Court to restore a pleader whose name has been struck off the rolls, although there is no express provision for a review of an order made under the Legal Practitioners' Act. 1935 All. 321 (F.B.). *See also* notes under S. 41, *infra*.

INQUIRY INTO MISCONDUCT OF PLEADER—JURISDICTION, PRACTICE AND PROCEDURE.—If a pleader or mukhtar practising in a Court commits an offence of professional misconduct in connection with any instructions which he has received from his client generally or in connection with any particular case, then it is within the jurisdiction of any Court before whom such pleader or mukhtar is practising, if brought to its notice that the practitioner has committed any unprofessional conduct, to take action against him, and those proceedings would be entirely within jurisdiction. The presiding officer of the Court in which the pleader or mukhtar practises has ample jurisdiction to initiate proceedings, though the particular matter in reference to which he commits the act complained of might not be before that Court. 18 Pat.L.T. 961=1938 Pat. 17 =17 Pat. 96 (S.B.). Where a Subordinate Court after drawing up a charge against a pleader and holding an inquiry is of opinion that no report should be sent to the High Court and that the proceedings should be dropped, the District Judge has no jurisdiction to forward those proceedings to the High Court recommending suspension. He has no jurisdiction to forward the proceedings which were never initiated by him or to act on the evidence which was never recorded by him. A reference to the High Court by the District Judge in such a case is *ultra vires*. 17 Pat. 261=1938 Pat. 385 (S. B.). If the District Judge disagrees with the findings of the Subordinate Court, he is at liberty to draw up fresh proceedings and after giving notice to the pleader record himself all evidence in support of the charge or to refute the charge, and then after adjudicating thereon he can report to the High Court if in his view the conduct of the pleader deserves a punishment to be meted out by the High Court. It is also open to the High Court to draw up fresh proceedings and then to dispose of the matter after giving notice to the pleader and after hearing his defence, if any. 17 P. 261. If a Court thinks there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case it should decide on the merits of the case and reserve such question for further consideration after the disposal of the suit. 40 A. 147=44 I.C. 28 =16 A.L.J. 64. Inquiry should ordinarily be made by the presiding officer of the Court where the misconduct is alleged to be committed. 1928 A. 396 (S.B.). *See also* I.L.R. (1940) Mad. 433=(1940) 1 M.L.J. 259 (F.B.).

PROCEDURE OF S. 14 MUST BE STRICTLY FOLLOWED.—The proceedings must be separate and distinct and cannot be made part of criminal proceedings. The report of the High Court must be accompanied by the opinion of the officer making the report.. 9 I.C. 247=15 C.W.N. 764. S. 14 includes a charge under Cl. (*f*) of S. 13 (as amended by Act XI of 1896), and Subordinate Courts have jurisdiction to take proceedings. 152 P.L.R. 1919=54 I.C. 982. *See also* 1939 Pat. 343=18 Pat. 580=20 Pat.L. T. 607. Where the District Judge finds that the charge of professional misconduct has not been established the case should not go to the High Court. 190 I.C. 320=1940 Rang. 190. Failure to formulate precise charges not fatal to proceedings in absence of prejudice). A charge of professional misconduct of a pleader can be enquired into only by the presiding officer of the Court in which the pleader practices. 32 M.L.J. 402=41 I.C. 305. The enquiry under S. 14 cannot be delegated to another officer. 1 Pat.L.J. 576=37 I.C. 484. Under S. 14 the proceedings could be instituted only by the Magistrate in whose Court

If such officer finds the charge established and considers that the pleader or mukhtar should be suspended or dismissed in consequence, he shall record his finding and the grounds thereof, and shall report the same to the High Court; and the High Court may acquit, suspend or dismiss the pleader or mukhtar.

Suspension pending investigation.

Any District Judge, or with his sanction any Judge subordinate to him, [1][any Judge of a Court of Small Causes of a Presidency-town], any District Magistrate, or with his sanction any Magistrate subordinate to him, and any Revenue-authority not inferior to a Collector, or with the Collector's sanction any Revenue-Officer subordinate to him, may, pending the investigation and the orders of the High Court, suspend from practice any pleader or mukhtar charged before him or it under this section.

Every report made to the High Court under this section shall—

(*a*) when made by any Civil Judge subordinate to the District Judge, be made through such Judge;

(*b*) when made by a Magistrate subordinate to the Magistrate of the District,[2] be made through the Magistrate of the District[2] and the Sessions Judge;

(*c*) when made by the Magistrate of the District,[2] be made through the Sessions Judge;

(*d*) when made by any Revenue-Officer subordinate to the Chief Controlling Revenue-Authority, be made through such Revenue-Authorities as the Chief Controlling Revenue-Authority may, from time to time, direct.

Every such report shall be accompanied by the opinion of each Judge, Magistrate or Revenue-authority through whom or which it is made.

LEG. REF.

[1] Inserted by Act IX of 1884, S. 4.

[2] To be read as "District Magistrate." *See* the Code of Criminal Procedure, 1898 (Act V of 1898), S. 3 (2).

NOTES.

the alleged misconduct or offence took place. 1 Pat.L.T. 379=57 I.C. 277. Inquiry by superior Court is invalid. The enquiry contemplated by S. 14 must be made by the presiding officer of the Court in which the misconduct was alleged and not by the presiding officer of a superior Court. 4 Pat. L.T. 97=71 I.C. 703. *See also* 32 M.L.J. 402=41 I.C. 305. The High Court, when the matter was referred to it, refused to take action upon that account. 4 Pat.L.T. 97=71 I.C. 703. An additional District Magistrate should follow the procedure laid down in S. 14 (*c*) with reference to a report by a District Magistrate and forward the report through the Sessions Judge. 27 C.W.N. 88=1922 C. 550. The District Magistrate acted improperly in replying upon his own recollections of facts when they differed from those of other witnesses and it was undesirable for him to sit as a Judge to determine the matters in respect of which he might have been called upon to report or examined as a witness. 1 Pat.L.T. 379=57 I.C. 277. S. 14 is material even when any pleader is acting in his professional capacity on behalf of his client in a proceeding in a Revenue Office. If he is guilty of professional misconduct he would bring himself within the disciplinary jurisdiction. 56 C.L.J. 595=1933 C. 344.

JURISDICTION.—District Judge to institute the proceedings under S. 14. *See* 49 C. 850=35 C.L.J. 520=67 I.C. 985 (S.B.). The expression "such Court" in the first clause of S. 14 cannot be construed to mean the Court in which the misconduct is alleged to have been committed. The section only means that any Court in which a pleader practises is competent to inquire into a charge of misconduct if the charge is brought in that Court. 72 I.C. 521=24 Cr.L.J. 409 (R.). Infliction of punishment on the legal practitioner is within the exclusive jurisdiction of the High Court. (15 C.W.N. 764, Dist.). 59 C. 709=36 C.W.N. 294=1932 C. 370. A District Judge, on being informed by a person, who is admittedly at enmity with a legal practitioner, that the legal practitioner is using his private motor as a public conveyance for passengers has no jurisdiction to hold any inquiry himself into the matter under S. 14 without having referred the matter previously to the High Court. The proper course is to report the matter to the High Court in order that it may take such steps as it deems fit under S. 13 or otherwise. 162 I.C. 485=1936 Rang. 189. S. 13 contemplates the High Court directing an inquiry before action is taken. Unless the tribunal is constituted, beforehand, the inquiry cannot be lawful. Approval of a tribunal *ex post facto* is repugnant to the spirit of the Act and the wording of S. 13. If the tribunal conducting the inquiry has not been validly constituted, acquiescence in

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the proceedings would not turn it into a lawful tribunal. A *District Judge who is directed to hold an inquiry under S. 12 must hold it himself and has no power to delegate to an Additional District Judge* without reference to the High Court and without obtaining the sanction of the High Court beforehand. Nor has the District Judge authority under S. 3-A of the Madras Civil Courts Act to transfer his duty to the Additional District Judge. I.L.R. (1940) Mad. 433=1940 Mad. 370=(1940) 1 M. L.J. 259 (F.B.).

Irregular Reference—Effect.—For a proper reference to the High Court the formalities required by S. 14 ought to be fulfilled and in the absence of those formalities being strictly complied with the reference is no valid reference. 27 A.L.J. 1042=118 I.C. 712=1929 A. 655 (F.B.). The High Court would exercise its disciplinary jurisdiction even though the reference under S. 14 with regard to alleged misconduct of a pleader is not made by the trial Court in whose Court the occurrence has taken place but by the appellate Court which has no power to refer it. It would be necessary however that the High Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the Court. P. 689=4 Pat. L.T. 235=71 I.C. 209. Subordinate Court can institute proceedings against a legal practitioner in respect of an act coming under Cl. (*f*) to S. 13. Where proceedings are commenced under Cl. (*b*) to S. 13, but if it is found that the act comes under Cl. (*f*) to S. 13, the High Court may avail itself even if the subordinate Court in such cases would have no jurisdiction to make the inquiry it did. 39 I.C. 305=21 C.W. N. 516. The fact that the pleader concerned had become a vakil of the new High Court at Lahore since the action was taken under S. 14 by a lower Court could not affect the jurisdiction of that Court. 152 P.L.R. 1919=54 I.C. 982.

Power of Suspension.—Investigation in para. 5 of S. 14 means investigation in the High Court. It is only after a report to the High Court under para. 4 that power is given to suspend under para. 5. 13 C.L.J. 457=9 I.C. 225=15 C.W.N. 269. The District Judge cannot suspend any pleader from practice until he has recorded his finding that he ought to be suspended or dismissed. Suspension pending investigation is not proper. 1937 M.W.N. 460=1937 Mad. 672. *See also* 163 I.C. 586=1936 Rang. 249.

Criminal Proceedings pending—Renewal of Pleader's Certificate.—Where a prosecution is ordered against a legal practitioner instead of proceeding according to S. 14, the Judge ought not to wait until the result of the criminal proceedings are known before renewing the pleader's certificate. 38 A. 182=14 A.L.J. 82=33 I.C. 632. The fact that criminal proceedings in connection with an offence under S. 193, I.P. Code, are pending against a mukhtar is not a sufficient reason within the meaning of R. 452 of the Rules of the Court of 4th April, 1898, for refusing to renew his certificate, unless the District Judge also takes action under S. 14. 1901 A.W.N. 60. A report to High Court under S. 14 recommending the dismissal of a mukhtar having no licence to practise in a Revenue Office for gross misconduct, does not lie where the misconduct was committed in the capacity, not of a mukhtar, but as a private individual and came to light in a proceeding wherein he was not a party but only a witness. 23 I.C. 746=19 C.L.J. 100. A proceeding under this Act which is not properly initiated is not a judicial proceeding in the course of which a prosecution may be directed by the Court under S. 476, Cr.P. Code. 15 C. W.N. 269=13 C.L.J. 457=9 I.C. 225. Proceedings against several pleaders are to be separate and distinct. 15 C.W.N. 764 =9 I.C. 247. An inquiry into the professional misconduct of a pleader being of a *quasi* judicial nature the Court must have strict proof of the pleader's misbehaviour. 11 Bom.L.R. 1150=4 I.C. 266. The section does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. 188 P. L.R. 1901. R. 37 of the Chapter XXI of the General Rules Civil (1911) applies even to a pleader of the High Court when he is practising in the Subordinate Courts. 17 I.C. 539=13 Cr.L.J. 794. Competency of District Judge to enquire into a charge of misconduct—Chief Court's power of revision. 4 I.C. 1022=11 Cr.L.J. 148. Misconduct of mukhtar as witness—Notice to Commissioner on Land Revenue appeal—Mukhtar not entitled to practise in revenue office—Jurisdiction of Commissioner to refer misconduct to High Court. 19 C.L. J. 110=22 I.C. 746. A Court subordinate to the High Court is competent to try offences falling under Cls. (*c*) and (*f*) of S. 13. 3 A.L.J. 811=29 A. 61.

Misconduct—Appearance for opposite side.—Proper professional conduct is not a mere matter of compliance with technical rules. It is one of which every one who aspires to be called a gentleman should have an instinctive appreciation. The conduct of a pleader who had already taken instructions from defendant and received his confidence in the matter of the genuineness of a Small Cause Court suit but who notwithstanding that confidence accepts the instructions of the other side in a title suit referring to same subject-matter, deserves the severest censure. 15 P.L.T. 305=150 I.C. 16= 1934 P. 352 (S.B.). *See also* 1938 Pat. 28 (S.B.); 1928 Mad. 592; 13 A.L.J. 475; 1938 Mad. 276; 1928 Lah. 65; 1930 Rang. 355; 1934 Oudh 58; 1938 Pat. 28=1938 P. W.N. 115. ***Reinstatement after disbarment***—Practice as to. *See.* 1939 Rang. 78.

Power to call for record in case of acquitted under section 14.

15. The High Court, in any case in which a pleader or mukhtar has been acquitted under section 14 otherwise than by an order of the High Court, may call for the record and pass such order thereon as it thinks fit.

Power to make rules for mukhtars on appellate side of High Court.

16. Notwithstanding anything contained in any letters patent or in the Code of Civil Procedure, section 37, clause (*a*), any High Court established by Royal Charter may, from time to time, make rules consistent with this Act as to the following matters (namely):—

(*a*) the qualifications and admission of proper persons to be mukhtars practising on the appellate side of such Court;

(*b*) the fees to be paid for the examination and admission of such persons;

(*c*) the security which they may be required to give for their honesty and good conduct;

(*d*) the suspension and dismissal of such mukhtars; and

(*e*) declaring what shall be deemed to be their functions, powers and duties;

and may prescribe and impose fines for the infringement of such rules, not exceeding in any case five hundred rupees; and such fines when imposed, may be recovered as if they had been imposed in the exercise of the High Court's ordinary original criminal jurisdiction.

CHAPTER IV.

OF REVENUE-AGENTS.

Power to make rules as to qualifications, etc., of revenue-agents.

17. The Chief Controlling Revenue-authority, may, from time to time, make rules[1] consistent with this Act as to the following matters (namely):—

(*a*) the qualifications, admission and certificates of proper persons to be Revenue-agents;

(*b*) the fees to be paid for the examination and admission of such persons;

(*c*) the suspension and dismissal of such revenue-agents; and

(*d*) declaring what shall be deemed to be their functions, powers and duties.

Publication of rules.

All such rules shall be published in the Official Gazette, and shall thereupon have the force of law.

Certificates to revenue-agents.

18. On the admission of any person as a revenue-agent under section 17, the Chief Controlling Revenue-authority shall cause a certificate, signed by such officer as such Authority from time to time appoint in this behalf, to be issued to such person, authorizing him to practise up to the end of the current year in such revenue-offices as may be specified therein.

At the expiration of such period, the holder of the certificate, if he desires to continue to practise, shall be entitled to have his certificate renewed by the Secretary of the Chief Controlling Revenue-authority, or by any other officer authorized by such Authority in that behalf.

On every such renewal, the certificate then in the possession of such revenue-agent shall be cancelled and retained by such Secretary or other officer.

Every certificate so renewed shall be signed by such Secretary or other officer and shall continue in force to the end of the current year.

LEG. REF.

[1] For rules made under this section, *see* the digerent Local Rules and Orders.

NOTES.

Sec. 15.—As to applicability of section *see* 46 L.W. 599=1937 Mad. 672.

Every officer so renewing a certificate shall notify the renewal to the Chief Controlling Revenue-authority.

Enrolment of revenue-agent.

19. Every revenue-agent holding a certificate issued under section 18 may apply to be enrolled in any revenue-office mentioned therein and situate within the limits of the territory under the Chief Controlling Revenue-authority; and subject to such rules as the Chief Controlling Revenue-authority may, from time to time, make in this behalf, the officer presiding in such office shall enrol him accordingly, and thereupon he may practise as a revenue-agent in such office and in any revenue-office subordinate thereto.

No person to act as agent in revenue-offices unless qualified.

20. Except as provided by this Act or any other enactment for the time being in force, no person, other than a pleader duly qualified under the provisions hereinbefore contained, shall practise as a revenue-agent in any revenue office, unless he holds a certificate issued under section 18 and has been enrolled in such office or some other office to which it is subordinate:

Provided that any person duly authorized in this behalf may, with the sanction of the Chief Controlling Revenue-authority, or of an officer empowered by the Provincial Government in this behalf, transact all or any business in which his principal may be concerned in any revenue-office.

The sanction mentioned in this section may be general or special, and may at any time be revoked or suspended by the Authority or officer granting the same.

Dismissal of revenue-agent convicted of criminal offence.

21. The Chief Controlling Revenue-authority may suspend or dismiss any revenue-agent holding a certificate issued under this Act who is convicted of any criminal offence implying a defect of character which unfits him to be a revenue-agent.

Suspension and dismissal of revenue-agents guilty of unprofessional conduct.

22. [1][The Chief Controlling Revenue-authority may also, after such inquiry as it thinks fit, suspend or dismiss any revenue-agent holding a certificate as aforesaid—

(*a*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

(*b*) who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other revenue-agent, or

(*c*) who, directly or indirectly, procures or attempts to procure the employment of himself, as such revenue-agent through, or by the intervention of, any person to whom any remuneration for obtaining such employment has been given by him, or agreed or promised to be so given, or

(*d*) who accepts any employment in any legal business through a person who has been proclaimed as a tout under section 36, or

(*e*) for any other reasonable cause.]

Procedure when revenue-agent is so charged in subordinate office.

23. If any revenue-agent holding a certificate issued under this Act is charged with any such conduct in any office subordinate to the Chief Controlling Revenue-authority, or in the Court of any Munsif, the officer at the head of such office, or such Munsif, as the case may be, shall

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LEG. REF.

[1] **Substituted by Act XI of 1896, S. 3.**

send him a copy of the charge, and also a notice that, on a day to be therein appointed, such a charge will be taken into consideration.

Such copy and notice shall be served upon the person charged at least fifteen days before the day so appointed. On such day or on any other day to which the enquiry may be adjourned, the officer or Munsif shall receive all evidence properly produced in support of the charge, or by the person charged, and shall proceed to adjudicate on the charge.

If the officer or Munsif finds the charge established, and considers that the person charged should be suspended or dismissed in consequence, he shall record his finding and the grounds thereof, and report the same to the Chief Controlling Revenue-authority; and such Authority shall proceed to acquit, suspend or dismiss him.

Any Revenue-officer not inferior to a Collector, and, with the Collector's sanction, any Revenue-officer subordinate to him, or any Munsif in his district, may, pending the investigation and the orders of the Chief Controlling Revenue-authority, suspend from practice any revenue-agent charged before him under this section.

Where any officer acting under this section is subordinate to the Commissioner of a Division, he shall transmit the report through such Commissioner, who shall forward with the same an expression of his own opinion on the case.

Power to Chief Controlling Revenue-authority to call for record.

24. The Chief Controlling Revenue-authority, in any case in which a revenue-agent has been acquitted under section 23 otherwise than by an order of the Chief Controlling Revenue-authority, may call for the record and pass such order thereon as seems fit.

CHAPTER V.

OF CERTIFICATES.

Fee for certificates.

25. Every certificate, whether original or renewed, issued under this Act shall be written upon stamped paper of the value prescribed therefor in the second schedule hereto annexed [1][and of such description as the Provincial Government may, from time to time, prescribe.[2]]

Provided that a certificate issued on or after the first day of July in any year may be written on stamped paper of half the value so prescribed:

[3][Provided also that no stamped paper shall be required in the case of a certificate, whether original or renewed, authorizing, under section 7, a vakil or attorney on the roll of a High Court established by Royal Charter to practise as a pleader.]

Dismissed practitioners to surrender certificates.

26. When any pleader, mukhtar or revenue-agent is suspended or dismissed under this Act, he shall forthwith deliver up his certificate to the Court or officer at the head of the office before or in which he was practising at the time he was so suspended or dismissed, or to any Court or officer to which the High Court or Chief Controlling Revenue-authority (as the case may be) orders him to deliver the same.

LEG. REF.

[1] Inserted by Act IX of 1884, S. 5.

[2] For instance of rule prescribing the stamp paper to be used for certificates, *see* different Local Rules and Orders.

[3] Inserted by Act I of 1908, S. 4.

CHAPTER VI.

OF THE REMUNERATION OF PLEADERS, MUKHTARS AND REVENUE-AGENTS.

High Court and Chief Controlling Revenue-authority to fix fees on civil and revenue proceedings.

27. The High Court shall, from time to time, fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate, pleader, vakil, mukhtar or attorney upon all proceedings (*a*) on the appellate side of such Court, (*b*) in the case of a High Court not established by Royal Charter, on its original side, and (*c*) in subordinate Courts [1][and in respect of the fees of his adversary's revenue-agent appearing, pleading or acting under section 10].

The Chief Controlling Revenue-authority shall, from time to time, fix and regulate[2] the fees payable upon all proceedings in the revenue-offices by any party in respect of the fees of his adversary's advocate, pleader, vakil, attorney, mukhtar or revenue-agent.

Tables of the fees so fixed shall be published in the Official Gazette.

Exception as to agents mentioned in section 20.

Nothing in this section applies to the agents mentioned in the proviso to section 20.

28 to 31. [*Agreements with clients. Power to modify or cancel agreements. Agreements to evclude further claims. Reservation of responsibility for negligence.*] *Rep. by the Legal Practitioners (Fees) Act (XXI of* 1926).

CHAPTER VII.

PENALTIES.

On persons illegally practising as pleaders, mukhtars or revenue-agents.

32. Any person who practises in any Court or revenue-office in contravention of the provisions of section 10 or section 20 shall be liable, by order of such Court or the officer at the head of such office, to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorizing him so to practise in such Court or office, and, in default

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LEG. REF.

[1] Inserted by Act IX of 1884, S. 6.

[2] For rules as to fees in revenue proceedings, *see* the different Local Rules and Orders.

NOTES.

Sec. 27.—This Act does not impose any limitation upon the fees which are recoverable by practitioners from their own clients as regulated by agreement between them. 29 I.C. 763; 17 C.W.N. 45=15 C.L.J. 660; 13 I.C. 43. Where several pleaders are employed the fees allowable under the rules framed by the High Court under this section should be equally divided amongst all of them. 7 C.W.N. 300. Engagement of more than one vakil—Rights to fees. *See* 38 I.C. 210. *See also* 4 M.L.J. 181=26 M. 654 (F.B.). Where a pleader who has been engaged in the suit is re-engaged by the assignee decree-holder, no pleader's fee can be allowed in execution afresh—C.P. Rules. 144 I.C. 379=1933 N. 360.

Sec. 28: ORAL AGREEMENT INVALID.—A suit by a pleader for fees based upon an alleged oral agreement cannot succeed because it is not a valid agreement as it is a special agreement and any special agreement is to be in writing under the provisions of S. 28. 26 C.W.N. 709=67 I.C. 874=1922 C. 567. *See also* 20 I.C. 47=20 C.L.J. 424.

FAILURE TO FILE AGREEMENT.—Even an illegal agreement if not actually filed under S. 28 cannot be acted on and if the pleader acted *bona fide* and in good faith no action ought to be taken on it. 12 Cr.L.J. 12=9 I.C. 130=8 A.L.J. 151.

Repeal of S. 28, Legal Practitioners Act, is not retrospective. 6 P. 614=101 I.C. 559=1927 P. 178. The repeal of the section does not affect rights created before it came into force. 1927 P. 178. As to a recent ruling under the repealed section, *see* 26 A. L.J. 258=1928 A. 274. *See also* 1930 P. 61; 30 L.W. 876=57 M.L.J. 756; 113 I.C. 93; 123 I.C. 408.

Sec. 32.—The term "practising" in S. 32 does not connote the doing of acts habitually or often, but signifies the performance of an act by a person as a professional man which as a private individual, he could not do. 26 A. 380=1904 A.W.N. 57.

MUKHTAR PRACTISING WITHOUT A CERTIFICATE.—*See* 1897 A.W.N. 8; 1901 A.W. N. 60.

of payment, to imprisonment in the civil jail for a term which may extend to six months.

He shall also be incapable of maintaining any suit for, or enforcing any lien with respect to, any fee or reward for, or with respect to, anything done or any disbursement made by him as pleader, mukhtar or revenue-agent, whilst he has been contravening the provisions of either of such sections.

On suspended or dismissed pleader, etc., failing to deliver certificate.

33. Any pleader, mukhtar or revenue-agent failing to deliver up his certificate as required by section 26 shall be liable, by order of the Court, authority or officer to which or to whom, or according to whose orders, the delivery should be made, to a fine not exceeding two hundred rupees, and in default of payment to imprisonment in the civil jail for a term which may extend to three months.

On suspended or dismissed practitioner practising during suspension or after dismissal.

34. Any pleader, mukhtar or revenue-agent who, under the provisions of this Act, has been suspended or dismissed, and who, during such suspension or after such dismissal, practises as a pleader, mukhtar or revenue-agent in any Court or revenue-office, shall be liable, by order of such Court or the officer at the head of such office, to a fine not exceeding five hundred rupees, and in default of payment to imprisonment in the civil jail for a term which may extend to six months.

Revision of fines.

35. Every order under section 32, 33 or 34 shall be subject to revision by the High Court where the order has been passed by a subordinate Court, and by the Chief Controlling Revenue-authority where the order has been passed by an officer subordinate to such Authority.

Power to frame and publish lists of touts.

[1][36. (1) Every High Court, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue-officer, not being below the rank of a Collector of a District, and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court, and the Courts, if any, subordinate thereto), may frame and publish lists of persons proved to their or his satisfaction,[2][or to the satisfaction of any subordinate Court as provided in sub-section (2-A)] by evidence of general repute or otherwise, habitually to act as touts, and may, from time to time, alter and amend such lists.

LEG. REF.

[1] Substituted by Act XI of 1896, S. 4.

[2] Inserted by Act XV of 1926, S. 3.

NOTES.

Sec. 36: SCOPE OF SECTION.—*See* 6 A.L.J. 22. S. 36 creates a special jurisdiction but does not define the details of the mode in which that jurisdiction is to be exercised. The course to be adopted should be such as would do substantial justice to the parties brought before the Court. An enquiry under S. 36 cannot be conducted in the manner prescribed in Cr.P. Code, regarding enquiries altogether of a different nature. 44 M.L.J. 437=69 I.C. 433=1923 M. 188 (2). As to the effect of a resolution of a Bar Association that a person is a tout, *see* 26 A.L.J. 790=1928 A. 334. To determine the regularity or otherwise of a Bar Association declaring certain persons to be touts any rules framed by the Association are irrelevant. 1928 All. 334.

JURISDICTION AND PROCEDURE.—Proceedings to declare a man a tout are not judicial ones but are only of a departmental nature. 166 I.C. 643=38 Cr.L.J. 316=1937 Sind 4. Under S. 36 of the Act it is not necessary that there should be a petition at all; it does not contemplate the case of a party making definite allegations against an alleged tout. 44 M.L.J. 437=69 I.C. 433=1923 M. 188 (2). The proceedings, under S. 36 are of a *quasi* criminal nature and it is doubtful whether consent of the persons claimed against can validate any irregularity in the procedure. 1931 Cr.C. 137=1931 L. 57. *See also* 62 I.C. 829=22 Cr.L.J. 589. The exhibition of the copy of the list referred to in S. 36, Cl. (3) of the Act is necessary to constitute a man a proclaimed tout. The principles applicable in cases under S. 110 of the Cr.P. Code apply to

NOTES.

cases under S. 36. 40 A. 153=44 I.C. 125. An order under S. 36 declaring a person to be tout is not valid if made by a District Magistrate on evidence recorded by a Subordinate Magistrate. 60 I.C. 321=24 C. W.N. 1074. An enquiry under S. 36 must be made by the District Magistrate himself and cannot be delegated to any subordinate officer. 13 Cr.L.J. 510=15 I.C. 654 (C.). *See also* 84 I.C. 462==1925 L. 225; 1931 Nag. 187. The insertion of names of persons in the list of touts should be made after conducting a proper enquiry under S. 36. 132 I. C. 41=1930 A. 796. Before directing inclusion of a person's name in the list of touts it is necessary under S. 36 to give the person an opportunity of showing cause against the inclusion. The duties cannot be delegated by any of the officers mentioned therein to their subordinates. 22 Cr. L.J. 66=59 I.C. 322 (S.B.). Notice to show cause why a person should not be declared a tout must be given to him and evidence should be taken in his presence to show that he is a tout. 42 I.C. 996 (F.B.). The District Judge is bound to examine witnesses named by the person sought to be declared as a tout. The District Judge ought not to impart his own personal knowledge in a case unless he informs the person of the nature and source of his information and allows himself to be cross-examined thereupon. 120 P.L.R. 1909. Where the District Judge sends to the Senior Subordinate Judge the names of persons suspected to be touts for the purpose of enquiry and report, the District Judge should on receipt of such report pass final orders as to the inclusion of the persons in the list of touts. 32 Punj.L.R. 9.

PROOF.—Proof by general repute or otherwise is necessary before a person can be declared a tout under the section. 11 P. L.R. 1912=15 I.C. 307; 44 I.C. 125=40 All. 153; 3 I.C. 982. If a resolution is based on general repute the Court may attach less weight to it, but it cannot be said that such a resolution is invalid or legally inadmissible in evidence and cannot be taken into consideration by the Court. 1931 A. 711. If a number of respectable pleaders in a particular district are found to be of opinion that a person is a tout, the fact is sufficient to justify the District Judge in holding that the person charged is by general repute a tout. 3 I.C. 982. In a proceeding under S. 36 certain legal practitioners who had been produced as defence witnesses by some of the persons proceeded against gave evidence in favour of those who had cited them and at the same time deposed that the rest were known to them by reputation or otherwise as touts. *Held,* that such evidence could not be relied on as evidence against those persons on whose behalf the witnesses had not been cited. 12 Lah. 385 =1931 L. 57. Where it appeared to the High Court, on evidence, that certain persons habitually acted as touts, they were asked to show cause why an order should not be made under S. 36 and, on their failing to give evidence that they were living by honest and legitimate means, they were included in the list of touts and a copy thereof ordered to be hung up in every Court. 1896 A.W.N. 107. The decision of a Court determining that a person is a tout must be based on substantial legal evidence. 13 Cr. L.J. 510=15 I.C. 654 (C.). The person against whom the evidence is directed must have an opportunity of cross-examining the witnesses. 15 I.C. 654 (C.). *See also* 3 I.C. 982.

ILLEGAL GRATIFICATION FOR FURNISHING CASES.—A letter written by a High Court Vakil to another practising in the mofussil asking the latter to send up cases to him and agreeing to share the fees, renders him culpable under S. 36 and the High Court has jurisdiction to take up the case and suspend the pleader, as his conduct amounts to a "reasonable cause" within S. 8 of the Letters Patent of March 17, 1866. 17 A. 498=22 I.A. 193 (P.C.).

DIVISIONAL JUDGE IN THE PUNJAB—POWER of, to declare a person as tout. 108 P.L. R. 1904.

CHIEF COURT'S POWER OF INTERFERENCE (PUNJAB).—*See* 3 P.R. 1900 (Cr.) [*Cited* 22 P.R. 1904 (Cr.) 7; 3 I.C. 982.

POWER OF JUDICIAL COMMISSIONER'S COURT TO INTERFERE IN REVISION.—In cases under S. 36, the Judicial Commissioner's Court has power to interfere in revision in the exercise of its general power of superintendence and control over Subordinate Courts. 28 N.L.R. 4=137 I.C. 66=1932 N. 50. *See also* 1941 Lah. 1=I.L.R. (1941) Lah. 133; (1938) 2 M.L.J. 100.

REVISIONAL JURISDICTION OF HIGH COURT, CONFLICT OF AUTHORITIES.—Proceedings under S. 36 are not governed by the Civil or the Criminal Procedure Codes and cannot be revised under the civil or criminal jurisdiction. But the High Courts have held that they have jurisdiction to interfere under S. 15 of the High Courts Act. 18 P.R. (Cr.) 1914=25 I.C. 513; 45 A. 676=1924 A. 69. *See also* 1941 Lah. 1=I.L.R. (1941) Lah. 133; I.L.R. 1938 M. 488=(1938) 2 M.L.J. 100. The only provision under which the High Court would interfere with the order of a subordinate Court under S. 36 of the Legal Practitioners Act is S. 15 of the High Courts Act. The High Court ought not to interfere with the order of the Sessions Judge under S. 36 of the Legal Practitioners Act on the ground that the finding of the latter was against the weight of evidence. 21 A. 181. The jurisdiction to revise is of an exceptional character and cannot be invoked except in furtherance of justice. If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or con-

[1][*Explanation.*—The passing of a resolution, declaring any person to be or not to be a tout, by a majority of the members present at a meeting, specially convened for the purpose, of an association of persons entitled to practise as

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LEG. REF.

[1] Explanation to sub-S. (1) was inserted by Act XV of 1926, S. 3 (*b*).

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jecture, the High Court would interfere with the order. I.L.R. 1938 Mad. 988 =1938 M. 634=(1938) 2 M.L.J. 100. S. 36 confers a special jurisdiction on Subordinate Courts; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115. C.P. Code, being a case decided by a Court subordinate to the High Court. S. 439 of the Cr.P. Code does not apply to such a case. Nor can it be revised under the Government of India Act, 1935. I.L.R. 1938 M. 988.=(1938) 2 M. L. J. 100. *See also* 1932 Nag. 50. The High Court cannot in its revisional jurisdiction interfere under S. 115; C.P. Code, with an order under S. 36. 56 I.C. 433=13 S.L.R. 212. An order under S. 36 does amount to a judgment contemplated by S. 224 (2). Government of India Act and is not open to revision under S. 115, C.P. Code, any more than under the Cr.P. Code, S. 224 (2), Government of India Act, 1935, bars the interference by the High Court on the administrative side and hence the High Court has no power to question a decision under S. 36. I.L.R. (1941) Lah. 133=192 I. C. 363=1941 Lah. 1. (Case law dismissed.) The intention of the Legislature was not to allow anything of the nature of an appeal against the decision of a competent Court under S. 36. 45 A. 676=21 A.L.J. 671=1924 A. 69. The High Court has power to revise orders passed under S. 36 of the Legal Practitioners Act by reason of power of superintendence vested in the Court by S. 107 of the Government of India Act, but this power is of a very exceptional nature and cannot be invoked except in furtherance of justice. 129 I.C. 487=1930 L. 889. *See also* 56 B. 577=34 Bom. L. R. 1281 =1932 B. 596. *See also* 3 I.C. 982; 3 I.C. 977; 1937 Sind 4=305 L.R. 346.

Sec. 36 (1), Expl.—Under S. 36 (1) Explanation, the resolution is valuable evidence even though the facts on which the resolution is based are not disclosed. 28 N.L. R. 159=139 I.C. 900=1932 N. 141. A resolution or report of a Sub-Committee of only seven members out of an Association of about 22 members declaring certain persons to be touts is not a resolution by a majority of the members, and hence it cannot be used as evidence of general repute under the Explanation. 6 P. 567=1927 P. 282. *Held,* that revision lies to High Court from an order of the District Magistrate including the name of a person in the list of touts under S. 36 of the Legal Practitioners Act. 1930 A.L. J. 961=1930 A. 641. The law does not require hat all the members should be present at the meeting but requires that a meeting of the association should be convened for the purpose of considering whether a certain person is a tout; and if by a majority of the members present at such a meeting a resolution is passed, it is sufficient. 56 C. 800=115 I.C. 602 (2)=1929 C. 196. *See also* 28 N.L.R. 159=1932 N. 141. Nor does it matter that some of the members who voted had lost their voting capacity for non-payment of subscriptions, according to the rules of the Association. 165 I.C. 963 =1936 Lah. 382. Nor does the fact that opportunity was not given to the persons to be declared touts to appear before the association to show cause why the resolution should not be passed. 1936 L. 382. To determine regularity or otherwise of a Bar Association declaring certain persons to be touts any rules framed by the Association are irrelevant. *See* 118 I.C. 524. In order to enable a Court to admit in evidence the resolution of the Bar Association declaring certain persons to be touts, it is necessary to establish that it was meeting specially convened for the purpose of passing the resolution in question. Where it is not proved that all the members of the Association who were able to attend had been notified nor is it shown that those who were not notified were otherwise not capable of attending the meeting, the special meeting convened to declare certain persons touts cannot he said to have been properly convened and consequently the resolution passed thereat is not a valid resolution, as is contemplated by explanation to S. 36 (1). 12 L. 385=1931 L. 57. After the amendment of the Act in 1926, while it is open to proceed under S. 36 in the old way and call evidence, it can also avoid the calling of witnesses once a resolution is presented to it which satisfies the requirements of Act XV of 1926. 130 I.C. 629=1931 A. 315. The expression *"majority of members present"* in the Explanation to S. 36 of the Legal Practitioners Act is not the same thing as majority of members voting. Where the only evidence on which a person was declared a tout was a resolution of the Bar Association and it appeared that at the meeting of the Association 64 were present but only 26 voted in favour of the resolution, 14 votes being against it and the rest being neutral, *held,* that there was no legal evidence on which the person could be declared a tout. 1930 A.L.J. 977 =1930 A. 752. On this Explanation, *see also* 26 A.L.J. 790=1928 A. 334. The words 'any person', mean any named or specified person. So, the *name* of the per-legal practitioners in any Court or revenue-office, shall be evidence of the general repute of such person for the purposes of this sub-section.]

(2) No person's name shall be included in any such list until he shall have had an opportunity of showing cause against such inclusion.

[1][(2-A) Any authority empowered under sub-section (1) to frame and publish a list of touts may send to any Court subordinate to such authority the names of any persons alleged or suspected to be touts, and order that Court to hold an inquiry in regard to such persons; and the subordinate Court shall thereupon hold an inquiry into the conduct of such persons and, after giving each such person an opportunity of showing cause as provided in sub-section (2), shall report to the authority which has ordered the inquiry the name of each such person who has been proved to the satisfaction of the subordinate Court to be a tout; and that authority may include the name of any such person in the list of touts framed and published by that authority:

Provided that such authority shall hear any such person who, before his name has been so included, appears before it and desires to be heard.]

(3) A copy of every such list shall be kept hung up in every Court to which the same relates.

(4) The Court or Judge may, by general or special order, exclude from the precincts of the Court any person whose name is included in any such list.

(5) Every person whose name is included in any such list shall be deemed to be proclaimed as a tout within the meaning of section 13, clause (*e*), and section 22, clause (*d*).]

[1][(6) Any person who acts as a tout whilst his name is included in any such list shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both].

LEG. REF.

[1] Sub-section (*2a*) and (6) were inserted by Act XV of 1926, S. 3.

NOTES.

son to be declared or not to be a tout should be before the meeting, 166 I.C. 643=1937 Sind 4. It is not proper for the District Judge to award costs of his inquiry against the Bar Association when he had invited it to assist him in the inquiry. 165 I.C. 963 =1936 Lah. 382.

Sec. 36 (2).—Under S. 36 (2) the District Judge has the power to differ from or accept the report of Subordinate Court; where District Judge refuses to accept the report the High Court will not interfere in revision unless the order is manifestly wrong. 134 I.C. 98=1931 L. 98 (2). That the order under S. 36 (2) was passed by the District Magistrate without giving the applicant an opportunity of appearing before him and being heard is sufficient ground for revision. (45 A. 676, Foll.) 27 N.L.R. 398=1931 N. 187.

Sec. 36 (2-A).—Order declaring person to be tout when he is not proved to be so, is illegal. 31 P.L.R. 212=1930 L. 405. The Senior Subordinate Judge was asked by the District Judge to hold an enquiry with regard to certain persons named in the list framed by a Bar Association. The name of the petitioner was included in the list and the matter was so reported. *Held,* that under S. 36 (2-A) it was the duty of the petitioner who knew that he was included in the list to enter appearance before the District Judge and apply to be heard and it was not the duty of the District Judge to issue notice to him. 132 I.C. 846=1931 L. 543 (2). Proceedings under S. 36 (2-A) are of a quasi--criminal nature. An order declaring a person to be a tout is one which very seriously affects his character and living. It is therefore incumbent upon the District Judge to satisfy himself that the conditions laid down by the Explanation to sub-S. (1) for the admissibility of a resolution are duly fulfilled and satisfied. 34 Bom.L.R. 1281=1932 B. 596=56 Bom. 577.

Sec. 36 (2-A) Proviso.—The District Magistrate delegating an inquiry to a subordinate cannot act on the report submitted by the latter recommending that a person should be declared a tout, if the person appears and desires to be heard. The District Magistrate cannot delegate the matter of hearing a person against whom a report has been made. 27 N.L.R. 398=1931 N. 187.

CHAPTER VIII.

MISCELLANEOUS.

Provincial Government to appoint Examiners.

37. To facilities the ascertainment of the qualifications mentioned in sections 6 and 17 respectively, the Provincial Government shall, from time to time, appoint persons to be examiners for the purposes aforesaid, and may, from time to time, make regulations for conducting such examinations.

Exemption of High Court practitioners from certain parts of Act.

38. Except as provided by sections 4, 5, [1][7], 16, [1][25], 27, 32 and 36, nothing in this Act applies to advocates, vakils and attorneys admitted and enrolled by any High Court under the letters patent by which such Court is constituted, or to mukhtars practising in such Court or to advocates enrolled [2][under section 41 of this Act]; [3][and, except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court, under the Indian Bar Councils Act, 1926].

Suspension or dismissal of person holding mukhtar and revenue-agent's certificates.

39. When any person who holds a certificate as a mukhtar under section 7 and a certificate as a revenue-agent under section 18 is suspended or dismissed in one of such capacities, he shall be deemed to be suspended or dismissed, as the case may be, also in the other.

Pleaders, etc., not to be suspended or dismissed without being heard.

40. Notwithstanding anything hereinbefore contained, no pleader, mukhtar or revenue-agent shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the Authority suspending or dismissing him.

Power for certain High Courts to enrol advocates.

[4]41. (1) A High Court not established by Royal Charter [5][in respect of which the Indian Bar Councils Act, 1926, is not in force] may, from time to time, with the previous sanction of the Provincial Government, make rules as

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LEG. REF.

[1] Inserted by Act I of 1908, S. 5.

[2] Substituted by Act IX of 1884, S. 7.

[3] The last clause was added by Schedule to Act XXXVIII of 1926 Indian Bar Councils Act).

[4] Substituted by Act X of 1884, S. 8, for the original section.

[5] The words within brackets after 'Royal Charter' were inserted by Act XXXVIII of 1926.

NOTES.

Sec. 37.—For Regulations made under this section by the Government of Burma, *see Burma Gazette,* 1911, Part. 1, p. 13. For Regulations in other Provinces, *see* Local Rules and Orders.

Sec. 40: SCOPE OF THE SECTION.—The provisions of S. 40 apply to interim orders of suspension passed under S. 14, para. 5; before an interim order of suspension is passed under S. 14 (5) he must be asked to show cause under S. 40 and a report must be sent to the High Court under S. 14 (4). 15 C.W.N. 269=9 I.C. 225. *See also* 163 I.C. 586=1936 Rang. 249.

Sec. 41: SUSPENSION OF PRACTICE ON ENTERING GOVERNMENT SERVICE—APPLICATION FOR RENEWAL OF SANAD.—Where a practitioner is sspended from practice owing to his accepting a Government service, and he applies for renewal of the permission after his discharge from such service, he should make a full and true disclosure of the facts which led to his removal from service. 62 I.C. 831 (C.)=22 Cr.L.J. 591. In the enquiry under Legal Practitioners Act of an advocate, the conviction of the advocate by a competent Magistrate must be accepted as proper, and cannot be reopened. 44 A. 352 =65 I.C. 560=1922 A. 140 (F.B.). The power to rescind order under S. 41 possessed by the Court of the Judicial Commissioner fo Oudh vests in the Chief Court. But as the order passed by the Bench of the Judicial Commissioner's Court was confirmed by the Local Government, it should not be rescinded without its confirmation. 148 I.C. 299 =1934 O. 140 (S.B.). Where a legal practitioner has been sufficiently punished by having remained debarred from practice for about fifteen years and he has tendered an unconditional apology the order under S. 41 should be rescinded. 148 I.C. 299=1934 O. 140 (S.B.). There is inherent power in the High Court to restore a pleader whose name has been struck off the rolls although there is no express provision for a review of an order made under the Legal Practitioners Act. 1935 A. 321 (F.B.).

to the qualifications and admission of proper persons to be advocates of the Court, and, subject to such rules, may enrol such and so many advocates as it thinks fit.

(2) Every advocate so enrolled shall be entitled to appear for the suitors of the Court, and to plead or to act, or to plead and act, for those suitors according as the Court may by its rules determine, and subject to those rules.

(3) The High Court may dismiss any advocate so enrolled or suspend him from practice.

(4) Provided that an advocate shall not be dismissed or suspended under this section unless he has been allowed an opportunity of defending himself before the High Court which enrolled him, and [1][except in the case of the Chief Court of Oudh] unless the order of the High Court dismissing or suspending him has been confirmed by the Provincial Government.

42. *Repealed by the Repealing Act,* 1938 (*I of* 1938), *Section* 2 *and Schedule.*

FIRST SCHEDULE.

ENACTMENTS REPEALED.

[*Repealed by Act I of* 1938.]

SECOND SCHEDULE.

VALUE OF STAMPS FOR CERTIFICATES.

(See *section* 25.)

I.

For a certificate authorising the holder to practise as a pleader—

(*a*) in the High Court and any Subordinate Court—rupees fifty:

(*b*) in any Court of Small Causes in a Presidency-town—rupees twenty-five:

(*c*) in all other Subordinate Courts—rupees twenty-five:

(*d*) in the Courts of Subordinate Judges, Munsifs, Assistant Commissioners, Extra Assistant Commissioners and Tahsildars, in Courts of Small Causes outside the Presidency-towns and in all Criminal Courts subordinate to the High Court—rupees fifteen:

(*e*) in the Courts of Munsifs and any Civil or Criminal Court of first instance not hereinbefore specifically mentioned—rupees five.

II.

For a certificate authorising the holder to practise as a mukhtar—

(*f*) in the High Court and any Subordinate Court—rupees twenty-five:

(*g*) in any Court of Small Causes in a Presidency-town—rupees fifteen:

(*h*) in all other Subordinate Courts—rupees fifteen:

(*i*) in the Courts of Subordinate Judges, Munsifs, Assistant Commissioners, Extra Assistant Commissioners and Tahsildars, in Courts of Small Causes outside the Presidency towns and in all Criminal Courts subordinate to the High Court—rupees ten:

(*j*) in the Courts of Munsifs and any Civil or Criminal Court of first instance not hereinbefore specifically mentioned—rupees five.

III.

For a certificate authorising the holder to practise as a revenue agent—

(*k*) in the office of the Chief Controlling Revenue authority and in any revenue office subordinate to such authority—rupees fifteen:

(*l*) in the office of a Commissioner and in any revenue-office subordinate to a Commissioner—rupees ten:

(*m*) in the office of a Collector and in any revenue-office subordinate to a Collector—rupees five.

THE LEGAL PRACTITIONERS (WOMEN) ACT (XXIII OF 1923).

PREFATORY NOTE.—The following extracts from the statement of Objects and Reasons show the circumstances that led to the passing of this Act:—

"The Letters Patents of the several High Courts empower them to admit proper persons as Advocates, Vakils and Attorneys, and to make rules for their qualifications and

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LEG. REF. XXXII of 1925.

[1] Inserted by S. 2 and Sch. of Act

admission. Sections 6 and 17 of the Legal Practitioners Act, 1879, similarly give powers to the High Courts and the Chief Controlling Revenue-authorities to make rules for the qualification and admission of persons as Pleaders and Mukhtars, and as Revenue Agents, respectively. Sections 6 and 31 of the Bombay Pleaders Act, 1920 (Bombay Act XVII of 1920), contain similar provisions as regards Pleaders in that Presidency. Conflicting decisions have been given by the High Courts as to the right of women, who are otherwise qualified to be enrolled and to practise as legal practioners.

The Government of India consulted Local Governments and other authorities on the question whether women should be as eligible as men to enter upon a career as legal practitioners. The general opinion expressed was that in the present conditions of India, the question should be decided by Indian opinion. An opportunity of obtaining the views of the Assembly upon the question arose in connection with the motion moved by Dr. H. S. Gour for the reference of his Bill further to amend the Legal Practitioners Act, 1879, to a Select Committee. During the course of the debate upon that Resolution, it was indicated that the acceptance of the motion by the Assembly would be regarded as an acceptance of the principle that no woman shall, by reason only of her sex, be disqualified from being admitted or being enrolled as a legal practitioner, or from practising as such in any Court of law. The motion was accepted and in accordance with the undertaking given in the course of the debate on the motion, the present Bill has been prepared to give effect to this view". (*See* Statement of Objects and Reasons. *Fort St. George Gazette*, 10th April, 1923, Part III, p. 177.)

THE LEGAL PRACTITIONERS (WOMEN) ACT (XXIII OF 1923).

[*2nd April*, 1923.

An Act for the removal of doubts regarding the right of women to be enrolled and to practise as legal practitioners.

WHEREAS it is expedient to remove certain doubts which have arisen as to the right of women to be enrolled and to practise as legal practitioners; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE LEGAL PRACTITIONERS (WOMEN) ACT, 1923.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definition.

2. In this Act, "Legal practitioner" means a legal practitioner as defined in section 3 of the Legal Practitioners Act, 1879.

Women not to be disqualified by reason only of sex.

3. Notwithstanding anything contained in any enactment in force in British India or in the Letters Patent of any High Court or in any rule or order made under or in pursuance of any such enactment or Letters Patent, no woman shall, by reason only of her sex, be disqualified from being admitted or enrolled as a legal practitioner or from practising as such; and any such rule or order which is repugnant to the provisions of this Act shall, to the extent of such repugnancy, be void.

THE LEGAL PRACTITIONERS (FEES) ACT (XXI OF 1926).[1]

Year.	No.	Short title.	Amendment.
1926	XXI	The Legal Practitioners (Fees) Act, 1926.	Repealed in part, XII of 1927.

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1926, Part V, p. 19.

[25th March, 1926.

An Act to define in certain cases the rights of legal practitioners to sue for their fees and their liabilities to be sued in respect of negligence in the discharge of their professional duties.

WHEREAS it is expedient to define in certain cases the rights of legal practitioners to sue for their fees and their liabilities to be sued in respect of negligence in the discharge of their professional duties; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE LEGAL PRACTITIONERS (FEES) ACT, 1926.

(2) It extends to the whole of British India.

(3) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint.

Interpretation.

2. For the purposes of this Act unless there is anything repugnant in the subject or context,—

(*a*) "legal practitioner" means a legal practitioner as defined in section 3 of the Legal Practitioners Act, 1879; and

(*b*) a legal practitioner shall not be deemed to "act" if he only pleads, or to agree to "act" if he agrees only to plead.

Agreement for engagement of legal practitioner.

3. Any legal practitioner who acts or agrees to act for any person may by private agreement settle with such person the terms of his engagement and the fee to be paid for his professional services.

Right of legal practitioner to sue for fees.

4. Any such legal practitioner shall be entitled to institute and maintain legal proceedings for the recovery of any fee due to him under the agreement, or, if no such fee has been settled, a fee computed in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner.

LEG. REF.

[1] This Act was brought into force on 1st June, 1926. See *Gazette of India*, 1926, Part I, p. 514.

NOTES.

Secs. 3 and 4.—A legal practitioner can not only by private agreement settle with a client the terms and fee but also sue for his fee due under that agreement and the former cannot be said to stand in any confidential relation towards the latter in view of the plain langage of Ss. 3 and 4. Such a private agreement can be impugned like any other contract and in case the agreement is avoided then the fee would have to be computed according to the rules for the time being in force as provided in S. 4. 132 I.C. 719=1931 R. 104. Where the fee payable is not settled with the client under S. 3 then under S. 4 the pleader is entitled only to such fee as would come to on computation, in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner. 1931 P. 137=131 I.C. 542. Where client engaged a pleader and filed a vakalatnama in his favour but it was not signed by the pleader, the pleader is entitled to his remuneration for the work done by him on the principle of *quantum meruit*. 1931 P. 137=131 I.C. 542. When there are several gentlemen retained by a client in the same vakalatnama, each of the vakils is entitled to claim his client the full fee stipulated for by him and not merely a share in the single fee allowed as against the losing party. (38 I.C. 210. Foll.; 7 C. W.N. 300. Not foll.) 1931 P. 137=131 I.C. 542; 18 Pat. 213=20 Pat.L.T. 352.

Sec. 4.—The right of a Barrister-at-Law to appear in the High Court in the Courts subordinate to it arises from his enrolment as an Advocate and not otherwise. The peculiar position of a Barrister-at-Law in England disappears here on his enrolment as an Advocate, his rights, duties and disabilities are the same as those of any other non-Barrister Advocate. He can see the client, settle his fees, and act for him, with or without the intervention of a solicitor. A Barrister practising as an Advocate in the High Court can accordingly sue his client for recovery of fees due. (25 A. 509, over.) 55 A. 570=1933 A.L.J. 451=1935 A. 417 (F.B.). There is no provision in the C.P. Legal Practitioners' Fees Rules for the case in which a pleader who has been engaged in the suit itself is re-engaged

Liability of legal practitioner to be sued.

5. No legal practitioner who has acted or agreed to act, shall, by reason only of being a legal practitioner, be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties.

Repeals.

6. [1][*Repealed by the Repealing Act, XII of* 1927.]

THE LEGAL REPRESENTATIVES' SUITS ACT (XII OF 1855).[1]

Short title given by Act XIV of 1897.

Year.	No.	Short title.	Amendment.
1855	XII	The Legal Representatives' Suits Act, 1855.	Repealed in part, IX of 1871.

Declared in force—Throughout British India except as regards the Scheduled Districts Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3; in the Angul District, Reg. 3 of 1913, S. 3; in Upper Burmah (except the Shan States) Act XIII of 1898, S. 4.

[*27th March,* 1855.

An Act to enable Executors, Administrators or Representatives to sue and be sued for certain wrongs.

Preamble.

WHEREAS it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives; It is enacted as follows:—

Executors may sue and be sued in certain cases for wrongs committed in lifetime of deceased.

1. An action may be maintained by the executors, administrators or representatives of any person deceased for any wrong committed in the lifetime of such person which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed

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LEG. REF.

[1] Short title. "The Legal Representatives' Suits Act, 1855." *See* the Indian Short Titles Act (XIV of 1897).

NOTES.

by the assignee decree-holder and no pleader's fee can be allowed in execution afresh. 144 I.C. 379=1933 N. 360. Where several pleaders are engaged by a party, in the absence of any special agreement, each pleader is entitled to his fees up to the full fee assessed at the hearing. It is not the rule that all of them should decide among them a single hearing fee. 18 Pat. 213=20 Pat.L.T. 352; 1931 Pat. 137. Where no fee had been settled by agreement, the legal practitioner would be entitled to his legal fees and not merely to a reasonable remuneration. 167 I.C. 505 (1)=1937 N. 32. Where a party agrees to pay his Advocate a particular fee for a particular case, the Advocate is entitled to sue for the full fee, though owing to the collapse unexpectedly of the opposite side's case, the Advocate had not to do that quantity of work originally expected of him. 1942 N. L.T. 225.

Sec. 1: LEGAL REPRESENTATIVES SUITS ACT.—Act does not apply during the pendency of a suit for damages for malicious prosecution by the manager of a joint Hindu family when he dies, since the Act relates to the maintainability of the suit, and not within one year before his death [1][* * *]; and the damages, when recovered, shall be part of the personal estate of such person;

and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death [2][* * *]; and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English law, be payable in like order of administration as the simple contract debts of such person.

Death of either party not to abate suit.

2. No action commenced under the provisions of this Act shall abate by reason of the death of either party, but the same may be continued by or against the executors, administrators or representatives of the party deceased;

Proviso.

Provided that, in any case in which any such action shall be continued against the executors, administrators or representatives of a deceased party, such executors, administrators, or representatives may set up a want of assets as a defence to the action, either wholly or in part, in the same manner as if the action had been originally commenced against them.

LEGISLATIVE ASSEMBLY (DEPUTY PRESIDENT'S SALARY) ACT (II OF 1921).

[27*th March*, 1921.

An Act to determine the salary of the Deputy President of the Legislative Assembly.

Preamble.

WHEREAS it is provided by sub-section (5) of section 63-C of the Government of India Act that the Deputy President of the Legislative Assembly shall receive such salary as may be determined by Act of the Indian Legislature; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE LEGISLATIVE ASSEMBLY (DEPUTY PRESIDENT'S SALARY) *ACT*, 1921.

Salary of Deputy President.

2. There shall be paid to the Deputy President of the Legislative Assembly in respect of any period during which he is engaged on work connected with the business of the said Assembly, a salary calculated at the rate of one thousand rupees per mensem.

Decision in case of doubt.

3. If any question arises whether during any period the Deputy President was engaged on work connected with the business of the Legislative Assembly, the question shall be referred for decision to the President of the said Assembly, and his decision shall be final.

LEG. REF.

[1] Repealed by Act IX of 1871, Sch. I.

[2] Repealed by Act IX of 1871, S. 2.

NOTES.

to its continuation, and since the surviving members are not the manager's representatives. 31 I.C. 4. S. 89 of the Probate and Administration Act is designed to protect suits for wrongs done to the property of a deceased person, but do not extend that protection to compensation for personal injury the right to which dies with the death of the person injured. The right to sue for legal expenses or other losses caused to a person due to a malicious prosecution instituted against him is a personal right and it does not survive to the legal representative of such person. 48 A. 630=1926 A. 610. Applicability of Act to cases not covered by Probate and Administration Act of 1881—Doctrine of *actio personalis moritur cum persona* not applicable in India. 53 C. 987. *See also* 31 Cal. 406=8 C.W.N. 329; 28 Mad. 487; 13 Bom. 677; 1 W.R. 251.

[1][4. On the establishment of the Federation of India this Act shall cease to have effect.]

THE LEGISLATIVE MEMBERS EXEMPTION ACT
(XXIII of 1925).

[Repealed by Act I of 1938.]

LETTERS PATENT (ALLAHABAD).

CONTENTS.

CLAUSES.
Recital of Acts 24 and 25, Vict., c. 104.
1. Establishment of High Court for the North-Western Provinces.
2. Constitution and first Judges of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in name of the Crown and under Seal.
6. Appointment of officers.
Admission of Advocates, Vakils and Attorneys.
7. Powers of High Court in admitting advocates, vakils and attorneys.
8. In making rules for the qualifications, etc., of advocates, vakils and attorneys.
Civil Jurisdiction of the High Court.
9. Extraordinary original civil jurisdiction.
10. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.
11. Appeal from Courts in the Provinces.
12. Jurisdiction as to infants and lunatics.
13. In the exercise of extraordinary original civil jurisdiction.
14. By High Court in the exercise of appellate jurisdiction.
Criminal Jurisdiction.
15. Ordinary original jurisdiction of the High Court.
16. Jurisdiction as to persons.
17. Extraordinary original criminal jurisdiction.
18. No appeal from High Court exercising original jurisdiction.
CLAUSES.
Court may reserve points of law.
19. High Court to review cases on points of law reserved by one or more Judges of the said High Court.
20. Appeals from Criminal Courts in the Provinces.
21. Hearing of referred cases, and revision of criminal trials.
22. High Court may direct the transfer of a case from one Court to another.
Act under which punishments to be inflicted.
23. Indian Penal Code.
24. Judges may be authorized to sit in any places by way of circuit, or special commission.
Testamentary and Intestate Jurisdiction.
25. Testamentary and Intestate Jurisdiction.
Matrimonial Jurisdiction.
26. Matrimonial Jurisdiction.
Powers of Single Judges and Division Courts.
27. Single Judges and Division Courts.
Civil Procedure.
28. Regulation of proceedings.
Criminal Procedure.
29. Regulation of proceedings.
Appeals to Privy Council.
30. Power to appeal.
31. Appeal from interlocutory judgment.
32. Appeal in criminal cases, etc.
33. Rule as to transmission of copies of evidence and other documents.
Calls for Records, etc., by the Government.
34. High Court to comply with requisition from Government for records, etc.
35. Powers of Indian Legislature preserved.

Establishing a High Court in the North Western Provinces of the Bengal Presidency, dated 17th March, 1866.

Recital of Acts 24 and 25, Vict., c. 104.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India", it was amongst other things enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great seal of the United

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LEG. REF.

[1] Inserted by A.O., 1937.

Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal division of the Presidency of Fort William, aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same presidency, should be and become Judges of such High Courts without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that, upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished:

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to the administration of justice in the said Presidency, as Her Majesty might, by such Letters Patent, as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts:

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency, in which such High Courts were established, shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories:

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of our Lord one thousand eight hundred and sixty-two did accordingly, for Us, Our heirs and successors, erect and establish, at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record.

1. Now know Ye that we, upon full consideration of the premises, and of

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NOTES.

Cl. 1.—The provisions of the Code relating to cross-objections do not apply to appeals under the Letters Patent. 1922

Establishment of High Court for the North-Western Provinces.

Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents, We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us, or Our Heirs and Successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire; William Edwards, Esquire; William Roberts, Esquire; Francis Boyle Pearson, Esquire; and Charles Arthur Turner, Esquire, being respectively qualified, as in the said Act is declared.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person, as the Governor-General in Council may commission to receive it:—

"I, *A.B.*, appointed Chief Justice (*or* a Judge) of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the said High Court shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription: "The Seal of the High Court for the North-Western Provinces." And We do further grant, ordain and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the said recited Act; and We do further grant, ordain and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, etc., to issue in name of the Crown and under Seal.

5. And We do hereby further grant, ordain and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature for the North-Western Provinces, shall run and be in the name and style of

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NOTES.

A. 55 (21 A. 297, Foll.) The C. P. Code and the Rules made under it apply to an appeal from a Judge of the High Court. 39 C.W.N. 155=1935 C. 35. No Court-fee is leviable upon a petition of appeal under the Letters Patent (Allahabad) from the judgment of a single Judge. 63 I.C. 318=19 A.L.J. 677.

Cl. 2.—As regards power of Crown to appoint a sixth puisne Judge, *see* 36 A. 168=12 A.L.J. 231. Omission to fill up a vacancy among Judges. 9 A. 625 (F.B.). As to the mode of exercising matrimonial jurisdiction conferred on the High Court, *see* 56 A. 428=1934 A.L.J. 1129=1934 A. 273.

Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature for the North-Western Provinces, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. [* * *] And it is Our further will and pleasure, and We do hereby, for Us, Our Heirs and Successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakeels and Attorneys.

Powers of High Court in admitting Advocates, Vakeels and Attorneys.

7. And We do hereby authorize and empower the said High Court of Judicature for the North-Western Provinces to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules, for the qualifications, etc., of Advocates, Vakeels and Attorneys.

8. And We do hereby ordain that the said High Court of Judicature for the North-Western Provinces shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed

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NOTES.

Cl. 8: REASONABLE CAUSE FOR REMOVAL OR SUSPENSION OF ADVOCATE.—(Article by advocate amounting to *libel on Judges* regarding their capacity and in reference to their conduct as judges.) *See* 29 A. 25=34 I.A. 41 (P.C.). *See also* 17 A. 498; 18 A. 174; 26 I.A. 242 (P.C.). *Intimidating a witness* from giving evidence. 46 I.C. 819. *Making reckless allegations* in petition without client's instructions. 42 A. 450=18 A.L.J. 419. The mere fact of *conviction of any criminal offence* implying moral turpitude can be sufficient basis in law for an order of suspension or dismissal of a pleader or a mukhtar only, but not of a vakil whose cases of misconduct are not provided by the Legal Practitioners Act but by paragraph 8 of Letters Patent. According to that paragraph, the High Court has a discretion to remove from practice on reasonable cause any vakil of the High Court and the order is conclusive. 131 I.C. 67=8 O.W.N. 267. Where a practitioner is charged with an offence of a criminal nature, in such cases it is eminently fitting that *criminal prosecution should precede disciplinary action*. Trial by Judges who framed charges undesirable. 35 C.W.N. 640=58 I.A. 152=61 M.L.J. 130 (P.C.). [*See also* notes under S. 13 of the Legal Practitioners Act.]

to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10. [1][And We do further ordain that an appeal shall lie to the said High

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LEG. REF.

[1] Substituted by amended Letters Patent, 9th December, 1927.

NOTES.

Cl. 10: EFFECT OF AMENDMENT OF CLS. 10 AND 27.—The Letters Patent of the Allahabad High Court has been amended by further Letters Patent, dated 9th December, 1927, in two material respects. Cl. 10 of the Letters Patent of the Court provided for an appeal to the High Court against decision of a single Judge of the Court, but under the change now made such appeal will lie only when the Judge against whose decision it is intended to prefer an appeal certifies that the case is a fit one for appeal. Cl. 27 of the Letters Patent provided for the opinion of the senior Judge prevailing in certain cases when two Judges constituting a Division Bench differed in opinion. This clause has been amended so as to do away with the opinion of the senior Judge prevailing in any case. (32 C.W.N. Journal, p. xlvi.) This *amendment* of Letters Patent is *not retrospective* in its operation in respect of right of appeal. 32 C.W.N. 1130=1928 C. 640 (F.B.). *See also* 48 C.L.J. 150; 55 M.L.J. (Short Notes 37). Second appeal disposed of prior to date on which amendment took effect—Appeal preferred subsequent to that date—New provision applicable. 30 Bom.L.R. 942=1928 B. 371. Under this Cl. 10 an appeal lies from an order of a single Judge passed in an appeal from an order. 1936 A. L. J. 1326=1937 A. 165. The word "judgment" covers not merely final orders but also preliminary or interlocutory orders. 20 A.L. J. 801=45 A. 66. As to the test to determine whether an adjudication is or is not a judgment, see 45 A. 66. A final decision which effectually disposes of the appeal before the High Court amounts to a judgment whether it amounts to a decree or not. If it does not amount to a decree, it would amount to an order. The word "judgment" in cl. 10 should not be read in a restricted sense and an appeal lies against an order of remand passed by a single Judge under O. 41, R. 23. 1933 A.L.J. 127=1933 A. 262 (F.B.); 55 A. 326. As a general working rule there has grown up in the Allahabad High Court a practice regarding those matters which are mentioned in O. 43, R. 1, C. P. Code, as being generally appealable from a single Judge to a Bench. 20 A.L. J. 801=45 A. 66. Memorandum of cross-objection is not maintainable in a Letters Patent appeal. 3 A. 198. As to the nature of Letters Patent appeal, *see* 148 I.C. 1175=1934 A. 551. *See also* 1922 A. 55; 21 A. 297; 188 I.C. 33 (F.B.) (Order of single Judge on Original Side deciding claim under C. P. C., O. 21, R. 58).

CASES NOT APPEALABLE.—The order of a single Judge dismissing an application under S. 5, Limitation Act, and refusing to extend time is not a judgment within the meaning of Cl. 10, Letters Patent, and accordingly no appeal lies from that order. 1935 A.L. J. 681=1935 A. 620 (2). Order of single Judge on appeal from order of remand—Letters Patent appeal not maintainable. 1923 A. 396; also from the order of a single Judge of the High Court dismissing an appeal from an order of the executing Court on an application under O. 21, R. 90 to set aside an execution sale. 39 A. 191=39 I.C. 460=15 A.L.J. 46; order refusing stay of execution of decree. I. L. R. (1940) A. 121=1940 A.L.J. 16=1940 All. 242; order refusing to set aside abatement of second appeal by single Judge 1939 A. 185=I.L.R. (1939) A. 19=1938 A.L.J. 1107. *See also* 40 Bom.L.R. 658 =1938 Bom. 408; also against an order of a single Judge of the High Court rejecting an application for review of judgment made by another Judge previously. 84 I.C. 586 =1923 A. 356; also against order on application for review of judgment. 21 A.L.J. 341=45 A. 335=1923 A. 356. Order of sanction for prosecution under S. 195, Cr. P. Code, is not a judgment within cl. 10; it is not appealable. 39 A. 147=36 I. C. 585=14 A.L.J. 1230. No appeal lies under cl. 10, Letters Patent, against an order of dismissing an application under S. 491, Cr. P. Code. 1934 A.L.J. 684=1934 A. 606; nor from an order of single Judge in first appeal pending before him declaring that a certain person is the legal representative of a deceased party. 1936 A.L.J. 1381=1937 A. 192.

Appeal from the Court of original jurisdiction to the High Court in its appellate jurisdiction.

Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any division Court, pursuant to section 108 of the Government of India Act, and that, notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any division Court, pursuant to section 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of said High Court or of such Division Court shall be to Us, Our Heirs, or Successors in Our or Their Privy Council, as hereinafter provided.]

Appeal from Courts in the Provinces.

11. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall be a Court of Appeal from the Civil Courts of the North-Western Provinces, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of

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NOTES.

Review.—No application for a review of judgment is allowable where the decree was given in an appeal under cl. 10 of the Letters Patent. 48 I.C. 476=16 A.L.J. 964. Per *Banerji and Bennet, JJ.*—Procedure is one thing and jurisdiction is another. There is a clear distinction between procedure and jurisdiction. A Bench hearing a Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code, because the Letters Patent provides that such an appeal should lie to a Bench and the Code makes no such provision and as S. 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws. 53 A. 535=1931 A. 244 (F.B.).

Cl. 11.—No appeal lies against an order of remand by the District Judge in an appeal. *See* 48 A. 684; 23 A. L. J. 965=48 A. 104. The term "rival courts" does not cover a tribunal created under a particular statute for a particular purpose, *e.g.*, a Court created under the U. P. Municipalities Act. 23 A.L.J. 385=47 A. 513=1925 A. 380 (F. B.).

Cl. 12.—The jurisdiction of the Court of Chancery exists in the Allahabad High Court by reason of cl. 12 of Letters Patent, but the High Court will not exercise that jurisdiction in a case where an application was made by the father as member of a joint Hindu family to be appointed guardian of the property belonging to his minor sons. 26 A.L.J. 595. *See also* 112 I.C. 873. In a case where the father and the mother are living apart, and where each of them claims to have the custody of the child, the main question for the consideration of Court is, what would be more conducive to the child's welfare, *i.e.*, whether the child would be better looked after by the mother or by the father. The Court has also to take into consideration the personal law to which the parties are subject. 150 I.C. 149=1934 A.L.J. 399=1934 A. 722. On an application under cl. 12 of the Letters Patent praying that the applicant may be appointed guardian of the person of a minor, the High Court has jurisdiction to grant the relief prayed for, even though the applicants more appropriate remedy would be to make an application to the District Judge under S. 9 of the Guardians and Wards Act for the guardianship of the

the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

In the exercise of extraordinary original civil jurisdiction.

13. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature for the North-Western Provinces, in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which have been applied to such case by any local Court having jurisdiction therein.

By High Court in the exercise of appellate jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature for the North-Western Provinces to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original criminal jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last mentioned High Court over such persons shall cease at such date: Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued.

Jurisdiction as to persons.

16. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

18. And We do further ordain that there shall be no appeal to the said High Court, from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

NOTES.

child. There is no general rule that the High Court should in all cases take action under cl. 12, as there may be cases in which complicated questions of fact have to be ascertained, and such cases might be more suitably dealt with in the Court of the District Judge where witnesses could be examined and cross-examined. 1934 A. L. J. 399=1934 A. 722.

Cl. 15.—*See* 12 A.W.N. 236. Jurisdiction of High Court—Hindu joint family—Application for appointment of guardian of property maintainable. 112 I.C. 873. *See also* 26 A.L.J. 595.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

20. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut virtue of any law now in force.

Appeals from Criminal Courts in the Provinces.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

Hearing of referred cases, and revision of criminal trials.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

High Court may direct the transfer of a case from one Court to another.

Act under which punishments to be inflicted.

23. And We do further ordain that all persons brought for trial before the said High Court of Judicature for the North-Western Provinces, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Indian Penal Code.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said

Judges may be authorized to sit in any places by way of circuit or special commission.

NOTES.

Cl. 22.—A village panchayat Court is a Court for purposes of cl. 22 and the High Court has got the power to transfer proceedings pending in one such Court to another. 21 A.L.J. 925=46 A. 167=1924 A. 265.

High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last mentioned High Court in relation thereto shall cease from the date of the publication of these presents: Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial jurisdiction.

Matrimonial jurisdiction.

26. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have jurisdiction, within the said Provinces in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Provinces lawfully possessed thereof.

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

27. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature for the North-Western Provinces, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose [1][in pursuance of section 108 of the Government of India Act, 1915]; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, [1][they shall state the point upon which they differ and the case shall then be heard upon

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LEG. REF.

[1] Substituted by the amending Letters Patent, dated 11th March, 1919 and 9th December, 1927. As to the effect of amendment of this clause, *see* notes under cl. 10, *supra*.

NOTES.

Cl. 27.—*See* 2 N.W.P. 117; 26 A. 10; 11 A. 176. Letters Patent appeal—Difference of opinion between two Judges—Procedure. 137 I.C. 58=1932 A. 195. When a Bench differ in opinion on certain points of law, under S. 98, C. P. Code, they may state those points and the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case again. S. 98 is confined to points of law only but the newly added sub-S. (3) makes it subject to the provisions of the Letters Patent, Cl. 27 of which states that the points of difference may be referred to the other Bench. This clause is wider than S. 98 of the C. P. Code, because it covers points of facts as well points of law. But in both cases, only the points of difference should be stated and not the whole case. 1933 A.L.J. 1127=1933 A. 861 (F.B.). *See also* I.L.R. (1938) All. 972=1938 A. L.J. 1027=1938 All. 641 (F.B.).

that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.]

Civil Procedure.

Regulation of proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adopting, as far as possible, the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdictions, respectively.

Criminal Procedure.

Regulation of proceedings.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal.

30. And We do further ordain that any person or persons may appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the said High Court of Judicature for the North-Western Provinces, made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court from which an

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Cl. 30.—In an application by a pleader for leave to appeal to the Privy Council from an order suspending him from practice for contempt of Court committed personally, *held,* that the Allahabad High Court can grant leave either under S. 109 (*c*), C. P. Code or S. 30, Letters Patent. 1933 A.L.J. 273=1933 A. 225=55 A. 246.

"FINAL ORDER"—Meaning of—Refusal of temporary injunction not final order. 1941 A.L.J. 508=1941 All. 367.

PROCEEDING UNDER BAR COUNCILS ACT FOR MISCONDUCT OF ADVOCATE—LEAVE TO APPEAL TO PRIVY COUNCIL.—When special power has been conferred upon the High Court under S. 10, Bar Councils Act, to get an inquiry made into the alleged misconduct of an advocate and on receipt of the finding to fix a date for the hearing of the case and to hear the parties concerned and then pass such final orders in the case as it thinks fit and make an order as to the payment of the costs of the inquiry and of the hearing in the High Court, and if necessary, later on to review its order, the High Court in such proceeding is acting judicially and not merely in an administrative capacity. The entire proceeding is of a judicial nature and the proceeding is a hearing before the High Court and orders for the payment of costs of such proceedings can be passed. No doubt, in essence, the action taken is a disciplinary action but the proceeding in itself is of the nature of a judicial proceeding and the inquiry is a public inquiry in which the parties concerned are entitled as of right to be heard. It cannot therefore be said that in such a judicial proceeding, the High Court is not exercising any 'jurisdiction' within the meaning of cl. 30, Letters Patent. Such a jurisdiction is not an appellate jurisdiction, nor is it a criminal jurisdiction. As it is the High Court only which passes final orders in the case on the receipt of the finding, it must be held to be exercising original jurisdiction and not any appellate jurisdiction. The order passed in such a proceeding is therefore an order passed in the exercise of original jurisdiction of the High appeal shall not lie to the said High Court, under the provisions contained in the 10th clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of, not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our Heirs or Successors, in Our or Their Privy Council: subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectivley, are hereby varied: and subject also to such further rules and orders, as We may with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgment.

31. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces at its discretion on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the High Court, in any such proceedings as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and Successors in Our or Their Privy Council, subject to the same rules, regulations and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal in criminal cases, etc.

32. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature for the North-Western Provinces, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or Successors in Council: Provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereinafter make in that behalf.

Rule as to transmission of copies of evidence and other documents.

33. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature for the North-Western Provinces, to Us, Our heirs or Successors, in Our or Their Privy Council, such High Court shall certify and

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Court, conferred upon it by the Indian Bar Councils Act, modifying to some extent the power conferred upon it by the Letters Patent. The High Court has therefore jurisdiction to grant leave to appeal to His Majesty in Council provided it is satisfied that it is a fit and proper case. In the case of an advocate the High Court found that not only was the filing of fee certificate contrary to the rules framed by the High Court but that he acted in bad faith in filing it. The point raised was that there was some contradiction in the two sub-sections of the Rule at the time when the advocate had got his form of certificate printed, which contradictions had been lately removed by amendment, that there was latitude allowed to him inasmuch as it was provided that the certificate shall be 'so far as is possible' in the form prescribed and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee. *Held*, that this was a case which should be certified as a fit one for appeal to the Privy Council under S. 109 (*c*), C. P. Code, or at any rate under Cl. 30, Letters Patent. 1934 A.L.J. 722=1934 A. 898. As to principles governing grant of leave to appeal to Privy Council, *see* 1941 All. 9.

transmit to Us, Our heirs and Successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

And We do further ordain that the said High Court, shall, in all cases of appeal to Us, Our heirs or Successors, conform to and execute or cause to be executed, such judgments and orders as We, Our heirs or Successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders or other order or rule of the said High Court, should or might have been executed.

Calls for Records, etc., by the Government.

High Court to comply with requisition from Government for records, etc.

34. And it is Our further will and pleasure that the said High Court of Judicature for the North-Western Provinces shall comply with such requisition as may be made by the Government for records, returns and statements in such form and manner as such Government may deem proper.

Powers of Indian Legislature preserved.

Powers of Indian Legislature preserved.

35. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section 72 of that Act and may be in all respects amended and altered thereby.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the seventeenth day of March in the twenty-ninth year of Our reign.

By warrant under the Queen's Sign Manual.

(Sd.) C. ROMILLY.

LETTERS PATENT (MADRAS, BOMBAY AND CALCUTTA).

CONTENTS.

CLAUSES.
1. Revocation of Letters Patent of 1862.
2. High Court at Madras to be continued.
3. Judges of the said High Court to be continued.
4. Clerks, eac., of the said High Court to be continued.
5. Declaration to be made by Judges.
6. Seal.
7. Writs, etc., to issue in name of the Crown and under Seal.
8. Appointment of officers.
Admission of Advocates, Vakils and Attorneys.
9. Powers of High Court in admitting Advocates, Vakils and Attorneys.
CLAUSES.
10. In making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.
Civil Jurisdiction of the High Court.
11. Local limits of the ordinary original jurisdiction of the High Court.
12. Original jurisdiction as to suits.
13. Extraordinary original civil jurisdiction.
14. Joinder of several causes of action.
15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.
16. Appeal from Courts in the Provinces.
17. Jurisdiction as to infants and lunatics.
18. Provision with respect to the Insolvency Court.

CLAUSES.

Law to be administered by the High Court.

19. By the High Court in the exercise of ordinary original civil jurisdiction.
20. In the exercise of extraordinary original civil jurisdiction.
21. By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

22. Ordinary original jurisdiction of the High Court.
23. Jurisdiction as to persons.
24. Extraordinary original criminal jurisdiction.
25. No appeal from High Court exercising orginal jurisdiction—Court may reserve points of law.
26. High Court to review on certificate of the Advocate-General.
27. Appeals from Criminal Courts in the Provinces.
28. Hearing of referred cases and revision of criminal trials.
29. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

30. Offenders to be punished under Indian Penal Code.

Exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

31. Judges may be authorized to sit in any place by way of circuit or special commission.

Admiralty and Vice-admiralty Jurisdiction.

32. Civil.
33. Criminal.

Testamentary and Intestate Jurisdiction.

34. Testamentary and intestate jurisdiction.

Matrimonial Jurisdiction.

35. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

36. Single Judges and Division Courts.

Civil Procedure.

37. Regulation of proceedings.

Criminal Procedure.

38. Regulation of proceedings.

Appeals to Privy Council.

39. Power to appeal.
40. Appeal from interlocutory judgments.
41. Appeal in criminal cases.
42. Rule as to transmission of copies of evidence and other documents.

Calls for Records, etc., by the Government.

43. High Court to comply with requisition from Government for records, etc.
44. Powers of Indian Legislature preserved.
45. Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

[*N. B.*—As the Letters Patent for Madras, Bombay and Calcutta are all in very similar terms, the Letters Patent, Madras, is given as the main one, and the differences in the wording of the other two Letters Patents indicated within square brackets.]

For the High Court of Judicature for the Presidency of Madras.

Bearing date the Twenty-eighth day of December, in the Twenty-ninth year of the Reign of Victoria in the year of Our Lord, One thousand eight hundred and sixty-five.

Recital of Acts 24 & 25 Vict., c. 104.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these Presents shall come, Greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our Reign, entitled "An Act for establishing High Courts of Judicature in India." It was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Madras, for the Presidency of Madras aforesaid [at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid] [at Bombay for the Presidency of Bombay aforesaid] and that such High Court should consist of a Chief Justice and as many Judges, not exceeding Fifteen, as, Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court, without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such

High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Faujdarry Adawlut at Madras [Calcutta] [Bombay] in the said Presidency, should be abolished:

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitation as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency-town, as might be prescribed thereby; and, save as by such Letters Patent, might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid or the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts:

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster, the twenty-sixth day of June in the Twenty-fifth Year of Our Reign, in the year of our Lord, One thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and Successors, erect and establish at Madras, for the Presidency of Madras aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Madras [at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal] [at Bombay, for the Presidency of Bombay aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Bombay] and did thereby constitute the said Court to be a Court of Record; and whereas We did thereby appoint and ordain, that the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] should, until further or other provision should be made by Us, or Our heirs and Successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and five Judges, and did thereby constitute and appoint certain persons, being respectively qualified as in the said Act is declared, to be Judges of the said High Court:

And whereas by the said recited Act it is declared lawful for Her Majesty, at any time within three years after the establishment of the said High Court, by Her Letters Patent, to revoke all of such parts or provisions as Her Majesty might think fit of the Letters Patents by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent:

And whereas by the Act of the twenty-eighth year of Our Reign, chapter fifteen, entitled "An Act to extend the term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the territorial jurisdiction of the said Courts," the time for issuing fresh Letters Patent has been extended to the first of January, One thousand eight hundred and sixty-six:

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it is expedient that the said Letters Patent, dated the twenty-sixth of June, One thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent:

Revocation of Letters Patent of 1862.

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion have thought fit to revoke, and do by these presents (from and after the date of the publication thereof, as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the Twenty-sixth of June, One thousand eight hundred and sixty-two, except so far as the Letters Patent of the forty-first year of His Majesty King George the Third, dated the twenty-sixth of December, One thousand eight hundred, establishing a Supreme Court of Judicature at Madras [Fort William in Bengal] [Bombay] were revoked or determined thereby.

High Court at Madras to be continued.

2. And We do by these presents, grant, direct and ordain that, notwithstanding the revocation of the said Letters Patent of the Twenty-sixth of June, One thousand eight hundred and sixty-two, the High Court of Judicature called the High Court of Judicature at Madras, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Madras [Fort William in Bengal] [Bombay] for the Presidency of Madras aforesaid [Bengal Division of Fort William aforesaid] [Bombay aforesaid]; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of these Letters Patent be the Chief Justice or Judges or Acting Chief Justice or Judges, if any, of the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] shall continue to be the Chief Justice and Judges, or Acting Chief Justice or Judges of the said High Court, until further or other provision shall be made by Us or Our heirs and Successors, in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Clerks, etc., of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] appointed by virtue of the said Letters Patent of the Twenty-sixth June, One thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed until he be

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Cl. 1.—Bombay cases—Scope and applicability of the Letters Patent, and nature of powers conferred thereby, *see* 32 B. 106 =10 Bom.L.R. 21; 21 Bom.L.R. 274; 13 Bom.L.R. 458.

MADRAS CASES.—Amended Letters Patent does not take effect retrospectively. The institution of a suit carries with it the implication that appeals then in force are preserved to it through the rest of its course unless the legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the act a retrospective effect. Where the plaint was presented on, the 30th July, 1919, the second appeal was presented on the 15th July, 1924, and the same was decided on the 9th February, 1928, and a Letters Patent appeal was subsequently filed, but meanwhile, on the 31st January 1928, the amended Letters Patent came into effect in the Madras Presidency. *Held*, that the appeal was maintainable and that the amended Letters Patent did not take effect retrospectively. 52 M. 361=1929 M. 381=56 M.L.J. 369 (F.B.). C. P. Code does not control the provisions of the Letters Patent. *See* 56 M. 915=1933 M. 570=65 M.L.J. 222 (F.B.).

removed from such office and employment; and he shall be subject to the like power of removal, regulations and provisions as if he were appointed by virtue of these Letters Patent.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor in Council may commission to receive it:—

"I, *A.B.*, appointed Chief Justice or (a Judge) of the High Court of Judicature at Madras, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

6. And We do hereby grant, ordain and appoint that the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] shall have and use, as occasion may require, a seal bearing a device and impression of our Royal Arms, with an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Madras" [Fort William in Bengal] [Bombay]. And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice and in case of the vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the said recited Act: and We do further grant, ordain and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said seal be committed shall be vacant, the said High Court shall be and is hereby authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

Writs, etc., to issue in name of the Crown, and under seal.

7. And We do hereby further grant, ordain and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] shall run and be in the name and style of Us, or of Our heirs and Successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

8. And We do hereby authorise and empower the Chief Justice of the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Provincial Government to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent.

[1][* * *] And it is Our further will and pleasure, and We do hereby for Us, Our heirs and Successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time,

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[1] Rep. by amending Letters Patent, dated 11th March, 1919.

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Cl. 8—Madras cases.—Cl. 8 does not widen the jurisdiction given to the Court in civil and criminal matters by Cls. 21, 22 and 23. 36 M. 72=23 M.L.J. 393.

appoint for each office and place respectively, and as the Central Government shall approve of: Provided always, and it is Our will and pleasure that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices: but this proviso shall not interfere with or prejudice the right of any other officer or clerk to avail himself of leave of absence under any rules prescribed by the Central Government in and to absent himself, from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels and Attorneys.

Powers of High Court in admitting Advocates, Vakeels and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys, as to the said High Court shall seem meet, and such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualifications, etc., of Advocates, Vakeels and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys-at-Law of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates, Vakeels or Attorneys-at-Law, and no person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

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Cls. 9 and 10—Madras cases.—*See* R. 128 of the Madras Insolvency Rules 1910, cited in the Original Side Rules, published by the Madras Law Journal Office, 1927 Ed., p. 259. Vakils have a right of audience on the Original Side of the Madras High Court, but attorneys have no such right. [1 M. 24 (F.B.), Foll.] 37 I.C. 699=31 M.L.J. 698. *See also* (1937) 2 M.L.J. 552 (F.B.) Right of audience of agent of party holding power of attorney with power to conduct proceedings in Court. R. 533 of the Original Side Rules of the Madras High Court of 1902 is not *ultra vires* of the Letters Patent. 31 M.L.J. 698.

Cl. 10.—[*See* Notes under Ss. 13 and 14, Legal Practitioners Act.]

Madras cases.—"REASONABLE CAUSE."—Where a vakil, though acquitted of personal fraud, permitted his clerks, guilty to his own knowledge, of practising fraud and gross deception upon his client, to continue in correspondence with him, there is "reasonable cause" to suspend the Vakil from practice under Cl. 10. 35 M. 543=39 I.A. 191=23 M.L.J. 114 (P.C.). Cheating a client first and then falsely asserting title against him: 40 M. 69. Making unfounded allegations against Judge. 21 M.L.J. 76. Vakil's professional misconduct—Perjury—Asserting absolute title in himself—Getting a conveyance benami. 39 I.C. 289=40 M. 69. Suggestion that he is in a position to influence a judge in his favour. 23 I.C. 789=26 M.L.J. 429. Disciplinary proceedings under Cl. 10 are not appealable under Cl. 39, and as to whether the High Court has power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction. *See* 39 M. 128=29 M.L.J. 16; 43 M.L.J. 382=1922 M. 440 (F.B.). A Bench of three Judges can hear and dispose of an enquiry against a legal practitioner under Cl. 10 as provided by the Rules of the High Court. 54 M. 857=61 M.L.J. 148 (F.B.). *See also* Notes under Ss. 12-14 Legal Practitioners Act, 1879 and S. 10, Bar Councils Act.

Cl. 10—Bombay cases.—It must not be supposed that a Court of justice has not the power to remove an Attorney if he is unfit to be entrusted with a professional status and character. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll. Contempt of Court when committed by an Attorney in a private capacity can be of such a nature as to show professional unfitness. There can be no grosser contempt on the part of an Attorney than to allege that a Judge has acted with prejudice, bias and malice in the course of his

Civil jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay] shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by

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judicial duties, that he decided a case not according to his own convictions but to please somebody else and that he abused his powers as a Judge and acted dishonestly and in bad faith. The fact that such allegations are contained in a notice sent by the Attorney under S. 80, C.P. Code, to a Judge in respect of certain remarks made by the Judge in a judgment in a case in which the Attorney was a witness is no ground for holding that no offence is committed. No one by merely filing or threatening to file a suit and calling his communication a notice under S. 80, C.P. Code, can insult and vilify a Judge in that manner. The fact that the scandalous allegations are contained in a notice under S. 80, C.P. Code, cannot therefore prevent them from being contempt of Court, and the Attorney who makes such allegations renders himself liable to be dealt with under the disciplinary powers of the High Court under Cl. 10. 195 I.C. 359=43 Bom.L.R. 250=1941 Bom. 228. Cl. 10 of the Letters Patent which empowers the High Court to remove or suspend from practice advocates, vakils, or attorneys on "reasonable cause," gives a wide discretion to the Court in regard to the exercise of this disciplinary authority. "Reasonable cause" in the clause means the same as professional or other misconduct under S. 10 of the Bar Councils Act. "Misconduct" is a sufficiently wide expression, it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court or any of the Courts subordinate thereto may be considered to be misconduct calling for disciplinary action. What the Court has to consider is the conduct of the Advocate or Attorney as it affects his position as an Advocate or Attorney and his relations to the Court. 195 I.C. 359=43 Bom.L.R. 250=1941 Bom. 228. Disciplinary jurisdiction over pleaders who passed resolution congratulating an accused in a pending criminal trial—Criticism of pending proceedings in Court constitutes contempt. 24 Bom.L.R. 1029=47 B. 117=1922 B. 361. Advocates and Pleaders—Passive resistance—Signing of pledge to civilly disobey law—Unprofessional conduct. 54 I.C. 679=22 Bom.L.R. 13. *See also* 26 Bom.L.R. 887 (Attorneys). Attorney's fraud on client making advances to him of money to be invested on mortgage is guilty of professional misconduct and can be removed from office. 29 Bom.L.R. 1066=1927 B. 537. Insolvency of pleader as a ground for his suspension. *See* 30 Bom.L.R. 1011.

Cl. 10—Calcutta cases.—Under Cl. 10 of the Letters Patent, no persons have rights of audience in the Original Civil Jurisdiction of the High Court except advocates and attorneys and suitors in person. Where the suitor is a company, it cannot appear in person, not having as a legal entity any visible person. The company must appear either by counsel or solicitor, and the liquidator as such has no right of audience. 41 C.W.N. 424=I.L.R. (1937) 2 Cal. 173. There is no special procedure for disciplinary action of the Court in the case of an attorney. The English procedure cannot be adopted in its entirety. 19 I.C. 993=41 C. 113. A case of suspicion is not enough to justify disciplinary action. 41 C. 113. *Reasonable cause.* Any cause which in the opinion of the Court affords reasonable ground for taking action will suffice, even though it may not be purely professional misconduct. *See* 34 C. 723=6 C.L.J. 55 (Advocate arranging with client direct). 4 C.L.J. 259 (F.B.). (Advocate stipulating with client to share in the result of the litigation). *See also* 8 C.L.J. 165 (F.B.) (Advising client to win over a witness by bribing him). 34 C. 129 (P.C.). A solicitor who detaches a client from another solicitor during the period of his retainer is guilty of professional misconduct. 32 C. 795=1925 C. 1084. Pleader accepting from client vakalatnama and papers but not filing appeal—When amounts to misconduct. *See* 114 I.C. 490.

Cls. 11 and 12—Madras cases.—The High Court in exercise of its original jurisdiction is merely a local court. 17 I.C. 342=23 M.L.J. 726.

Cl. 11—Bombay cases.—Power of single Judge sitting on the Original Side of the High Court, to stay suit pending in a mofussil Court subordinate to the High Cort. *See* 39 B. 604=30 I.C. 560=17 Bom.L.R. 635 (F.B.).

Cls. 11 and 12—Bombay cases: DECREE PASSED BY HIGH COURT—EXECUTION OUTSIDE LIMITS OF ORIGINAL CIVIL JURISDICTION—POWERS OF HIGH COURT.—Rr. 386 and 387 of the Bombay High Court Rules (Original Side) are not *ultra vires* and the High Court of Bombay has the power to pass an order for execution of a decree passed by it anywhere within the *Presidency* of Bombay. The Supreme Court of Bombay had such a power and there is nothing in the Letters Patent that deprives the High Court, which has succeeded to the powers of the Supreme the Provincial Government[1] and until some local limits shall be declared and prescribed, within the limits of the local jurisdiction of the said High Court of Madras [Bombay] at the date of the publication those presents and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay] in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling with the jurisdiction of the Small Cause Court at Madras [Bombay,] [Calcutta,] in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

LEG. REF.

[1] [*N.B.*—The provisions of the Calcutta Letters Patent differ slightly and are as follows:—"..........prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta, issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord One thousand, seven hundred and ninety-four, and the ordinary original civil jurisdiction..........".—By Act No. XV of 1919 the limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal have been declared and prescribed.]

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Court under Cl. 11 of the Letters Patent, of that power. (26 M. 120 and 28 Bom.L.R. 380, Expl.) 36 Bom.L.R. 454=1934 B. 225 (F.B.).

Cl. 12—Madras cases: MEANING OF TERMS.—*"Dwelling within limits,"* meaning of. 34 M. 257=38 I.A. 129=21 M.L.J. 669 (P.C.). *"Carrying on business"* includes carrying on business through an agent by foreigners living outside the jurisdiction of the Court as well as the carrying on business through an agent by British subjects. A foreigner is included in the word "defendant." 45 M.L.J. 471=1924 M. 158. "Resides" and *"Carries on business,"* meaning of. *See* 50 M. 449=1927 M. 689=53 M.L.J. 355; 52 L.W. 625=(1940) 2 M.L.J. 688. (Insurance company with head office at Calcutta and Branch Office at Madras—Madras Branch cannot be said to carry on business at Madras).

SCOPE OF CLAUSE.—Cl. 12 does not control Cl. 18. 40 M. 810=36 I.C. 524; 1928 M. 732 (F.B.).

JURISDICTION—RESIDENCE.—Cl. 12 of the amended Letters Patent does not confer jurisdiction upon the High Court in cases where one or more of the several defendants reside within jurisdiction. 1922 M.W.N. 841=1923 M. 272. Submission of accounts at Madras—Defendant residing out of Madras—Court has jurisdiction. 29 I.C. 462=1915 M.W.N. 519.

LEAVE TO SUE.—Lands situate partly within and partly without—Leave to sue, discretionary. 32 I.C. 423=3 L.W. 107. As to necessity for fresh leave to sue after amendment of plaint, *see* 41 Bom.L.R. 536=1939 Bom. 345.

SUIT FOR LAND.—A suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell made in Madras by parties resident therein is not a "suit for land" within the meaning of Cl. 12 of Letters Patent. 52 M. 809=1929 M. 721 =57 M.L.J. 190 (F.B.). The suit is one for land under Cl. 12 where, on the allegations in the plaint, title to land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit. 24 I.C. 895=26 M.L.J. 567. *A suit for the recovery of damages* for trees cut and carried away from the plaintiff's casuarina plantation is a suit for land. (*Ibid.*) *See also* 33 I.C. 906=30 M.L.J. 120. A *suit to avoid an incumbrance on land* is a suit for land. 17 I.C. 342=23 M.L.J. 726 (27 M. 157; 33 M. 131, F.). *Administration suit* is not a suit for land. 1928 M. 760. *Suit for accounts* of the management of a trust, and for the administration of a trust, whether a suit for land. 90 I.C. 188=1925 M. 1084=49 M. L.J. 311. *See also* I.L.R. (1940) Mad.

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195=50 L.W. 597=1940 Mad. 49=(1940) 1 M.L.J. 676 (Suit for damages for breach of contract). Fraud alleged as cause of action. *See* 1922 M.W.N. 841=1923 M. 272.

Cl. 12—Bombay cases: GENERAL SUIT FOR LAND OR IMMOVABLE PROPERTY.—The High Court of Bombay has given a restricted meaning to the expression in 14 B. 353; 22 B. 701. But later decisions seem to put a liberal construction as was done by Calcutta and Madras High Courts. *See* 29 B. 249; 37 B. 494. Where the material part of the cause of action arises outside jurisdiction, leave to sue cannot properly be granted. 100 I.C. 946=29 Bom.L.R. 131. High Court has no jurisdiction to pass a decree on the basis of an equitable mortgage *when no part of the property over which the decree is intended to operate is situate within the jurisdiction of the Court.* 31 N. L.R. (Supp.) 57=1936 N. 1 (F.B.) [1935 N. 250 F.] As to the meaning of the words "cause of action", *see* 33 Bom.L.R. 1364. The following are a few instances of where the suits have been held to be suits for land, redemption, foreclosure or sale. 26 Bom. L.R. 535; 27 Bom.L.R. 570. Specific performance of contract to sell land. 7 Bom. L.R. 319. Where the suit is for cancellation of sale but the object is to get an adjudication as to title to land as between the parties, the suit is one for land within the meaning of cl. 12. 35 Bom.L.R. 630=57 B. 450=1933 B. 398. *Suit by unpaid vendor* for charge on property sold. 48 B. 625=26 Bom.L.R. 541. *Suit for maintenance* and making it a charge. 25 Bom.L.R. 1172. *Suit for recovery of title-deeds.* 37 B. 494. *Administration suit* is not a suit for land. 46 B. 772=23 Bom.L.R. 1326. Administration suit—Land outside Court's jurisdiction—Power to adjudicate on claim. 48 B. 331=26 Bom.L.R. 163. *Mortgage suit for sale* is not a suit for land. *See* 104 I. C. 115=29 Bom.L.R. 659 [Following 29 Bom. L.R. 498 (F.B.)]. *See also* 1936 Bom. 313; 1927 B. 663. So also suit by mortgagee for declaration that he has priority rights under his mortgage as against a charge-holder. 60 B. 778=38 Bom.L.R. 535=164 I.C. 581=1936 B. 313

"COURSE OF BUSINESS"—MEANING OF.—I.L.R. (1937) Bom. 810=1937 Bom. 387=39 Bom.L.R. 648; 43 Bom.L.R. 916.

LEAVE OF COURT.—In a case in which the cause of action has arisen in part only within the local limits of the original jurisdiction of the High Court, it is a condition precedent to the maintenance of the suit that the leave of the Court should have been first obtained. It is not a condition which it is competent for a Court to ignore or for the parties to waive. 56 B. 324=34 Bom. L. R. 236=1932 B. 291 (31 Bom.L.R. 1002=29 Bom.L.R. 468, overr. 35 C. 394, Diss.). [But *see* 18 I.C. 898=17 C.W.N. 512; 56 C. 979.] The Bombay High Court has no jurisdiction to entertain suit on hundis which were not made payable in Bombay. 40 B. 473=32 I.C. 918. But *see* 41 Bom.L.R. 536=1939 Bom. 345; 40 Bom.L.R. 252=1938 Bom. 278 (Place of payment). Any step which a plaintiff has to prove in order to establish his title to sue on a negotiable instrument is a material fact, and if any such event has taken place within the jurisdiction of the High Court, with leave granted under Cl. 12 of the Letters Patent, the High Court has jurisdiction to try the suit. The 1st defendant drew in Bombay five bills of exchange on the 2nd defendant who was residing at Calicut in the Madras Province in favour of the plaintiffs. These were endorsed over by the plaintiffs to a Bank in Calicut for collection, and when presented to the 2nd defendant were accepted by him. But on the due date he dishonoured them by non-payment. The plaintiffs having filed a suit in the Bombay High Court after obtaining leave under Cl. 12 of the Letters Patent, the 2nd defendant pleaded that the High Court of Bombay had no jurisdiction because he had accepted the Bills at Calicut and no part of the cause of action arose in Bombay as against him. The 1st defendant did not appear at all. *Held,* that the fact that the bills were drawn on defendant No. 2 was a material fact to be proved by the plaintiffs, to establish their claim, and that fact took place in Bombay, the Bombay High Court had jurisdiction to try the suit with leave under Cl. 12 of the Letters Patent. 1942 Bom. 15=43 Bom.L.R. 916. Where Judge makes an order granting leave, it should appear clearly on the face of it that he was giving leave under cl. 12. 45 B. 24=59 I.C. 28=22 Bom.L.R. 863. As to interference in appeal with the discretion of lower Court in granting leave to sue, *see* 100 I.C. 946=29 Bom.L.R. 131=1927 B. 660. The absence of leave of Court goes to the root of the jurisdiction of the Court. 37 B. 553=20 I.C. 530=15 Bom.L.R. 672. *"Suits of every other description"* in cl. 12 include third party proceedings and leave of the High Court must be obtained to proceed therein. 59 I.C. 12=21 Bom.L.R. 808 (810); 45 B. 24=22 Bom.L.R. 863. Jurisdiction—*Partition* suit—Part of property situate outside British India—Leave of Court whether necessary. 23 Bom.L.R. 1049. In a *suit for accounts* by principal against his agent who was carrying on business at Calcutta, *held,* that no material part of the cause of action arose in Bombay and that leave granted under Cl. 12 was not conclusive when the jurisdiction was in issue. 33 Bom.L.R. 1364. Contract made in Bombay with constituent resident in Central Provinces—Goods delivered, advances made and accounts to be rendered in Bombay—Leave, not necessary. 34 Bom.L.R. 1410. The High Court has no jurisdiction to entertain a suit for partition of lands **outside British India, even though part of**

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the estate was within the local limits of the ordinary original civil jurisdiction. 23 Bom.L.R. 1049. Leave to sue, cause of action outside jurisdiction—Suit against dead man—Subsequent addition of legal representative—Fresh leave necessary. 85 I. C. 464=1925 B. 109. Leave to sue obtained under cl. 12 does not enure as against the legal representative of the original defendant. 31 Bom.L.R. 1002=1929 B. 468. *See also* 25 Bom.L.R. 7=1924 B. 109. The plaintiffs were doing business at Bombay as Pakka Adatias and claimed a certain sum of money as the balance due on accounts from the merchants who resided in Gaziabad (in Meerut) and who had employed them. The plaintiffs had addressed a letter to the defendants intimating the terms on which they were prepared to do business and on that basis, the defendants had been forwarding merchandise to the plaintiffs at Bombay to be sold on commission. *Held,* that the cause of action arose wholly and not merely in part at Bombay. 56 B. 324=24 Bom.L. R. 236=1932 B. 291.

Calcutta cases: MEANING OF TERMS.—*"Carrying on business"*—Meaning of—Ordinary original jurisdiction of High Court. 24 C.W.N. 582=57 I.C. 211. A foreign company must be deemed to carry on its business at its agent's office in British India. 167 I.C. 897=1937 A.L.J. 98=1937 A.W. R. 52=1937 A. 208. Railway carriage business is a business within the meaning of Cl. 12. As Government carry on the business of railway carriage under the name of the Eastern Bengal Railway amongst other places, at the head office in Calcutta, a suit can be brought in Calcutta against the Secretary of State in respect of a claim against the railway. I.L.R. (1941) 2 Cal. 160. Term "cause of action" explained. 58 C. 539=134 I.C. 65=1931 C. 659. The Secretary of State for India in Council does not dwell or carry on business, or personally work for gain within the local jurisdiction of the High Court at Calcutta. 21 I.C. 1 =40 C. 308, on appeal from 16 C.W.N. 747 =15 I.C. 955. The Government of a country is not a business within the meaning of Cl. 12 of the Letters Patent. 4 Fed. L. J. (H. C.) 400. *See also* I.L.R. (1941) 2 Cal. 160. Where a person having headquarters elsewhere has also a house at Calcutta for temporary residence, which he was using from time to time as he pleased for a week or more at a time, he may be said to *'dwell'* at Calcutta. 164 I.C. 907=40 C.W.N. 65. An originating summons is a "suit" within the meaning of cl. 12 of the Letters Patent and when the cause of action arises partly outside the High Court's jurisdiction, leave of the Court is necessary under cl. 12. 62 C. 120.

THE CONSTRUCTION OF CL. 12, upon which all the High Courts are agreed is that, as regards suits for land, the High Court can take cognizance if the land is situate wholly within the local limits or where the land is situate in part only within such limits if leave has been first obtained; and that as regards suits other than those for land, the High Court has jurisdiction, if the cause of action has arisen in part only within the limits, if the leave of the Court shall have been first obtained or if the defendant dwells or carries on business or personally works for gain within these limits. 56 C. 940=1929 C. 358. The term *"suit"* in cl. 12 is not to be construed in a restricted sense. If an order made on the originating summons will have the same effect upon the title to immovable property as the decree passed in an ordinary suit for the same relief, the originating summons must be deemed to be a suit within the meaning of cl. 12. 56 C. 979. *See also* 58 C. 768=1931 C. 651. Although the legislature had power in 1908 to override the Letters Patent, the legislature has not by introducing S. 21, C. P. Code, overridden the provisions of cl. 12. 56 C. 940=1929 C. 358. Neither the practice of the English Courts nor the practice of the Indian Courts in proceedings under the Divorce Act can apply to proceedings under Cl. 12 of the Letters Patent which are governed by the procedure laid down in the Code of Civil Procedure. 57 C. 1089=34 C.W.N. 319=1930 C. 558. Per *Derbyshire, C. J., and Ameer Ali, J.*—Where the parties to a marriage are not domiciled in India and the husband is a non-resident foreigner, the High Court has no jurisdiction to entertain a suit brought by the wife under cl. 12 of the Letters Patent for a declaration under S. 42 of the Specific Relief Act that her Christian marriage with the defendant has been dissolved as a result of her conversion to Islam and the refusal of the defendant to embrace Islam when presented to him. Per *Derbyshire, C.J.*—Even the submission of the defendant to the jurisdiction of the Court will not avail the plaintiff. 46 C.W.N. 465. An application to revoke a leave once granted under cl. 12 is maintainable. The party is not obliged to wait until the trial and to take the point by way of defence in his written statement. The application to revoke should however be based on something better than a mere criticism of the clarity of the pleadings. In granting leave or revoking it, the Judge should go by the cause of action alleged. Where in the case of contracts part of the cause of action arises within the jurisdiction of the Court, the defendant cannot ask for revocation unless he shows that cl. 12 has no application at all. 58 C. 539=1931 C. 659. Per *Rankin, C.J.*—It cannot be said that the Judge in granting leave should not consider matters of evidence outside the plaint. (*Ibid.*) Application to revoke leave—Case involving important and difficult questions—Proper procedure. *See* 35 C.W.N. 930. *See also* 1941 Cal. 236. Plaint not in order—Procedure. *See* 58 C. 539=1931 C. 659.

NOTES.

Suit for Land.—The test whether a suit is a suit for land or other immovable property is not a formal test, but regard is to be had to substance of the suit. 31 I.C. 581=42 C. 942. The term *'suit for land or other immovable property'* is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property. It means suits in which, having regard to the issue raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property. 104 I.C. 721=54 C. 655=1927 C. 768. *See also* 1937 Cal. 593=I.L.R. (1937) 2 Cal. 644. Where the plaintiff sued to have it established that, on the death of the tenant for life, the title to the immovable property no longer remained in the Official Trustee in trust for the sons as they attain the age of 21 years but reverted to the estate of the settlor and that the property accordingly had become available to satisfy the claims of their creditors: *Held,* that the suit was one for land though the plaintiff did not claim a proprietary title in himself. 58 C. 768=1931 C. 651. A suit for specific performance of an agreement to mortgage lands outside the jurisdiction is a suit for land. 48 C. 882=1922 C. 328. *See also* I.L.R. (1937) 2 Cal. 644; 27 C.W.N. 65=49 C. 60. Claim for damages for erecting masonry buttresses is a claim for land. 17 I.C. 500=39 C. 739; 42 C. 742. A suit to recover damages for breaking through plaintiff's mine or land and carrying away coal is a suit for land. 39 C. 739. A suit for damages in respect of injury to land is a suit for land, and so if the land is outside the original jurisdiction of High Court, the High Court cannot try it. 38 I.C. 571 =24 C. 10. Where the plaintiff claimed that he was entitled to the whole of the residuary estate of the testator to the exclusion of certain other persons and for a declaration that the purported dedication of the properties made *debutter* under the will was void: *Held,* that the proceeding was a suit for land. 56 C. 979. Debutter property partly in Calcutta and partly in mofussil—Jurisdiction. *See* 60 C. 54=1933 C. 295. *See also* I.L.R. (1938) 1 Cal. 531=42 C.W.N. 422 (Suit for construction of will and administration). I.L.R. (1938) 1 Cal. 354=1938 Cal. 271, (Suit for possession of movables situate outside jurisdiction). A suit by trustees under a composition deed regarding certain properties within the original jurisdiction of Calcutta High Court does not cease to be a suit for land, merely because the properties have been entirely swept away by prior encumbrances. 56 C. 940=1929 C. 358. Where in a suit on a mortgage the mortgaged premises were outside the jurisdiction of the Court leave could not be granted under Cl. 12. 49 C.L.J. 235=1939 C. 373. A suit for land part of which only was situate within the ordinary original civil jurisdicton of the High Court and the other part was situate in the mofussil was brought on the Original Side without leave being obtained under Cl. 12: *Held,* that as regards all properties outside the original jurisdiction of the High Court the suit was without jurisdiction and that effect must be given to the objection about jurisdiction though taken in the appellate Court for the first time. 56 C. 940=1929 C. 358. *See also* 41 C.W.N. 854; 41 C.W.N. 1133; 43 C.W.N. 365; 44 C.W.N. 214; 41 C.W.N. 854. Under Cl. 12 of the Letters Patent in the case of a suit for land of which a part is within its jurisdiction, the High Court acquires jurisdiction over the entire suit provided that its leave is first obtained. When once it acquires jurisdiction to determine the suit, the decree that it passes is in no way different from a decree passed by the mofussil Court. Thus, an order for sale passed in a mortgage suit in respect of properties partly situate outside the original jurisdiction does operate as *lis pendens.* 58 C. 598=1931 C. 763. Where a deed of trust by way of composition for creditors was executed in Calcutta and it comprised certain properties in Calcutta and certain items outside and a suit was filed on the Original Side to enforce the deed without sanction under Cl. 12, but the objection to jurisdiction was taken only in appeal, *held,* (1) that the plaintiff should have obtained leave to sue; (2) that the objection to jurisdiction could be raised in appeal; (3) that S. 21, C.P. Code, did not abrogate the mandatory provisions of Cl. 12; (4) that the suit could be proceeded with only as regards properties within the jurisdiction of the High Court on its Original Side and that the mere fact that they were transferred subsequent to the institution of the suit did not affect the maintainability of the suit. 56 C. 940=1929 C. 358. S. 92 of the C.P. Code, must be taken as overriding Cl. 12 of the Letters Patent. A suit under S. 92 of C.P. Code, cannot be instituted in the High Court when the subject-matter of the trust is situated outside the local limits of its jurisdiction, even though the defendants may dwell or carry on business within. 59 C. 357=1932 C. 444. Leave to sue—Suit for damages for wrongful conversion of house in the Punjab —One of the joint tort-feasors residing in Calcutta—Suit for recovering sale proceeds and for account—Maintainability. *See* 116 I.C. 727. Suit for damages for *malicious prosecution*—Forum: *See* 60 C. 918=38 C.W.N. 120=1933 C. 706. Specific performance of contract to sell land. 19 C. 358; 49 C. 670. Suit for declaration that lease is subsisting. 36 C. 59. High Court —Original Side—Limited territorial jurisdiction—Fictitious entry in mortgage—Not effective to give jurisdiction—Decree of High Court—Nullity. 41 C. 972=41 I.A. 910=23 I.C. 637 (P.C.). Where the value of the Calcutta property mortgaged is

NOTES.

almost infinitesimal and the intention of the parties was not to make that property an effective part of the security given in the mortgage, and it was included merely to confer jurisdiction on the High Court and not for any other purpose, held, that leave to institute the suit on the mortgage should not be granted under Cl. 12, as the High Court had no jurisdiction to entertain the suit. 41 C.W.N. 854. But when the High Court grants leave under the clause, it holds that the property included in the mortgage was validly included in it and was intended to be so included and charged. And when a decree has been passed in such suit, it is not open to a party afterwards in a subsequent suit based on such decree to contend that the property was not really intended to be included in the mortgage and that the decree was therefore without jurisdiction. 41 C.W.N. 396=1937 C. 88.

LEAVE TO SUE.—Where persons living outside jurisdiction are made parties to a suit but leave to sue is applied for and the High Court has granted it, the suit is valid as against them. 1937 C. 172=171 I.C. 652. *See also* (1940) 1 Cal. 497=44 C.W.N. 460. The Calcutta High Court cannot grant leave to enforce a cause of action regarding properties partly within and partly without the ordinary original civil jurisdiction, and so a decree affecting properties outside those limits is void. 56 I.C. 532 =24 C.W.N. 633. A contract was signed by the manager of the defendant business in Calcutta; the defendant himself was resident of Singapore. The defendant can be sued in his firm's name for damages for breach of contract in the Original Side of the High Court. 10 I.C. 895. Suit for damages for wrongful conversion of house in the Punjab—One of the joint tort-feasors residing in Calcutta—Leave to sue can be granted by Calcutta High Court. 32 C. W.N. 208. *See also* 1941 Cal. 291 (Suit for money lent in Calcutta to non-resident foreigner. Cal.H.C. has jurisdiction). The High Court has the power under the ordinary Original Civil Jurisdiction conferred on it by Cl. 12 to pass an order for judicial separation between Jews. 57 C. 1089=34 C.W.N. 319=1930 C. 558. The jurisdiction of the High Court as it stood in 1908 when the Code was republished depended upon S. 9, High Courts Act of 1861. It was to have such power and authority as Her Majesty may by Letters Patent grant and direct. 56 C. 940=1929 C. 358. In a *suit by an assignee of a debt,* the *assignment is a part of the cause of action* and upon that leave is invariably granted. It is impossible in practice to decide before the hearing of the suit whether an assignment is or is not *bona fide*. The Court would not be justified on a mere suspicion that the assignor might not have acted in the ordinary way of business in depriving the plaintiff of the right to bring a suit in the place where the assignment was made. 37 C.W. N. 1139=1934 C. 175. But where the sum at stake is not a large one and *prima facie* there is no issue likely to be raised which the tribunal at the place where the note was originally executed and where the defendant resides is not competent to try satisfactorily, and where further assignment of the promissory note was executed on the last day before the expiry of the period of limitation and collusively for the purpose mainly of giving the High Court jurisdiction which it would not otherwise possess, the case is one in which leave under Cl. 12 ought not to be granted. 63 C. 435=40 C.W.N. 161=1936 C. 349. In such a case the High Court has power to recall the leave granted at the time of the filing of the plaint, the grant of leave at that stage being only *ex parte*. But it is important that the defendant who applies for revocation must take steps to have the leave set aside at the earliest possible moment. 63 Cal. 435. *See also* 40 C.W.N. 165=1936 C. 230. It is not usually right to grant leave under Cl. 12 of the Letters-Patent in a case where the part of the cause of action on which the jurisdiction depends is a matter with which the defendants have had nothing to do; and generally speaking, when people take an assignment of a promissory note, they should be prepared to enforce their claim either in the Court within whose jurisdiction the makers reside, or in a jurisdiction where a part of the cause of action with which the makers are directly concerned has arisen. In the case of note executed by a mercantile firm, different considerations will prevail, for parties engaged in mercantile transactions must be held to contemplate the possibility of the note passing from hand to hand by negotiation and eventually getting into the hands of a party who may elect to sue in a Court which does not suit the convenience of the maker. 63 Cal. 526=40 C.W.N. 164=1936 Cal. 219. But *see* 63 C. 908=40 C.W.N. 717; 40 C.W.N. 1349.

WAIVER OF OBJECTION TO JURISDICTION.—A defendant cannot be held to have waived his objection to jurisdiction, when the plaint alleged the cause of action to have risen wholly within the original civil jurisdiction, if it afterwards turns out that a portion was beyond jurisdiction, and no leave was obtained. 38 I.C. 571=41 C. 10. An objection as to want of such leave might be waived and would be considered to have been waived if the defendant had taken any steps in furtherance of the suit to its trial. 18 I.C. 898=17 C.W.N. 512. But *see* 56 B. 324=137 I.C. 381=1932 B. 291; 56 C. 979, *contra*. The failure to obtain leave in a suit where leave is necessary under the Letters Patent goes to the root of the jurisdiction and the want of jurisdiction in the Court to entertain the suit cannot be overcome or waived by the consent or submission of the parties. 56 C. 979. Leave granted subsequent to presentation of plaint

Extraordinary original Civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay,] shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Madras, [Bengal Division of the Presidency of Fort William] [Bombay], subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Joinder of several causes of action.

14. And We do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immovable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

15. [1][And We do further ordain that an appeal shall lie to the said High

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LEG. REF.

[1] Substituted by Amending Letters Patent, dated 11—3—19 and of 9th December, 1927.

NOTES.

relates back to date of institution. 43 C. W.N. 1015.

Cls. 13 and 15—Madras cases.—An order for transfer of a suit to the High Court under Cl. 13 is a "judgment" and appealable. 45 M.L.J. 152=1924 M. 90 [35 M. 1=21 M.L.J. 1 (F.B.), Foll.] Application for transfer of suit from the Presidency Small Cause Court to the High Court is governed by Cl. 13, and must be made to judge sitting on the original side of the High Court. 13 I.C. 860=22 M. L.J. 187. Case transferred to High Court from Judicial Commissioner, Coorg, is appealable under Cl. 15. 1922 M.W.N. 830. The powers of the High Court in a case transferred from the District Court, are confined to those exercisable by a district Court but for the transfer. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 and tried by the High Court as a Court of Extraordinary Original Jurisdiction, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction (and not those payable under the Court-Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Courts Act (VII of 1892), 60 M. L.J. 435.

Cls. 13 and 14—Bombay cases.—*See* 27 B. 575; 34 B. 364.

Cls. 13 and 15—Calcutta cases.—An order of a single Judge transferring a suit from the Small Cause Court to the High Court for trial is not a judgment and no appeal lies from the order. 60 I.C. 963=47 C. 1104. The question whether there should be a transfer 'for purposes of justice' within the meaning of Cl. 13 has to be determined by reference to the circumstances of each case, and the balance of convenience is certainly a matter for consideration. 54 C. 607=1927 C. 791. Word 'suit' as comprising probate proceedings—Transfer of pending proceeding in a Subordinate Court to the High Court—Order if appealable. *See* 54 C. 126=1927 C. 281.

Cl. 14.—The plaintiff filed a suit in Bombay against the ex-Maharaja of Indore claiming to recover damages for false imprisonment and injury, for wrongful use and occupation, and for wrongful conversion and misappropriation of certain property. The defendant contended that the Court had no jurisdiction to entertain a suit for false imprisonment and personal injury. The Court granted leave under Cl. 12 and the question arose whether the cause of action could be considered under Cl. 14. *Held,* (1) that in order to give jurisdiction it was not necessary that the defendant should admit that at least one cause of action arose within the original jurisdiction; (2) that the words "such causes of action not being for land or other immovable property" in Cl. 14 means "excluding any cause of action which is for land or other immovable property"; (3) that the cause of action for false imprisonment though not one for land or other immovable property could be joined to the other two causes of action which arose within the jurisdiction; (4) that under the circumstances of the case it could not be said that the Court had no jurisdiction at all on the ground that the defendant was a non-resident foreigner. 53 B. 251=31 Bom.L.R. 7=1929 B. 100.

Cl. 15: EFFECT OF AMENDMENT OF CLAUSES 15 AND CF.—The Letters Patent of the High Court had been amended by further Letters Patent, dated 9th December, 1927, in two

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

Court of Judicature at Madras [Fort William in Bengal] [Bombay], from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made[1] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments, of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

LEG. REF.

Appeal to High Court from Judges in Court.

[2] **Madras amendment.**—In the fifteenth clause of the Madras Letters Patent between the words 'pursuant to the S. 108 of the Government of India Act, made' and the words 'in the exercise of appellate jurisdiction' the words 'on or after the first day of February, One thousand nine hundred and twenty-nine' shall be inserted. [*N.B.*—This Amendment is to come into force on 1st February, 1929.] [Amended by Letters Patent, dated 12th December, 1928.]

NOTES.

material respects. S. 15 provided for an appeal to the High Court against the decision of a single Judge but under the change now made such appeal will lie only when the Judge against whose decision it is intended to prefer an appeal certifies that the case is a fit one for appeal. S. 36 provided for the opinion of the Senior Judge prevailing in certain cases when two Judges constituting a Division Bench differed in opinion. The secton has been amended so as to do away with the opinion of the Senior Judge prevailing in any case. 32 C.W.N. Journal, p. 46. The amendment of this clause does not take effect retrospectively so as to take away a right of third appeal which the suitor had under the Letters Patent on the date of the institution of his suit. 32 C.W.N. 1130=1928 C. 640 (F.B.). *See also* 48 C.L.J. 150; 55 M.L.J. (Short notes) 37 citing S.R. No. 12176 of 1928. Otherwise in matters of procedure. 30 Bom.L.R. 942=1928 B. 371. No hard and fast rule can be laid down as regards the grounds on which leave to appeal should be granted by a Judge under Cl. 15 of the amended letters patent against his decision passed in second appeal. The mere fact that there was a question of fact involved in the second appeal or that the second appeal was allowed and the decision of the lower appellate Court reversed or modified, or that the valuation of a second appeal was not insignificant, is not by itself, conclusive for the grant of such leave to appeal. *Leave to appeal however may be limited to certain points* only, in which case the appellant will be confined to such points. Where the decision in second appeal was based on the construction of a deed of adoption which contained certain peculiar provisions: *Held*, that leave should be refused. *Principles applicable to granting of leave to appeal* elaborately discussed. 53 M. 405=1931 M. 202=58 M.L.J. 388. *See also* 56 M.L.J. 369.

Madras cases: SCOPE OF CL. 15.—Cl. 15 is not controlled by S. 105, C.P. Code, and it is open to a person, though he does not appeal against the order of remand to attack it in his appeal against the final decree. 30 L.W. 787=1929 M. 349.

MEANING OF WORDS "TRIAL".—The word "trial" includes an appeal under Cl. 15. 22 M.L.J. 44=12 I.C. 653.

CONSTRUCTION OF CL. 15.—Where it is doubtful whether the decision appealed from was in revision or second appeal but the party aggrieved had a right of second appeal, it must be construed as an appeal and a Letters Patent appeal would lie in an appropriate case. 1930 M. 489. In granting a certificate for leave to appeal under Cl. 15, it is not open to the Judge granting leave to limit the points fit for appeal; it is for the Court hearing the Letters Patent appeal to say what questions it will allow to be raised. I.L.R. (1941) Mad. 775=1941 Mad. 481=(1941) 1 M.L.J. 800 (F.B.). An order refusing to grant review of a judgment in a second appeal, is an order made in the exercise of such second appellate jurisdiction. Hence a Letters Patent

NOTES.

appeal from such an order is incompetent without the necessary leave under Cl. 15. I.L.R. (1938) Mad. 633=1938 Mad. 399=(1938) 1 M.L.J. 402.

"Judgment".—Meaning of, *see*, 52 M.L.J. 161=50 M. 380; 35 M. 1=21 M.L.J. 1 (F.B.); 47 M. 316=1924 M. 597=46 M.L.J. 138. The term "judgment" includes an order awarding costs even if they are discretionary and such order can be appealed against.' 22 I.C. 551.

What are Judgments,—[*See also* cases under "cases where appeal lies".] An order as to costs passed by a Judge, sitting on original side on a review of taxation by the taxing officer. 42 M. 352=36 M.L.J. 351 (F.B.). Order for transfer of a suit. 47 M. 136=1924 M. 90. Order under Prov. Sm. C.C. Act, S. 25. 39 M. 235=29 I.C. 846=29 M.L.J. 12. An order of a single Judge on an application for an *ad interim* injunction is a judgment if obtained. 21 L.W. 310=1925 M. 586. An order awarding a plaintiff maintenance pending the trial of her suit is a judgment and is appealable. 1925 M. 443=48 M.L.J. 395. *Ex parte* order granting or refusing to grant leave to sue, if and when judgment. *See* 50 M. 770=52 M.L.J. 329.

What are not Judgments.—[*See also under title "cases where no appeal lies."*] An order refusing leave to amend is not a judgment. 3 L.W. 107=32 I.C. 423. Order adding a party is not a "judgment" and therefore is not appealable. 1930 M. 987=60 M.L.J. 237. So also an order of a single judge refusing an application to set aside his previous order excusing the delay in applying for leave to appeal *in forma pauperis*. 59 M. 656=43 L.W. 310=1936 M. 387=70 M.L.J. 306. The decision of the High Court in an appeal under S. 54 of the Land Acquisition Act is not a judgment. 41 M. 943=35 M.L.J. 110. The order of a single Judge sitting in the admission Court, dismissing a petition for stay of execution, is not a 'judgment'. 14 L.W. 701. Order referring a partnership suit to Commissioner is not a judgment. 1924 M. 406. Order of Judge under R. 206. Original Side Rules, not judgment. 45 M.L.J. 611=1924 M. 386. Order refusing to alter sale proclamation or postpone sale is not judgment. 46 M.L.J. 71=1924 M. 234. Order referring back report to official referee. 51 M. 235=1928 M. 160=54 M.L.J. 136. Order dismissing application to enlarge time under Arbitration Act. 51 M. 103=1928 M. 69=54 M.L.J. 49 (F.B.). Order refusing transfer. 51 M. 330=1928 M. 209=54 M.L.J. 710. Order in criminal case is not a judgment—Sanction application. 45 M. 928=43 M.L.J. 375=1922 M. 495. Order refusing to allow inspection of accounts disclosed in the affidavit of documents. 1927 M. 409=52 M.L.J. 192. Order of Judge of High Court calling for a finding. 25 L.W. 95=1927 M. 317. Order directing stay of proceeding pending appeal made conditional on giving security within a certain time. 53 M.L.J. 494. But *see also* 1927 M. 592=52 M.L.J. 670. Order allowing evidence in lower appellate Court. 105 I.C. 720=1927 M. 1021.

Cases where Appeal Lies.—[*See also* under *"What are judgments".*] An appeal lies against the order of a single judge of the High Court refusing to stay the execution of a decree. 47 M. 316=1924 M. 567=46 M.L.J. 138. An order of a judge on the original side of the High Court giving leave to the plaintiff to sue *in forma pauperis* is a judgment and is appealable. 1925 M. 167=47 M.L.J. 932. At the hearing of such an application even if the Government admits the pauperism of the plaintiff, the defendant should be given opportunities to prove he was not a pauper. 20 L.W. 845=1925 M. 167=47 M.L.J. 932. An appeal lies against an order on the original side setting aside the abatement of a suit, as such order is a judgment. 31 I.C. 38=2 L.W. 948. (35 M. 1, Foll.) Appeal will lie against an order by a single Judge of the High Court rejecting petition for a revision of a small cause judgment. 27 M.L.J. 480=26 I.C. 57. *See also* 30 M. 311. Also from order of a single Judge of the High Court on a claim petition 39 M. 1196=28 I.C. 367. Where the Official Assignee applies to the Insolvency Judge for an order directing delivery of the insolvent's property and for committing to prison for contempt the wife and son of the insolvent who remain in the house and obstruct delivery, aiding the insolvent, but the Judge refuses the application, holding that he has no power to do so, such order of refusal is a "judgment" within the meaning of Cl. 15; the Official Assignee being an aggrieved party under S. 8 of the Presidency Towns Insolvency Act, has a right of appeal. 1938 Mad. 927=(1938) 2 M.L.J. 609. Written statement—Amendment of, at plaintiff's instance—Order refusing—Applicability of. 1925 M. 64=49 M.L.J. 632. Order granting review and amending decree is a judgment and appealable. 1927 M.W.N. 411=1929 M. 261. *See also* 56 M. 915=1933 M. 570=65 M.L.J. 222 (F.B.).

Cases where no Appeal Lies. [*See also* under *"What are not judgments."*] Interlocutory orders passed in Civil Revision Petition. 51 M. 165=1928 M. 169=54 M.L.J. 323. An order for compensation under S. 250 of the Cr.P. Code is an order in a criminal trial and the judgment of the single Judge of the High Court in revision from that order is not open to appeal. 43 I.C. 624. No appeal lies from an order of a single Judge of the High Court staying the further trial of a suit. 30 I.C. 942=18 M.L.T. 312. Also against an order passed by a single Judge of the High Court in the exercise of its criminal revisional jurisdiction. 29 I.C. 96=2 L.W. 363. Also from order of a single Judge of the High

NOTES.

Court passed in revision in proceedings under S. 488, Cr.P. Code. 39 M. 472=28 M.L.J. 483=28 I.C. 662. Also against order of a single Judge on a revision against the order of Magistrate acting under S. 118 of Cr.P. Code. 39 M. 539=28 I.C. 927 =28 M.L.J. 307. Proceedings taken for binding over persons to keep the peace under Ch. VIII of Cr.P. Code, are criminal trials within Cl. 15. 39 M. 539. As to order refusing to grant review of Judgment in Second appeal. I.L.R. (1938) Mad. 633=1938 Mad. 399=(1938) 1 M.L.J. 402. No appeal lies at the instance of the judgment-debtor, under Cl. 15 against an order staying further proceedings on terms in an appeal preferred against the preliminary decree in a mortgage suit. 1923 M. 197=56 M.L.J. 197. No appeal lies, under Cl. 15 against the refusal of a single Judge of High Court to grant leave to appeal from the judgment passed by him in a second appeal. 30 L. W. 386=57 M.L.J. 398. Where during the pendency of an appeal the appellant died and an application having been made by one of the respondents claiming as legal representatives of the deceased the Court brought him on record as appellant after going into the genuineness of a will under which he claimed, *held,* that the order was not a judgment within the meaning of cl. 15 and was not appealable. 1933 M. 417=64 M.L.J. 493. *See also* 50 L.W. 202=1939 Mad. 800=(1939) 2 M.L.J. 414 (Order refusing to grant leave to appeal from an order under S. 75 (3) of Provincial Insolvency Act). Whether an appeal lies under the clause against an order of the High Court under S. 195, Cr. P. Code, is doubtful. 39 M. 768= 38 I.C. 994.

PRACTICE AND PROCEDURE.—Before the amendment of 1927 in appeals governed by S. 96, C. P. Code, when two Judges of the High Court were divided in opinion, the judgment of the Judge who confirmed the decree of the lower Court prevailed. 21 L. W. 721=1925 M. 1032. But now a different procedure is prescribed. (*See also* Cl. 36.) In an appeal against orders in execution, if appellant dies, his legal representative can continue the same. 1928 M.W.N. 385=1928 M. 772.

REVIEW.—The High Court is competent to entertain an application to review a judgment passed in a Letters Patent appeal. S. 114, C. P. Code, applies to judgment under the High Court's Letters Patent. 40 M. 651=32 M.L.J. 144.

STAY *of* EXECUTION.—The fact that a part of a decree is declaratory is no bar to a stay of execution thereof being granted pending an appeal therefrom. 47 M. 316 =1924 M. 597=46 M.L.J. 138. Where a second appeal was filed and an application was made for stay of execution of the decree of the lower Court and it was dismissed, *held,* that the order of dismissal was not appealable except with certificate as provided for under the amended Letters Patent. 30 L.W. 976=57 M.L.J. 783. An order passed by a single Judge of the High Court, dismissing an application for stay of execution of the decree of the lower appellate Court made in a pending second appeal is one made in the exercise of its "appellate jurisdiction" within the meaning of the amended cl. 15 of the Letters Patent and, consequently, no appeal lies from such an order, unless the Judge who has passed the order declares that the case is a fit one for appeal. 30 L.W. 976=57 M.L.J. 783.

Bombay cases.—Under cl. 15 of the Letters Patent as now amended, leave will be necessary as regards all decisions in second appeals by a single High Court Judge on and after February, 1, 1929. 31 Bom. L R 473=1929 B 241. *See also* 32 Bom. L.R. 185=54 B. 331; 30 Bom.L.R. 942= 52 B. 753.

"JUDGMENT".—"Judgment" in cl. 15 means a decision affecting the merits of the question between the parties by determining some right or liability. It may be final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary one only, a part of it. 45 B. 428=59 I.C. 533=22 Bom.L.R. 1169; 53 I. C. 395=21 Bom.L.R. 955. The term 'judgment' means in civil cases a decree and not a judgment in the ordinary sense. 27 Bom.L.R. 872=49 M.L.J. 25 (P.C.). *See also* I.L.R. (1940) Bom. 361=42 Bom.L. R. 377=1940 Bom. 196; 42 Bom.L.R. 428 =1940 Bom.216=I.L.R. (1940) Bom. 426 (Order of single Judge conferring order of remand by appellate Court is appealable).

WHAT ARE JUDGMENTS.—A pronouncement giving liberty of withdrawing his suit made after recording evidence and hearing argument. 45 B. 377=58 I.C. 1004=22 Bom.L.R. 1012. An order of a single Judge of the High Court refusing to excuse the delay in presentation of the appeal. 42 B. 260=44 I.C. 913=20 Bom.L.R. 172. Also an order refusing to excuse the delay in presenting an application for leave to appeal to His Majesty in Council. 26 Bom. L.R. 395=48 B. 442. Refusal to revoke arbitration. 34 B. 1.

WHAT ARE NOT JUDGMENTS.—A finding on a preliminary issue in a suit that it is maintainable. 27 Bom.L.R. 1496. A finding on a preliminary issue which does not involve the practical determination of the suit still amounts to a judgment and is appealable, owing to the peculiar framing of the suit in which the issue raised does imply its final determination. 32 Bom.L.R. 285=1930 B. 262. An order refusing directions in third party proceeding under Rr. 130 and 131 of the High Court Rules is not a "judgment". 45 B. 428=59 I.C. 533=22 Bom.L.R. 1169. Also order on original side setting aside abatement of suit. I.L.R. (1938) Bom. 704=40 Bom.L.R. 658=1938 Bom. 408. Order allowing transfer of summary suit to short causes not a judgment. No appeal

NOTES.

lies. 27 Bom.L.R. 99=86 I.C. 100. An order by a single Judge on the original side of the High Court allowing amendment of the plaint in a suit by a sole partner of a firm in the firm name, permitting the substitution of the name of the partner for that of the firm, is merely an order for regulating procedure and not one affecting the rights of the defendant, and is hence not appealable. 38 Bom.L.R. 529. Nor an order of the Court refusing to commit a party for breach of an undertaking given to the Court. 38 Bom.L.R. 571=164 I. C. 335=1936 B. 314. An order refusing to restrain the defendant by an injunction from prosecuting his suit in a foreign Court is not a "judgment". 53 I.C. 395=21 Bom. L.R. 955. It is doubtful whether an order refusing to grant sanction to prosecute under S. 195, Cr. P. Code, is a judgment. 24 Bom.L.R. 817=47 B. 270=1922 B. 453.

Appeal.—An appeal does not lie against an order of a judge refusing to grant leave to appeal under cl. 15. 32 Bom.L. R. 185=1930 B. 224; or order excusing delay in filing appeal. I.L.R. (1940) Bom. 361=42 Bom.L.R. 377=1940 Bom. 196. An order of the Judge sitting in chambers refusing leave to sue *in forma pauperis* is appealable as a judgment. 32 Bom.L.R. 1647. An order extending the time for making an award is appealable. 32 Bom.L.R. 1650. The right of appeal from the decision of one Judge in second appeal to the High Court and the right of appeal from the decision of more Judges than one to the Privy Council are governed *mutatis mutandis* by the same principles. In each case, the case must be certified to be a fit one for appeal. Though considerations of private or public importance, or importance as precedents and like matters must exist in a greater measure when a decision is requested from the Privy Council, than when a decision is invited from a Bench of the High Court, yet where there is no point in dispute which the Court could in the exercise of judicial discretion certify as being of great public or private importance and no important precedent governing numerous other cases, no leave can be granted from the decision of second appellate Court. 34 Bom. L.R. 398=1932 B. 218. Where, at the time the second appeal was dismissed, no application for a certificate was made and subsequently at the time when the application was made the Judge who disposed of the appeal ceased to hold the office of Judge of the High Court, *held,* that a certificate cannot be granted by another Judge of the High Court, and that an appeal under cl. 15 of the Letters Patent was not competent without a certificate. 32 Bom.L.R. 624=1930 B. 366. An *order granting leave to defend* on condition that the defendant should deposit in Court a sum of money by a date mentioned therein is a "judgment" within the meaning of cl. 15 from which an appeal lies. 56 B. 268=34 Bom.L.R. 252=1932 B. 163. But an *order fixing the date of sale or extending the time for sale of* certain partnership property is in the nature of an order regulating the procedure under the order for sale and not a "judgment" within cl. 15 and is not appealable. 56 B. 237=34 Bom.L.R. 12=1932 B. 134. An *order under S. 10, C. P. Code,* refusing to stay a suit is not a "judgment" within the meaning of cl. 15 and is not appealable. 35 Bom. L. R. 15=1933 Bom. 85=57 B. 364. But *see* 61 I.C. 670 *contra*. An *order dismissing a petition under* S. 39, *Lunacy Act,* to adjudge a person to be a lunatic is not a judgment, and is not appeable. 35 Bom.L.R. 38=1933 B. 112=57 B. 371. Contempt arising out of comments upon a pending trial by persons some some of whom are parties to the suit and some of whom are not is contempt of a criminal nature and the order passed in such proceedings is not appealable. 35 Bom.L. R. 9=1933 B. 108=57 B. 286. An order refusing the issue of a commission to examine witnesses is not a "judgment" within cl. 15 of the Letters Patent and no appeal lies from such an order. [35 M. 1 (F.B.); 1920 C. 894; 3 R. 293; 3 Rang. 605, Foll.; 2 I.C. 157, Expl.] 36 Bom.L.R. 272=1934 B. 168.

Practice.—In an appeal the whole case is open and not merely the points on which the Judges differed. 48 B. 691=87 I.C. 199=1925 B. 118.

Calcutta cases.—Amendment of Letters Patent not retrospective. Cl. 15 of the amended Letters Patent does not take effect retrospectively so as to take away a right of third appeal which the suitor had under the old Letters Patent on the date of the institution of his suit. 48 C.L.J. 150=32 C.W. N. 1130=1928 C. 640 (F.B.). Otherwise in matters of mere procedure. *See* 1928 B. 371. As to the effect of the amendment of 1927, *see* notes under cl. 15, *Bombay Cases*. A Judge hearing an application praying for leave to file an appeal under S. 15, has no jurisdiction to entertain an application for the extension of the period of limitation under S. 5 of the Limitation Act for filing the appeal. That would be a matter for the Division Bench that may be constituted by the Chief Justice for the purpose of hearing Letters Patent Appeals and if there is no such Bench, it will be for the Chief Justice to constitute a Division Bench to deal with the application for extension of time. 46 C.W.N. 131.

Judgment.—The term 'judgment' means "decree or order." 47 I.C. 677=28 Cr.L. J. 20. Order of dismissal of an appeal without investigation of the merits, may be judgment. (*Ibid.*) 'Judgment' means the sentence of law pronounced by the Court. 22 Cr.L.J. 452=20 C.W.N. 210. 'Judgment' signifies what is now termed 'decree' or 'order'. 31 I.C. 965=22 C.L.J. 525; 40 C.W.N. 1264. As to whether an adjudication is a judgment, the test is what is its

NOTES.

effect on the suit or proceeding in which it is made. 21 C.W.N. 921=29 C.L.J. 225. By the express provision contained in sub-S. (2) of S. 26 of the Land Acquisition Act, introduced by the Amending Act of 1921, "judgment" includes a decision of the High Court in a L. A. appeal from an award of the L. A. Judge. The decision in such an appeal is appealable under cl. 15. 40 C.W.N. 1143=1936 C. 688. *See also* 45 C.W.N. 181 (decision of Judge on election petition).

WHAT ARE JUDGMENTS.—Order of attachment before judgment. 50 C. 215=1923 C. 639. Also order setting aside abatement. 49 C. 62=1922 C. 335. Also order refusing to stay proceedings. 47 C. 611=24 C. W.N. 612. An order rejecting an application for judgment on admissions is a judgment and is appealable. 54 I.C. 836=23 C.W.N. 1017. An order refusing to set aside an award. 46 I.C. 687=45 C. 502. A decision of a single Judge of the High Court reversing in appeal an order of a District Judge and remanding the case for rehearing. 27 C.L.J. 418=22 C.W.N. 627. A decision that a suit being open to the objection of multifariousness cannot be entertained as framed. 45 C. 111=21 C.W.N. 794. A remand order nullifying the benefit of the decree is a judgment. 21 C.W.N. 921=41 I.C. 250. An order of a single Judge on the Original Side of the Calcutta High Court dismissing a suit for want of prosecution is a judgment and is appealable. 28 C.W.N. 916=51 C. 1025. As an order refusing an application for the appointment of a receiver based on a provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein, the plaintiff's assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so is a judgment within the meaning of cl. 15. 39 C.W.N. 155=1935 C. 35. An order of a Single Judge of the High Court under S. 9 of the Insurance Act directing the refund, of the deposits under S. 7 of that Act, is a 'judgment' within the meaning of cl. 15 of the Letters Patent and is appealable. So also an order under S. 61 (1) and (2) of the Insurance Act reducing the amount of the insurance contracts. 46 C.W.N. 441.

WHAT ARE NOT JUDGMENTS.—Order restoring suit is not a judgment. 49 C. 616=1922 C. 407. Order admitting appeal filed out of time. 32 C.W.N. 935. Suit on behalf of a lunatic—Application to take the plaint off the file—Dismissal of the application is not a judgment. 26 C.W.N. 242=1922 C. 172. Order refusing leave to file written statement is not a judgment and is not appealable. 49 I.C. 120=45 C. 818. Ordinarily an order of a Judge on the Original Side allowing or refusing an amendment is not a judgment. 45 C. 305=47 I. C. 129=22 C.W.N. 611. Order refusing to issue commission to examine witnesses is not a judgment. 55 I.C. 766=31 C.L.J. 162. The judgment given upon a case stated by the Commissioner of Income-tax under S. 66 (2) of the Income-tax Act. 52 C. 546=29 C.W.N. 398=1925 C. 598. The opinion pronounced or delivered by a Judge on the original side of the High Court on a special request referred to him by the Registrar under R. 50, Ch. XXVI of the High Court Original Side Rules: 40 C. W. N. 1264=(1937) I.L.R. 1 Cal. 149. An order setting aside an *ex parte* decree and the attachment in consequence thereof is not a "judgment". 30 C.W.N. 104. Transferring a suit under cl. 13 of the L. P. 47 C. 1104. *See* however 45 M. L. J. 152. An order of a Judge of the High Court in an appeal filed under the Tea Control Act refusing to strike out the Tea Licensing Committee as respondents, is not a "judgment" within the meaning of Cl. 15. No appeal, therefore, lies from his order to a Division Bench of the High Court. 45 C.W.N. 454.

CASES WHERE APPEAL LIES.—Rulings under this clause before the amendment of 1927. [*See also* cases under *"what are judgments."*] An order refusing to stay a suit under S. 10, C.P. Code, is a judgment within Cl. 15 of the Letters Patent and is appealable. 61 C. 670=38 C.W.N. 818. But *see* 57 B. 374, *contra*. An order of a Judge of the High Court remanding a case to the Small Cause Judge who refused to a grant sanction under S. 195, Cr.P. Code to make a further investigation and pass orders thereon, is a "judgment." 44 C. 816=25 C.L.J. 193. *See also* 23 I.C. 977=41 C. 323. (Order of High Court interfering with judgment of Presy. S. C. Court.) An order of Judge of the High Court in its original jurisdiction rejecting an application under C.P. Code, O. 9, R. 9, for restoring a suit dismissed for default. 43 C. 857; 20 C.W.N. 594. Where the Judges of Division Bench, hearing an appeal in a probate case have disagreed and a decree has been drawn up in accordance with S. 98 of Cr.P. Code, an appeal lies under Cl. 15, 31 I.C. 319=22 C.L.J. 298. Order refusing permission to creditor to prove debt in a company's winding up proceeding is appealable. 31 C.W.N. 1894=193 I.C. 659=1927 C. 689. *See also* 64 I.C. 689=34 C.L.J. 489. So also order directing change of attorney. 60 C. 1273=37 C. W.N. 998. Order granting revocation of patent. 43 C.W.N. 697.

CASE WHERE NO APPEAL LIES.—[*N.B.—See also* cases under *"What are not judgment."*] Cl. 15 (as amended)—Second appeal disposed of under S. 98 (2). C.P. Code, prior to amendment—Application for certificate to one of the two Judges dismissing appeal—Maintainability—Letters Patent Appeal—Right if preserved. *See* 56 C. 507=114 I.C. 493. Provision whether takes effect retrospectively—Suit filed prior to amendment—Second appeal disposed of, after amendment—Right of third appeal—Neces-

Appeal from Courts in the provinces.

16. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall be a Court of Appeal from the Civil Courts of the Presidency of Madras, [Bengal Division of the Presidency of Fort William] [Bombay], and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

NOTES.

sity for certificate. *See* 56 C. 512=113 I.C. 49. Whether an order refusing leave to appeal be a judgment or not, it cannot be appealed against. Under the Amended Letters Patent leave granted by the Judge hearing the second appeal is the sole and necessary condition for such an appeal. 58 C. 342=1931 C. 571. The right of appeal to the High Court depends upon Cl. 13 and whether or not the decision of the learned Judge appealed from is a judgment depends upon whether or not so far as he is concerned he finally decided the rights of the parties as regards the question on which the appeal is based. 1930 C. 623. Second appeal disposed of under S. 98 (2), C. P. Code—Application for certificate under Cl. 15—Refusal—Appeal—Court-fee payable. 56 C. 482. Order admitting appeal filed out of time—Applicability. 56 C. 135=114 I.C. 88=1929 C. 214. No appeal lies from an order refusing to issue commission for the examination of witnesses. 55 I.C. 766 =31 C.L.J. 162. An application for review of a judgment of a Division Bench of the High Court being rejected by a Judge the other having ceased to be a Judge no appeal lies. 25 C.L.J. 360=41 I.C. 183=21 C. W.N. 652. There is no appeal against an order discharging a rule under S. 115 of C.P. Code. 33 I.C. 247=22 C.L.J. 22; 30 I.C. 906=22 C.L.J. 113; 30 I.C. 862= 22 C.L.J. 40. An order on the original side dismissing an application under O. 21, R. 58, is not appealable under Cl. 15, because of the prohibition contained in O. 21, R. 6. 37 C.W.N. 641=60 C. 914=1933 C. 715. An order under O. 37, C.P. Code, against a defendant to furnish security before he can defend the suit, is not appealable if it is that of a single Judge of High Court, original side. 42 C. 735=31 I.C. 238=22 C.L.J. 41. No appeal lies from an application for writ of *habeas corpus*. 54 I.C. 727=102 I.C. 647=1927 C. 496. An appeal lies under Cl. 16 from a dissentient judgment that has prevailed in an appeal under the same clause. 18 I.C. 253=17 C.L.J. 206. But it can be only with respect to the portion of the matter about which there is disagreement among the Judges. 40 C.W. N. 1143=1936 C. 688. Division Bench of High Court hearing appeal—Difference of opinion—Dismissal of appeal under S. 98, C.P. Code, Letters Patent appeal. 28 C. W.N. 637=51 C. 669. Where the Judge on the original side directed that the Registrar might be at liberty to sell the mortgaged properties without reserve: *Held,* that the order was not appealable. 60 C. 506=1933 C. 504. Opinion pronounced by Judge on Original Side (H.C.) on a special request referred to him by Registrar, under, R. 50, Ch. 26, H.C. Original Side Rules. I.L.R. (1937) 1 Cal. 149=40 C.W.N. 1264. An order directing enquiry by the Official Referee as to the respective rights of the parties for rateable distribution does not finally decide their rights. An appeal therefrom is incompetent. 57 C. 736=1930 C. 623. Where a receiver was appointed in a partition suit on the footing of intestacy, *held,* that an order refusing to discharge the receiver is appealable under the Letters Patent. 52 C.L.J. 66=1930 C. 803. Where in an appeal under Cl. 15, the respondent relied on facts and circumstances which appeared in the judgment of the lower appeallate Court and which must have been referred to before the single Judge of the High Court who heard the second appeal, but it appeared that such facts and circumstances were not referred to in the judgment under appeal. *Held,* that the respondents were entitled to rely on the facts contained in the judgment of the lower appellate Court. 34 C.W.N. 97=1930 C. 321.

Cl. 16: Cal. Cases.—An Appellate Officer appointed by the Local Government under S. 40 of the Bengal Agricultural Debtors Act is not a Civil Court within the meaning of S. 16 of the Letters Patent. The civil Courts contemplated by that clause do not cover Courts which are created by a special statute for a special purpose. 68 C.L.J. 407=42 C.W.N. 507=1938 Cal. 448 (1).

Cls. 16 and 26—Madras cases.—Under its superintending powers, the main function of the High Court is to see that the inferior tribunal does not usurp a jurisdiction which it does not possess whether at all or to the extent claimed or refuses to exercise a jurisdiction which it has and ought to exercise or act illegally in the exercise of its jurisdiction. But it is no part of that function to substitute its own opinion for that of the Court superintended in matters assigned by the legislature to the cognizance of the latter. That can be done only when a right of appeal is given to it. Revisional jurisdiction over Board of Revenue regarding orders under S. 173, Madras Estates Land Act, negatived. 55 M. 833=1932 M. 612=63 M. L.J. 450 (F.B.) High Court can entertain revision petition against a decree passed by a District Munsiff in an Agency tract. 59 M. 356=1936 M. 187=70 M.L.J. 204 (F.B.).

Jurisdiction as to infants and lunatics.

17. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have the like power and authority with respect of the persons and estates of infants, idiots and lunatics within the Presidency of Madras [Bengal Division of the Presidency of Fort William] [Bombay], as that which was vested in the said High Court immediately before the publication of these presents.

Provision with respect to the Insolvent Court.

18. And We do further ordain that the Court for relief of Insolvent Debtors at Madras, [Calcutta] [Bombay], shall be held before one of the Judges of the said High Court of judicature at Madras [Fort William in Bengal] [Bombay], and the said High Court, and any such Judge thereof, shall have and exercise, within the Presidency of Madras, [Bengal Division of the Presidency of Fort William] [Bombay], such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

NOTES.

Cl. 17—Madras cases.—The High Court has therefore jurisdiction to appoint a guardian for minors resident within the Presidency, though beyond the Presidency town, on the application of the father of the minors who is resident in Madras. S. 3 of the Guardian and Wards Act saves the power of the Chartered High Courts. 44 L.W. 904=71 M.L.J. 873. All that is necessary to invoke the jurisdiction of the High Court is that the minor should be a subject of His Majesty at the time it is invoked. The jurisdiction can be exercised over infants in the mofussil in the Presidency provided they are subjects of His Majesty. The High Court under Cl. 17 of the Letters Patent has jurisdiction to appoint a guardian of an infant residing in the mofussil, who is not a European British subject. 71 M.L.J. 873. Cl. 17 of the Letters Patent confers on the High Court the same power as Cl. 32 of the Charter of Supreme Court of 1800 conferred on that Court. There is no restriction in these clauses in regard to the Court's jurisdiction as to place or persons. 71 M.L.J. 873. Whatever the powers of the Supreme Court prior to 1858, the moment the Crown assumed direct control in 1858, every native of British India became *ipso facto* a British subject. 71 M.L.J. 873.

Cl. 17—Calcutta cases.—The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 (and apart from the Guardian and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family. 49 C. 570=138 I.C. 739=1932 C. 502. There is no restriction in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the Presidency town or to European British subjects. The High Court has power to appoint a guardian, even when the minor resides outside and has no property within the limits of the Ordinary Original Civil Jursdiction of the High Court. 57 C. 533=1930 C. 598. But *see* 58 C. 919=1931 C. 188.

Cl. 17—Bombay cases.—The High Court has power and can make an order appointing a guardian in respect of undivided coparcenary property of a minor Hindu coparcener, in respect of a minor situate within the limits of the ordinary original jurisdiction of the High Court, that is, the town and island of Bombay. This jurisdiction extends to minors wherever in the Presidency they may be found, provided they are subjects of the British Crown. The jurisdiction of the High Court to sanction a contract for the benefit of a minor extends to a minor Hindu coparcener resident within the Bombay Presidency, who is a British subject. Where the manager of a joint Hindu family comes to Court and asks it to sanction a sale of joint family property including the interests of the minor coparcener, as being for the benefit of the minor, the Court ought not to make an order *ex parte*. The minor concerned should be made a respondent to the application, and he should be represented by a guardian *ad litem*, who should normally be an officer of the Court, and he should satisfy himself as to the interest of the minor, by requiring further evidence as to the alleged necessity for the sale or as to the price being a good one, and as to how the proceeds of the sale are to be dealt with. If he requires funds to enable him to look into the matter properly, the party seeking the order must provide such funds. 43 Bom.L.R. 926=1941 Bom. 397 (S.B.).

Cl. 18—Madras: INSOLVENCY—APPLICATION FOR ADJUDICATION—DEBTOR BEING IN MOFUSSIL—COURT HAVING JURISDICTION BEING CLOSED—JURISDICTION OF HIGH COURT.—The High Court has no power to entertain a petition for the adjudication of a debtor, who is outside the limits of the Presidency-town, as an insolvent, even though the mofussil Court having jurisdiction in the matter is at the time closed for summer recess. (52 M. 52=55 M.L.J. 690. Foll.). 57 M. 453=1934 M. 314=66 M.L.J. 428.

Law to be administered by the High Court.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Madras [Bombay] shall have ordinary original criminal jurisdiction, within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons, beyond such limits, over whom the said High Court of Judicature at Madras [Bombay] shall have criminal jurisdiction at the date of the publication of these presents.

[The corresponding provision of the Calcutta Letters Patent is as follows:—

"And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in

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Cl. 21—Madras cases.—The High Court as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39. (35 L.W. 168, Diss. from.) 37 L.W. 110=64 M.L.J. 112=56 M. 563.

Calcutta cases: APPLICABILITY OF ENGLISH COMMON LAW—EXTENT OF.—Although the English common law is enforced on the original side of Chartered High Courts, on the appellate side and in the *mofussil* Courts, the English common law is not and has not even been followed. 61 C. 841=38 C.W.N. 682=1934 C. 682.

Cl. 22—Calcutta cases.—S. 106 of the Government of India Act leaves the definition of the High Court's original criminal jurisdiction to be made by the Letters Patent and the High Court derives a particular original criminal jurisdiction from Cl. 22, Letters Patent. It is within the power of the Indian Legislature to alter and amend the Letters Patent and consequently within the Ordinance making power of the Governor-General under the Government of India Act. 37 C.W.N. 481=1933 C. 364=60 C. 814.

Bengal shall have criminal jurisdiction over at the date of the publication of these presents".]

Jurisdiction as to person.

23. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction — Court may reserve points of law.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Madras [Fort William in Bengal] [Bombay], from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review on certificate of the Advocate-General.

26. And We do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said

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Cls. 24 and 29—Calcutta cases.—Extraordinary criminal jurisdiction is conferred on the High Court under Cl. 24. Under that section, however, the High Court has no power to take proceedings against persons, one of whom is not in India at all and the others or either Indian subjects or else residing within the original jurisdiction. 35 C.W.N. 1088. *See also* 35 C.W.N. 782; 35 C.W.N. 1086. Where certain British Indian subjects resident within the original jurisdiction were accused of offences committed outside British India, the complaint cannot be entertained by the High Court on its appellate side, Cls. 24 and 29 not being applicable to such a case. 35 C.W.N. 1082. Where the Advocate-General appears on behalf of the accused and does not commence proceeding under Cl. 24, it cannot be said that he ceased to be Advocate-General and an application by counsel for private party to be clothed with the powers of the Advocate-General cannot be maintained. 35 C.W.N. 1082.

Cls. 25 and 26—Madras cases: REVIEW.—The judgment of a special Criminal Bench of the High Court constituted under S. 6 (*b*) of the Criminal Law Amendment Act, 1908, is open to review on a certificate granted by the Advocate-General under cl. 26. 14 I.C. 896=13 Cr.L.J. 352=(1912) 1 M.W.N. 552=12 M.L.T. 1. The expression "*point of law*" in cl. 26 means the same thing as matter of law in S. 418 of the Cr. P. Code. It includes such misdirection or non-direction as would permit an appeal against the verdict of a jury. And misdirection includes not only an error in laying down the law by which the jury are to be guided but also a defect in summing up the evidence or in not summing it up or in summing it up erroneously. 1930 M.W.N. 249. As to whether presiding Judge can reserve question, when point was raised after reading out charge and accused called upon to plead, *see* 1936 M.W.N. 281=1936 M. 353=70 M.L.J. 635 (F.B.).

Cls. 25 and 26—Calcutta cases.—Under cls. 25 and 26 the Full Bench is not competent to order a retrial but should finally decide the matter on review. 47 C. 671=31 C.L.J. 402=24 C.W.N. 501 (F.B.). (44 C. 477; 2 B. 61; 17 C. 642, Ref.) As to right of appeal or revision in the case of trials on the Sessions Side of a High Court, *see* 44 C. 723=21 C.W.N. 167.

Cl. 26—Bombay cases.—The failure of the Judge to comply with S. 297, Cr. P. Code, is an error of law which brings the case within cl. 26 of the Letters Patent. But that clause does not entail that wherever any misdirection is found to exist, the Court has no option but to set aside the ver-

Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

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dict. 60 B. 599=38 Bom.L.R. 19=1936 B. 52 (F.B.). Although the wording of S. 537, Cr. P. Code, does not apply to a case dealt with under cl. 26 of the Letters Patent, the Court ought to apply to such a case the principle which underlies that section, that is, that where there has been no illegality in the mode of trial, but some irregularity in the process of trial, the High Court is not entitled to set aside the verdict or judgment unless it is satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused. 60 Bom. 599. It is clearly open to the Court to consider, not so much what effect the misdirection has upon its mind sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case; and in so doing, it must assume that the jury was a reasonably competent jury, though it must remember that a jury consists of laymen and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge. 60 Bom. 599.

Cl. 26—Calcutta cases.—The powers of the High Court are limited under cl. 26. 28 C.W.N. 170=1924 C. 257 (F.B.). Where a Judge in his discretion under S. 239, Cr. P. Code, desires to try a number of accused jointly it is not a matter for interference on a certificate of the Advocate-General under Cl. 26. 38 C.L.J. 309 (F.B.). A defective summing up to the jury, unless it causes a failure of justice is not ground for reversing a conviction. 38 C.L.J. 309 (F.B.). Where there was a misdirection to the jury and it appeared that the accused was prejudiced thereby and the Advocate-General granted a certificate under cl. 26 of the Letters Patent, *held,* that the conviction must be set aside. Per *C. C. Ghose.*—Under cl. 26 the Court can review the entire case and determine the point of law reserved or certified; the word 'thereupon' means that the point is in favour of the prisoner. The Court cannot order a re-trial if the point is held in favour of the accused. Where improper evidence has been admitted the Court must consider whether such evidence could possibly have considerably influenced the minds of the jury and whether it was reasonably certain that the jury *would,* not might, have acted on the unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. 1929 C. 617 (F.B.). Per *Rankin, C.J.*—The phrase "to review the case" as used in cl. 26 of the Letters Patent applies as much where a point of law is reserved by the trial Judge as where the Advocate-General has given a certificate. I am far from saying that inordinate delay may not be a matter for consideration by the Advocate-General at the time when he is called upon to consider whether a certificate should be granted. Per *Jack, J.*, dissenting.—In a proceeding under cl. 26, the Court can examine the evidence for itself and determine without reference to the probable verdict of a jury whether excluding the inadmissible evidence the residue is sufficient to justify the conviction. The fact that a retrial cannot be ordered ought to make the Court careful to avoid setting aside a conviction on immaterial grounds. 33 C.W.N. 1121=1929 C. 617 (F. B.). Where the accused was prosecuted for offences under Ss. 406 and 477, I. P. Code, but it appeared that the Judge had misdirected the jury on the question of law, namely, as to the ingredients forming the offence. *Held,* that it was fit case for interference under cl. 26. Accused acquitted. 58 C. 1051=35 C.W.N. 425=1931 C. 184 (S.B.). A certificate under Cl. 26—What should contain. 21 C.L.J. 377=30 I. C. 113=16 Cr.L.J. 561 (F.B.). Once the Advocate-General grants a certificate the Court has to deal with the case. The statement of the trial Judge as to what took place before him is conclusive. 30 I. C. 113. When the Advocate-General, after considering the matter and exercising his judgment, refuses a certificate it is not within the province of the High Court to issue a Rule to call upon him to show cause why he should not issue a certificate. 63 C. 838. The refusal by the Advocate-General to give a certificate is not a matter which can be called in question by any proceeding in the High Court. The revisional jurisdiction of the High Court in criminal matters is limited to matters arising in the Criminal Courts subject to the appellate jurisdiction of the High Court. 63 Cal. 838.

Cl. 26—Madras cases: "DECISION ON A POINT OF LAW—WHAT CONSTITUTES.—*Held,* by the majority (*Madhavan Nair and Curgenven, JJ.*, dissenting): A point of law referred to in cl. 26 of the Letters Patent means a point of law submitted to and decided by the trial Judge or any direction as to the law given by him in the course of his summing up to the jury. The word 'decision' cannot be read so as to cover cases where the Judge has never applied his mind to the matter and has not pronounced an opinion on it. Per *Madhavan Nair and Curgenven, JJ.*, dissenting: All questions which have to be necessarily decided in a trial and which in effect have been decided

Appeal from Criminal Courts in the Provinces.

27. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall be a Court of appeal from the Criminal Courts of the Presidency of Madras, [Bengal division of the Presidency of Fort William] [Bombay], and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Hearing of referred cases and revision of criminal trials.

28. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said High Court.

High Court may direct the transfer of a case from one Court to another.

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

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by the Judge, though not expressly, would fall within the meaning of the word "decision". 68 M.L.J. (Supp.) 1 (F.B.). In an enquiry following the grant of a certificate by the Advocate-General the High Court has jurisdiction to say that the Advocate-General's certificate should not have been granted on the ground that there was no decision on a point of law involved in the case and if it came to that conclusion, the petition could straight away be dismissed without any further consideration of the merits of the case. 68 M.L.J. (Supp.) 1 (F. B.).

Cls. 27 and 28—Bombay cases.—Order of Chief Presidency Magistrate under Maintenance Orders Enforcement Act, 1921—Power of High Court to interfere in revision. 30 Bom.L.R. 350.

Cl. 29—Bombay cases.—Bombay High Court has no power to quash proceedings before Village Patil under the Cr. P. Code, but it has such power under the Letters Patent. 50 I.C. 491=21 Bom.L.R. 274 (10 Bom.L.R. 630, Rel.).

Cl. 29—Calcutta cases.—The second half of cl. 29 is addressed to the same, subject-matter as the first-half. The section merely confers a power of transfer. If the High Court transfers the case to its file it assumes original criminal jurisdiction. The High Court has no power under this clause to take proceedings against certain persons one of whom is not in India at all and others are either Indian subjects or else residing within the original jurisdiction of the High Court. 35 C.W.N. 1088. Where certain British Indian subjects resident within the original jurisdiction were accused of offences committed outside British India. *Held,* that the complaint cannot be entertained by the Court on its appellate side, cls. 24 and 29 not being applicable to such a case. 35 C.W.N. 1082. ***See also*** 35 C. W.N. 1086.

Exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any place by way of circuit or special commission.

31. And We do further ordain that whenever it shall appear to the Governor in Council convenient that the jurisdiction and power, by these Our Letters Patent or by the recited Act, vested in the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto, which has been or may be made by competent legislative authority for India.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as may now be exercised by the said High Court.

Criminal.

33. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, or otherwise in connection with maritime matters, or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have the like power and authority as that which may now be lawfully exercised by the said High Court, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, within or without the Presidency of Madras, [Bengal Division of the Presidency of Fort William] [Bombay]: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial jurisdiction.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall have jurisdiction, within the Presidency of Madras,

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Cl. 32—Calcutta Cases.—Admiralty jurisdiction—High Court—Law applicable. 28 I.C. 463=42 C. 85. The Admiralty Jurisdiction of Calcutta High Court rests on cl. 32. The effect is to vest in the High Court such civil and maritime jurisdiction as might be exercised by the Supreme Court as a Court of Admiralty, or by any Judge of that Court as Commissary of the Vice-Admiralty Court. The Admiralty Jurisdiction of the Supreme Court is defined by Cl. 26 of the Charter of 1774 which conferred upon the Supreme Court a Jurisdiction of Admiralty as the same is used and exercised in that part of Great Britain called England. 171 I.C. 513=1937 Cal. 122.

Cl. 35.—The Court cannot give relief to parties who are Jews by religion under cl. 35 of the Letters Patent. 57 C. 1089 =34 C.W.N. 319=1930 C. 558.

[Bengal Division of the Presidency of Fort William] [Bombay], in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, [1][in pursuance of section 108 of the Government of India Act, 1915]; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided, [2][they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it].

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], from time to time to make rules and orders for the purposes of regulating all proceedings in civil cases which may be brought before the said High Court, including

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LEG. REF.

[1] Substituted by Amending Letters Patent, dated 11th March, 1919.

[2] Added by the Letters Patent Amendment of 1927.

NOTES.

Cl. 36—Madras cases.—The amended cl. 36 applies to all pending cases. 52 M. 584=1929 M. 497=57 M.L.J. 22 (F.B.). In all cases of equal division of opinion between the Judges of the High Court the procedure to be adopted is that prescribed in cl. 36 of the Letters Patent and not that mentioned in S. 98, C.P. Code. 52 M. 563=1929 M. 641=57 M.L.J. 264 (F.B.). In the case of difference of opinion in revision cases cl. 36 and not S. 98, C. P. Code, regulates the procedure. 32 I.C. 330=17 Cr.L.J. 42. Where a High Court acts in revision under S. 25 of the Provincial Small Cause Courts Act and the Judges constituting the Bench differ in opinion. S. 98, C. P. Code, does not apply but under cl. 36 of the Letters Patent the opinion of the senior Judge would prevail. 1925 M. 281=47 M. L. J. 876. Difference of opinion among Judges—Sanction under Cr. P. Code, S. 195 (6)—Opinion of the senior Judge prevails. 39 M. 750=14 I.C. 305=22 M.L. J. 419 (F.B.). Proceeding before High Court under S. 439, Cr. P. Code—Difference of opinion—Procedure. *See* 1932 M. W.N. 873.

Bombay cases.—According to cl. 36, if the Judges are equally divided in opinion, that of the senior prevailed. 45 B. 719=48 I.A. 181=40 M.L.J. 519 (P. C.). [*N.B.*: This is not now good law in view of the amendment of the Letters Patent in 1927.] *See also* 26 Bom.L.R. 470=1925 B. 113; 85 I.C. 778=1925 B. 113. S. 98 of the C. P. Code which provides for reference of the disputed point to one or more other Judges does not affect cl. 36 of the Letters Patent. (*Ibid.*) On a difference of opinion in an appeal from the Mofussil the procedure is governed by S. 98, C. P. Code and not by cl. 36. 43 B. 433 and 492 =50 I.C. 715=21 Bom.L.R. 157 (F.B.).

Calcutta cases.—As regards the costs of an original side appeal the Judges having differed. S. 98, C. P. Code, is not applicable, but cl: 36 applies and the opinion of the Chief Justice prevailed. 58 I.C. 421=24 C.W.N. 352. *See also* 18 C.W.N. 106 =16 I.C. 922=17 C.L.J. 75. (Not now good law in view of the amendment of the Letters Patent in 1927). Difference of opinion between two Judges of High Court on appellate side—Procedure. 52 C. 1018. Applicability of clause to—Reference under S. 66 of the Indian Income-tax Act—Difference of opinion among members of Division Bench—If opinion of senior Judge prevails. 51 C. 504. [But S. 66-A of the Income-tax Act enacted recently provides otherwise. *See also* the amended Letters Patent of 1927.]

Cl. 37—Madras cases.—R. 107 of the

proceedings in its admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdiction respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rs. 10,000 or that such judgment, decree or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs. 10,000 or from any other final judgment, decree or order made either

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Appellate Side Rules of the High Court is authorised by cl. 37 of the L. P. and is therefore not *ultra vires*. 29 M.L.J. 784 =31 I.C. 74. R. 105 of the High Court Appellate Side Rules does not contravene the provisions of the C. P. Code by limiting the right of appeal conferred by S. 100, C. P. Code, or by varying the provisions of O. 41 as to the mode of disposing of appeals. (*Ibid.*)

Calcutta cases.—O. 3, R. 4 (5) is inconsistent with the rules of the Calcutta High Court framed under cl. 37, Letters Patent and O. 3, R. 4 (5) being contrary to rules under cl. 37 the latter must prevail. 135 I.C. 789=1932 C. 1.

Cl. 39—Madras cases.—*See* (1939) 2 M.L.J. 667 (F.B.). An application for leave to appeal to Privy Council in an insolvency matter (original or appellate) lies under cl. 39 of the L. P. 22 L.W. 362 =1925 M. 243. Deputy Collector sanctioning prosecution as Income-tax Officer—High Court order refusing to quash proceedings if appealable. 25 M.L.J. 565=21 I.C. 896. If the High Court has powers to allow an appeal to the Privy Council against an order in a disciplinary matter, such as suspending a vakil from practice, *see* 43 M.L.J. 382= 1922 M. 440.

Bombay cases: Meaning of words.—The meaning of "final" is that the judgment or order must finally determine the rights of the parties. 38 B. 421=16 Bom. L.R. 195.

Illustrative cases.—An award made in a land acquisition case by the High Court is not a decree. Nor is it a final judgment or order within the meaning of cl. 39. No appeal lies in such cases. 37 B. 506=17 I. C. 952=14 Bom.L.R. 1194. *See* on appeal 20 I.C. 763=17 C.W.N. 421 (P.C.). As to scope of cl. 39, *see* 55 B. 785=33 Bom.

on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or Successors, in Our or Their Privy Council, subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgment.

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitation as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal in criminal cases, etc.

41. And We do further ordain that from any judgment, order or sentence, of the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or Successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

NOTES.

L.R. 1476. The decision of a High Court on a reference from the Chief Revenue Authority under Income-tax Act is a judgment within cl. 39, and an appeal lies to the Privy Council from the same. 64 I.C. 931 =23 Bom.L.R. 1102. *See also* (1939) 2 M.L.J. 667 (F.B.). A decision of the High Court on reference by case stated under S. 51, Income-tax Act (now S. 66) is not final but merely advisory, and as such is not open to an appeal. 47 B. 724=50 I. A. 212=45 M.L.J. 295=1923 P.C. 148 (P.C.) (But the enactment of new S. 66-A provides for such appeal). Application under Sp. Rel. Act, S. 45—Order refusing—Leave to appeal ought to be granted. 64 I.C. 959=24 Bom. L. R. 1102. Order in civil extraordinary jurisdiction not appealable. 1923 B. 39. An order of the High Court rejecting the application of a legal representative to be brought on record not being final, but interlocutory, no appeal from the order lies to the Privy Council. 38 B. 421=23 I.C. 373=16 Bom.L.R. 195. No appeal lies to His Majesty in Council from the decision of a single Judge of the High Court in the exercise of appellate or revisional jurisdiction. To this extent, S. 111, C. P. Code, overrides cl. 39 of the Letters Patent. (56 C. 512 and 46 M. 958, Foll.). 33 Bom.L.R. 1106=1931 C. 503.

Calcutta cases.—By "*final order*" in cl. 39 is meant an order finally deciding any matter directly at issue in the case in respect of the rights of the parties. *See* 9 I. C. 183=15 C.W.N. 848. The words "*in any matter not being of criminal jurisdiction*" govern all the classes of judgments or decree or orders which are hereinafter in that clause mentioned. *Held*, that no appeal lies to the Privy Council against a decision of the High Court sitting in criminal appeal and that the application for leave was not maintainable. 58 C. 344=1931 C. 526.

Cl. 41—Calcutta cases.—The High Court is not empowered to grant leave to appeal to His Majesty in Council from its decision in a criminal appeal either under cl. 41 or any other provision of law. 38 C.L.J. 406=1924 C. 338. As to whether appeal lies to Privy Council from order on certificate by the Advocate-General, *see* 1 O.W.N. 935=1925 P.C. 1 (25 M. 61, Expl.). As to appeal to Privy Council, *see also* 52 C. 197=52 I.A. 40=29 C.W.N. 181=48 M. L. J. 543 (P.C.). Criminal case—Leave to appeal to His Majesty in

Rule as to transmission of copies of evidence and other documents.

42. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], to Us, Our heirs or Successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or Successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs, or Successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Calls for Records, etc., by the Government.

High Court to company with requisition from Government for records, etc.

43. And it is Our further will and pleasure that the said High Court of Judicature at Madras, [Fort William in Bengal] [Bombay], shall comply with such requisitions as may be made by the Government for records, returns and statements, in such form and manner as such Government may deem proper.

Powers of the Indian Legislature preserved.

[1][44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Gover-

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LEG. REF.

[1] This clause was substituted by Amending L. P., dated 11th March, 1919.

NOTES.

Council—Grounds for—Stay of execution of sentence. 28 C.W.N. 377=83 I.C. 580=1924 C. 545. Criminal proceedings however are, in practice, reviewed only if it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. 28 C.W.N. 377=1924 Cal. 545. *See also* 52 C. 197 (P.C.); I.L.R. (1939) 1 Cal. 187=43 C.W.N. 133=1939 Cal. 682 (conditions for grant of certificate under cl. 41). There is no right of appeal to the Privy Council under cl. 41 of the Letters Patent, from an order of a single Judge passed in revisional criminal jurisdiction. 62 C. 389=39 C.W.N. 235.

Madras cases: LEAVE TO APPEAL—QUESTION AS TO INADMISSIBILITY OF EVIDENCE.—The accused was convicted at the Criminal Sessions of the High Court of an offence under S. 302, I. P. Code, and sentenced to death. He then applied to the Advocate-General and obtained a certificate under cl. 26 of the Letters Patent on the ground that certain inadmissible evidence had been put to the jury at the trial. The majority of the Full Bench who heard the review application held that there was no decision on a point of law with reference to the question raised and dismissed the review application. At the same time the trial Judge acting under cl. 25 of the Letters Patent referred the question as to the admissibility of the evidence for further cinsideration by the High Court. The matter once again came up before a Full Bench and it was held that the evidence was admissible in law and that in any case there was ample evidence, quite apart from the evidence called in question, to support the conviction. The accused having applied for leave to appeal to the Privy Council. *Held,* that it was not a fit case for leave being granted as the Court had found that there was ample evidence to support the conviction apart from the evidence objected to. Jurisdiction of Privy Council in criminal cases pointed out. 68 M.L.J. (Supp.) 93 (F.B.). The provisions of cl. 44 do not enable Courts by implication to supplement the Letters Patent by importing into it all Acts *ejusdem generis* passed by the Governor-General in Council. 40 M. 651=32 I.C. 873=32 M.L.J. 144.

nor-General in cases of emergency under section 72 of the Act, and may be in all respects amended and altered thereby.]

Provisions of former Letters Patent, inconsistent with these Letters Patent, to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George the Third as was not revoked or determined by the said Letters Patent of the Twenty-sixth of June, One thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In witness whereof, We have caused these Our Letters to be made Patent Witness Ourself, at Westminster, the Twenty-eighth day of December in the Twenty-ninth year of Our Reign.

By warrant under the Queen's Sign Manual. (Sd.) C. ROMILLY.

LETTERS PATENT (LAHORE).

(*9th February,* 1919.)

CONTENTS.

CLAUSES.
1. Establishment of High Court at Lahore.
2. Constitution and first Judges of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in the name of the Crown and under seal.
6. Appointment of officers.

Admission of Advocates, Vakils and Attorneys.

7. Powers of High Court in admitting Advocates, Vakils and Attorneys.
8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

Civil Jurisdiction of the High Court.

9. Extraordinary original civil jurisdiction.
10. Appeal to the High Court from Judges of the Court.
11. Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.
12. Jurisdiction as to infants and lunatics.

Law to be administered by the High Court.

13. By the High Court in the exercise of extraordinary original civil jurisdiction.
14. By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. Ordinary original criminal jurisdiction of the High Court.
16. Jurisdiction as to persons.
17. Extraordinary original criminal jurisdiction.
18. No appeal from High Court exercising original jurisdiction.

CLAUSES.
19. High Court to review cases on points of law reserved by one or more judges of High Court.
20. Appeals from other Criminal Courts in the Provinces of Punjab and Delhi.
21. Hearing of referred cases and revision of criminal trials.
22. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

23. Offenders to be punished under Indian Penal Code.

Testamentary and Intestate Jurisdiction.

24. Testamentary and intestate jurisdiction.

Matrimonial Jurisdiction.

25. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

26. Single Judges and Division Courts.

Civil Procedure.

27. Regulation of Proceedings.

Criminal Procedure.

28. Regulation of Proceedings.

Appeals to Privy Council.

29. Power to appeal in civil cases.
30. Appeal from interlocutory judgments.
31. Appeal in criminal cases.
32. Rule as to transmission of copies of evidence and other documents.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

33. Special commission and circuits.
34. Proceeding of Judges on special commission or circuit.

CLAUSES.

Delegation of Duties to Officers.

35. Power to delegate duties.

Calls for records, etc., by the Government.

36. High Court to comply with requisitions from Government for records, etc.

Powers of Indian Legislatures.

37. Powers of Indian Legislatures preserved.

Letters Patent constituting the High Court of Judicature at Lahore for the Provinces of Pubjab and Delhi, dated 21st March, 1919.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act; and

WHEREAS the Provinces of the Punjab and Delhi are now subject to the jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor-General of India in Council, being Act No. XXIII of 1865, and was continued by later enactments and no part of the said Provinces is included within the limits of the local jurisdiction of any High Court.

Establishment of High Court at Lahore.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for us, Our Heirs and Successors, erect and establish, for the Provinces of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India,* a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Rattigan Knight, and the six other Judges being William Chevis, Esquire, Henry Scott Smith, Esquire, Shadi Lal, Esquire, Rai Bahadur Walter Aubin Le Rossignol, Esquire, Leycester Hudson Leslie Jones, Esquire, and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore previously to entering in the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor of the Punjab may commission to receive it:—

"I, *A.B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Lahore, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a seal bearing a device and impression

of Our Royal Arms, within an exergue or label surrounding the same, with this inscription, "The seal of the High Court at Lahore." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 105 of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

Writs, etc., to issue in name of the Crown, and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our Heirs and Successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is Our further will and pleasure, and We do hereby, for Us, Our Heirs and Successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, may approve of: Provided always and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

7. And We do hereby authorise and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are thereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

8. And We do hereby ordain that the High Court of Judicature at

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NOTES.

Cl. 7.—Counsel in a Letters Patent appeal are not confined to the arguments addressed to the single Judge. 89 I.C. 958.

Cl. 8.—Under cl. 8 only an advocate, vakil or attorney of a High Court can ap-

Power of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any

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NOTES.

pear, act or plead for or on behalf of a suitor. An application therefore for leave to appeal *in forma pauperis* by a person who is not so qualified is not proper. 1937 L. 318; 174 I.C. 239. Proceedings under—Nature of—Propriety of conviction cannot be gone into—Duties of legal practitioners. 4 L. 271=1924 L. 123 (S.B.). *See also* 1933 L. 577=143 I.C. 727=14 L. 532 (S. B.). The Courts are bound to see that its officers are proper persons to be trusted by the Court with regard to the interests of the suitors. It is necessary therefore for the Court to know what the nature of the act complained of is in order to decide whether that act shows that the person in question is an improper person to remain a practitioner. There is a distinction between being a member of an unlawful association and assisting the operations of an unlawful association. The former interferes with the maintenance of law and order or is a danger to public peace and it may well be considered to render a man an improper person to be a practitioner in a Court of justice, but it by no means follows that a man who has committed an isolated act which assists the operations of an unlawful association is necessarily such an improper person. Much would depend upon the nature of the act done and the particular operation assisted. Where, apart from the conviction of the legal practitioner under S. 17 (1) of the Criminal Law Amendment Act, for having assisted in the celebration of the Independence Day, there was nothing on the record to show what exactly the respondent did on the occasion. *Held,* that there was no reasonable cause within the meaning of cl. 8 to take disciplinary action: *held, also,* that the speech made by the practitioner at a meeting organised by an unlawful association protesting against the arrest of a political leader did not warrant disciplinary action against the practitioner who made the speech. 14 L. 532=1933 L. 577 (S.B.). An advocate received money from a client for filing an appeal. He did not file the appeal as he found out later that the appeal was barred by time. The explanation given by the advocate as to the application of the money was not quite satisfactory nor did the client give out the correct and true information to the Court, and the client's conduct also was not consistent with what normally would have happened under the circumstances of the case. *Held,* that having admitted the receipt of money, though it was for the advocate to account for its application, there was no reasonable cause established to enable the Court to remove or suspend the advocate from practice, that the Court cannot be uninfluenced by the conduct of the client in withholding the correct information and that the advocate should return the money received. 1933 L. 575=34 Cr.L.J. 954 (S.B.). *A,* an advocate, allowed his clerk to enter into agreements with his clients to finance the litigation about property which they launched against others; the clerk was to be compensated for his labour and expenses by being given a share in the property in dispute if the cases be ultimately decided in favour of his clients; and in pursuance of this *A* appeared for those clients without receiving any fees in advance. It was proved that the advocate's clerk consulted him and showed him the papers before he entered into agreements with his clients and that he gave him advice regarding the prospect of the litigation. *Held,* that a counsel is expected to be free from any personal as distinguished from professional interest in litigation and the conduct of the Advocate in allowing his clerk to enter into such a transaction called for severe censure, but his conduct in advising him in the matter and then appearing for the litigants without receiving the usual fees in advance amounted to professional misconduct. 1932 L. 584.

Cl. 9.—The word 'suit' in cl. 9 of the Letters Patent includes a proceeding in the Insolvency Court, and the High Court under its extraordinary powers has jurisdiction to transfer a proceeding in insolvency from the District Court to itself for disposal. 17 L. 582=160 I.C. 972=1936 L. 608.

Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice. the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court.

[1][10. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superin-

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LEG. REF.

[1] Amended by Letters Patent, 1927. As to the effect of this amendment, *see* notes under cl, 10 of Letters Patent, Allahabad.

NOTES.

Cl. 10.—Under cl. 10 the authority to make the declaration that the case is a fit one for appeal is conferred only on the judge who passed the judgment and on none other. No other judge or judges of the High Court have any jurisdiction to grant a certificate. 1935 L. 330 (1).

JUDGMENT.—In order to decide whether an adjudication should be treated as a "judgment," regard should be had, not to the form of the adjudication, but to its effect upon the suit or other civil proceeding in which it was made. 3 L. 188=1922 L. 380. *See also* 1922 L. 185. Judgment also includes an interlocutory judgment. 55 I.C. 933=79 P.L.R. 1920. Order refusing transfer of case is not a judgment. 8 L. 681=1927 L. 540. Judgment—If synonymous with decree—Order staying further proceedings. *See* 10 L. 132. An order of the High Court transmitting the order of His Majesty in Council for execution is a judgment and is appealable. 11 L. 365=123 I.C. 277=1930 L. 674. An order of a single judge of the High Court directing a decree of a Subordinate Judge to be registered under S. 100 (2) of the Punjab Tenancy Act as a decree of a Revenue Court, by which the suit was triable, is not a judgment within the meaning of Cl. 10 of the Letters Patent and is not, therefore, appealable. 17 L. 606=38 P. L. R. 611=1936 L. 785. *"Final order,"* meaning of. 5 L.L.J. 287=1923 L. 428. An order of a judge in Single Bench on appeal holding that the trial Court had jurisdiction to try a suit and directing it to proceed with the suit, is a judgment within the meaning of Cl. 10 and therefore appealable. 44 P.L.R. 140 (F.B.).

CASES WHERE APPEAL LIES.—Where a judge of the High Court refuses to set aside a dismissal of an appeal for default, his order of refusal is a judgment and is appealable. 1924 L. 412. An order rejecting an application to re-admit an appeal dismissed for default amounts to a judgment and is appealable. 89 I.C. 795=1925 L. 617. A new point cannot be raised in an appeal under the Letters Patent. 1933 L. 685=34 P.L.R. 853. As to *appeal from the decision of a single judge* who hears a reference under S. 66, Income-tax Act, *see* 6 L. 30=1925 L. 336 (1). No appeal lies against an order passed in revision. 6 L. 250=1925 L. 624. As to *appeal from an order of remand,* see 48 A. 684.

PRACTICE AND PROCEDURE.—An appellant in Letters Patent appeal cannot put forward a new case not suggested in the Courts below and claim relief on that footing. 4 L.L.J. 293. *See also* 80 I.C. 321=1924 L. 468; 1923 L. 151; 2 L.L.J. 1=55 I.C. 983. The point not raised before the Division Bench who heard the appeal cannot be taken in an appeal under Letters Patent. 30 Punj.L.R. 433=1929 L. 536. An appellant is not entitled in an appeal under the Letters Patent to be heard on points which had not been raised before the judge from whose judgment he has preferred the appeal. 31 Punj.L.R. 281=1930 L. 632. But *see* 1940 Lah. 204. Where a point is not taken before a single judge of the High Court the Court will not allow it to be raised on Letters Patent appeal, nor will it remit the case on the point. 1925 L. 281 (1)=89 I. C. 958. On interference with a finding of fact of the lower appellate Court by a single judge of the High Court, it is open to a Division Bench in an appeal under cl. 10 to set aside his decision and restore that of the lower appellate Court. 5 L.L.J. 109. *See also* 89 I.C. 298 (1)=1925 L. 392 (1). *Held,* that in an appeal under cl. 10 of the Letters Patent, the High Court can set aside the judgment of a single judge who has interfered with an erroneous finding of fact in second appeal. 31 Punj.L.R. 381=1931 L. 144. Application for leave under cl. 10—Conversion into petition for review on refusal of leave—Permissibility. *See* 1935 L. 330. Mistake in trial Court's decree apparent on record can be corrected in Letters Patent Appeal. 42 P.L.R. 7=1940 Lah. 204.

LIMITATION.—In appeals under cl. 10 the provisions of Limitation Act, S. 4, do not apply. 2 L. 127=61 I.C. 327. New plea as to limitation not allowed in Letters Patent appeal. 80 I.C. 321=1924 L. 468.

Cls. 10 and 26.—Under cl. 10 the declaration that the case is a fit one for further appeal to the Privy Council can only be made by the judge who passed the judgment and cl. 26 does not confer such power on any other judge. 34 P.L.R. 469=1933 L. 534 (1). Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Courts, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where, the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in Our or Their Privy Council as hereinafter provided.]

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.

11. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

Law to be administered by the High Court.

By the High Court in the exercise of extraordinary original civil jurisdiction.

13. And We do further ordain that, with respect to the law or equity to be applied to such case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the

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tent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal. (71 I.C. 824 and 21 M.L.J. 1, Rel. on.) 144 I.C. 672=1933 L. 881.

Cl. 12.—In Bombay a suit by a mortgagee of land to enforce his mortgage by sale can be maintained in the High Court under cl. 12, Letters Patent, even when the mortgaged land is situate wholly outside the limit of the ordinary original civil jurisdiction of the High Court if the cause of action has arisen wholly within the said limits. 120 I.C. 279=1929 L. 449.

proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original criminal jurisdiction of the High Court.

15. And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents.

Jurisdiction as to persons.

16. And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Appeals from other Criminal Courts in the Provinces of the Punjab and Delhi.

20. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

21. And We do further ordain that the High Court of Judicature at

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Cl. 15.—According to the Letters Patent, the original criminal jurisdiction of the Lahore High Court is co-extensive with that of the Chief Court of the Punjab, which had no original criminal jurisdiction to try any person except European British subjects. 115 I.C. 428=1929 L. 217.

Hearing of referred cases and revision of criminal trials.

Lahore shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorised to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

24. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever, of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

25. And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi, in matters matrimonial between Our subjects professing the Christian Religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

26. And We do hereby declare that any function which is hereby directed

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Cl. 26.—Under the old clause the opinion of the senior judge prevailed in case of difference of opinion among the judges, un-

Single Judges and Division Courts.

to be performed by the High Court of Judicature at Lahore, in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose in pursuance of S. 108 of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there by a majority, but if the Judges be equally divided, [they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.][1]

Civil Procedure.

Regulation of proceedings.

27. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act No. V of 1908 passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

Regulation of proceedings.

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Appeals to Privy Council.

Power to appeal in civil cases.

29. And We do further ordain that any person or persons may appeal to Us, Our heirs and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of the presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees or that such judgment, decree or order involves, directly, or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit

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LEG. REF.

[1] Substituted by Amended Letters Patent, 1927.

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der certain circumstances. Under the amended section, there is no provision for the opinion of the senior judge prevailing in the case. *See* 32 C.W.N. (Journal), p. 46.

Cl. 26 of the Letters Patent (Lahore), and not S. 98 of the C. P. Code, applies in case of a difference of opinion between the judges of a Division Bench even in the case of an appeal from the moffusil (52 M. 563, Foll.). 142 I.C. 427=1933 L. 648=34 P.L.R. 584.

one for appeal to Us, Our heirs or Successors, in Our or Their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

30. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal cases.

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or Successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders, as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi.

Rules as to transmission of copies of evidence and other documents.

32. And we do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or Successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and Successors in Our or Their Privy Council, a true and correct copy of all evidence proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or Successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or Successors in Our or Their Privy Council, may think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

Special Commissions and circuits.

33. And We do further ordain that whenever it appears to the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent,

or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Lahore, should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

Proceedings of Judges on special commissions or circuit.

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents, the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

Power to delegate duties.

35. The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Calls for records, etc., by the Government.

High Court to comply with requisitions from Government for records, etc.

36. And it is Our further will and pleasure that the High Court of judicature at Lahore shall comply with such requisitions as may be made by the Governor-General in Council or by the Lieutenant-Governor of the Punjab for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

Powers of Indian Legislatures preserved.

37. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915; and also of the Governor-General in cases of emergency under section seventy-two of that Act, and may be in all respects amended and altered thereby.

IN WITNESS whereof We have caused these Our Letters to be made Patent.

WITNESS Ourself at Westminster the 21st day of March in the Year of Our Lord One thousand nine hundred and nineteen and in the ninth year of Our Reign.

BY WARRANT under the King's Sign Manual.

(Sd.) SCHUSTER.

LETTERS PATENT (NAGPUR).

CONTENTS.

SECTIONS.

1. Establishment of a High Court at Nagpur.
2. Constitution and the first judge of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in the name of the Crown and under seal.
6. Appointment of Officers.
7. Powers of High Court in admitting Advocates, Pleaders and Attorneys.
8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Pleaders and Attorneys.
9. Extraordinary original civil jurisdiction.
10. Appeal to the High Court from Judges of the Court.

SECTIONS.

11. Appeal from other Civil Courts in the Central Provinces.

12. Jurisdiction as to infants and lunatics.

13. By the High Court in the exercise of extraordinary original Civil Jurisdiction.

14. By the High Court in the exercise of Appellate Jurisdiction.

15. Ordinary Original Criminal Jurisdiction of the High Court.

16. Jurisdiction as to persons.

17. Extraordinary Original Criminal Jurisdiction.

18. No appeal from High Court exercising Original Jurisdiction. Court may reserve points of law.

19. High Court to review cases on points of law reserved by one or more Judges of the High Court.

20. Appeals from other Criminal Courts in Central Provinces.

21. Hearing of referred cases and revision of Criminal trials.

22. High Court may direct the transfer of a case from one Court to another.

SECTIONS.

23. Offenders to be punished under Indian Penal Code.

24. Testamentary and intestate jurisdiction.

25. Matrimonial jurisdiction.

26. Single Judges and Division Courts.

27. Regulation of proceedings.

28. Regulation of proceedings.

29. Powers to appeal in Civil Cases.

30. Appeal from interlocutory judgments.

31. Appeal in criminal cases.

32. Rule as to transmission of copies of evidence and other documents.

33. Special commissions and circuits.

34. Proceedings of Judges on special Commission or circuits.

35. Provisions regarding pending proceedings.

36. Powers to delegate duties.

37. High Court to comply with requisitions from Government for records, etc.

38. Powers of Indian legislatures preserved.

Letters Patent constituting the High Court of Judicature at Nagpur in the Cenral Provinces.

[*2nd January*, 1936.

George the Fifth, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To all to whom these Presents shall come, greeting:

Whereas in the Government of India Act, it was amongst other things enacted that it should be lawful for us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act:

And whereas the Province known as the Central Provinces is now subject to the jurisdiction of the Court of the Judicial Commissioner of the Central Provinces which was established by an Act of the Governor-General of India in Council, being Act No. XIV of 1865, and was continued by later enactments and no part of the said province is included within the limits of the local jurisdiction of any High Courts:

Establishment of a High Court at Nagpur.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the Central Provinces aforesaid, with effect from the date of the publication of these presents in the Gazette of India, a High Court of Judicature, which shall be called the High Court of Judicature at Nagpur, and We do hereby constitute the said Court to be a Court of Record.

Constitution and the first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Nagpur shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with Section One hundred and

one of the Government of India Act, ordinarily consist of a Chief Justice and not less than five other Judges, the first Chief Justice being Gilbert Stone, Esquire, and the other Judges being Frederick Louis Grille, Esquire, M. Bhawani Shankar Nyogi, Esquire, Ronald Evelyn Pollock, Esquire, Harold George Gruer, Esquire, and Vivian Bose, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by the Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Nagpur, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor of the Central Provinces may commission to receive it:—

"I, *A, B,* appointed Chief Justice (*or* a Judge) of the High Court of Judicature at Nagpur, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Nagpur shall have and use as occasion may require, a Seal bearing a devise and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Nagpur." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of Section One hundred and five of the Government of India Act; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed is vacant, the said High Court shall be, and is hereby, authorised and empowered to demand, seize and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, or their possession.

Writs, etc., to issue in name of the Crown, and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Nagpur shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Nagpur from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Governor of the Central Provinces in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Governor of the Central Provinces in Council may approve:

Provided always and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Pleaders and Attorneys.

Powers of High Court in admitting Advocates, Pleaders and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Nagpur to approve, admit and enrol such and so many Advocates, Pleaders and Attorneys as to the said High Court may seem meet; and such Advocates, Pleaders and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Powers of High Court in making rules for the qualifications, etc., of Advocates, Pleaders and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Nagpur shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court, and shall be empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates. Pleaders or Attorneys; and no person whatsoever but such Advocates, Pleaders or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the High Court of Judicature at Nagpur shall have power to remove and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court.

10. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Nagpur from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of

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Cl. 10.—Cl. 10 deals with appeals against judgments of one Judge of High Court or of one Judge of any Division Court and it has no application to judgments delivered previous to the constitution of the present High Court. I.L.R. 1936 Nag. 58=1936 Nag. 118. The condition of certificate that a case is fit one for appeal under Cl. 10 applies only to those decrees or orders which are passed by a single Judge in the exercise of his second appellate jurisdiction and to no other cases. I.L.R. (1940) Nag. 141=1940 N.L.J. 37 =1940 Nag. 39 (F.B.). An order rejecting an application to review is not a judgment within the meaning of the Letters Patent and a Letters Patent appeal does not lie. 1941 N.L.J. 617. Decision of Judge of H. C. in appeal against award under Workman's Compensation Act is not a Judgment" under Cl. 10. But Judge may refer any matter of importance to a Bench. I.L. R. 1939) Nag. 124=1939 N.L.J. 63=1939 Nag. 122.

LIMITATION.—Appeals under Letters Patent may well be held to be out of time if not filed within 30 days. I.L.R. (1939) Nag. 124=1939 N.L.J. 63=1939 Nag. 127. (*See* same case as to whether intervening holidays should be excluded in computing the period of 30 days). Where according to the rules of the Court provision is made for filing of Letters Patent appeals alone during the long vacation, it cannot be said that the Court is closed so far as that business is concerned. So limitation for such an appeal is not affected by S. 4, Limitation Act. I.L.R. (1941) Nag. 563=1941 N.L. J. 284=1941 Nag. 216.

Cls. 10 and 27 and Rules framed by High Court, R. 10.—Refusal of leave to second application lies. *See* I.L.R. (1940) Nag. 34=1939 N.L.J. 535=1940 Nag. 47.

revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of Section One hundred and seven of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section One hundred and eight of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section One hundred and eight of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs and successors in Our or Their Privy Council as hereinafter provided.

Appeal from other Civil Courts in the Central Provinces.

11. And We do further ordain that the High Court of Judicature at Nagpur shall be a Court of Appeal from the Civil Courts of the Central Provinces and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Court of the Judicial Commissioner of the Central Provinces by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Nagpur by any law made by competent legislative authority for India.

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the High Court of Judicature at Nagpur shall have the like powers and authority with respect to the persons and estates of infants, idiots and lunatics within the Central Provinces as that which was vested in the Court of the Judicial Commissioner of the Central Provinces immediately before the publication of these presents.

Law to be administered by the High Court.

By the High Court in the exercise of extraordinary original civil jurisdiction.

13. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Nagpur in the exercise of its ordinary original civil jurisdiction, such law or equity and rule of good conscience shall, until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Nagpur to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have been applied to such case.

Criminal Jurisdiction of the High Court.

Ordinary original criminal jurisdiction of the High Court.

15. And We do further ordain that the High Court of Judicature at Nagpur shall have ordinary original criminal jurisdiction in respect of all such persons within the Central Provinces as the Court of Judicial Commissioner of the Central Provinces had such criminal jurisdiction over immediately before the publication of these presents.

Jurisdiction as to persons.

16. And We do further ordain that the High Court of Judicature at Nagpur, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the High Court of Judicature at Nagpur shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction. Court may reserve points of law.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Nagpur from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid the High Court of Judicature at Nagpur shall have full power and authority to review the case, or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Appeals from other Criminal Courts in the Central Provinces.

20. And We do further ordain that the High Court of Judicature at Nagpur shall be a Court of Appeal from the Criminal Courts of the Central Provinces and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Court of the Judicial Commissioner of the Central Provinces by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Nagpur by any law made by competent legislative authority for India.

Hearing of referred cases and revision of criminal trials.

21. And We do further ordain that the High Court of Judicature at Nagpur shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Central Provinces, who were, immediately before the publication of these presents, authorised to refer cases to the Court of the Judicial Commissioner of the Central Provinces and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Central Provinces, as were immediately before the publication of these presents subject to reference to or revision by the Court of the Judicial Commissioner of the Central Provinces.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the High Court of Judicature at Nagpur shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it,

though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Nagpur, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the Indian Penal Code, or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Testamentary and intestate jurisdiction.

Testamentary and intestate jurisdiction.

24. And We do further ordain that the High Court of Judicature at Nagpur shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Central Provinces by the Court of Judicial Commissioner of the Central Provinces in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

25. And We do further ordain that the High Court of Judicature at Nagpur shall have jurisdiction within the Central Provinces in matters matrimonial between Our Subjects professing the Christian religion:

Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

26. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Nagpur in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court, thereof appointed or constituted for such purpose in pursuance of Section one hundred and eight of the Government of India Act; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but, if the Judges be equally divided, they shall state the point on which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges which have heard the case including those who first heard it.

Civil Procedure.

Regulation of Proceedings.

27. And We do further ordain that it shall be lawful for the High Court of Judicature at Nagpur from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act No. V of

1908, passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same by competent legislative authority for India, to proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

Regulation of Proceedings.

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Nagpur shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Appeals to Privy Council.

Power to appeal in civil cases.

29. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Nagpur made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the tenth clause of these presents:

Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rs. 10,000, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Central Provinces except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

30. And We do further ordain that it shall be lawful for the High Court of Judicature at Nagpur at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal cases.

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Nagpur made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion

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NOTES.

Cls. 29 and 30.—Petition by First Grade Pleader of Judicial Commissioner's Court for being enrolled as Advocate or Pleader of High Court without requiring to pay Stamp duty rejected—No leave to appeal to Privy Council can be granted. I.L.R. (1938) Nag. 186=1937 Nag. 318.

of the said High Court, in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs and successors, in Council, provided that the said High Court declares that the case is a fit one for such appeal and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Central Provinces.

Rule as to transmission of copies of evidence and other documents.

32. And we do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Nagpur to Us, Our heirs and successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the Seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall in all cases of appeal, to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.

Special commissions and circuits.

33. And We do further ordain that whenever it appears to the Governor in Council of the Central Provinces subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the High Court of Judicature at Nagpur should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

Proceedings of Judges on special commission or circuit.

34. And we do further ordain that whenever any Judge or Judges of the High Court of Judicature at Nagpur visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority, for India.

Provisions regarding pending proceedings.

Provisions regarding pending proceedings.

35. And We do further ordain that all suits, appeals, revisions, applications, reviews, executions and other proceedings whatsoever pending immediately before the publication of these presents in the Court of the Judicial Commissioner of the Central Provinces in the exercise of any jurisdiction vested in it by any law, shall be continued and concluded in the High Court of Judicature at Nagpur as if the same had been instituted in the said High Court; the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents.

Delegation of duties to Officers.

Powers to delegate duties.

36. The High Court of Judicature at Nagpur may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Calls for records, etc., by the Government.

High Court to comply with requisitions from Government for records, etc.

37. And it is Our further will and pleasure that the High Court of Judicature at Nagpur shall comply with such requisitions as may be made by the Governors-General in Council or by the Governor in Council of the Central Provinces for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

Powers of Indian Legislatures preserved.

38. And we do further ordain and declare that all the provisions of these, Our Letters Patent, are subject to the legislative powers of the local legislature and of the Indian legislature, and also of the Governor-General in Council under Section Seventy-one of the Government of India Act; and also of the Governor-General under Section Seventy-two of that Act; and may be in all respects amended and altered thereby.

In witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the 2nd day of January in the year of Our Lord One thousand nine hundred and thirty-six and in the Twenty-sixth year of Our Reign.

LETTERS PATENT CONSTITUTING THE HIGH COURT OF JUDICATURE AT PATNA.

CONTENTS.

CLAUSES.
Recital of Act 24 and 25 Vict., c. 104.
Recital of establishment of High Courts at Fort William and Allahabad.
Recital of Act 1 and 2, Geo. 5, c. 18.
Recital of Act 5 and 6, Geo. 5, c. 61.
Recital of creation of Province of Bihar and Orissa.
1. Establishment of High Court at Patna.
2. Constitution and first Judges of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in name of the Crown and under seal.
6. Appointment of officers.
Admission of Advocates, Vakils and Attorneys.
7. Powers of High Court in admitting Advocates, Vakils and Attorneys.
8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.
Civil Jurisdiction of the High Court.
9. Extraordinary original civil jurisdiction.
10. Appeal to the High Court from Judges of the Court.
CLAUSES.
11. Appeal from other Civil Courts in the Province of Bihar and Orissa.
12. Jurisdiction as to Infants and Lunatics.
Law to be administered by the High Court.
13. By the High Court in the exercise of extraordinary original civil jurisdiction.
14. By the High Court in the exercise of appellate jurisdiction.
Criminal Jurisdiction.
15. Ordinary original criminal jurisdiction of the High Court.
16. Jurisdictions as to persons.
17. Extraordinary original criminal jurisdiction.
18. No appeal from High Court exercising original jurisdiction—Court may reserve points of law.
19. High Court to review cases on points of law reserved by one or more Judges of the High Court.
20. Appeals from other Criminal Courts in the Province of Bihar and Orissa.
21. Hearing of referred cases and revision of criminal trials.
22. High Court may direct the transfer of a case from one Court to another.

CLAUSES.

Criminal Law.

23. Offenders to be punished under Indian Penal Code.

Admiralty Jurisdiction.

24. Civil.
25. Criminal.

Testamentary and Intestate Jurisdiction.

26. Testamentary and intestate jurisdiction.
27. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

28. Single Judges and Division Courts.

Civil Procedure.

29. Regulation of proceedings.

Criminal Procedure.

30. Regulation of proceedings.

Appeals to Privy Council.

31. Power to appeal in civil cases.
32. Appeal from interlocutory judgments.
33. Appeal in criminal cases.

CLAUSES.

34. Rule as to transmission of copies of evidence and other documents.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

35. Judges to visit Orissa by way of circuit.
36. Special commissions and circuits.
37. Proceedings of Judges on special commission or circuit.

Delegation of Duties to Officers.

38. Power to delegates duties.

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal.

39. Cessation of jurisdiction of the High Court of Judicature at Fort William over the Provinces of Bihar and Orissa.

Calls for Records, etc., by the Government.

40. High Court to comply with requisitions from Government for records, etc.

Powers for Indian Legislatures.

41. Powers of Indian Legislatures preserved.

[*9th February,* 1916.

Recital of Acts 24 and 25 Vict., c. 164.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To all to whom, these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William;

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared;

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished;

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency-town, as might be prescribed thereby; and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts:

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a

High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies; and that subject to the directions of the Letters Patent all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the Persons administering the Government of the said territories:

Recital of establishment of High Courts at Fort William and Allahabad.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and did constitute that Court to be a Court of Record:

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December, in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord One thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record:

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad and did constitute that Court to be a Court of Record:

Recital of Act 1 & 2 Geo. 5, c. 18.

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one that the maximum number of Judges of a High Court of Judicature in India including the Chief Justice, should be twenty;

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits:

Recital of Act 5 & 6 Geo. 5, c. 61.

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915:

Recital of creation of Province of Bihar and Orissa.

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were, by Proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council.

Establishment of High Court at Patna.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the Publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other Judges being Saiyid Shurf-ud-din, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Hon'ble Cecil Atkinson, and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor in Council may commission to receive it:—

"I, *A.B.*, appointed Chief Justice (*or* a Judge) of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of may ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have, and use as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief

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NOTES.

Cl. 2.—Death of Chief Justice during vacation—Effect of—Jurisdiction of Vacation Bench to decide cases during vacancy in office of Chief Justice not affected. 17 Pat. 574=19 Pat.L.T. 675=1938 Pat. 550=1938 P.W.N. 683.

Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

Writs, etc., to issue in name of the Crown and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our Heirs and Successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our Heirs and Successors, give grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, may approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

8. And We do hereby ordain that the High Court of Judicature at Patna

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NOTES.

Cl. 8.—Disciplinary jurisdiction—General infamy of Vakil not necessary. 12 Pat. L. T. 725.

Powers of High Court in making rules for the qualification, etc., of Advocates, Vakils and Attorneys.

shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove and to try and determine as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court.

[1][10. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence

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LEG. REF.

[1] Amended by the Letters Patent, 1927—As to the effect of this amendment, *see* notes under Cl. 15 of the Madras Letters Patent.

NOTES.

Cl. 9.—The mere non-recording of reasons where a case is removed from the Court of the Subordinate Judge to the High Court is only an irregularity which does not affect the jurisdiction of the High Court and does not make its decision illegal. 14 Pat. L.T. 258=12 P. 727=1933 P. 250.

Cl. 10: SCOPE AND OBJECT.—*See* 3 Pat. L.J. 509=48 I.C. 348. S. 9 of the High Courts Act, 1861, is not inconsistent with the provision of the Letters Patent. 20 Pat.L.T. 404=1939 Pat. 425. A certificate of "leave to appeal" should not be granted merely on the ground that a point of law arises in the case. It is only when a case presents some difficulty and the Judge feels really that the matter before him requires further consideration by a larger Court that "leave" should be granted. If the Judge decides the case with confidence, that should indicate that it is not a fit case for appeal; and if he accepts the responsibility which is cast upon him by the Letters Patent his decision will be final. 13 P. 587 =15 Pat.L.T. 456=1934 P. 466. If a single Judge by order reverses and remands a case for being tried anew, then this is a judgment, and can be appealed under Cl. 10. But it is not a judgment if the remand is made for a finding. 1924 P. 336. *See also* 1 P. 246=3 Pat.L.T. 343=1922 P. 384. An order of a Judge of the High Court sitting alone staying a criminal trial is not a judgment and is not appealable under Cl. 10. 3 Pat.L.J. 509=19 Cr.L.J. 1008=48 I.C. 348. No appeal lies under the Letters Patent from a decision of a single Judge of the High Court passed in revision. The words "which has been called for by the said Court" (which occurred in Cl. 10 prior to the amendment of 1929) are general in their application and refer both to the case in which the High Court has *suo motu* called for records and the case where the records have been called for on the application of one of the parties. In both cases, no appeal is competent. 10 P. 428=1931 P. 292. Ch. VII, R. 2 of the High Court Rules excludes the applicability of S. 12 of the Limitation Act to appeals which are preferred under Letters Patent. 5 Pat.L.J. 701=2 Pat.L.T. 42=59 I.C. 179. Right of appeal given by the Letters Patent does not apply to administrative or disciplinary powers. 1 P. 590=1922 P. 603. New point not to be raised in Letters Patent appeal. 19 Pat. 104=1940 P.W.N. 280= 1940 Pat. 322. No application for review lies against a decision on appeal under the Letters Patent. [1931 A.L.J. 187 (F.B.) and 40 M. 651, Foll.] 12 Pat.L.T. 652= 1931 P. 409. Where a Judge refuses to exercise his discretion under S. 151, C.P. Code, and grant a review his order is not a "judgment" and is not appealable. 12 P. 203=142 I.C. 455=1933 P. 139.

PRACTICE.—Appeal—Questions not raised before Bench cannot be raised later. 3 Pat. L.T. 386=1922 P. 171. Appeal—Preliminary hearing—Practice—High Court Rules—Validity and effect. *See* 4 Pat.L.J. 695= 54 I.C. 230.

of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.]

Appeal from other Civil Courts in the Province of Bihar and Orissa.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after the date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

Jurisdiction as to Infants and Lunatics.

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents.

Law to be administered by the High Court.

By the High Court in the exercise of extraordinary original civil jurisdiction.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Patna

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NOTES.

Cl. 12.—Applicability of Cl. 12—Submission to jurisdiction—Part of the cause of action outside jurisdiction—Waiver of objection. 1923 P. 562.

Ordinary original criminal jurisdiction of the High Court.

shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents.

Jurisdiction as to persons.

16. And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

Court may reserve points of law.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and pass such judgment and sentence as to the said High Court may seem right.

Appeals from other Criminal Courts in the province of Bihar and Orissa.

20. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Province of Bihar and Orissa, who were, immediately before the publication of these presents, authorized to refer cases to the High Court of

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NOTES.

Cl. 17.—The High Court of Patna has jurisdiction to try persons against whom the Government Advocate with the previous sanction of the Local Government has exhibited an *ex officio* information. 1933 P.C. 127=64 M.L.J. 466=142 I.C. 335 (P.C.).

Judicature at Fort William in Bengal, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Admiralty Jurisdiction.

Civil.

24. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal, as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize cases and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

Criminal.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

26. Any We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

27. And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, [1][they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of Judges who have heard the case including those who first heard it].

Civil Procedure.

Regulation of proceedings.

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

Regulation of proceedings.

30. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna in the exercise of its ordinaty original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the

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LEG. REF.

[1] Added and substituted by amended Letters Patent of 1927.

NOTES.

Cl. 27.—The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Divorce Act. 1923 P. 127; 1923 P. 301.

Cl. 28.—As to the effect of this amendment, *see* notes under Cl. 15, Madras Letters Patent. The amendment of Cl. 28 and the addition of Cl. 3 to S. 98 of the C.P. Code by Act XVIII of 1928 has now settled the conflict of opinion as to the effect of a difference between the two Judges constituting the Bench hearing an appeal from a Subordinate Court. The Chartered High Courts of which the Letters Patent provide for a difference of opinion are excluded from the provisions of S. 98 of the C.P. Code, and the procedure indicated in Cl. 28 should only be followed. [52 M. 563 (F. B.), Foll.] 11 P. 772. A single Judge is competent to hear a reference under Cl. 28. 11 P. 772.

proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal in civil cases.

31. And We do further ordain that any person or persons may appeal to Us, Our Heirs and Successors, in Our or Their Privy Council in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs or Successors, in Our or Their Privy Council: but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal cases.

33. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these

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NOTES.

Cl. 31: DISCIPLINARY JURISDICTION.—No right of appeal to His Majesty in Council. 1 P. 590=1922 P. 603. *See also* 52 I.C. 599=4 P.L.J. 423; 22 Pat.L.T. 341 =20 Pat. 561=1941 Pat. 225. (No leave to appeal to P.C. can be granted from order summarily rejection application for reference under S. 66 (3). Income-tax Act.

Cl. 33: CONSTRUCTION AND SCOPE—CRIMINAL CASE—LEAVE TO APPEAL—GGANT OF.—The matter of appeals to His Majesty in Council from decisions of the High Court is limited by the Letters Patent under which the High Court's jurisdiction is exercised. While Cl. 31 of the Letters Patent refers to civil appeals, the matter of criminal appeals is dealt with by Cl. 33. The wording of Cl. 33 is very precise and must be strictly construed. Under that clause there is a right of appeal from any judgment or order or sentence made in the exercise of original criminal jurisdiction. Leave to appeal is also granted when a point or points of law have been reserved for the opinion of the High Court in the manner provided by Cl. 18. When the case does not fall under either of these two categories, there is no right of appeal. 14 P. 318=15 Pat.L.T. 833=1935 P. 66.

presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs or Successors in Council, provided the said High Court declares that the case is a fit one for such appeal and the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa.

Rule as to transmission of copies of evidence and other documents.

34. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna, to Us, Our Heirs or Successors in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our Heirs and Successors in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of the said High Court, or by any such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our Heirs or Successors, conform to and execute, or cause to be executed, such judgments and orders, as we, Our Heirs or Successors, in Our or Their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.

Judges to visit Orissa by way of circuit.

35. And We do further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the Jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court: Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council, otherwise directs: Provided also that the said High Court shall have power from time to time to make rules, with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any parti-

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NOTES.

Cl. 35.—Patna High Court Rules, Ch. XXII, R. 5 and Ch. II, R. 4—Vacation Judge—Power to hear case arising in Orissa. 130 I.C. 262=1931 P. 61. Under Cl. 35 read with R. 5 of Ch. XXII of the Rules of the High Court, the Vacation Judge has no jurisdiction to hear a matter which is required by those provisions to be heard in Orissa. The power given to the Vacation Judge by R. 4 in Chapter II of the Rules is confined to Patna as distinguished from Orissa. R. 5 cannot be read with, or as controlling R. 4 of Chapter II and therefore the discretionary power of the Chief Justice under Cl. 35 of Letters Patent to order that any particular case arising in the Division of Orissa shall be heard at Patna does not vest on the Vacation Judge. The possible inconvenience arising from the absence of a Vacation Judge for Orissa is no reason for placing upon R. 4 an interpretation which it will not bear if regard is had to the other rules in Chs. II and XXII and Cl. 35 of the Letters Patent. 11 Pat. L.T. 862. As to jurisdiction of Vacation Judges to decide cases when office of Chief Judge is vacant. *See* 17 Pat. 574=1938 Pat. 550.

cular case arising in the Division of Orissa shall be heard at Patna or in that Division.

Special commission and circuits.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

Proceedings of Judges on special commission or circuit.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

Power to delegate duties.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal.

Cessation of jurisdiction of the High Court of Judicature at Fort William over the province of Bihar and Orissa.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court:

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(*a*) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question; and

(*b*) in all proceedings [not being proceedings referred to in paragraph (*a*) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th or 35th clause of the Letters Patent bearing date at Westminster the twenty-eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty-five, relating to that Court; and

(*c*) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court:

Provided, secondly, that if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

Calls for Records, etc., by the Government.

High Court to comply with requisitions from Government for records, etc.

40. And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant-Governor in Council, for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

Powers of Indian Legislatures preserved.

41. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section seventy-two of that Act, and may be in all respects amended and altered thereby.

In witness whereof We have caused these Our letters to be made patent. Witness Ourself at Westminster the Ninth day of February, in the year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign.

By warrant under the King's Sign Manual.

(Sd.) SCHUSTER.

THE INDIAN LIFE ASSURANCE COMPANIES ACT.

See The Insurace Act (IV of 1938), *supra*.

THE INDIAN LIMITATION ACT (IX OF 1908).[1]

Year.	No.	Short title.	Amendment.
1908	IX	The Indian Limitation Act, 1908.	Rep. in part, XVII of 1914, S. 3; XVIII of 1919; VIII of 1930. Amended, XXVI of 1920; X of 1922; XI of 1923; XXX of 1925; I of 1927; IX of 1927; X of 1927; I of 1929; XI of 1929; VIII of 1930; XIV of 1937; XX of 1937; Govt. of India (Ad. of Ind. Laws) Order, 1937; IV of 1938; XXXIV of 1939 and X of 1940

LEG. REF.

[1] For Statement of Objects and Reasons, ste *Gazette of India*, 1908, Pt. V, p. 22; for Report of Select Committee, see *ibid.*, 1908, Pt. V, p. 223 and for Proceedings in Council, see *ibid.*, 1908, Pt. VI, pp. 2, 13, 37 and 145.

NOTES.

Cl. 40.—"Judgment"—Order directing trial of certain issue—Court hearing appeal after return of findings entitled to disregard order of remand. *See* 2 Pat. L. J. 663=41 I.C. 337.

Limitation Act.

SCOPE OF ACT.—Act is a complete Code. Provision saving bar of limitation must be contained or necessarily implied from the Act. 1928 M. 509. Provisions of the Act are exhaustive—Analogical extension of saving clauses not allowed—Considerations of expediency or hardship immaterial. 32 C.W.N. 971. *See also* 1938 N.L.J. 336=1938 Nag. 534=I.L.R. (1940) Nag. 334; 40 Bom.L.R. 1134=1939 Bom. 1; 1940 Rang. 276 (F.B.); I.L.R. (1939) All. 207 =1939 A.L.J. 29=1939 All. 82.

OBJECT OF ACT.—The intention of the law of limitation is, not to give a right where there is none, but to interpose a bar after a certain period to a suit to enforce an existing right. 21 C. 8; 33 A. 356=38 I.A. 87 =21 M.L.J. 645 (P.C.); 44 M.L.J. 303 =1923 M. 462; 24 C. 1 (P.C.); 17 C.W.N. 5=16 I.C. 742=16 C.L.J. 282; 39 M. 456; 54 A. 525=1932 A. 543; 1931 A.L.J. 1018=1931 A. 635 (F.B.). The Limitation Act does not create new obligations but only provides periods within which suits must be brought. 39 M. 456=28 M.L.J. 571; 17 C.W.N. 5=16 C.L.J. 282; 44 M.L.J. 303=1923 M. 462.

APPLICABILITY OF THE ACT.—The law of limitation is a *branch of the adjective law*

THE INDIAN LIMITATION ACT (IX OF 1908).

CONTENTS.

SECTIONS.

PART I.

PRELIMINARY.

1. Short title, extent and commencement.
2. Definitions.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

3. Dismissal of suits, etc., instituted, etc., after period of limitation.
4. Where Court is closed when period expires.
5. Extension of period in certain cases.
6. Legal disability.
7. Disability of one of several plaintiffs or applicants.
8. Special exceptions.
9. Continuous running of time.
10. Suits against express trustees and their representatives.
11. Suits on foreign contracts.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

12. Exclusion of time in legal proceedings.
13. Exclusion of time of defendant's absence from British India and certain other territories.
14. Exclusion of time of proceeding *bona fide* in Court without jurisdiction.
15. Exclusion of time during which proceedings are suspended.
16. Exclusion of time during which proceedings to set aside execution sale are pending.
17. Effect of death before right to sue accrues.
18. Effect of fraud.
19. Effect of acknowledgment in writing.
20. Effect of payment of interest as such or of part payment of principal.
    Effect of receipt of produce of mortgaged land.
21. Agent of person under disability.
    Acknowledgment or payment by one of several joint contractors, etc.
22. Effect of substituting or adding new plaintiff or defendant.
23. Continuing breaches and wrongs.
24. Suit for compensation for act not actionable without special damage.
25. Computation of time mentioned in instruments.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

26. Acquisition of right to easements.
27. Exclusion in favour of reversioner of servient tenement.
28. Extinguishment of right to property.

PART V.

SAVINGS AND REPEALS.

29. Savings.

30 to 32 [*Repealed.*]

THE FIRST SCHEDULE—LIMITATION.

THE SECOND AND THIRD SCHEDULES. [*Repealed.*]

[*7th August*, 1908.

An Act to consolidate and amend the Law for the Limitation of Suits and for other purposes.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Court; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

NOTES.

and is applicable to all proceedings which it governs from the date of its enactment. 62 I.C. 100=2 P.L.T. 667. *See also* 67 I.A. 251=I.L.R. (1940) Lah. 493=1940 P.C. 116=(1940) 2 M.L.J. 903 (P.C.); 20 C.W.N. 952=34 I.C. 273; 1940 Mar.L.R. 125 (Civ.). Limitation is a question of procedure and not one of jurisdiction. A wrong decision whether express or implied on a question of limitation does not oust the jurisdiction. 54 A. 573=1932 A.L.J. 365=1932 A. 273 (F.B.); 46 I.C. 569. The law applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding. 40 I.A. 74=35 A. 227=25 M.L.J. 131 (P.C.); 29 I.C. 833; 21 I.C. 113; 20 I.C. 821=18 C.L.J. 27; 19 C.L.J. 187=19 I.C. 968; 43 M.L.J. 184=1922 M. 417. *See also* 62 I.C. 100=2 P.L.T. 667; 20 C.W.N. 952=34 I.C. 27; 1940 Mar.L.R. 125 (Civ.). It is incorrect to say that because the first Limitation Act was not introduced until 1877 there was no law of limitation in force in 1872. There was a law of limitation laid down in S. 14 of Bengal Regulation (III of 1793) which provided a period of 12 years for the cause of action for any suit. I.L.R. (1939) All. 990=1939 A.L.J. 1127=1940 All. 29. The Act *does not apply to actions which it is the Court's duty to take without any formal application*. 19 C.W.N. 473=22 C.L.J. 66. Nor to applications to Court which it cannot refuse nor to applications for the exercise of functions of a purely ministerial character. 9 Bur.L.T. 148=35 I.C. 950; 1930 N. 206. Nor

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN LIMITATION ACT, 1908.

NOTES.

to Letters Patent Appeals. 60 I.C. 737=3 L.L.J. 36; nor to references to a Judge on an order of the Deputy Registrar of the Chief Court of Lower Burma. 38 I.C. 563 =9 Bur.L.T. 226. Act applies to *appeals from Revenue Courts.* 25 I.C. 703=17 O. C. 254. The provisions of the Act do not govern suits and applications provided for by the Agra Tenancy Act. 1938 A.L.J. 208=1938 All. 213. *See also* 14 R.D. 248. Act *not retrospective* and cannot revive a right to sue, a judgment or decree barred or unenforceable before the Act. 48 I.A. 335=26 C.W.N. 858=49 C. 203 (P.C.); 33 A. 356=38 I.A. 87=21 M.L.J. 645 (P. C.); 43 I.C. 50=33 M.L.J. 753; 40 M. 846=41 I.C. 546; 39 M. 645=29 M.L.J. 1. *See also* 1928 B. 28=29 Bom.L.R. 1563. If there has been an interval between the passing and the coming into force of a later Limitation Act, it is clear indication that the Act was meant to have a retrospective operation. 43 M.L.J. 184=1922 M. 417. New rules of limitation which are merely procedural apply to causes of action arising before their enactment. 62 I.C. 795=41 M.L.J. 65. Although it is not a matter of law, still it is a matter of uniform practice that civil revisions are entertained only if they are filed within three months of the date of the order sought to be revised. 1933 P. 582= 147 I.C. 200. *See also* 30 S.L.R. 271= 1936 Sind 172. Act applies to *arbitration proceedings* and an arbitrator is bound to give effect to all legal defences including a defence under any statute of limitation. 56 C. 1048=1929 P.C. 103 (P.C.). *See also* 1931 M.W.N. 451; 34 L.W. 507=1931 M. 619. It does not necessarily follow that awards which have not been decided in accordance with the law of limitation are on that account invalid. 34 L.W. 507=1931 M. 619. As regards the application of the statute of limitation, there is no analogy between the position of a debtor to, and a creditor of, a company in liquidation; and the winding up does not prevent the statute from running in favour of persons indebted to the company. 60 I.A. 13=54 A. 1067= 64 M.L.J. 403 (P.C.). Per *Boys, J.*—The operative sections of the Limitation Act apply to all suits whether in the civil or the Revenue Courts, while the schedules only refer to the particular matters there dealt with, and for the limitation affecting particular matters with which the Tenancy Act is concerned, reference must be made to the Tenancy Act for the period of limitation. 1930 A.L.J. 256=1930 A. 193 (F.B.). *See* 1938 A.L.J. 208=1938 All. 213. The general provisions of the Limitation Act are founded mainly on equitable considerations which apply as much to the period of limitation prescribed by the special Act, as to the period of limitation prescribed by the Limitation Act. The principle of S. 28 of the Limitation Act can be applied to a *reference under S.* 66 (2) *of the Income-tax Act.* 9 P. 172=122 I.C. 810=1930 P. 14. Under the Limitation Act as amended in 1922, Ss. 4, 9 to 18 and 22 are applicable to a proceeding under the Agra Tenancy Act. 14 R.D. 248. *See also* 1938 All. 213. Also to Sikh Gurdwaras Act, 1930 L. 800. *See also* 43 M.L.J. 168=44 M. 785; 44 M. 817. Where an appeal from the decree of the Consul-General is presented, his duty is only to take the memorandum of appeal when it is presented to him and transmit the same together with other papers to the High Court. He cannot decide whether the appeal is barred by time. It is only when the appeal comes on for hearing that the question of limitation can be taken. 146 I.C. 45=14 L. 656.

CONSTRUCTION.—The statute of limitation *should be construed strictly.* 47 I.C. 122; 27 I.C. 935=11 N.L.R. 18; 32 I.C. 536; 1929 L. 513; 1938 A.W.R. (B.R.) 200. *See also* 1939 All. 82. The Act is strict and inflexible and does not admit of an equitable construction. 11 Pat.L.T. 403=1930 P. 455; 59 I.A. 283=63 M.L.J. 329 (P.C.); 1933 C. 422=144 I.C. 150. In a matter governed by the Act, which in some respects gives the Court a statutory discretion, the Court has no general discretion, outside the limits of the Act, to dispense with its provisions or to relieve a suitor from the operation of the Act in a case of hardship or mistake. 1935 P.C. 85=68 M. L.J. 665=62 I.A. 80=57 A. 242 (P.C.); 1935 A. 323; 1929 A. 677=118 I.C. 670; 1933 C. 422=144 I.C. 150; 1941 Rang. L. R. 1. The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of those provisions. There is no place in the law of limitation in India for a "general principle of limitation." It is not permissible to the Court to discover in the provisions of the Limitation Act general principles and to apply these principles to cases which are not specifically provided for by the Act itself. I.L.R. (1939) All. 207 =1939 A.L.J. 29=1939 All. 82. The Courts should, as far as possible, place upon the Limitation Act a *construction favourable to the plaintiffs.* 1930 M. 991=59 M. L.J. 881=54 M. 445. In determining the proper article of the Limitation Act applicable to a suit, what has to be considered is the "true effect of the suit and not its formal or verbal description." 1934 L. 725; 1939 O.W.N. 1005=15 Luck. 157. If the plain-

NOTES.

tiff is entitled so to frame his suit as to make a certain article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise so as to make a less favourable article applicable. 1932 A.L.J. 317=1932 A. 358; 127 I.C. 889=1930 N. 300. *See also* 146 I.C. 811. The rule is now well settled that lapse of limitation, apart from S. 28, bars only the remedy and does not extinguish the title of the claimant. 52 A. 979=1930 A. 858; 132 I.C. 661=1931 L. 668. Nor does it extinguish a debt. 53 A. 963=1932 A. 199. *See also* 54 A. 525=1932 A. 543. Courts are not at liberty to allow new periods of suspension not provided for in the Act. 40 M. 1040=43 I.C. 31=33 M.L.J. 320 (F.B.). As to construction of the Act, *see also* 67 I.C. 365=55 P.L.R. 1922 (particular articles to be applied in preference to general articles); 21 M.L.J. 1041=12 I.C. 695; 41 M. 18=33 M.L.J. 35. *See also* 1930 N. 300; 1930 N. 366; 130 I.C. 157=1931 N. 47; 127 I.C. 889=1930 N. 300. Special article of a special local Act must be applied in preference to general article. 105 I.C. 431. The first and the third columns of an article should be given the same meaning as in other columns. 40 M. 1040=33 M.L.J. 320 (F.B.). Where both first and third columns of an article do not apply to a case, the residuary article must be applied. 40 M. 1040=33 M.L.J. 320. The Court in discovering the Article of the Limitation Act applicable to a suit, is not tied down to the statements in the plaint. In order to determine it, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. 15 Luck. 157=1940 O. 134=1939 O.W.N. 1005; 39 Bom.L.R. 224=1937 Bom. 244. It is impossible for parties by consent or agreement to extend or alter the period of limitation. Parties cannot waive the statute. 178 I.C. 20=1938 Rang. 328. In considering whether a particular remedy is barred one looks not at the relief given but at the cause of action, that is at the necessary allegations which have to be made and found before the relief sought can be given. I.L.R. (1939) Nag. 1=1938 N. 335 (F.B.). A statutory liability will be governed by the same articles as a Common Law liability, if the words of the articles are capable of covering it. 42 I.C. 502=33 M.L.J. 379. The sections in the Act govern and control the application of the articles, except where the language of a particular article clearly precludes the application of a section. 12 I.C. 695=21 M.L.J. 1041. Exemption from Limitation—Ground for—Not stated in execution application—Party not entitled subsequently to rely on it. 1933 S. 365. Obstruction to a right of way being a "continuing nuisance," Limitation does not apply to such a case. 60 C.L.J. 213.

BURDEN OF PROOF.—When limitation is pleaded in defence the duty of proving that the suit is in time lies on the plaintiff. 1941 R.D. 672=1941 O.A. (Supp.) 617=1941 A.W.R. (Rev.) 677.

ACT APPLIES TO CLAIMS, NOT DEFENCES.—Limitation Act does not bar defences to an action, *e.g.*, plea of fraud. 20 C.W.N. 957=34 I.C. 37=31 M.L.J. 362 (P.C.); 37 Bom.L.R. 471. *See* 35 I.C. 610; 49 I.C. 115; 1928 C. 810=110 I.C. 571; 1929 A. 77; but the Act bars a plea of set-off. 66 I.C. 209=25 C.W.N. 800. The Act does not bar the use of a mortgage as a shield, by way of equitable defence, though suit to enforce it is barred. 108 I.C. 149=1928 A. 99. *See also* 132 I.C. 767=1931 O. 157; 138 I.C. 206=9 O.W.N. 387. A party in possession cannot be prejudicially affected by the law of limitation. 132 I.C. 661=1931 L. 668. Even if a claim based on certain facts is barred by efflux of time, a defence based on those facts is not so barred. 182 I.C. 510=1938 Lah. 286. It is not the law that limitation can never affect a plea urged in defence. Where the plea rests on a right which the defendant had no occasion to urge until his possession was attacked, limitation would not ordinarily affect his defence; but when his defence raises a plea of some inchoate or imperfect right, the establishment of which would depend upon a suit within a particular time he should not be allowed to urge that defence if the suit which has not been brought would, at the time when he urged the defence, have been time-barred. 1939 Mad. 678=(1939) 1 M.L.J. 770. By the Punjab Laws Act, 1872, the Mahomedan Law is made applicable to the religious institutions of Muslims but only in so far as it has not been modified by legislation. Thus the Limitation Act applies though limitation is not an original principal of Mahomedan Law The rules of lmitation which applies to a suit are the rules in force at the date of the institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Limitation Act applies to immovables made waqf, notwithstanding that the ownership in such property is said to be in God. The Limitation Act provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It *is impossible to read into the modern Limitation Acts any exception for property made waqf for the purpose of a mosque* whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. 67 I.A. 251=I.L.R. (1940) Lah. 493=52 L.W. 266=44 C.W.N. 957=42 Bom.L.R. 1100=1940 P.C. 116=(1940) 2 M.L.J. 903 (P.C.).

STARTING POINT.—As to starting point of limitation, *see* 64 I.C. 447=19 A.L.J. 836. When an appeal is preferred against an original decree after amendment but not attacking any point in the amendment, the period

(2) It extends to the whole of British India; and

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "applicant" includes any person from or through whom an applicant derives his right to apply:

(2) "bill of exchange" includes a hundi and a cheque:

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligations shall be void if a specified act is performed, or is not performed, as the case may be:

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued:

NOTES.

of limitation is computed from the date of the original decree. 43 A. 380=19 A.L.J. 152. The period during which the execution of a decree is stayed by order of Court can be deducted in computing the period of limitation for executing a decree. 1923 C. 316. As to Suspension of limitation period during pendency of Insolvency petition, *see* (1937) 2 M.L.J. 703; 1937 M.W.N. 1182. Institution of administration suit does not save or suspend limitation. 38 Bom.L.R. 864=1936 Bom. 423. Time *bona fide* spent in appeal to administrative authorities may be deducted. 29 S.L.R. 382=1936 Sind 108. Starting point—Decree incapable of execution—Time when begins to run. 1922 C. 136. Where a plaint is amended, it relates back to the date of the presentation of the plaint and limitation is counted from the date of the presentation. 63 I.C. 701. An order of Court cannot give a cause of action to a party to start a judicial proceeding. A cause of action briefly means "right and the infringement of the right". Where a party has an undoubted right and that right is infringed, a cause of action at once accrues to him. When it has so accrued and time has begun to run against him, an act of Court restraining him from interfering with or obstructing the opposite party, passed in a suit by that party, can never amount to an infringement of his right. I.L.R. (1939) Bom. 173=40 Bom.L.R. 1134=1939 Bom. 1. A party cannot claim fresh period of limitation on the basis of an order of execution Court which referred him to a regular suit if so advised. 40 P.L.R. 768=1938 Lah. 437. So long as the attachment is in force, the decree must be considered under execution and the decree-holder is not called upon to make any fresh application to that effect. If he files a fresh application during the pendency of the previous application, it is not subject to any limitation. 189 I.C. 585. Starting point in case of fresh cause of action. *See* 43 M. 845=59 I.C. 472=39 M.L.J. 312; 1938 M.W.N. 113=1938 Mad. 429. The question whether an application for review gives a fresh starting point of limitation for a declaratory suit depends upon whether the application reopened the question already decided. 24 O.C. 286=66 I.C. 205. The pendency of an arbitration before an arbitrator does not oust the jurisdiction of a Civil Court and the fact of the reference does not suspend the operation of limitation. 61 I.C. 807=6 P.L.J. 273. Condition that suit is to be filed "within two months". Starting point. *See* 1937 M.W.N. 1319. Where time is given to a party to pay a certain sum of money *"by a certain date"*, it includes that date. The word "by" indicates the utmost limit of time, being the end or the expiry of the date or period indicated; and in reckoning a day it is to be taken as from midnight to midnight. Although a Court of Law is not expected to receive money after 5 P.M. or 6 P.M., if a tender is made at any time before midnight that day, it is a valid tender. 15 Mys. L.J. 503=42 Mys.H.C.R. 545. Where in a suit against two defendants, an interlocutory judgment is passed dismissing the suit against one of them, and a final judgment later on dismissing the suit against both, limitation for purposes of appeal begins to run from the date of the interlocutory judgment so far as the former defendant is concerned as if there have been two decrees one bearing the former date. 164 I.C. 718=1936 Rang. 313. Suit against two persons—Notice under S. 80, C.P. Code, required against one only—Limitation period is extended against the other also. 32 S.L.R. 106=1937 Sind 281=172 I.C. 627.

LACHES.—Defence of laches cannot prevail where a statutory period of limitation is prescribed. 41 C. 771=26 I.C. 284=18 C.W.N. 631. A plea of limitation which is apparent on face of record can be taken in appeal, though not taken in trial Court, where such plea has not been waived. 1933 L. 1044 (1).

Sec. 2 (4): "DEFENDANT".—Subsequently born son in a joint Mitakshara Hindu family —Liability to be sued. *See* 3 P.L.T. 709. Independent trespasser claiming to be in possession in his own right does not derive liability through a former trespasser. 44 C. 858=44 I.A. 104=32 M.L.J. 505 (P.C.).

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another:

(6) "foreign country," means any country other than British India:

(7) "good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention:

(8) "plaintiff," includes any person from or through whom a plaintiff derives his right to sue:

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

(10) "suit" does not include an appeal or an application: and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suits, etc., instituted, etc., after period of limitation.

NOTES.

Sec. 2 (5): EASEMENT—"ONE PERSON".—An indeterminate and fluctuating body like the Sonthals and Ghatwals cannot acquire easement rights. 2 P.L.J. 323=39 I. C. 868. A mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in S. 2 (5) of the Act. 148 I.C. 431=1934 P. 420. So also a right to cut bamboos in another's land. 155 I.C. 966=16 Pat.L.T. 192=1935 P. 188.

Sec. 2 (7): "GOOD FAITH".—Wanton negligence on the part of a legal adviser is not "good faith". 3 P.L.J. 484=46 I.C. 509. *See* 13 I.C. 260=5 S.L.R. 181.

Sec. 2 (8).—The term "plaintiff" does not include "ghatwal". Ghatwal does not claim through his father. 17 C.W.N. 137 =40 C. 173. Mere transfer of title does not prolong cause of action. 24 I.C. 216; 7 M.I.A. 323 (353). As to purchaser from Government, *see* 28 C.W.N. 66=1924 C. 394. A succeeding *watandar* claims under his predecessor. So, adverse possession against the previous holder operates equally as bar to a suit by the successor against the vendee of *watan* lands. 55 B. 21=129 I.C. 145=1931 B. 24.

Sec. 3: SCOPE OF SECTION.—S. 3 is mandatory and a suit or an application shall be dismissed even if limitation has not been set up. 24 C.L.J. 467=21 C.W.N. 564; 39 I.C. 154=11 Bur.L.T. 73; 29 I.C. 476 =19 C.W.N. 970. *See also* 150 I.C. 588 =1935 N. 109; 152 I.C. 939=1935 A. 923; 1935 P.C. 85=68 M.L.J. 665 (P.C.). But *see* 23 I.C. 360; 16 I.C. 418; 42 I.C. 536; 32 I.C. 785; 34 C. 941 (F.B.); 1933 A.L. J. 1283; I. L. R. (1937) Nag. 61=1936 Nag. 265; I.L.R. (1939) All. 990=1939 A. L.J. 1127=1940 All. 29. S. 3 applies to every suit including suits concerning mosques, religious endowments, and lands and buildings dedicated to religious uses. 40 P.L.R. 319=1938 Lah. 369. An application to execute an award under the Bombay Co-operative Societies Act falls within S. 3 and the Limitation Act is applicable to such an application. 40 Bom.L.R. 889= 1938 Bom. 424. The principle is applicable even to an appellate Court. 1936 N. 285; I.L.R. (1937) Nag. 61. Though limitation is not pleaded in the written statement, or ever raised in the trial Court, and no issue framed on the question of limitation and no reference thereto is made anywhere in the judgment of the trial Court the appellate Court before which the plea is first raised must take notice of it if it appears to that Court that the suit is barred by time. 20 Pat.L.T. 124=1939 Pat. 421. No doubt the plea of limitation can be urged at any stage having regard to S. 3, but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it is difficult for the Court sitting in appeal to give effect to the defence contention. 64 C.L.J. 513=1936 Cal. 382. Court has no power to relieve a suitor on the ground of hardship or mistake. 30 S. L. R. 242=165 I.C. 91=1936 S. 169 (application under O. 22, R. 9, C. P. Code). A combination of claims in one action can

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

NOTES.

be split into its component parts each of which comes under its own rule of limitation. 130 I.C. 574=1931 L. 309. A Court is not bound to take notice *suo motu* of the fact that an application made at the trial Court was barred by limitation. 1929 A. 485=121 I.C. 552. But *see also* 1930 A. 699; 1940 Rang.L.R. 273=1940 Rang. 207. In an application for transfer of execution, the transferring Court should investigate the question of limitation when raised, as it is the proper Court to decide such objections under S. 39, C. P. Code. 1929 M. 199=29 L.W. 246. Any Court having an application for execution made to it must *suo motu* determine the question of limitation. It has not only power but duty to determine such question. 1930 A. 699. S. 3 is not affected by S. 151, C. P. Code. 57 I. C. 15. Inherent powers of Court cannot be invoked to evade limitation. 43 M.L.J. 184=1922 M. 417 (2). Court is assumed to have decided plea of limitation unless contrary is shown. 8 Pat.L.T. 494=1927 P. 261. The question whether a suit is within time must be decided primarily on the basis of the plaintiffs' own pleadings and not on the basis of defence set up. 1933 L. 404. *See also* 1933 L. 491=34 P.L.R. 841. It is in the discretion of the Judge or the officer appointed in that behalf to accept an application beyond office hours, or refuse to do so, and if the discretion is exercised in favour of a litigant who unfortunately could not approach the Court or the officer appointed in that behalf during the usual Court hours but did manage to approach him on the last day of limitation and prevailed upon him to accept the presentation on that day, it could not be said that the discretion was not properly exercised. Where an application for execution is presented to an officer appointed to receive such application on the last day of limitation beyond office hours, the presentation is valid. No ratification by the Judge is necessary for such presentation. I.L.R. (1938) Nag. 451=1938 Nag. 46. S. 3 is mandatory and leaves no room for equitable considerations. 197 I.C. 217.

"SUIT".—Schedule I prescribes period of limitation for bringing suits and S. 3 does not apply to defences. 1 P.R. 1916=32 I. C. 485; 40 I.C. 820=1917 M.W.N. 327; 40 I.C. 358=5 L.W. 593. But *see* 41 M. 102=33 M.L.J. 309 (A person whose right to set aside an alienation is barred cannot attack the alienation by way of defence to a suit for possession brought by the alienee). Exemption from limitation cannot be recognised apart from what the Limitation Act itself provides. 37 M. 186=24 M.L.J. 96; 62 C. 66=1935 C. 333. Disqualification of a proprietor under the Court of Wards Act is no ground for exemption from limitation. 46 C. 694=23 C.W.N. 531=36 M. L. J. 210 (P.C.); 28 I.C. 818=19 C.W.N. 1193. An application to execute a decree of Baroda Court sent to British Court is governed by the local law of the Court where the application to execute is filed and will be rejected if barred by the Act. 40 B. 504=18 Bom.L.R. 481. The Act applies to appeals from Revenue Court to the District Judge. 25 I.C. 703=17 O.C. 254. The Act does not apply to reference to a Judge on an order by a Deputy Registrar of the Chief Court. 38 I.C. 563=9 Bur.L.T. 226. Plea of prescriptive right, *i.e.*, positive limitation cannot be taken at any stage. 1928 N. 203. S. 3, Limitation Act, does not apply to the case of a claim by a liquidator against the company. 8 R. 581=1931 R. 72. Application by Official Assignee under Ss. 7 and 36, Presidency Towns Insolvency Act, is equivalent to "suit" for the purpose of this section and Art. 109. 59 M. 1020=1936 M. 778=71 M.L.J. 289 (F. B.).

DATE OF INSTITUTION.—For purposes of Limitation Act a suit must be deemed to be instituted on the date on which the plaint is presented to the proper officer even in the case of suits where leave under Cl. 12 of the Letters Patent is necessary. Therefore a suit is within time if the plaint is presented to the proper officer within the period of limitation even though leave under Cl. 12 of the Letters Patent is obtained after the expiry of such period. 44 C. W. N. 604. Where a memorandum of appeal is presented to the Court on the last day of limitation with insufficient Court-fee and the deficiency in Court-fee is subsequently paid by the appellant of his own accord, the appeal must be deemed to have been presented only on the date when the Court-fee is paid in full, and is therefore out of time. 165 I.C. 57=44 L.W. 249. *See also* 1938 M.W.N. 257. When an amendment has been allowed by the Court, and a date has been fixed by the Court for filing the amended plaint and the amended plaint has been filed within the time allowed, the presentation of the amended plaint relates back to the original presentation of the plaint, and the date of the original presentation of the plaint has to be taken to be the date of institution of the suit for the purpose of S. 3. 14 Rang. 383=1936 Rang. 508. Where a plaint in a suit presented within the period of limitation is returned by the Court for want of pecuniary jurisdiction, and the plaint if reduced in its scope in order to get over the difficulty of want of jurisdiction and re-presented to the same Court on a date on

NOTES.

which a new suit would be barred by limitation, it may be treated as a continuation of the previous suit; the Court returning the plaint has the power to receive the plaint with a reduced scope on re-presentation. 49 L.W. 25=1939 M.W.N. 449=1939 Mad. 397. *See also* 1940 Mad. 689=(1940) 1 M. L.J. 590. Registration of a document having been refused on 3—11—1928, a suit was instituted on 1—12—1928 under S. 77 of the Registration Act. The defendant who was a lunatic died on 15—12—1928, without a guardian *ad litem* having been appointed at all. His heirs were substituted on 18—1—1929. *Held,* the suit was instituted on 1—12—1928 and not on 18—12—1929, when the heirs of the deceased defendant were substituted; it cannot be said that, because there was no guardian *ad litem* appointed for the lunatic defendant, there was no legally instituted suit against him. 38 C.W.N. 900=1934 C. 833. Where the person against whom an appeal is to be presented is a minor, the appointment of a proper guardian is not a necessary preliminary to the filing of an appeal, although it is necessary before the appeal can be properly heard and disposed of. The appeal therefore must be deemed to have been presented in time by calculation of the date when it was actually presented. 1936 P. W. N. 321=1936 Pat. 153. Same rule applies in the case of appeal against minor. 161 I.C. 579=1936 P. 153.

CONSENT OR AGREEMENT OF PARTIES—WAIVER.—Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. 18 A.L.J. 625=24 C. W.N. 1055 (P.C.); 39 M.L.J. 68 (P.C.). There is no estoppel against a statute. Parties cannot waive or contract themselves out of the Law of Limitation. 38 M. 374=21 I.C. 24=25 M.L.J. 264. *See also* 44 I.C. 570=3 Pat.L.J. 132; 54 A. 573=1932 A. 273 (F.B.); 18 I.C. 595=17 C.W.N. 518; 1924 O. 127=26 O.C. 324. Willingness to pay barred instalments in previous suit does not operate as estoppel. 24 I.C. 507.

ONUS.—The plaintiff must prove from his own allegation that his suit is not barred by limitation. He cannot rely on defendant's allegations. 6 P.R. 1912=12 I. C. 453. Burden of proof—Suit for recovery of deposit—Plaintiff's case *prima facie* within time—Defendant must plead and prove that particular demand was made and refused beyond period of limitation. 1934 A. 11.

PLEA WHEN CAN BE RAISED.—The question of limitation can be taken at any time in the course of proceedings. 1 Pat.L.J. 221=36 I.C. 960. *See also* 35 I.C. 337; 20 I.C. 360; 1933 N. 130=29 N.L.R. 272. A question of limitation cannot be raised for the first time in appeal. It must be raised by the defendant in his pleading. 60 I.C. 280=32 C.L.J. 236. Plea of limitation may be raised for the first time in first appeal. 45 B. 920=23 Bom.L.R. 279; 1933 N. 130 or in second appeal. 46 C. 455=47 I.C. 25=22 C.W.N. 995; 20 I.C. 360; 25 I.C. 354; 63 I.C. 785; 1928 N. 203; 1930 C. 703; but all facts necessary to support the plea of limitation must be apparent on record if limitation is pleaded in appeal for the first time. 1923 C. 283. *See also* on the point 44 I.C. 896; 16 I.C. 418; 13 I.C. 792=84 P.R. 1911; 49 A. 809=102 I.C. 1=1927 A. 589; 27 Punj.L.R. 870; 1934 R. 329; 1936 C. 382. S. 3 does not lay upon an appellate Court the duty of dismissing suits filed out of time in the original Court, unless its attention is drawn to it. 42 I.C. 536. *See also* 28 I.C. 378=28 M.L.J. 115; 17 I.C. 638=8 N.L.R. 174; 4 Pat.L.J. 645=52 I. C. 125.

PERIOD TO OBTAIN SANCTION NOT EXCLUDED.—Where the plaintiff who wanted to sue a native prince applied to the Government of India for previous sanction and it took four years to obtain the same and by that time the suit had become barred, the four years period could not be deducted. 30 Bom.L. R. 1463.

EXPLANATION—"SUITS INSTITUTED".—A mere claim against a company in compulsory liquidation is not by virtue of the explanation to S. 3 a "suit instituted" within the meaning of those words in S. 3. The "Explanation" merely enacts that in the case of a suit (*i.e.*, a proceeding instituted by the presentation of a plaint) against a company which is being wound up by the Court, the institution of such a suit is for purposes of S. 3 advanced to an earlier date, namely, the date when the claim was first sent in to the Official Liquidator. 60 I.A. 13=54 A. 1067=1933 P.C. 63=64 M.L.J. 403 (P. C.). A suit is instituted on the day on which the plaint is presented. 27 C. 814; 31 C. 75; even if insufficiently stamped, provided the deficiency is supplied within the time allowed by Court. 27 Cal. 814; 31 Cal. 75. *See also* 1940 Mad. 689=(1940) 1 M.L.J. 590; 1939 Mad. 397. The presentation of a plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. But when a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order, it must be held that the suit has been instituted. Merely because at some later stage, as the result of a finding on the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation to that Court, it does not mean that the suit has not been instituted. And when a plaint has been so returned and re-presented to the Court having jurisdiction, the date of institution of the suit is the date on which the plaint was originally presented and not the date on which it was re-presented. 1941

Where Court is closed when period expires.

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

NOTES.

Mad. 711=(1941) 1 M.L.J. 629. But when deficiency in Court-fee is subsequently *paid by party of his own accord,* the appeal must be deemed to have been presented only on the date when the Court-fee is paid in full. 165 I.C. 57=44 L.W. 249. Plaint presented on the last day after Court hours to the Judge. 65 I.C. 274; 34 A. 482 (F. B.). The plaint must be presented to an officer authorized to receive it. 12 A. 57=18 W.R. 172; 8 M. 411. Similarly, in the case of appeals. 15 M. 78; 19 C. 747; 12 A. 129; 20 M. 319; 16 C. 250. But *see* 37 P.L.R. 124=1935 L. 124 (2). A pauper suit commences for the purpose of limitation on the day when the petition to sue *in forma pauperis* is presented to the Court. 32 Bom.L.R. 1343. *See also* I.L.R. (1938) Nag. 183=1937 Nag. 36; 41 Bom.L.R. 784. Also for purpose of application of rule of '*lis pendens*' under S. 52, T. P. Act. 1936 M. 853=71 M.L.J. 301.. But to save limitation, when application to sue as pauper is rejected, permission of Court should be obtained to pay Court-fee on original plaint. 41 C.W.N. 537=65 C.L.J. 151=1937 C. 241. Such permission will not be given when application to sue as pauper was not *bona fide*, but was made merely to gain time to pay Court-fee. 166 I.C. 796=1937 N. 36. The plaint is presented when it is handed over to the proper officer in the prothonotary's office. The obtaining of the leave of the Judge under cl. 12 of the Letters Patent in a case where such leave is necessary and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Limitation Act. 36 Bom.L.R. 84=1934 B. 91. Plaint filed by pleader not duly authorized in writing—Not valid presentation. 39 C. W.N. 534; 44 L.W. 528=165 I.C. 659=71 M.L.J. 604. But *see* 63 C. 733=40 C.W. N. 730. The effect of the provisions of Ss. 3 and 9, is that all questions of limitation have to be decided under the Act, and once time has begun to run, no subsequent disability or inability stops it, and no equitable grounds for suspension of the running of the time or of the cause of time outside the provisions of Ss. 4 to 25 of the Act can be relied on or added to those provisions. I.L.R. (1939) Bom. 173=40 Bom.L.R. 1134=1939 Bom. 1.

Secs. 3 and 4.—If a plaintiff, availing himself of the option given to him under O. 2, R. 3, C.P. Code, has united several causes of action against the same defendant before a Court competent to try not necessarily those causes of action separately but the suit as a whole when those causes of action are combined, the question of limitation under Ss. 3 and 4 of the Limitation Act has to be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of the other Courts which have been able to try those suits when split up had they been brought before them. No restriction can be implied on the facilities given by O. 2, R. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on. The law of limitation should not be unduly strained to bar a suit any more than it should be strained to allow it to be tried. 1941 Mad. 786=(1941) 2 M.L.J. 244. Courts have no power to invent new grounds of exemption from limitation. (1942) 1 M.L.J. 472.

Sec. 4: APPLICABILITY.—There is a marked distinction in the scope and purpose of Ss. 4 and 14 of the Limitation Act. S. 14 provides for the exclusion of certain periods in computing the period of limitation. S. 4, on the other hand, has nothing to do with computing the period of limitation. What it provides is that where the period prescribed expires on a day when the Court is closed, the application, etc., may be made on the day the Court re-opens. There is nothing in S. 4 which alters the length of the prescribed period. 1935 P. C. 85=68 M.L.J. 665 (P.C.); I.L.R. (1937) N. 217=1937 Nag. 215; 1940 N.L. J. 227; 1940 N.L.J. 607. S. 4 has nothing to do with computing the period prescribed under S. 19. Consequently, an acknowledgment signed after the expiration of the period prescribed by S. 19 cannot be brought within time by the application of S. 4. I.L.R. (1941) Nag. 144=1941 Nag. 100. *See also* 1937 Lah. 642; 45 L.W. 72. S. 19 cannot include the period extended by S. 4. Where the period of three years prescribed for a suit on a promissory note expires during a period when the Court is closed, an acknowledgment of liability or endorsement made after such date but before the re-opening of the Court will not serve as a fresh starting point of limitation. 1937 Mad. 367=(1937) 1 M.L.J. 262. S. 4 applies to cases where a definite period of limitation is given in the section, not applicable to conditions in the decree. No Court has power to alter the terms of the decree when it has become final so as to extend the time allowed for payment. 41 A. 47=48 I.C. 353=16 A.L.J. 892. The furnishing of security or the deposit of costs is not an application within the meaning of S. 4. An appellant to the Federal Court who deposits the printing charges does not move the Court to do anything. 19 Pat. 123=20 P.L.T. 905=1939 Pat. 667 (F.B.). Even if it be assumed that the application for obtaining a copy of the decree does not

NOTES.

strictly fall within the purview of S. 4, the general principle underlying this section, which has been reproduced in S. 10, General Clauses Act, must be given effect to, namely that where an act or proceeding is allowed to be done on a certain day, then if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day on which the Court or office is opened. 1938 Lah. 707. S. 4 has no application where a certain date has been fixed for payment by agreement of parties. 56 I.C. 495=1 Pat.L.T. 227. But *see* 12 I.C. 810=7 N.L.R. 176. Whether applicable to L.P. appeals. 2 L. 127; and an application to file an appeal *in forma pauperis*. 30 C. 790. The provisions of S. 4 are quite general and apply to an application under S. 12 (2) of the Oudh Courts Act. 14 Luck. 138=1938 O.W.N. 706=1938 Oudh 186; 1942 O.W.N. 106. Where the time for presenting an application expires while a Court is closed, the applicant may present it to Court on the date when it opens again. The date of presentation goes back to the day when it ought to have been, but could not be, presented. 120 I.C. 377. The period allowed by S. 4 is not intended to be cut down; and a litigant should not be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature—the Village Court—happens to be open to him. A plaintiff is therefore entitled to wait for the reopening of the Munsiff's Court after the vacation in order to avail himself of S. 4 of the Limitation Act, though the suit may be cognizable in the Village Court, and there is no compulsion to go to the Village Court which might be open on the day the period of limitation expired. The Court of the lowest grade in S. 15, C.P. Code, refers to Courts subject to the Code and cannot refer to a Village Court. I.L.R. (1940) Mad. 684=51 L. W. 179=1940 Mad. 495=(1940) 1 M.L.J. 220. An application to the Civil Court under O. 21, R. 89, C.P. Code, to set aside an execution sale held by the Collector, is one in respect of which the benefit of S. 4 of the Limitation Act can be availed of. The fact that the Court of the Collector was open when the limitation expired does not make S. 4 inapplicable. 40 Bom.L.R. 152 =1938 Bom. 209. As to presentation of appeal, *see* 1931 P. 60=130 I.C. 265 (1). S. 4 applies to suits under S. 77 of the Registration Act. 12 I.C. 33=16 C.W.N. 20. Also to application under S. 54 of the Provincial Insolvency Act, 1920. 1933 M. W.N. 1049. Section is not applicable to the period of grace allowed by S. 31 (1), Limitation Act. 36 B. 268=12 I.C. 811=13 Bom.L.R. 1153. But *see* 15 I.C. 439=15 O.C. 373. The principle laid down in S. 4 of the Act and in S. 10 of the General Clauses Act is not applicable to the period of limitation prescribed by a pre-emption decree for the payment of money. 67 I.C. 772=3 L.L.J. 310 (F.B.). Ss. 4 to 25 are not confined in their application to periods prescribed in the Limitation Act but extend also to periods prescribed by other general Acts, such as the C.P. Code. 43 M.L.J. 168=44 M. 785. *See also* 44 M. 817, and the cases cited on the point under S. 1. Section applies to application under S. 68 of the Prov. Ins. Act. 9 R. 150=1931 R. 209. Although a party cannot extend a period allowed by law for doing an act in Court by his own act, yet if the Court is closed on the last day of that period, he is entitled to do the act on the first opening day. 12 I.C. 810=7 N.L.R. 176. *See also* 19 N.L.R. 116=1923 N. 246; 1937 Cal. 454 (application of substitution of heirs of deceased appellant). Payment under a compromise decree on re-opening day. 60 I.C. 894=19 A.L.J. 49; 20 A.L.J. 543=1922 A. 195. When the period prescribed for a suit to recover a debt expires during the Court vacation and before re-opening the debt is assigned, the suit brought by the assignee on the re-opening day is within time. 19 I.C. 820=15 Bom.L.R. 348. If the last day when the debt could have been enforced was a public holiday and on the next re-opening day the debtor is adjudicated an insolvent, the debt is provable in insolvency. It is not necessary for the creditor for the purpose of keeping his debt alive, to file a suit on the re-opening day after the intervention of the insolvency. 55 M. 630=1932 M. 287=62 M.L.J. 256 (F.B.). The section avails only where there has been a presentation to the proper Court. 47 I.C. 624=8 L.W. 256. *See also* 1937 Lah. 464=173 I.C. 740; 41 C.W.N. 956; 1937 Nag. 215=I.L.R. (1937) Nag. 217; 68 M.L.J. 665 (P.C.) noted *supra*. Suit filed in wrong Court—Deduction of holiday not permissible. 43 M.L.J. 579=1923 M. 114 (2). *See also* 1929 L. 425; 27 A.L.J. 976=118 I.C. 670 =1929 A. 677; I.L.R. (1937) Nag. 217. Wrong Court—Presentation on re-opening day—Exclusion of holiday if allowable. *See* 35 I.C. 292=14 A.L.J. 310. *See also* 44 M. 817=41 M.L.J. 84; 36 M. 131=21 M. L.J. 1000. Court closed—Meaning of—Officer absent in camp—Applicability of section. *See* 29 I.C. 449=38 M. 295 (F. B.). The absence of a presiding officer of a Court is not tantamount to the Court being closed during the period of his leave within the meaning of S. 4 where the office of the Court is open and the establishment of the Court is present. 1933 L. 239=38 P.L.R. 338. But *see* 15 L. 308=1934 L. 622 (1). The Original Side of the Bombay High Court is not closed within the meaning of the section in order to dispose of summary suits on negotiable instruments. 25 Bom.L.R. 1296 =1924 B. 144. So also in the case of filing short cause suit when provision had been made for urgent business. 51 B. 848=29 Bom.L.R. 981. Application to set aside

Extension of period in certain cases.

5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable [1][by or under any enactment] for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

LEG. REF.

[1] Substituted for the words "by any enactment or rule" by Act X of 1922, S. 2.

NOTES.

dismissal for default—Court working with special permission of the High Court—Application presented on the next day—Good ground for excusing delay. 17 L.W. 413=1923 M. 489. The period of limitation mentioned in S. 4 must be understood not only as prescribed in the Schedule but also as qualified by Ss. 5 to 22 of the Act. Where the three years period prescribed by S. 8 expired during the vacation of the trial Court and the plaint was presented a month later on the date when the Court re-opened, *held,* that S. 4 applied to the case and that the plaint was within time. 1928 M.W.N. 796=1928 M. 1255. Suit on promissory note—Courts being closed for summer recess—Assignment of note on re-opening date—Suit filed on same day is maintainable. 52 L.W. 221=1940 Mad. 908=(1940) 2 M.L.J. 251. Where an alleged payment is made at a time beyond 3 years of the execution of a promissory note, the provisions of S. 4 cannot be invoked to extend the prescribed period under S. 20. 1939 A.W.R. (H.C.) 153=1939 All. 252. The endorsement of payment at the back of a promissory note made more than 3 years after its execution but during the close holidays of the Civil Courts does not give a fresh start of limitation under S. 20 and S. 4. I.L.R. (1938) All. 861=1938 A.L.J. 1183=1938 All. 606. *See* 1938 M. 683=47 L.W. 726. *See also* 61 M.L.J. 675=34 L.W. 650. (Suit by plaintiff after attaining majority). Plaintiff cannot be allowed any extension of time to save limitation merely on equitable consideration unless the extension is provided for by the statute. [1920 M. 1 (F.B.) and 1924 L. 40, Ref.] 146 I.C. 939=1933 L. 615. Period for preferring appeal expiring during vacation, copy of application filed after re-opening and appeal preferred immediately after obtaining copies limitation is saved. 6 R. 743. *See* 11 L. 111=1930 L. 216. *See also* 13 P. 632=1934 P. 367; 1934 P. 4. A plaint filed in wrong Court was returned. It was re-presented after holidays as holidays intervened. Limitation was saved under Ss. 14 and 4 of the Act. 33 C.W.N. 421.

Sec. 5: APPLICABILITY.—An application for leave to appeal to His Majesty in Council comes within the purview of S. 5. 1923 A. 536; 1923 O. 93=26 O.C. 24. S. 5 contemplates an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended later on account of any defect having been noticed in the memorandum of appeal. The section cannot, therefore, be invoked by an appellant who has already filed an appeal without impleading a necessary respondent but seeks to implead him after the limitation for the appeal. 42 P.L.R. 355=1940 Lah. 314. Where a Privy Council appeal was dismissed as incompetent, an application for *review* does not come within the purview of the section. 36 C.W.N. 40=1932 C. 171. The provisions of S. 5 are not applicable to an application for a final decree in a mortgage suit under Art. 181 and the Court has, therefore, no discretion under S. 5 to extend the period of limitation prescribed by Art. 181. 1935 P.C. 85=68 M.L.J. 665 (P.C.). Where an application for leave to appeal to the Privy Council is not presented within the time prescribed by law owing to an agreement between the applicant and the opposite party not to continue the litigation further as the parties had incurred enormous expense and to accept as final the decision of the High Court, but the opposite party goes back on the agreement and files an application for leave to appeal, there is sufficient cause for the applicant not presenting his application within time. 181 I.C. 248=1938 Lah. 836. The section applies to applications under O. 22, C. P. Code. 36 A. 235=12 A.L.J. 299. But *see also* 1922 L. 131. S. 5 is expressly made applicable by O. 22, R. 9, C. P. Code, to an application to set aside abatement for which time can be extended for "sufficient cause". 54 A. 280=1932 A. 459. *See also* 46 L.W. 898=1938 M.W.N. 14; 1935 L. 443. S. 5 is not to be invoked when a person acts in ignorance of specific provisions of law and thereby misses remedy. 1940 A. W. R. (B.R.) 55=1940 R. D. 159. S. 5 does not apply to applications to set aside execution sales under C. P. Code. I.L.R. (1939) 1 Cal. 452=69 C.L.J. 138=43 C.W.N. 383=1939 Cal. 310. S. 5. has not been made applicable to applications under O. 44, R. 1 and hence if such an application is out of time, no extension can be allowed. 15 Luck. 390=186 I.C. 161. S. 5 applies to proceedings under Provincial Insolvency Act. 23 I.C. 730=80 P.W.R. 1916. S. 5 applies to the application for leave to appeal in an insolvency matter. 18 L.W. 808=1924 M. 400.

NOTES.

The provisions of S. 5 cannot be applied to the case of a creditor's petition under S. 9 of the Provincial Insolvency Act, because such a petition is not an application within the meaning of S. 78 of that Act. *Distinction between petition and application* pointed out. 55 M. 766=1932 M. 352=63 M.L.J. 152. *See also* 1933 L. 821. S. 5 may be applied to the applications under O. 41, Rr. 17 and 19, C. P. Code. 45 M.L.J. 813=47 M. 171. Whether section applies to application under S. 17, Provincial Small Cause Courts Act. 24 C.W.N. 380=31 C. L.J. 197. *See also* 42 M.L.J. 484=45 M. 628; 102 I.C. 228=1927 N. 238; 34 L. W. 795=61 M.L.J. 710; 1933 P. 134=14 Pat. L.T. 20. *See* notes under S. 17, Provincial Small Cause Courts Act. A Small Cause Court Judge has jurisdiction to excuse delay in deposit under O. 9, R. 3, C. P. Code. 42 M. L. J. 484=45 M. 628. Applicability—U. P. Revenue Manual, Rule 1057—Appointment of Registrar Qanungo by Collector—Appeal—Delay—Power of Commissioner to excuse. 18 R.D. 710=16 L. R. 82 (Rev.). In the absence of any rule or enactment making S. 5 applicable to an application for execution of decree the section does not apply to such an application. 44 I.C. 570=3 P.L.J. 132. Neither S. 5 nor S. 18 applies to cases under S. 47, C. P. Code. 23 I.C. 240. The Court cannot extend the time prescribed by Art. 158. 18 C.L.J. 35=18 C.W.N. 826; 8 L. 274=1927 L. 273. Section does not apply to suits. 30 N.L.R. 294=149 I.C. 956=1934 N. 145; 87 I.C. 17=1925 O. 369; 32 C.W. N. 935. Except where there are special rules made by the High Court extending the provision of S. 5 of the Limitation Act to applications for setting aside *ex parte* decree, the Courts do not have the power to have recourse to the provisions of S. 5, or enlarge the period prescribed by Art. 164 by resorting to S. 151 of the C. P. Code. The Nagpur Judicial Commissioner's Court has not framed any rules under S. 122 of the C. P. Code extending the application of S. 5 to applications for setting aside *ex parte* decrees and so that Court has no such power. 1934 N. 43=144 I.C. 394. *See also* 40 Bom.L.R. 957=1938 Bom. 459; 40 C.W.N. 83; 1936 Lah. 672. S. 5 does not apply to applications under Art. 164 to set aside *ex parte* decrees. 1922 L. 266; 2 R. 655=1925 R. 187; 1927 L. 342=100 I.C. 936; 1933 R. 110=144 I.C. 980. Section does not apply to application under O. 9, R. 9, C.P. Code. 1928 M. 556; 49 B. 839=27 Bom.L.R. 1150; 1933 P. 557. *See also* 1929 A. 127; 53 B. 453=1929 B. 262. Nor to application under O. 21, R. 90, C. P. Code. 1934 A. 314. Nor to application to restore appeal dismissed for default of prosecution. 142 I.C. 185=1933 R. 96. Section has no application to proceedings under the Land Acquisition Act. 1927 P. 333=103 I.C. 295. But *see* 1928 L. 263. Nor to appeals from Special Magistrates under S. 39 of Ordinance II of 1932. 60 C. 511=37 C.W.N. 195=1933 C. 124. *See also* 1939 Sind 78 (appeal under S. 476-B, Criminal Procedure Code); 1937 A.L.J. 365=1937 All. 466 (appeal to Sessions Judge from conviction under S. 124-A, Penal Code); 1941 A.W.R. (H. C.) 122. The High Court has power to frame a rule making the provisions of S. 5 applicable to applications to set aside *ex parte* decrees. 47 M. 824=47 M.L.J. 409; 53 B. 453. S. 5 does not apply to extend the period of 30 days provided by Art. 166. 2 P.W.R. 1919=50 I. C. 610. Section does not apply to an application under O. 21, R. 89, C. P. Code. 1925 O. 411=87 I.C. 722; 1933 R. 8. The period of limitation under Art. 166 being fixed by statute and not by the Court, it cannot be extended under S. 148, C. P. Code, or under S. 5, Limitation Act. 148 I.C. 1082=1934 Pesh. 25. The proviso to S. 5 can be applied to extend the time which is limited by a section which is mandatory. 99 I.C. 779=1927 N. 165. Where limitation is prescribed by special rules made by the High Court, S. 5 does not apply to extend the time. 110 I.C. 719. Question of limitation does not arise when both Courts—District Court and Additional District Judge's Court are part and parcel of the same District Court. 1928 N. 199. An application for review of judgment must be made within 90 days of the passing of the judgment and it is only when sufficient cause is shown that the time can be extended under S. 5. 1931 A.L.J. 103=1931 A. 218. S. 5 applies to an application for review of an order passed under Companies Act. 116 I.C. 427=1929 N. 185. Applicability of S. 5 to Income-tax Act, S. 66. *See* 1937 Lah. 876. S. 29 of the Act makes it quite clear that S. 5 would not apply for the purpose of extending the period of limitation prescribed by a special law like that embodied in the Registration Act. 42 C.W.N. 1174. Minority is a factor to be taken into account when considering circumstances which justify the application of S. 5. Applications for the extension of time under S. 5 have to be more liberally construed in favour of minors than other litigants. I.L. R. (1939) Lah. 433=1939 Lah. 439. Also to appeals under Agra Tenancy Act, 1901. 14 R.D. 538. Also to application under S. 6, C.P. Tenancy Act. 20 N.L.J. 84. S. 5 may be applied to an application by a landlord for pre-emption under S. 6 of the C.P. Tenancy Act. 20 N.L.J. 84.

CONSTRUCTION.—S. 5 should be liberally construed so as to advance substantial justice. 31 I.C. 876=13 A.L.J. 1101. *See also* 20 I.C. 3=159 P.W.R. 1913; 78 I.C. 953=1925 S. 60; 1929 C. 240. Delay of one day in presenting an appeal is as fatal as delay of any longer period. 38 I.C. 464. In considering the question of "sufficient cause" under S. 5, the equities on which

NOTES.

Ss. 4 and 14 are based may be taken into account. The existence of circumstances mentioned in Ss. 4 and 14, therefore, be regarded as a sufficient ground for excusing the delay. 1941 M.W.N. 989=(1941) 2 M.L.J. 873.

DELAY NOT EXPLAINED.—When the delay is not sufficiently explained it should not be excused under S. 5. 25 I.C. 30=12 A.L.J. 837. *See also* 26 I.C. 472=16 M.L.T. 547; 1937 Nag. 65; 1937 Pat. 528; 10 I.C. 210; 1923 L. 144 (1); 4 L.L.J. 475=1923 L. 95; 34 I.C. 617; 3 L.W. 109=32 I.C. 579; 50 C.L.J. 397. Each day's delay to be accounted for. 103 I.C. 498=1927 L. 717; 14 L. 656=1933 L. 681; 39 P.L.R. 897; 20 Lah. L.T. 115. Burden of proof is upon person claiming relief under this section. 30 S.L.R. 242=165 I.C. 91=1936 S. 169.

DELAY IN GETTING COPIES.—When the copy of the trial Court's judgment has been obtained before the expiry of the period of limitation, the time spent in obtaining the same cannot be added under S. 5 to the end of the period of limitation. 148 I.C. 818 (1)=1934 L. 464. Where the appeal was filed late on account of delay in getting copies and the same was due to the mistake of pleader's clerk, there is no sufficient cause to excuse delay. 21 A.L.J. 817=75 I.C. 254; 1924 A. 176; 82 I.C. 484=1925 O. 189 (1); 1932 M.W.N. 328. A Court is not bound to show indulgence to a litigant who has not been prompt in applying for copies preparatory to filing an appeal. 1923 L. 96; 24 S.L.R. 415=1931 S. 58=132 I.C. 473; 1936 O.W.N. 1109=1936 O. 9; 1936 R.D. 327; 38 P.L.R. 903=1936 Lah. 693. But where the delay was caused by the officer of the Court, it was held that this was sufficient cause for not filing the appeal in time. 13 I.C. 943=9 A.L.J. 15. *See also* 23 I.C. 874; 13 I.C. 850; 1922 L. 415; 9 I.C. 381=189 P.W.R. 1911; 1930 L. 129. Where the delay was due to the appellant's ignorance of the procedure of the copying department and the consequent failure to get copies in time, *held*, the Court could excuse the delay. 8 O.W.N. 191=1931 O. 314. Where a person makes an application for a copy of judgment so late as within 3 days of the expiry of the period of limitation for filing an appeal and chooses to obtain it by post and gets it after the period of limitation, the delay in the transit cannot be excused and time cannot be extended under S. 5. 1942 A.W.R. 131=1942 O.A. (Supp.) 151. *See also* 35 I.C. 233. Where an application for leave to appeal under S. 449, Cr.P. Code, was presented out of time, and the delay was due to a mistake on the part of the jailor, *held*, there was sufficient cause for excusing the delay. 54 C. 52=1927 C. 307. A mistake in the copyist office in not preparing copies of the judgment and decree is a sufficient cause. 25 I.C. 26; 10 I.C. 210. *See also* 161 I.C. 457=1936 L. 132; 38 P.L.R. 852=1936 L. 670; 38 P.L.R. 903=1936 L. 693. But where delay in filing an appeal is caused by the supply of wrong information to the copying department, a person making the application is not entitled to deduction of time as of right. 155 I.C. 588=1935 N. 109. Non-availability of a copy of a decree is sufficient ground for excusing delay in filing an appeal in time. 22 I.C. 919=26 M.L.J. 356. *See also* 39 P.L.R. 34; 39 P.L.R. 897. Delay in filing copy of judgment—Inability to file due to accidental loss of papers—Extension of time ought to be granted. 100 I.C. 19=28 P.L.R. 1. *See also* 13 Pat.L.T. 612=1932 P. 349 (Copy of order appealed from filed out of time in one of the two connected appeals). The time for obtaining a copy of judgment of the first Court should be excluded. 1928 A. 416. *See also* 1936 L. 1007. Where there was a delay of over three months in delivering a simple judgment which at the bottom contained a note in the Judge's handwriting that it was delivered in open Court after notice, and an application to excuse the delay is filed under S. 5 in respect of an appeal against such a judgment on the ground that the party was ignorant of the date of the delivery of judgment, it was held that the delay ought to be condoned. 1940 A.M.L.J. 43. Whether the provisions of S. 5 can be applied in second appeal when there was no application to that effect in the lower Appellate Court. 175 I.C. 33=1938 Nag. 233. *See also* 1936 L. 1007. In a case where the appellant was guilty of a certain amount of unnecessary delay, but in view of the practice of the Court which prevailed, namely, to exclude under S. 12 (2) the whole period taken in obtaining a copy of the decree, *held*, the appellant had "sufficient cause" for the delay, and the Court would therefore excuse the delay under S. 5. I.L.R. (1937) Bom. 421=38 Bom. L.R. 1281=1937 Bom. 64.

DISCRETION OF COURT.—The Court under S. 5 has a discretion to excuse the delay in filing an appeal; and if it applies its mind to the question and exercises its discretion judicially after considering all the circumstances it will be acting correctly. 152 I.C. 419=11 O.W.N. 1359. The period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence to the party seeking relief. A Court granting the indulgence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever. I.L.R. (1938) Nag. 409=1938 Nag. 156. *See also* 1937 Nag. 65. Where the lower appellate Court exercises a judicial discretion in such matters, High Court would not interfere in second appeal, even if it might have taken another view, had it been the lower appellate Court. 45 A. 432=21 A.L.J. 319.

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See also 14 I.C. 59=9 A.L.J. 292; 130 I.C. 840 (2)=1931 A. 28; 1938 Pat. 413. Where the discretion has been exercised arbitrarily, it may be challenged in second appeal. 1933 A. 294=1933 A.L.J. 561; 1937 Pat. 528; 1938 Pat. 413. Where there are conflicting views on a certain point and the delay caused in filing the appeal is caused by adopting one of the views, even though the Court takes the contrary view, it can extend the time under S. 5. 196 I.C. 654=1941 Pesh. 74. The words "sufficient cause" in S. 5 have to be liberally construed. The test is whether negligence, inaction or want of *bona fides* can be imputed to the applicant. The exercise by the Court of its discretion to excuse the delay would to a certain extent be detrimental to the respondent who has in the meanwhile acquired valuable rights, but the question has to be approached from the point of view of the applicant's conduct rather than of the advantage gained by the respondent. 1941 M.W.N. 989=(1941) 2 M.L.J. 873. An order extending time under S. 5 should give sufficient indication that the discretion given by the law has been judicially exercised. 59 C. 388=1932 C. 482. If the lower appellate Court has come to a definite finding as to 'sufficient cause' for filing an appeal beyond time High Court will not interfere in second appeal. 20 C.W.N. 1303; 1 P.L.J. 485. *See also* 14 I.C. 244; 33 I.C. 808; 88 P.R. 1916; 35 I.C. 67; 36 I.C. 614=92 P.R. 1916; 103 I.C. 90 (1)=28 Punj.L.R. 257; 1930 A.L.J. 1256 (Second appeal against order refusing time). Where the necessary papers have not been filed along with the memorandum of appeal, it is open to the Court to excuse the delay. 36 C.L.J. 389=1923 C. 261. Under special circumstances the High Court can (has extended) extend the time by more than 5 years for preferring a Letters Patent appeal. 34 I.C. 584. In the admission of appeals filed out of time, the discretion of the appellate Court should not be fettered by any definite or crystallised set of rules. 31 I.C. 705=19 C. W. N. 1113. *See also* 59 C. 781; 1941 A.M.L.J. 57. The High Court will refuse to interfere with the discretion of the judge in a Letters Patent appeal. 1922 L. 170. An order granting an application for extension of the period of limitation for filing an appeal under cl. 15 of the Letters Patent (Calcutta) without giving notice of the application to the respondent is irregular and is liable to be set aside. 46 C.W.N. 131. Where the last day of limitation expired on a holiday and an application was made for copies on the re-opening day and the appeal was filed as soon as the copies were received, it was held that, even deducting the time spent in obtaining copies, the appeal was time-barred. 35 I.C. 233=79 P.R. 1916. "Sufficient cause" is a question of fact and there can be no second appeal as to the exercise of discretion by the lower Court. 88 P.R. 1916=35 I.C. 67. Punjab Chief Court will interfere in exceptional cases, particularly in cases of change introduced by the new Punjab Courts Act, on the ground of erroneous legal advice. 33 I.C. 808=18 P.W.R. 1916. Appeal filed without copy of decree—Appellant asked to file on next hearing day—Copy filed after expiry of limitation—Delay excused. 14 I.C. 244; 1930 R. 182. Where more than 3 years after the decree-holder's death, his minor legal representatives apply to be brought on record, the delay can be excused. 26 O.C. 244=1924 O. 83. Where the parties are living in the same village and there is a delay in applying to add the legal representative on the death of one of the parties, the benefit of S. 5 should not be extended to such a case. 1940 A.W.R. (B.R.) 128=1940 O.A. 779. When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must be fully satisfied of the justice of the ground for an extension of the time for attacking the decree. 20 I.C. 513=17 C.L.J. 596. *See also* 41 M. 412=34 M.L.J. 63 (P.C.); (1941) 2 M.L.J. 873. Discretion of Court when to be exercised. 1927 A. 386=100 I.C. 727; 1928 C. 249 (1); 1928 C. 468; 33 C.W.N. 76. Interference by High Court with such discretion. 1928 L. 643; 1929 A. 31=111 I.C. 816.

DOUBTFUL POINT OF PRACTICE.—Doubtful point of practice is sufficient cause for delay in presenting the appeal beyond time. 37 I.C. 818=15 A.L.J. 200. *See also* 161 I.C. 251=1936 Lah. 168; 38 Bom.L.R. 1281 =I.L.R. 1937 B. 421=1937 B. 64. Time may be extended when a litigant has been misled by a change in the practice of the Court. 58 I.C. 408=32 C.L.J. 127. *See also* 37 I.C. 818=15 A.L.J. 200; 39 I.C. 542=13 N.L.R. 25; 58 I.C. 995; 52 I.C. 959. *See also* 48 M. 631=48 M.L.J. 384. Where the last day of limitation for an appeal was the last Saturday of the month which was generally regarded as a holiday, but, which, however, was a working day according to the individual practice of the Commissioner. *Held*, the party may be excused for his ignorance of the Commissioner's individual practice and the appeal allowed to be filed on the next working day. 14 L. R. 293 (Rev.)=17 R.D. 412. *See also* 1942 O.A. 135=1942 A.W.R. (C.C.) 156 (deliberate adoption of a remedy which results in delay not to be excused). Vakalatnamah of vakil invalid—It amounts to sufficient cause within the meaning of section. 102 I.C. 255=1927 A. 816; 103 I.C. 537=1927 L. 618. Where notice of an appeal was affixed by affixation and it was uncertain when he got the notice. *Held*, that a delay of 4 or 5 days in filing the memorandum of cross-objections could be condoned. 15 L. R. 69 (Rev.)=18 R.D. 56.

EX PARTE ADMISSION.—The order admitting an appeal *ex parte* can be re-opened on the objection of the respondent at the hear-

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ing. 20 I.C. 513=17 C.L.J. 596; 41 M. 412=34 M.L.J. 63 (P.C.); 29 I.C. 265=71 P.W.R. 1915. *See also* 16 L.W. 662=1923 M. 82; 1929 A. 31; 44 L. W. 152=165 I.C. 471=1936 M. 600; 1936 O.W.N. 1109=1936 Oudh 9. When an appeal has been provisionally admitted, a judge can entertain and decide the question whether there was sufficient cause for extending the time for appeal under S. 5. 38 B. 613=25 I.C. 369. *See also* 40 C. 259=17 C.W.N. 42; 63 I.C. 726. *Ex parte* admission by Dt. Judge—Transfer to Sub-Judge—Power of Court. 40 C. 259=17 C.W.N. 42; 1936 O. W. N. 1109=158 I.C. 19=1936 O. 9. *Ex parte* admission—Pauper appeal—Application to excuse delay for filing appeal. 60 I.C. 212=12 L.W. 500. *Ex parte* admission—If can be set aside by the successor of admitting judge. 25 I.C. 746=27 M.L.J. 147. *Ex parte* admission—Objections overruled and appeal admitted—Effect. 21 I.C. 96=25 M.L.J. 281. Notice without proper order of Court is a nullity and cannot by mere inaction amount to an estoppel. 21 I.C. 96=25 M.L.J. 281. *Ex parte* admission—Sufficient cause—Burden of proof—Duty of Court to decide the question of excusing the delay before final hearing—Question of limitation—Power to decide. 54 I. C. 36. *See also* 3 Pat.L.T. 110=6 P.L. J. 444; 15 I.C. 562=8 N.L.R. 50.

SUFFICIENT CAUSE—WHAT AMOUNTS TO.—1928 M. 690; 1928 L. 216; 54 M.L.J. 234; 35 C.W.N. 283=58 C. 793=1931 C. 506. A Court may give a liberal construction to the words "sufficient cause", but the interpretation should be in accordance with judicial principles. A client preferring a time-barred appeal under the mistaken advice of his counsel may be entitled to the benefit of S. 5, but the mistake must be *bona fide, i.e.*, made in spite of due care and attention. But want of care and attention is not "sufficient cause". Filing an appeal in a wrong Court through carelessness of the counsel is not a "sufficient cause" for presenting the appeal to the proper Court after the expiry of the period of limitation. 146 I.C. 127=1933 O. 523 (F.B.). *See also* 40 C.W.N. 83 (Amendment of decree as ground for extention of time). The fact that a decree is amended does not of itself operate to extend the time for appealing; where, however, there has been an amendment and it appears reasonable that the time for appealing should be extended, the Court can excuse the delay under S. 5. 33 C.W.N. 958=50 C.L.J. 12=1929 C. 676. *See also* 35 C.W.N. 251=1931 C. 578. Amendment of decree unrelated to grounds of appeal, if sufficient cause for extension of time. 59 C. 1052=36 C.W.N. 218=1932 C. 534; 40 C.W.N. 83=165 I.C. 53. It is not every amendment that entitles a party to claim extension. 1930 O. 463. Where the date actually entered on the decree apparently misled the appellant, it would obviously be a sufficient cause for admitting the appeal after time. 1930 R. 67. Surety for appearance of judgment-debtor — Execution petition dismissed for default of decree-holder and surety discharged—Application for restoration also dismissed—Appeal from order discharging surety—Extension of time not granted. 1934 L. 349. Memorandum of appeal was filed in time without the judgment and decree of the lower Court. Two days after expiry of limitation, the decree and judgment of the lower Court was filed. *Held,* that the case was a fit case for extension of period under S. 5. 6 O.W.N. 1035=1930 O. 184 (1). Technical omission should be condoned and allowed to be rectified. 146 I. C. 517=1933 L. 224. Omission to mention vakil's name in vakalatnama through pure mistake is sufficient cause. 1930 A. 112=121 I.C. 546. *See also* 134 I.C. 114 (L.). Also where copy of the decree could not be got as no decree was found in the proceedings and where the appellate Court granted the application for dispensing with the copy and the copy was produced later. 1930 R. 182. *See* 1930 P. 63. Application to bring on record legal representatives—Delay in making—Ignorance of death of deceased—If sufficient cause. 155 I.C. 610=1935 L. 478. Where an application by the wife for reviewing the judgment passed in a suit for restitution of conjugal rights by the husband was filed after long delay, it was excused for sufficient cause. 1930 P. 63. Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending. He must satisfy the Court that there were reasonable grounds for review. 15 Luck. 526=1940 O.W.N. 281=1940 Oudh 310. Wilful putting off of appeal to last date when unexpected contingency prevents appellant from filing appeal—Extension cannot be granted. 1930 N. 121. Execution—Defective application filed on the last day—Failure to get copy of decree owing to misdescription—Case not fit for restoration. 17 R.D. 273=14 L. R. 257 (Rev.). The applicant is only required to satisfy the Court that he was unable to present his appeal in time on account of some misadventure on the *last date* on which it ought to have been presented; it is not necessary for him to account for inactivity during the entire period prescribed by law. 34 C.W.N. 1119; 1931 M. W. N. 1161. Where an appeal is filed beyond the time, it is for the appellant to show sufficient cause for extending the time; and for this he has to justify every day taken beyond time. 14 L. 656=1933 L. 681.

INABILITY WITHOUT FAULT.—When the Court creates a limitation and the party is unable to conform to it, for no fault of his own, the law will ordinarily excuse him. 38 B. 656=25 I.C. 67. *See also* 38 B.

NOTES.

653=25 I.C. 66. *Inconvenience of party* to attend Court as per Court's discretion is not sufficient cause under S. 5. 177 I.C. 364=1938 Rang. 214.

MERITS OF CASE.—The Court would excuse the delay if there are any merits in the appellant's case. But when the appeal is on a mere technical ground, the principle of technicality defeating technicality may well be brought into play. 25 I.C. 28. *See also* 66 P.W.R. 1912=13 I.C. 714; 33 I.C. 546=14 A.L.J. 212. But *see* 114 I.C. 612 =1929 N. 8, where it was held that the appellate Court had no jurisdiction to touch the decree and decide the case on merits on the basis of time-barred memo.

MISTAKE IN CALCULATION.—Mistake in calculating period of limitation which is a mistake of arithmetic is not sufficient cause for extension. 46 I.C. 480. A *bona fide* mistake by the pleader in calculating the period may constitute sufficient cause, which must be decided by the Court having regard to all the facts and circumstances of the case. 19 I.C. 931=17 C.W.N. 807. *See also* 108 I.C. 619=1928 L. 643; 40 I.C. 425 =13 N.L.R. 89. Where the appellant who filed his appeal on the 19th instead of the 9th December alleged that he made a mistake in reading the date '9' as '19' in the letter written by Counsel's clerk, but the letter was not produced. *Held,* that no sufficient cause was made for condoning the delay. 136 I.C. 838=1932 O. 167. But *see also* 59 I.C. 937. Mistake in calculation made by an assistant in the Office of the Stamp Reporter, who is under no obligation to inform litigants, is not a sufficient ground for extending time. 57 C.L.J. 39=1933 C. 462.

MISTAKE OF COURT.—*See* 16 I.C. 979= 76 P.W.R. 1912. *See also* 26 O.C. 24= 1923 O. 93; 24 I.C. 113=1 O.L.J. 193; 161 I.C. 215. A delay in filing an appeal caused by the failure of the Court to give notice of the date of delivery of judgment ought to be excused. 38 I.C. 575=9 Bur. L.T. 250. *See also* 27 I.C. 784=8 Bur.L.T. 99; 1930 R. 182. A litigant is entitled to expect that the infringement of the rules and orders of the Court by the Judge should not hamper him in his appeal; and if he is allowed a reasonable time within which to bring that appeal the best way of finding out what time is reasonable is to consult the relevant Article and to assume that the period prescribed will be a reasonable period. No doubt, if after the expiration of that period, he seeks for a further period he must then show that he has acted with due diligence. Where a Judge in appeal pronounced judgment in contravention of O. 41, R. 30 and the parties came to know of the delivery of judgment only a couple of months later, it was *held,* that the aggrieved party was entitled to the full period allowed by law commencing from the date of the knowledge of the delivery of judgment. 1941 Rang.L.R. 213=1941 Rang. 194. Mistake of Court in not discovering in time that the decree was not filed is sufficient cause. 1930 R. 235. Smaller Court-fee was paid as a result of mistake in lower Court's judgment. Extension of time to pay additional Court-fee is allowed under S. 5. 1928 L. 737. Where, in spite of an order passed by the Sub-Judge on the 25th March, 1924, directing the plaint to be returned to the plaintiff for presentation to the proper Court, it was not however returned in fact till the 10th of April owing to delay by office. *Held,* that the plaintiff was entitled to have the period between 25th March and 10th April excluded in computing the period of limitation. 144 I.C. 5=1933 L. 611 (1). *See also* 71 C.L.J. 540=1940 Cal. 530.

MISTAKE OF FACT.—Mistake of fact—Mistake of Counsel's clerk. Time can be extended. 59 I.C. 937; 34 L. W. 795=61 M. L.J. 710. The Court can extend the period in favour of an appellant under S. 5 if he has omitted to include the name of a respondent on account of oversight or *bona fide* mistake. 26 I.C. 68=12 A.L.J. 941. After the error regarding ineffective filing of an appeal is pointed out and ample time given for its rectification, the excuse of carelessness cannot be pleaded a second time for granting a further extension of time. 11 Lah.L.T. 31. Mistake of fact—Recent notification—Ignorance of. 4 L. 122=1924 L. 41. Gazetted holiday—Substitution of, by another day—Second appeal. 77 P.R. 1917=42 I.C. 343. Mistake of fact—Two cross-appeals—Two decrees—Appellant believing in one decree is sufficient cause. 115 P.R. 1912=15 I.C. 140. So also in case of appeal filed against a dead man by a *bona fide* mistake. 165 I.C. 201=1936 Pesh. 192. A *bona fide* mistake as to the date on which the copying department told the applicant to come to take delivery of decree copy is sufficient cause to justify extension of time under S. 5. 9 I.C. 607=79 P.L. R. 1911. Where an appellant has no notion at the time of filing his appeal that it is time-barred, he cannot be expected to have explained the cause of delay at the time of filing the appeal. 71 P.W.R. 1911=9 I.C. 607. An appellant is bound to show that there has been no negligence, inaction or want of *bona fides* imputable to the appellant before he can claim an extension of time on the ground of a mistake of fact. 28 I.C. 82. *See also* 32 I.C. 380; 104 I.C. 281. Party misled by High Court's judgment—Time should be extended. 102 I.C. 123 (2)=1927 N. 247.

MISTAKE OF LAW.—Mistake of law is *per se* no ground for exclusion of time but when in fact erroneous proceedings are instituted owing to the mistake, extension may be granted. 45 C. 94=44 I.A. 218=33 M.L.J. 486 (P.C.); 104 I.C. 281. A mistake of law is not 'sufficient cause' unless it was made in 'good faith', *i.e.*, in spite of due care and attention. 18 I.C. 37=59 P.R. 1913.

NOTES.

See also 1917 M.W.N. 362=39 I.C. 975; 69 I.C. 398=1937 Rang. 199; 26 O.C. 56=1923 O. 238; 1936 N. 246. Where an application originally filed as an appeal, was as such, within time, but on its being decided by a Judge that it ought to be dealt with as a revision, it is found to be beyond time as revision, the reason for the delay being the conflict of decisions as to proper remedy, it is sufficient cause for the delay being excused. 197 I.C. 221=1941 N.L.J. 519=1941 Nag. 308. Where a pardanashin lady is ignorant of the rules of procedure, it is not 'sufficient cause'. 9 I.C. 222=8 P.W.R. 1911. A memorandum of appeal was filed without any stamps and out of time by 21 days. *Held,* that even though the litigant was a pardanashin lady, extension of time ought not to be granted. 37 C.W.N. 179=146 I.C. 359 (1)=1933 C. 796. Ignorance of law is no excuse. 177 I.C. 28 =1929 N. 74 (13 C. 266, Dist.; 12 B. 320 and 12 A. 741. Foll.). The time occupied by an application, in goot faith for review of the judgment, although made on a mistaken view of the law, might be excused. 45 C. 17=22 C.W.N. 74=42 I.C. 849=44 I.A. 229=34 M.L.J. 1 (P.C.). *See also* 1937 R. 199. But *see* 14 N.L.J. 22. An applicant for leave to appeal to His Majesty in Council was misled by the practice of calculating the period of limitation for such application and thus filed his application beyond time. *Held,* that in the particular case the time should be extended. 62 I.C. 649=6 P.L.J. 350 (F.B.); 57 I.C. 312=1 P.L.T. 262. Mistake of law—Pleader's mistake. *See* 1923 L. 612. *See also* 73 I.C. 788. Mistake of law—Illiteracy of clients. 1923 L. 208 (2). Where the appellant, being misled by the only reported decision on the question erroneously preferred an appeal from the decree based on an award, the time during which that appeal was pending may be deducted as a plausible excuse for extension of time under S. 5 of the Limitation Act for preferring a fresh appeal from the order of the Court modifying the award. 36 C.W.N. 1069=1932 C. 713.

MISTAKE OF PLEADER.—An honest mistake made by a litigant upon incorrect advice of counsel is a sufficient cause for excusing delay. 44 A. 637=20 A.L.J. 674; 43 B. 376=23 C.W.N. 753=52 I.C. 897=46 I.A. 15 (P.C.); 43 A. 392=61 I.C. 710; 101 I.C. 777; 46 C.L.J. 257=105 I.C. 217=1927 C. 829. *See also* 153 I.C. 161=11 O.W.N. 1530=1935 O. 108; 59 C. 781=36 C.W.N. 420=1932 C. 589; 14 L.R. 441 (Rev.)=17 R.D. 577. A lawyer's wrong advice causing an error has to be proved by the party. It is pertinent under S. 5. 45 I.C. 725; 17 I.C. 155=17 C.L.J. 66; 16 I.C. 425=16 C.L.J. 366. There is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if *bona fide* acted upon by the litigant, will entitle him to the protection of S. 5. The facts of each case and the nature of the omission or mistake on the part of the legal adviser in each particular case, will have to be examined and scrutinized in order to find out whether there has been negligence or gross want of legal skill in the legal adviser, or whether there was merely a *bona fide mistake* not through misconduct or negligence or want of reasonable skill, but such as even a skilled person might make. It is only in the latter case that the litigant would be allowed the benefit of the section. 67 C.L.J. 107. Reasonable care by a competent lawyer would be a sufficient cause within the meaning of S. 5; to attract the operation of the section, it is enough to show that the mistake of the lawyer was of such a description that it may arise even amongst legal practitioners of experience. A litigant should not be made to suffer for such error or mistaken advice given by counsel. 17 Pat. 507=19 Pat.L.T. 309=1938 Pat. 413. Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the meaning of S. 5, though there is certainly no general doctrine which saves parties from the results of wrong advice. (1934 Oudh 360, Reversed.) 41 C.W.N. 1189=46 L.W. 219=39 Bom.L.R. 1021=1937 P.C. 276 (P.C.). *See also* I.L.R. (1938) Nag. 409=1938 Nag. 156 (Party being misled by wrong information given by pleader's clerk not sufficient cause). 43 P.L.R. 502. Where owing to his ill-health counsel was not able to pay personal attention to an appeal and filed it out of time acting on a mistake of his clerk in reading the date of the order appealed against, it was held that it was a case in which the party was not remiss and that there was sufficient cause which prevented the appeal from being filed within time. 1940 A.L.J. (Supp.) 18. (Per *Harper, J.M.*) It would be dangerous precedent to allow the benefit of S. 5 because a litigant's counsel filed an affidavit to say that the delay was due to counsel's illness. 1940 A.L.J. (Supp.) 18. Mistake of pleader—Recalling order excusing delay. 45 C. 725. Mistake of pleader being omission to file copy of decree. 17 I.C. 155=17 C.L.J. 66. The true test is whether the litigant has acted under honest, though mistaken, belief, formed with due care and attention. 12 I.C. 677. A legal adviser's mistake to justify an extension under S. 5 must be a *bona fide* one. 95 P.R. 1917=43 I.C. 317. *See also* 45 I.C. 542=69 P.W.R. 1918; 63 I.C. 726; I.L.R. (1937) Nag. 507=19 N.L.J. 273=1937 Nag. 97; 1936 Nag. 246; I.L.R. (1938) Lah. 379=1938 Lah. 31; 1938 Nag. 156; 1939 Rang. L.R. 639=1940 Rang. 14; 14 Luck. 701=1939 Oudh 245; 1941 O.W.N. 1282; 1941 Pat. 108=22 Pat.L.T. 549; 32 I.C. 640=37 P.W.R. 1916; 1923 L. 612; 101 I.C. 363 (1); 1927 R. 20=5 Bur.L.J. 187; 110 I.C. 533; 6 O.W.N. 1042; 1929 M. 91. The plaintiff

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is not entitled to the benefit of S. 5 where he has acted in good faith on the advice of counsel which advice has been given negligently, even though honestly. 149 I.C. 239 =11 O.W.N. 653=1934 O. 360. Mistake of pleader—Memorandum not signed by pleader—Extension of time. 63 I.C. 726. *See also* 1923 L. 402; 1 R. 584=1924 R. 148. A mistake of law by an advocate is not by itself a sufficient cause. 11 I.C. 812=4 Bur.L.T. 175. *See also* 27 I.C. 639; 37 I.C. 815=10 Bur.L.T. 221; 49 I.C. 1000; 63 I.C. 278=6 Pat.L.J. 237; 1927 L. 92; 7 A.I.Cr.R. 28; 5 Bur.L.J. 227=101 I.C. 363 (1). In a special jurisdiction case valued at Rs. 6,000 and filed in Sub-Court, the appeal was wrongly preferred by the same pleader to the District Court which rejected it. Appeal was then filed in High Court out of time. It was held that there was no reasonable doubt as to the forum and the delay was not excused. 31 Bom. L.R. 954=1929 B. 393. *See also* 1933 L. 568=144 I.C. 627. But *see*. 152 I.C. 323= 1934 Pesh. 57; 152 I.C. 155=1934 M. 637=67 M.L.J. 962. The decree, as framed by the lower Court, was not clearly worded and its exact meaning and significance were not beyond doubt. The respondent himself was misled in choosing the wrong forum and it was he who was the first to file his appeal in the District Court instead of the High Court and it was only subsequently that appellant filed his appeal in the District Court within time. *Held,* that the provisions of S. 5 were applicable and the period during which the appeal remained pending in the District Court should be excluded. 161 I.C. 251=1936 L. 168. A wrong advice of a pleader acting on a statement of the Court clerk not to apply for the copy of the judgment until the copy of the decree was drawn up was held to be not a *bona fide* mistake. 7 R. 13= 1929 R. 116. Mistake of a vakil—When a sufficient cause. *See* 1929 M. 91=112 I.C. 307. But a pleader's gross carelessness is no ground. 114 I.C. 101=1929 S. 32; 131 I.C. 507=1931 R. 80. *See also* 142 I.C. 185=1933 R. 96; 144 I.C. 41 (N.). Where a pleader whose power has terminated with proceedings in trial Court does not take steps to find out whether or not the appeal has been properly presented, he acts without due care and attention, and as he delays in the hope that the irregularity might escape detection, it does not form proper cause for the delay in filing the appeal. (59 C. 781; 7 R. 18 and 5 N.L.R. 25, Rel.) 145 I.C. 760=29 N.L.R. 295=1933 N. 219. The fact that a party is a minor and the next friend is a pardanashin lady or that the pleader acting for them has been negligent or ignorant cannot amount to sufficient cause within the meaning of S. 5 of the Limitation Act. A suitor must suffer for the negligence or ignorance or gross want of skill of his legal adviser. 19 N.L.J. 273. The client has his remedy against the defaulting legal adviser. 131 I.C. 507 (1)=1931 R. 80. An honest oversight of an advocate is a sufficient cause. 34 C.W.N. 119. Where the counsel made a *bona fide* mistake in failing to get a fresh power of attorney after the death of the party for impleading the legal representatives, the Court could extend the time under S. 5. 133 I.C. 877 =32 P.L.R. 389. *See also* 150 I.C. 731= 1934 L. 444; 36 P.L.R. 277=1934 L. 1001; 1937 N. 65.

MISTAKE OF PLEADER'S CLERK.—Where decree amount could not be deposited in Court in time as required by S. 17, Provincial Small Cause Courts Act, owing to the *bona fide* mistake of the vakil's clerk in mislaying the challan, *held,* there was sufficient cause to excuse the delay. 34 L.W. 795=61 M.L.J. 710; *see also* 1938 Nag. 156 *Fraud* of pleader's clerk, if sufficient excuse, 36 P.L.R. 284=1934 L. 986 (2). *Negligence* of pleader's clerk is no sufficient cause. 101 I.C. 448=1927 P. 232; 110 I.C. 374=1928 L. 488; 1929 S. 206. But *see* 108 I.C. 619 =1928 L. 643. Where a *bona fide* mistake by pleader's clerk in calculating the period was excused. *See also* 32 C.W.N. 935; 110 I.C. 837=1928 M. 690. Where a clerical mistake of vakil's clerk in omitting the name of the only contesting respondent in the cause title while copying was excused and the respondent's name was added after period of limitation. In the case of delay due to mistake of a clerk, the sole test is whether the appellant has acted with reasonable diligence. 1929 A. 351=119 I.C. 447. [44 I.A. 218=33 M.L.J. 486 (P.C.). Foll.; 1926 A. 252 and 1925 O. 189 and 374, Disc.] Where by a *bona fide* mistake of the clerk, an earlier judgment of the same date and same month but of a different year was filed along with the memorandum of appeal and subsequently on discovery of the mistake the counsel prayed to have the correct judgment filed when the time for presenting the appeal had expired, *held,* that the mistake being *bona fide,* the time should be extended. 33 P.L.R. 1085=1933 L. 1. *See also* 136 I.C. 838=1932 O. 167; 59 I.C. 937.

NEGLIGENCE OF GUARDIAN.—46 I.C. 68= 5 O.L.J. 153. *See also* 30 I.C. 211=2 O. L.J. 325.

NEGLIGENCE OF PARTY.—A Court should not excuse under S. 5, delay due to gross carelessness. 55 I.C. 271. *See also* 22 O.C. 379=55 I.C. 837; 37 I.C. 503=12 N. L.R. 171; 55 I.C. 17; 24 S.L.R. 415=1931 S. 58; 10 O.W.N. 1247=1934 O. 10 (1); 11 O.W.N. 256=1934 O. 131 (1). The negligence of a servant in the performance of the duties entrusted to him does not amount to sufficient cause. 55 I.C. 17. *See also* 52 I.C. 225=3 Pat.L.J. 381. One of several persons not impleaded as respondent due to carelessness—Time cannot be extended. 99 I.C. 619=1927 L. 118.

ONUS.—It is the duty of the litigant to know the last day on which he can present

NOTES.

his appeal and if there is delay, the burden rests on him of adducing strict proof of the sufficient cause on which he relies. 41 M. 412=45 I.A. 25=34 M.L.J. 63 (P.C.); 1931 S. 58=132 I.C. 473.

POWER OF SUCCESSOR.—An order made by one judge extending time owing to delay in getting copies of decree should not be interfered with by his successor. 50 I.C. 882. *See also* 50 I.C. 374.

PAUPER APPEALS.—An appeal presented after time with full stamp may be admitted if a previous application for leave to appeal as pauper was presented within time and rejected. 74 P.R. 1916=36 I.C. 84. *See also* 1935 O.W.N. 162=1935 O. 231; 34 P.W.R. 1912=13 I.C. 73. Delay in filing an application for leave to appeal *in forma pauperis* cannot be condoned. 101 I.C. 320 (1)=1927 N. 197; 9 Pat.L.T. 613. An appeal was filed as one against order in execution but the Court reqired party to pay *ad valorem* Court-fee. The party applied for leave to appeal as pauper and was allowed. 26 A.L.J. 847=1928 A. 499.

POVERTY.—Poverty is not a sufficient cause within S. 5. 22 I.C. 884=7 L.B.R. 90.

SICKNESS.—Appellant unwell in the last portion of limitation—Filing his appeal two days later—The two days' delay would be excused, 1928 R. 165. But *see* 119 I.C. 678=34 C.W.N. 1119. Where no reason is shown why the applicant during the time of his alleged illness should not have given instructions to his advocate which would have enabled him to present the appeal within time and there is no medical certificate or any other corroborative evidence to support his allegation in the affidavit that he was ill, the applicant fails to discharge the onus that lies upon him to satisfy the Court that he had sufficient cause for not preferring the appeal within the time limited by law. 14 R. 155=1936 R. 183.

WANT OF STAMPS.—Delay in filing an appeal owing to the non-availability of stamp on the last day for filing the appeal will be excused. 37 I.C. 211=1 P.L.J. 163; 3 P.L.J. 74=42 I.C. 675=1923 L. 513 (2). Application for copy accepted by copying department without demand for copying fee —Deduction of time taken for obtaining copies allowed. 38 P.L.R. 903=1936 Lah. 693.

INSUFFICIENT STAMP.—One day's delay in payment of deficient Court-fees on copies of judgments excused. 131 I.C. 127=32 P.L.R. 240=1931 L. 349. Where the appellant honestly believed that he paid the proper Court-fee when he originally presented the appeal, the delay in paying adequate Court-fees should be condoned. 1933 L. 264=144 I.C. 184. Where the appellant failed to pay a substantial portion of the Court-fee in time and there is no question of *bona fide* mistake or misapprehension, there is no reason to extend the time. 33 P.L.R. 12. When the appellant knows at the time when he files the appeal that a further sum is due on account of the Court-fees, it is his business or the business of his pleader to ascertain the date fixed for depositing the deficit Court-fees. In a case of this sort it is expected that pleaders shall make themselves acquainted with the nature of the orders passed and it is not the duty of the Court to communicate the orders to them. The omission of Court to communicate its order to the pleader concerned does not entitle the appellant to any indulgence under S. 5. 71 C.L.J. 540=1940 Cal. 530.

IGNORANCE OF DEATH.—The mere insertion of the name of a person who is dead long before the institution of the suit, in the array of defendants does not save limitation against his widow and heir who is not impleaded in the suit. 140 I.C. 387=1932 L. 592. *See also* 15 R.D. 244. Mere ignorance of death is not a "sufficient cause" under S. 5. 38 I.C. 7=118 P.R. 1916. But *see* 1930 A. 131. *See also* 1936 Pesh. 192 (appeal filed against a dead man by *bona fide* mistake—time extended). Four days before filing of an appeal respondent had died. The appellants were not aware of the death. An application was made to make necessary additions after the expiry of limitation. The Court was satisfied that the error was *bona fide* and the respondent was living in a different province and that period of limitation extended. 123 I. C. 824=1930 A. 131. *See also* 1940 A.W.R. (B.R.) 128=1940 O.A. 779. Ignorance of the death of one of the respondents, in the absence of any negligence or other act or omission for which the applicant seeking to set aside the abatement can be held responsible, can be "sufficient cause" within the meaning of S. 5 of the Limitation Act. 54 A. 280=1932 A.L.J. 18=1932 A. 459; 165 I.C. 201=1936 Pesh. 192.

CORPORATE BODY AND PRIVATE PARTY.—If a corporate body chooses to embark on litigation, its officials and advisers must act with at least as much diligence as is expected from an ordinary litigant. The corporate body is not entitled to greater indulgence than a private individual. 123 I.C. 83.

GOVERNMENT AND PRIVATE PARTY—DISTINCTION.—Though any delay is evidence of laches in the case of a private party, the same cannot be said of Government and so delay can be condoned if it is inevitable. 1929 S. 211.

Secs. 5 and 14.—In exercising its discretion under S. 5, Court will be guided by the provisions of S. 14, though S. 14 does not in terms apply to appeals. 35 C.L.J. 106 =1922 C. 247. *See also* 46 I.C. 116=24 C.W.N. 594; 16 I.C. 940=17 C.W.N. 116; 9 O.W.N. 1165; 1936 O.W.N. 325; 1941 A.L.J. (Supp.) 92=1941 O. W. N. 713. Delay in filing a criminal appeal should be excused under S. 5, where it was erroneously filed in another Court since there is no question of a successful litigant losing a "valuable right." 59 I.C. 556=1 L. 508. *See* *also* 48 M.L.J. 457=1925 M. 709; 26 Cr. L.J. 1110. Where an appeal is preferred to a wrong Court in good faith and by the advice of a lawyer, the time which is spent in prosecuting the same should be excused under S. 5 of the Act. 52 I.C. 235 [45 C. 194 (P.C.) and 20 C.W.N. 49, Foll.] *See also* 15 I.C. 170; 30 I.C. 211=2 O.L.J. 325; 27 I.C. 967=7 Bur.L.T. 250; 12 I.C. 28=4 Bur.L.T. 274; 1927 A. 758; 108 I.C. 123=1928 A. 144; 1928 C. 468; 101 I. C. 777; 1930 A. 15. So also where it is due to wrong valuation in trial Court for purposes of jurisdiction, and especially when such valuation was not questioned by defendant. 1936 O.W.N. 325. Proceedings in wrong Court—*Bona fide* mistake of guardian—Sufficient cause. 30 I.C. 211=2 O. L.J. 325. When time-barred appeals are filed in wrong Court the Court can dismiss them and need not return them for presentation to the proper Court in order that the latter might consider the question as to whether the time for presentation could be extended. 48 C. 110=47 I.A. 255=39 M.L. J. 195 (P.C.). Where an appeal filed in time but in wrong Court owing to a *bona fide* mistake is returned on the last day of limitation for presentation to a proper Court, the fact that it is not presented on the proper day ought not to be a ground for rejecting it as barred; judicial discretion should point to its admission. 11 I.C. 814=8 A. L.J. 793. *See also* 1923 A. 364; 45 B. 607; 1930 A. 15. When two remedies are available prosecution of one would be a good ground for extending time for the other. 98 I.C. 892=1927 L. 43. A person prosecuting an application under S. 151, C. P. Code, cannot be said to be acting in good faith when he has a remedy open to him under some other provision of C. P. Code. Delay due to such wrong prosecution cannot be condoned under S. 5, Limitation Act. 165 I.C. 661=38 P.L.R. 868=1936 L. 672. Whether pendency of application for amending decree saves limitation, *see* 1928 P. 265. The pendency of application for setting aside *ex parte* order certifying an adjustment of a decree saves limitation for appealing from the *ex parte* order. 30 Bom. L.R. 512=115 I.C. 467. But *see* the cases cited below. Where an appeal lies against the *ex parte* decree, the time taken by the party in applying for setting aside the *ex parte* decree and in preparing an appeal against the order refusing to set it aside cannot be excluded in computing the period of limitation for appeal against the main *ex parte* decree. 8 R. 168=1930 R. 41; 59 C. 1057=36 C.W.N. 352. An appeal was preferred under the B. T. Act to the Special Judge on 18th May, 1925, and the same was dismissed on 31st October, 1925, on the ground that it was not maintainable but it was suggested an appeal would be preferred to the District Judge. An appeal was filed on 18th November, 1925, and the delay of 18 days was excused on the ground that the period would be necessary to get copy of the judgment, prepare memo. of appeal, etc. 1929 C. 240=33 C.W.N. 76.

REVIEW.—An appellant is entitled to deduct the period during which an application for review was pending. 1923 C. 291 (1); 45 C. 94, Rel. *See also* 20 I.C. 647; 42 B. 295=46 I.C. 14; 22 A.L.J. 365=1924 A. 867; 30 S.L.R. 301=1936 Sind 43; 1941 A.W.R. (Rev.) 1100; 15 Luck. 526=1940 O.W.N. 281=1940 Oudh 310; 1928 L. 964; 1929 L. 283; 1929 L. 824; 34 C.W.N. 1002; 130 I.C. 545=1931 S. 3, following 45 C. 94; 11 Lah.L.T. 37. But *see* 17 N.L.J. 22. He is not entitled as a matter of right but must seek extension of time under S. 5. 47 I.C. 577=28 C.L.J. 20; 80 I.C. 786=1925 C. 253. The time spent in an infructuous application for review will not be excluded if the grounds of review were only grounds of appeal. 31 I.C. 705=19 C.W. N. 1113. *See also* 89 P.R. 1918=46 I.C. 588. Where the appellants act *bona fide* and under legal advice in applying for review and prosecute their application with due diligence, they are entitled to have the period occupied in prosecuting the application excluded in computation of the period of limitation for the appeal. 30 S.L.R. 301=162 I.C. 257=1936 S. 43. An application for review preferred with a reasonable expectation of success and not prosecuted with reasonable diligence does not justify an excuse of the delay for filing an appeal caused by the prosecution of the review application. 107 P.R. 1918=46 I. C. 23. Leave to appeal to Privy Council—Time taken in application for review—Reduction when permissible. 29 Bom.L.R. 344=101 I.C. 432=1927 B. 221. "Leave to appeal," Meaning of. *See* 26 A.L.J. 847 =1928 A. 499. Where one party applies for review, the time for cross-review by the other party should be extended if necessary as one is a counterblast to the other. 94 P. W.R. 1917=42 I.C. 54. Time spent in review proceedings based on reasonable grounds may be sufficient cause but an unexplained delay of two months after rejection of the review application is not sufficient cause. 10 I.C. 129. *See also* 28 I. C. 926=22 I.C. 919=26 M.L.J. 356; 64 I.C. 516=13 Bur.L.T. 219.

REVISION.—An order refusing to excuse delay in presentation of an appeal is not open to revision even for showing that the appeal was in time. 24 I.C. 872. *See also* 35 P.L.R. 374.

PRACTICE.—The practice of admitting appeals "subject to objection at the hearing" has been condemned by Privy Council and should therefore cease. 50 I.C. 374. Reliance on a prevailing practice of Court may be taken into consideration in excusing delay. I.L.R. (1937) Bom. 421=38 Bom. L.R. 1281=1937 Bom. 64.

Explanation.—The fact that the appellant or applicant was misled by any order, practice, or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

Legal Disability.

6. (1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

NOTES.

PROCEDURE.—Delay in filing appeal—Extension of time if may be implied from the procedure of the High Court. 43 M. 550 =56 I.C. 163=38 M.L.J. 444 (P.C.). Memorandum of appeal presented beyond time—Procedure. 43 B. 376=46 I.A. 15 (P.C.). Second appeal—Time for obtaining copy of the judgment of first Court when excluded. 1928 A. 416.

Secs. 6 and 7.—Ss. 6 and 7 of the Act are not mutually exclusive. S. 7 supplements S. 6. 41 A. 435=49 I.C. 990=17 A. L.J. 649. *See also* 24 O.C. 330=64 I.C. 757; 39 P.L.R. 127. S. 6 is expressly limited to cases where limitation is prescribed in the first schedule to the Act, and when limitation is provided for in some Act outside the provisions of the Limitation Act; such specal limitation is not affected by S. 6 or S. 7. The special provision for limitation in S. 48, C. P. Code, is therefore, not governed by the provisions of S. 6 or S. 7. 65 C.L.J. 403. 1938 Cal. 25; 1939 N. L.J. 387. S. 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time and it should be construed liberally. 41 B. 625 =41 I.C. 238. The section applies to applications under S. 144, C. P. Code. 41 B. 625. S. 6 applies to every minor, whether he has a guardian or not, and the existence of a guardian competent to sue or to apply is immaterial. A minor under S. 6 (1) is entitled to sue or to apply for execution of a decree within the statutory period of three years after attaining majority, and the protection given to a minor in the matter of making an application for execution cannot be restricted by the acts of his guardian. 18 Pat. L. T. 989=1938 Pat. 92. The benefit of S. 6 can be claimed by an assignee of the person who is entitled to that benefit in a suit where both the assignor and assignee join in the suit as plaintiffs, so long as the assignor has a subsisting right to sue at the date when the suit is brought, although the benefit would not be available had the assignee alone brought the suit. 40 Bom.L.R. 548=1938 Bom. 358. Where an alienation is made by some of the coparceners without legal necessity and against the wishes of others, it will be invalid not only against the latter but also as against other coparceners born after the alienation. Such coparceners would be entitled to avoid it not as the representatives of their fathers, but in their own right. The period of limitation would run from the date of the sale, and there is only one cause of action which would arise in favour of the other members who had not consented to the sale. Successive causes of action cannot arise as new members are born year after year. A coparcener who is not in existence at the time from which the period of limitation would be reckoned, cannot rely upon S. 6. 185 I.C. 881=1940 Nag. 94. *See also* 18 Lah. 395= 1937 Lah. 420. *See also* 1939 L. 1. Although under certain system of law, such as Hindu Law, a child *en ventre sa mare* is by a legal fiction and for certain purposes considered to be born in the sense that he has a right of inheritance in his father's property, such a fiction does not govern the rule laid down by the law of limitation. Under the law of limitation, minority begins at the date of birth and not at the date of conception. Where therefore a person challenging an alienation of ancestral property was in mother's womb but not born at the time of the alienation he cannot be said to be a minor and cannot therefore claim an extension of time contemplated by S. 6. 42 P. L.R. 237=1939 Lah. 290. *See also* 1939 Lah. 1. Marumakkathayam thavazhi—Alienation by karnavan and adult member—Karnavan acting as guardian of minor member also—Suit by latter within three years of his coming of age not barred. 1939 Mad. 907. A plaintiff must prove affirmatively and clearly that his suit is within time and that the exemption created by this section applies to his case. 1923 L. 41. The point about the minority of a party for the purpose of calling in aid the provisions of S. 6, cannot be raised for the first time in second appeal. 1940 N.L.J. 607. The section lays down a general rule for all kinds of disabilities and in all kinds of suits, while Art. 44 applies to only one case of disability, *i.e.*, minority, and one class of suits, *i.e.*, a suit to set aside a sale by guardian. 12 I.C. 695=21 M.L.J. 1041. A lunatic is protected under S. 6 as long as he is under disability. The mere fact that there was a guardian on his behalf, who

NOTES.

could have sued earlier, would not deprive him of the protection given by that section. 148 I.C. 1166=1934 A.L.J. 803=1934 A. 434. Where payment is made by a debtor towards a debt due to a minor, the date of payment should be taken under S. 6 as the date "at the time from which the period of limitation is to be reckoned." 161 I.C. 330 =1936 A. 152. A suit could be brought on behalf of the minors in which the minors obtained the benefit of S. 6. 1936 All. 152 =1936 A.L.J. 59. S. 6 does not operate to extend the period of twelve years under S. 48, C. P. Code. 37 M. 186=24 M.L. J. 96; 37 A. 638=30 I.C. 521=13 A.L.J. 826; 13 A.L.J. 166. *See also* 26 Bom. L.R. 426=1924 B. 468; 1938 Cal. 25=I.L. R. (1937) 2 Cal. 373=65 C.L.J. 403; 20 Pat. 1=22 Pat.L.T. 721=1941 Pat. 45. Minority can be successfully invoked as a plea only in suits and execution applications. 37 I.C. 292=101 P.R. 1916. Where an appeal of a minor appellant has been dismissed for default, he cannot resort to S. 6 to apply for its restoration. 45 B. 648= 23 Bom.L.R. 110. S. 6 does not apply to suits under Registration Act. 18 M. 99; nor to a suit under the Bengal Tenancy Act. 29 C. 813. Sections 6 and 7 do not extend to suits to enforce a right of pre-emption. 52 I.C. 587=86 P.R. 1919. Section 6 does not apply to an application to set aside an *ex parte* decree. 37 I.C. 292=101 P. R. 1916; 35 I.C. 438 (Bur.); nor to applications for personal decree under O. 34, R. 6, C. P. Code. 56 C. 1117=33 C. W. N. 519=1930 C. 34; 12 I.C. 695=21 M.L.J. 1041; nor to an application for a final decree in a mortgage suit. 40 A. 203=16 A.L.J. 85; 37 C.W.N. 184=144 I.C. 768=1933 C. 508. [In this case it was however held that having regard to O. 32, R. 10, C. P. Code, the suit did not abate but was kept in abeyance and that the application for a final decree was maintainable]. *See also* I.L.R. (1941) Bom. 435=43 Bom.L.R. 329=1941 Bom. 203; nor to an application to make a decree absolute. 48 I.C. 934=15 N.L. R. 36; nor to applications under O. 22, R. 3 of the C. P. Code. 35 I.C. 438. S. 6 does not prevent possession being adverse or the running of limitation against a minor. It only gives an extension of time in his favour. 1928 O. 481. The only disabilities which save the operation of the Limitation Act are those which are created by the statute itself, S. 6 of which recognises only three classes of persons as being under legal disability. It is difficult to bring an idol or a math within the same category as a minor, lunatic or an idiot for whom express provision has been made. 11 Pat.L.T. 403= 1930 P. 455. A disqualified proprietor whose estate is managed by the Court of Wards does not come under the section. 8 O.W.N. 349=1931 O. 177. Where Court of Wards has assumed the superintendence of the property of a minor, it can apply for execution of a decree passed in favour of the minor's father after the period of limitation and rely upon S. 6. 30 S.L.R. 30=163 I.C. 379=1936 S. 84. Insolvency is not a disability under the Limitation Act. 61 M.L.J. 688=1932 M. 170. *See also* 53 L.W. 569=1941 Mad. 449=(1941) 1 M.L. J. 644 (as to effect of minority in the case of manager of Hindu Religious Institution). The mother and guardian of a minor sold certain property belonging to the ward in 1873, and, the ward having died an infant in 1879 or 1880, she succeeded to his other property and died in 1921 without taking steps to set aside the alienation. A reversionary heir instituted a suit in 1922 to recover possession of the property sold from persons holding under the original vendee, *held,* that the suit was barred by limitation because of S. 6 (3) read with Art. 44 of the Limitation Act. The suit became barred on the lapse of three years after the death of the ward, nothwithstanding the fact that he was succeeded by a female heir. 59 M.L. J. 196. *See also* 39 P.L.R. 127=1937 Lah. 485. S. 6 of the Limitation Act is made applicable to the Kumaun Rules by a notification of 1918 and it confers on a minor a large period of limitation for instituting a suit to avoid a sale of Khaikari right. 14 R.D. 635. Under S. 6, the last date for a minor decree-holder to apply in execution is within three years after attaining majority. The guardian of a minor can also apply in execution at any time during the minority, even though his previous application is more than three years old. 32 Bom.L.R. 1299. *See also* 32 Bom.L.R. 1093=1930 B. 508; 1935 L. 144 (1). Ss. 6 and 7 import that during minority the operation of the Limitation Act is suspended and since a minor can apply within 3 years after attaining majority, he may by his guardian or next friend apply at any time before he attains majority. 119 I. C. 39=1929 M. 394.

PERSONAL PRIVILEGE.—The assignee of property from a minor cannot avail himself of the benefit of S. 6. 44 I.C. 890. *See also* 46 I.C. 802=22 C.W.N. 831; 42 M. 637=50 I.C. 380; 9 O.L.J. 88=1922 O. 31. S. 8 is ancillary to and restrictive of the concession granted by Ss. 6 and 7 and does not confer any substantial privilege. 42 M. 637=50 I.C. 380. The transferee cannot maintain a suit even if he brings it on the same day on which the transfer takes place, if it is otherwise barred. 9 O.L.J. 88= 1922 O. 31. But *see* 27 I.C. 118; 18 O.C. 34. *See also* 90 I.C. 741=2 O.W.N. 811. S. 15 (2) does not refer to the extension of time allowed to persons under disability under Ss. 6 and 8. 52 I.C. 725=37 M.L. J. 256.

SUBSEQUENT DISABILITY.—A minor is not entitled to the benefit of S. 6 in respect of a right to sue which accrued before his birth. 54 I.C. 838. Where a cause of action accrued to a person when he was in embryo, he cannot get the advantage of S. 6, as he

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

Illustrations.

(*a*) The right to sue for the hire of a boat accrues to *A* during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(*b*) A right to sue accrues to *Z* during his minority. After the accruer, but while *Z* is still a minor, he becomes insane. Time runs against *Z* from the date when his insanity and minority cease.

(*c*) A right to sue accrues to *X* during his minority. *X* dies before attaining majority, and is succeeded by *Y*, his minor son. Time runs against *Y* from the date of his attaining majority.

7. Where one of several persons jointly entitled to institute a suit or make

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NOTES.

cannot be deemed to be a minor in existence on the date of the conception. 10 L. 713=1929 L. 254 (2). *See also* 1930 L. 394; 1931 M. 456=60 M.L.J. 521. S. 6 does not apply to the case of a minor born subsequent to the alienation objected to. 14 I.C. 60; 8 L. 19=97 I.C. 435; 59 I.C. 678 =1 L. 558; 1927 A. 54; 1937 L. 420. *See also* 43 Bom. L. R. 222=1941 Bom. 197 (adopted son). But if an elder brother of such a person brings a suit to set aside the alienation, the after-born son can join in the suit. 40 C. 966=40 I.A. 213=25 M.L. J. 512 (P. C.). This is so because the second son has no independent right to sue and his right is derived from his elder brother's right. 13 L. 520=1932 L. 605.

MISCELLANEOUS.—Medical evidence is not of much help in determining age. 1928 L. 200. Death of minor—Disability of legal representative. 40 B. 564=37 I.C. 221= 18 Bom.L.R. 579. S. 6 gives the minor the same period of limitation after his attaining majority as an ordinary person gets. There is nothing in S. 8 to extend the period. 43 I.C. 712. *See also* 34 A. 496=10 A.L.J. 3. To set aside the sale under Art. 12 the minor must bring an action exactly within one year from the date of his attaining majority. 43 I.C. 712=30 P.W.R. 1918. An application by minor representative after more than three years but during minority for execution of decree is not barred. 26 O.C. 206=1924 O. 31. *See also* 22 I. C. 637; 21 I.C. 365=16 O.C. 206; 1929 L. 681 =117 I. C. 909. Pro-note executed in favour of minor represented by guardian—Minor is entitled to extend period of limitation under S. 6. 28 Bom.L.R. 1431= 1927 B. 61. *See also* 1932 A.L.J. 1012. Alienation by Hindu father—Suit to set aside by subsequently born son—Limitation—Elder brother existing at the time of alienation—Application of S. 6, Limitation Act. 41 L.W. 610=1935 M. 431. *See also* 18 Lah. 769=40 P.L.R. 188=1938 Lah. 1; (1941) 1 M.L.J. 644. Alienation by Hindu widow—Suit by after-born reversioner—Limitation—Benefit of S. 6—If available. 16 Pat.L.T. 236=1935 P. 256.

Secs. 6 to 9 have been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act (III of 1913).

Secs. 6, 7, 8 and 9: SCOPE AND EFFECT.—The effect of Ss. 6, 7, 8 and 9 of the Limitation Act was to bar the plaintiff's right to sue, whether or not the previously adopted son died a major or a minor. Since the right of the former adopted son was barred by limitation, time having already run against him, no further right to sue in respect of the alienations could accrue to the plaintiff. 43 Bom.L.R. 222=1941 Bom. 197.

Sec. 7: APPLICABILITY.—S. 7 does not apply where disability had not existed when the right to apply accrued. 34 I.C. 86=20 C. W. N. 852. *See also* 11 I.C. 401=14 C.W.N. 845. S. 7 is a disabling section, and in so far as it takes away the right conferred by S. 6, has to be strictly construed. 50 L. W. 562=1939 Mad. 907= (1939) 2 M.L.J. 619. The disability referred in the section means a disability of a kind which is of the nature and existed at the time referred to in S. 6. 24 O.C. 330= 64 I.C. 757. S. 7 clearly has no application

Disability of one of several plaintiffs or applicants.

an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Illustrations.

(*a*) *A* incurs a debt to a firm of which *B, C* and *D* are partners. *B* is insane, and *C* is a minor. *D* can give a discharge of the debt without the concurrence of *B* and *C*. Time runs against *B, C* and *D*.

(*b*) *A* incurs a debt to a firm of which *E, F* and *G* are partners. *E* and *F* are insane, and *G* is a minor. Time will not run against any of them until either *E* or *F* becomes sane, or *G* attains majority.

NOTES.

to any but the cases to which it is made applicable, namely, to debts and execution of decrees. 133 I.C. 155=1931 A. 398. But *see* 25 I.C. 755 (M.). S. 7 applies not only to cases of discharge of debts but also to cases involving immovable property; the word "discharge" in S. 7 is wide enough to include any form of quittance whereby the rights and liabilities between two parties are put an end to." 34 P.L.R. 384=1933 L. 479; 25 I.C. 755; 18 Pat.L.T. 385=1937 P. 435 (F.B.). When several persons jointly interested in a property have been dispossessed, section does not apply if each of the several persons can sue for his individual share. 51 I.C. 797. S. 48, C. P. Code, cannot override S. 7, and does not therefore imply that running of time will not be suspended against a minor. 1929 M. 394=119 I.C. 39. Where some minors were impleaded as co-mortgagees in the place of one of the co-mortgagees since deceased and a final decree is passed but the execution application was filed five years after: *Held*, that it was not barred by limitation. 37 C. W.N. 838.

MEMBERS OF A JOINT FAMILY.—A major manager of a joint Hindu family can give a valid discharge of a decree debt within S. 7 so as to make time run against minor members of the family. 44 I.C. 566; 30 Bom. L.R. 537. *See also* 25 I.C. 755; 15 M.L. T. 100=22 I.C. 76; 30 I.C. 76; 31 Bom. L.R. 963=1929 B. 382; I.L.R. (1941) Kar. 72=1941 Sind 166; (1941) 1 M.L.J. 195. But if he happens to be the guardian *ad litem* or the next friend of a minor coparcener, he would not be competent to give a valid discharge in respect of the subject-matter of the suit or decree sought to be executed wherein he occupies such position without the permission of the Court under O. 32, R. 6, C. P. Code, in respect of the interest of such minor. But when he is not the next friend of a minor in respect of the decree sought to be executed, his powers as manager are not restricted or curtailed by any statutory rule. 161 I.C. 969; 43 L.W. 390=1936 M. 434=70 M.L.J. 700. *See also* 19 Pat.L.T. 855=1939 Pat. 33; 1938 Bom. 392. His right as manager to receive money due under the decree in favour of the family and give a valid discharge without the concurrence of the minor is not in any way affected by the fact that another person than himself represented the minor as next friend in the decree. A minor coparcener cannot therefore claim the benefit of S. 7, in respect of an application by him to execute the decree. *See* 70 M. L. J. 700; 1939 Pat. 33. Where a cause of action accrues to two brothers of a joint Hindu family jointly when they are minors, limitation runs from the date on which the elder of the two becomes major. 43 M. 842 =39 M.L.J. 375; 1930 A.L.J. 852; 12 I.C. 695=21 M.L.J. 1041; 86 I.C. 704=1925 A. 247; 1929 L. 14; 37 Bom.L.R. 225; 1934 M. 469=67 M.L.J. 27; 18 Pat.L.T. 385=1937 P. 435 (F.B.). *See also* 1938 Bom. 206. Mere coming of age of one of the brothers in a joint Hindu family does not raise a presumption that he is the manager of the family in the absence of any evidence. 167 I.C. 934=18 Pat.L.T. 383=1937 P. 155. Where, therefore, a suit is brought by two brothers out of whom one had become major, for possession of lands of which a wrong entry was made in the record-of-rights, which suit would have been barred by time but for the minority of one of them, and there is no evidence to show that the major brother was karta of the family, the suit is not barred as major brother could not have given a valid discharge. *See* 36 Mad. 544; 40 Bom.L.R. 127=1938 Bom. 206; 40 Bom.L.R. 521=1938 Bom. 392; 67 C.L.J. 88 (case of minor member represented by certificated guardian—Major member not competent to give valid discharge). Under the Hindu Law, where there is an eldest member of a family, the presumption is that he is the manager of the family, and he is competent to give a discharge without the concurrence of the other members of the family under S. 7, so far as the Madras Presidency is concerned. It cannot be said that an elder brother or eldest brother must be shown to be acting as the manager. If a party wants to displace the ordinary presumption that the eldest member has acted as manager and contends that he was not in a position to give a valid discharge, it is incumbent on him to prove facts rebutting that presumption. I.L.R. (1940) Mad.

NOTES.

752=1940 Mad. 530=(1940) 1 M.L.J. 195. Where the eldest of several Hindu brothers never acts as the manager of the joint family though he becomes a major, and cannot give a valid discharge without the concurrence of the others, time will not run against the latter under S. 7. 40 Bom.L.R. 1029=1938 Bom. 500. A minor promisee (in a Hindu joint family) of a pronote cannot sue on it after three years, when the adult co-promisee allows it to be barred. 36 M. 544=24 M.L.J. 333 (F.B.). *See also* 1933 M.W.N. 895. S. 7 merely refers to the capacity to give discharge. "If he gives a discharge without any benefit to the family his act may be liable to be challenged by the minors but that is immaterial to the question of limitation." (45 B. 446; 38 M. 118, Foll.) 34 P.L.R. 384=1933 L. 479. One co-heir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other co-heirs. 35 Bom.L.R. 388=1933 B. 245=145 I.C. 164. But where the cause of action is distinct, the mere fact that the elder brother could have joined it with his does not bring the suit within S. 7. 41 M. 102=33 M.L.J. 309. *See also* 53 I.C. 161 =10 L.W. 422; 32 I.C. 802=1915 M.W.N. 908; 38 M. 113=25 M.L.J. 405; 12 I.C. 695 =21 M.L.J. 1041; 52 I.C. 725=37 M.L.J. 256; 53 M.L.J. 677. Applicability of section to suit by a member of a joint Hindu family against a stranger setting up *title by adverse possession*. 155 I.C. 569. In the case of alienation by manager or guardian of minors, the bar of limitation as against one member does not affect other members, if such other members have a right to impeach alienation. 133 I. C. 155=1931 A. 398. [This decision proceeds on the ground that S. 7 applies only to debts.] *See also* 53 L.W. 724=1941 Mad. 678. In the case of an alienation by a widow a remoter reversioner can sue to set it aside independently of the nearer reversioner and if he is a minor at the time of transfer, he can avoid it within three years of his attaining majority. 1938 L. 39; 132 I.C. 665 (L.). *See also* 1940 O.W.N. 1237=1941 Oudh 165. But *see* 1933 L. 524 and 39 P. L. R. 127 holding that a suit by a reversioner to challenge an alienation made by the limited owner is a representative one and if a reversioner competent to challenge the alienation fails to do so within the period of limitation, others can't challenge it afterwards whether minors or otherwise. Where a suit to set aside an alienation by a Hindu father is brought by the eldest son within three years of his attaining majority, sons born subsequent to the alienation are entitled to join in the suit and get their share. 40 C. 966=40 I.A. 213=25 M.L.J. 512 (P.C.). In such a case, limitation will run from the date of the cessation of the elder son's minority. The after-born sons have no independent right to sue. Their right is derived from the eldest son's right to sue. 13 L. 520=1932 L. 605. In the absence of fraud a *karnavan* sufficiently represents a tarwad as to be able to give a discharge even on behalf of the minor members. 25 I.C. 755. Where a Hindu uncle and his minor nephew claim as co-owners under independent titles and not as members of a joint family, the former cannot give a valid discharge of the claim of the latter so as to make limitation run against him also. 31 N.L.R. (Supp.) 191 =162 I.C. 577=1936 N. 80. In Mahomedan family, the heirs are entitled to definite shares as tenants-in-common and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation. 51 I.C. 748=36 M.L.J. 184. And a bar of limitation against one major son does not affect another son. 1929 L. 582. Under the *Punjab Customary law,* minor reversioner's right to contest alienation of ancestral property even when nearer reversioners are in existence, is saved by S. 6. 1933 L. 866=1934 L. 908. So also, his right to contest an adoption. 1934 L. 968 (2). Co-heirs must join in suit for accounts of partnership. 33 I.C. 564. One member of a partnership even if it has been dissolved is entitled to give a valid discharge of a debt to the partnership. 52 I.C. 456=10 L.W. 57. *See also* 33 I.C. 564. A suit by minor brothers to set aside alienatlon by their mother brought after three years after the eldest of them attained majority is barred by time. 45 B. 446=22 Bom.L.R. 1323. *See also* 23 Bom.L.R. 1191=46 B. 535; 42 B. 277=44 I.C. 851; 38 B. 94=15 Bom.L.R. 882; 67 M.L.J. 27=150 I.C. 76=1934 M. 469; 37 Bom.L.R. 225; even if the eldest brother was living separately and at distance. 165 I.C. 656=1936 M. 914.

DISCHARGE BY GUARDIAN.—A Muhammadan mother who is *de facto* guardian having no authority to transfer or deal with the property of the minors cannot give a valid discharge for payments made to the minors. 41 A. 473=50 I.C. 730=17 A.L.J. 582.

JOINT DECREE-HOLDERS.—Decree in favour of major and minor members of joint Hindu family—Discharge—Limitation. 18 I.C. 723. Joint promissory note—Decree in favour of brothers—Elder brother authorised to recover entire amount—Period of minority cannot be excluded. 39 L.W. 62 =148 I.C. 54. Joint decree in favour of one adult and two minors—Persons not proved to be members of joint Hindu family —Adult not acting as karta—He cannot give discharge on minor's behalf. 104 I.C. 668 (25 M. 26; 28 M. 487; 28 C. 465; 47 M. 920; 36 M. 295; 44 C. 120; 31 A. 156, Ref.); 55 C. 608. If one of several decree-holders can give a discharge without the concurrence of others, S. 7 applies. 12 I. C. 503=21 M.L.J. 1088. *See also* 18 I.C. 723; 10 I.C. 464. One of several minor Mahomedan daughters, who are joint decree-holders, cannot, after attaining majority, give a discharge without the concurrence of

Special exceptions.

8. Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(*a*) *A,* to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. *A* has, under the ordinary law, only one year remaining within which to sue. But under section 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(*b*) A right to sue for an hereditary office accrues to *A* who at the time is insane. Six years after the accruer *A* recovers his reason, *A* has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under section 6 read with this section.

(*c*) A right to sue as landlord to recover possession from a tenant accrues to *A,* who is an idiot. *A* dies three years after the accruer, his idiocy continuing up to the date of his death. *A's* representative in interest has, under the ordinary law, nine years from the date of *A's* death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Continuous running of time.

9. Where once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

NOTES.

others. S. 7 will, therefore, apply and time will not run against any of them till all of them become majors for the purpose of the execution of the decree, and it would make no difference that there was a next friend who had instituted the suit on minor's behalf. 119 I.C. 234=1929 L. 467. *See also* 27 A.L.J. 284=116 I.C. 481=1929 A. 142 [7 A. 313, (F.B.), Dist.] Where in a suit by widow of deceased brother and minor, a joint decree was passed, the widow cannot give a valid discharge and the execution application filed by the minor within three years of his attaining majority is not barred. 27 A.L.J. 72=118 I.C. 229 (1) =1922 A. 267 (1). Decree in favour of father—His three sons, two majors and one minor forming members of a joint family constitute a single legal representative and one of them cannot execute the decree nor give a valid discharge. 1931 L. 5=130 I.C. 403. *See also* 30 L.W. 361=1929 M. 394 (a case of joint decree in favour of three minors); 1929 C. 165 (a case of joint decree in favour of a minor and karta of joint family).

MISCELLANEOUS.—Court not bound to raise *ex proprio motu* the special plea in party's favour. 18 I.C. 391=17 C.W.N. 667.

Sec. 8.—Under S. 8 where a plaintiff is a minor when the cause of action arises, time does not run against him until the minority has ceased. A suit brought within the prescribed period after minority is over is not barred. 27 A.L.J. 1233=1929 A. 963.

Sec. 9: SCOPE OF SECTION.—*See* 43 M. 185; 5 O.W.N. 832. *See also* 40 M. 701; 6 P.L.J. 273. S. 9 contemplates only cases where the cause of action continues to exist; but where the cause of auction is cancelled by reason of subsequent events, this section will not apply. 62 C. 66=1935 C. 333. "Disability"—S. 9 covers the case of an alien enemy who is debarred from suing in consequence of a declaration of war. 46 C. 526=23 C.W.N. 157. *See also* 47 I.C. 122. Once time begins to run for a suit on a mortgage, there is no suspension of the running of time during the period. The period of limitation cannot be suspended once the period has begun to run unless the suspension is itself provided for in the Act. 49 A. 565=102 I.C. 96=1927 A. 446. *See also* 1939 Lah. 270. Adjustment of claim—Re-opening of fresh cause of action. 2 L. 320=64 I.C. 454. Suit on a promissory note—Time not extended by reason of suit by executant for declaration of invalidity of note. 50 M. 417=52 M.L.J. 396. It is not open to a plaintiff suing on a pro-note to deduct the time during which insolvency proceedings were pending against the defendant. 42 M. 319=36 M.L.J. 104. When once limitation begins to run for a suit to enforce a mortgage, it is not suspended merely because the mortgaged property is submerged under water, as it does not affect mortgagee's right to bring a suit on the mortgage. 146 I.C. 856=1933 P. 693. Nor when there has been a fusion of the interests of the mortgagor and mortgagee. 35 A. 227=40 I.A. 74=25 M.L.J. 131 (P.C.); 4 L. 90=1924 L. 40. When time once begins to run against a reversioner for contesting the validity of an alienation of ancestral property, no subsequent disability to sue on the ground of minority of another reversioner can suspend it. 29 I.C. 761. When once time has begun to run

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

[1] [For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.]

LEG. REF.

[1] Inserted by Act I of 1929. S. 2. The necessity for the addition of the new para. and the insertion of the new Articles 48-A, 48-B. 134-A, 134-B and 134-C has been fully stated in the Statement of Objects and Reasons. See *Fort St. George Gazette*, Sept. 1927, Pt. II, pp. 439-444.

NOTES.

against a party, the subsequent minority of his heirs does not stop it. 42 I.C. 809. *See also* 1923 R. 98 (2); 18 I.C. 306; 42 M. 319=36 M.L.J. 104. Where a person has begun to hold possession of land adversely to two co-sharers, each being the owner, of a moiety, and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, although he has become jointly interested with the other. 24 C.W.N. 346=53 I.C. 901=38 M.L.J. 313 (P.C.).

Secs. 9 and 15.—Where a decree against the judgment-debtor has been passed before the order of adjudication of the judgment-debtor as insolvent, the time for applying for execution of the decree begins to run, which cannot be suspended by a subsequent disability. Moreover, the disability in such case can be removed by the decree-holder himself applying to the Insolvency Court for permission to sue. Where no such permission is asked, S. 15 cannot possibly apply. 184 I.C. 573=1939 Lah. 270.

Sec. 10.—The amendment of S. 10 (by Act I of 1929) which was effected in consequence of the decision in *Vidya Varuthi's* case is not retrospective and does not apply to suits instituted prior to it. 61 I.A. 50 =56 A. 111=66 M.L.J. 431 (P.C.). Therefore, in a suit brought in 1926 by the Sajjadanashin of a Mahomedan *dargah* (Shrine) for possession of wakf lands from defendants who were at one time mujawars (*i.e.*, attendants and servants of the shrine) and who were in possession in lieu of their services but had been dismissed in 1898. *Held,* that in view of the decision in *Vidya Varuthi's* case the suit did not come within the provisions of S. 10, as it stood before the amendment; that the Sajjadanashin is not a "trustee" in the technical sense nor is any property belonging to the wakf "vested" in him. 61 I.A. 50=56 A. 111=66 M.L.J. 431 (P.C.). *See also* 157 I.C. 181=1935 M. 483.

CONSTRUCTION.—S. 10 and Art. 134 must be read together. S. 10 is in the main designed to meet a suit brought for the purpose of following misapplied trust funds for the benefit of the trust. 20 Bom.L.R. 441; 32 M.L.J. 85. Scope of S. 10. *See* 49 I.A. 37=1922 P.C. 212 (P.C.).

APPLICABILITY.—S. 10 applies only to cases of express trustees and not to constructive trusts. 45 M. 415=32 M.L.J. 119; 1925 P. 68. It excludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations. Nor does it apply to purchasers of property with notice of prior agreement to sell. 1929 N. 298. *See also* 1929 L. 753. A trust, as defined by S. 3 of the Trusts Act, contemplates that the trustee is the legal owner of the trust property, and before there can be a trust, the "trustee" must be the owner, that is, there must be a transfer of the property to the trust before a trust can be created. 1940 Pat. 90. In order to invoke the application of S. 10 the property must be vested in a trustee or trustees for a specific purpose. A person claiming adversely to the trust and on the footing that the trust deed itself was bad cannot contend that the property was held by the trustees for any purpose. Where a person claiming to be an heir of the settlor and to be entitled to the property on the ground that the trust deed was void and that as an heir of the settlor he is entitled along with the other heirs to recover the property from the trustees, S. 10, does not apply. 41 Bom.L.R. 622 =1941 Bom. 307. S. 10 is confined to cases where property has become vested in trust for any specific purpose. 22 A.L.J. 866= 1924 A. 884; it does not apply to principal's suit against agent. 81 I.C. 405=1925 N. 115. Nor to a suit against assigns for valuable consideration. 16 I.C. 53=23 M. L.J. 263; 89 I.C. 483=1925 A. 822. *See also* 46 I.C. 19=20 Bom. L. R. 441. A benamidar is not a trustee. 45 M. 415. Nor depository or a banker. 22 I.C. 936; 1 A.L.J. 422; 52 I.C. 65. S. 10 has no application to "constructive trusts" which are only obligations in the nature of trusts, but only to trusts properly so called. Where a vendor of immovable property leaves a

NOTES.

portion of the sale consideration in the hands of the vendee directing him to pay the same to his minor son when he attains majority, the vendee undertaking to pay interest on the amount retained by him, there is no trust which would attract the operation of S. 10. 1939 Mad. 722=(1939) 1 M.L.J. 820. S. 10 applies to a case of entrustment of money for the specific purpose of investment. I.L.R. (1938) 2 Cal. 81=42 C.W.N. 381=1938 Cal. 336. *See also* 1937 M.W.N. 493. S. 10 does not apply to directors of companies. 1923 L. 58 (2); 54 M. 153=60 M.L.J. 280=1931 M. 58. Nor to a suit by one co-sharer against other for mesne profits. 51 I.C. 393; nor to a suit by a co-sharer against manager of joint Hindu family governed by Dhayabhaga law. I.L.R. (1940) 1 Cal. 183=44 C.W.N. 93=1940 Cal. 51. Money gifts made to bride on occasion of marriage and afterwards according to custom of Nattukottai Chetty community—Hundis handed over to bride's father-in-law—Amounts collected by him and invested by him in family business—Amount to accumulate and to be payable to bride on demand is trust fund—Suit to recover—Limitation—Doctrine of tracing applies with right to charge. 1937 M.W.N. 493. A co-heir recovering debt due to the deceased on behalf of all others is not a trustee for the others. 37 A. 233. A suit against a trustee for failure to obtain possession and income of the trust falls under S. 10. 41 M. 319=42 I.C. 544. But *see* 42 I.C. 543=1922 M. 409. Suit by trustee of temple to recover money from former trustee, which had been taken by him wrongfully from trust funds, is governed by Art. 120, and not by Art. 61 or by S. 10. 40 L.W. 27=1934 M. 542. *See also* 1941 N.L.J. 184=1941 Nag. 181. The words "vested in trust" in S. 10, if they do not necessarily imply a transfer of ownership in the strict sense, do at any rate imply something more than mere possession and temporary control of property. 41 Bom.L.R. 215=1939 Bom. 126. The words "for any specific purpose" merely indicate an express trust, *i.e.*, a trust that is not constructive or one arising by implication of law, or such that there is no doubt as to its specified terms nor any uncertainty as to affirming them. 1930 A. 96; 1937 Bom. 433=39 Bom.L.R. 572; 1938 Mad. 295. Where trust property is leased by trustee in derogation of the trust, S. 10 does not apply if the lessees are assigns for valuable consideration and are not aware that the property was affected by any possible trust when the lease was executed. 1940 Cal. 228. Where, by an arrangement, a person receives a monthly sum of money which is to enure for the benefit of another during the latter's minority, the money when paid to the former becomes vested in him for a specific purpose within the meaning of S. 10. 62 C. 393. A gratuitous transferee of trust property is within S. 10 and therefore there is no limitation of time for following up the property in his hands. 33 I.C. 45=38 M. 1064. *See also* 40 I.C. 50=32 M.L.J. 85; 24 I.C. 369=26 M.L.J. 537. Under S. 10 an express trustee cannot prescribe for a title by adverse possession against his beneficiary; the trustee's legal representatives or assignees are in no better position than the trustee himself. But the rule does not apply in the case of a stranger to the trust who takes possession of the trust property independently of the trustee. The section does not prevent such a person from acquiring title by adverse possession. 157 I.C. 181 (2)=1935 M. 485. Express trust—Meaning of—Agreement for payment of sum out of particular fund—Obligor if a trustee—Suit for recovery of money out of fund—Agreement to pay on demand—Limitation — Promissory note — Assignment — Rights of assignee. 44 M.L.J. 685=46 M. 259=1923 M. 667. Suit to set aside sale in contravention of S. 99 of T. P. Act, S. 10 does not apply. 101 I.C. 896. *See also* 19 Pat.L.T. 367=1938 Pat. 273. S. 10 applies to a suit brought by the reversioners of a lady, whose property was put in charge, of a *Sipurdar,* to recover the property from his legal representatives. 101 I.C. 427. Section applies to suit against heirs of express trustee for ascertainment. 52 B. 184=107 I.C. 705 (2)=1928 B. 58. It is not necessary that the property followed should be identical property in respect of which a breach of trust has been committed. I. L. R. (1940) Nag. 94=1938 Nag. 30. Where a testator made a will bequeathing all his property to *A* and also entered into a contract with *A's* father not to revoke the same but later executed a second will by which he revoked the first and bequeathed all his property to *R,* his wife, whom he appointed executrix and it was contended that by virtue of the contract, there was a trust created in favour of *A*. *Held,* that the trust did not fall within S. 10, as it could not be said that the property was vested in the executrix under the second will for the specific purpose of making them over to *A*. 58 I. A. 279=10 P. 851=61 M.L.J. 78 (P.C.). *See also* 1938 P.W.N. 186=19 Pat. L. T. 202. Once a trust has been declared invalid *ab initio* S. 10 can have no application at all to a suit for account of rents of property held under trust. 1940 Rang.L.R. 136=1939 Rang. 365. S. 10 does not apply to a claim for an account on the footing of wilful default. Such a claim is liable to be barred by limitation and Art. 120 is the article applicable. 1940 Rang.L.R. 273=1940 Rang. 207. Property held by a Mahant of a math for maintaining the math and the office relating thereto is not property which "has become vested in trust for any specific purpose." The endowments are not "conveyed in trust" nor is the head of a math a "trustee" with regard to them save as to specific property proved to have been vested

NOTES.

in him for a specific object. So S. 10 is not applicable to property appertaining to the mahant of an asthan. [44 M. 834 (P. C.). Rel. on] 9 Luck. 384=1934 O. 96. As to temple funds, *see* 38 Bom.L.R. 808=1936 Bom. 412; 1941 P.C. 130 (P.C.). In the mofussil Parsis are governed by rules of justice, equity and good conscience. The rule in *Vidya Varuthi's* case. 44 M. 831 (P.C.), cannot be applied to a Parsi charity. Where the vendees acted on behalf of the Anjuman and purchased properties with the express purpose of guarding against a danger to the fire temple. *Held,* that the vendees were express trustees for purpose of S. 10, and their subsequent conduct in derogation of the trust should be disregarded. 35 Bom.L.R. 1091=1934 B. 1.

EXPRESS TRUST.—Persons could not by breach of trust continued for a period of 12 years confer a statutory title on themselves in derogation or extinction of the trust. 36 C.L.J. 35=50 I.C. 49. Time would be no bar to an action against the shebaits for recovery of the debutter properties from their hands. 1925 C. 1; 25 A.L.J. 1047. An administrator in whom no special trust is vested for a specific purpose is not a trustee within the meaning of S. 10. 2 P.L.J. 642=40 I.C. 860. A guardian, appointed under the Guardians and Wards Act, of the property of a minor, is not an express trustee within the meaning of S. 10. 39 Bom. L.R. 351. A ward cannot therefore take advantage of S. 10 to avoid the bar of limitation for a suit against an ex-guardian. 39 Bom.L.R. 351=I.L.R. (1937) Bom. 636 =1937 Bom. 334. Under S. 10 as amended, the manager of a Hindu Religious Endowment is in the same position as an express trustee, although it cannot be said that any property is conveyed to a shebait or mutawalli, in the case of a dedication under the Hindu or Mahomedan Law, or vested in him. Whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interests regulated by custom or usage. 157 I.C. 181 =1935 M. 483. As a general rule, the high priest of a temple and a person in like position, is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. The property is not conveyed to or vested in him nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration. But a high priest appointed under a decree of Court as a "trustee for all the properties movable and immovable devoted to the service" of the temple God, is an exception to the general rule. A suit against his widow for the recovery of the amount due on certain war bonds vested in him in trust would fall within S. 10 and will not be barred by any length of time. 22 Pat.L.T. 981=196 I.C. 696=1941 P.C. 130 (P.C.).

TRUSTEE DE SON TORT.—A suit for accounts in respect of trust property comes under S. 10 and a trustee *de son tort* stands in the same position as an express trustee. 57 I. C. 805=24 C.W.N. 752; 105 I.C. 721=1927 L. 773 (2); 1941 All. 1; but not an executor *de son tort* in whom no special trust is vested for a specific purpose. 1929 L. 753. Trustees *de son tort* would come within the operation of S. 10, but the existence of a trust must be first established before the section may be applied against them. I. L. R. (1938) 1 Cal. 652=1938 Cal. 673. S. 10 does not apply to the case of trustees *de son tort*. The section is intended to apply to express trustees and their representatives which a trustee *de son tort* is not. 13 Luck. 344=1937 Oudh 373. S. 10 will not apply to a suit for accounts against a trustee *de son tort,* for it applies to cases of express trust alone. All that the amendment of 1929 did was to make a Hindu *shebait* or a Mahomedan *mutwalli* a trustee in whom property may be said to have vested. 1940 A.L.J. 705.

TRUST PROPERTY.—A suit by an alleged trustee for recovery of trust property against person claiming himself to be trustee is governed by Art. 144 of the Act. 46 I. A. 204=53 I.C. 288=37 M.L.J. 460 (P. C.). When the guardian gives a discharge for a decree in favour of the minor in consideration of the transfer to him of certain property, he holds the property as a trustee for the minor. 28 I.C. 861. Where a father executed a settlement deed by which the son who was given the properties was directed to pay a certain amount to the settlor's daughter. *Held,* that there was a trust in favour of the daughters and a suit to enforce the same was not governed by any rule of limitation. 39 L.W. 496=1934 M. 273. A suit against the *karta* for account is not governed by it, as *karta* is not vested with property of the family. 58 I.C. 877=25 C.W.N. 356. A suit against a trustee for failure to obtain possession of the corpus and income of the trust property is not within S. 10 but is governed by the ordinary law of limitation. 42 I.C. 543. *See also* 70 I.C. 87; 1922 M. 409. Suit by one executor against legal representatives of deceased co-executor—S. 10 does not apply. 1927 B. 424=29 Bom.L.R. 418. Dispute between father and son as to possession of land—Order under S. 146, Cr.P. Code—Land put in possession of receiver and income deposited in Government treasury—Suit by son after death of father for income so deposited—Art. 120 applies—Whether Government is trustee under S. 10. 46 L.W. 632=1937 Mad. 787=(1937) 2 M.L.J. 296.

"VESTING."—The word "vesting" means merely properly having control of the property. 1926 M. 109=49 M.L.J. 468. The word "vest," implies that the property be-

Suits on foreign contracts.

11. (1) Suits instituted in British India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

(2) No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of time in legal proceedings.

12. (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

NOTES.

comes in law the property of the trustee. 3 R. 206=1925 R. 289. *See also* I.L.R. (1939) Bom. 154=41 Bom.L.R. 215=1939 Bom. 126. To save limitation under S. 10 it must be shown that the defendants are persons "in whom property has become vested in trust for any specific purpose." Trusts which have not been declared by any specific words but which the law would imply from the existence of particular facts or fiduciary relations are excluded from the operation of the section. One useful test for determining whether any particular trust is within the provisions of the section or not is to see if a suit for the purpose of following the trust property in the hands of the trustee would be to restore it to the trust. I.L.R. (1938) 1 Cal. 652=1938 Cal. 673. If a fund is handed over to one in order that he should pay it to a temple or utilize it for the temple, it must be held to have vested in him as trustee for that purpose, and the managers of the temple are entitled to rely on S. 10, and to call upon him to account. 38 Bom.L.R. 808=165 I.C. 1001=1936 B. 412. While transfer of proprietary rights is not intended, mere transference of management or control is not eough to satisfy the requirements of "vesting" as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting." 61 C. 119=1934 C. 87. A suit for recovery of property from a person in whom it was vested in trust for the upkeep of a shrine, or from a gratuitous transferee from him is governed by S. 10. 53 I.C. 577=109 P.R. 1919. Trust property—Land assigned by mutual agreement—Suit for its recovery—Limitation. 45 I.C. 325=66 P.R. 1918. Failure of trustee to reduce trust property to possession—Liability for acts on default of predecessors—Failure to account—Limitation. 70 I.C. 87=1922 M. 409; 42 I.C. 543. S. 10 controls Art. 134 and gives the clue to its meaning. 1922 L. 271. The words of S. 10 are wide enough to cover a case by one of two trustees, who claims against the other that the property ought to be held and managed by both. 18 L.W. 907=1924 M. 125. A new trustee succeeds to the office of a former trustee and not to him personally and is not therefore his legal representative under this section. 4 L.W. 369=34 I.C. 945.

A "SPECIFIC PURPOSE" means a purpose which is either actually and specifically defined in the deed of trust or a purpose which from the specified terms can be certainly affirmed. 29 Bom.L.R. 241=1927 B. 398. *See also* 49 I.A. 37=1932 P.C. 212 (P.C.); 58 I.A. 1=60 M.L.J. 1=8 R. 645 (P.C.); 1933 A. 96. The phrase "trust for a specific purpose" in S. 10 it only a more expanded mode of constituting express trust in English law. 1941 Mad. 811=(1941) 2 M. L.J. 558. Where by a family arrangement, a hundi was vested in defendant for payment of debts of plaintiff's husband, and any balance that might remain after payment of his creditors was to be paid to the latter. *Held,* that this arrangement constituted a trust for specific purpose within the meaning of S. 10. 1936 Mad. 876. The purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section. 61 C. 119=1934 C. 87.

Sec. 12: APPLICABILITY.—The rules as to computation of period of limitation laid down in Part III of the Act are not intended by the Legislature to apply only to periods of limitation prescribed by the Schedule but apply also to periods of limitation provided for by other enactments. I.L.R. (1939) All. 647=1939 A.L.J. 522 =1939 All. 403 (F.B.). Section is only applicable to suits in British India and not to proceedings in foreign Courts. 8 L. 54=102 I.C. 523 (2)=1927 L. 200. Section does not apply to applications under Land Acquisition Act. 104 I.C. 399; 9 L. 244; 54 A. 282=1932 A. 598. Nor to a proceeding under S. 66 (3) of the Income-tax Act. 1931 A.L.J. 593=1931 A. 673. The Commissioner of Income-tax preferring an application for leave to appeal to the Privy Council is entitled in computing limitation to deduct the period taken for delivering copies of the judgment. 59 C. 251=1932 C. 587. In computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the judgment cannot be excluded. I.L.R. (1939) Lah. 156=1939 Lah. 43. *See also* 1941 Oudh 247. Time taken actually in obtaining copies is to be deducted in calculating the period of limitation. 49 I.A. 307=43 M.L.J. 765=49 C. 999=27 C.W.N. 156 (P.C.); 87 I.C. 93=1924 B. 185. *See also* 15 Pat.L.T. 649=1934 P. 236. Applicant must apply once for all for necessary copies. 18 A.L.J. 208=42 A. 260. *See also* 1938 A.W.R. (B.R.) 140. An appeal presented under S. 46, Provincial Insolvency Act, falls under S. 12. 10 A.L.J. 3=34 A. 496. *See also* 1937 A.M.L.J. 101. S. 12 is applicable to pauper appeals. 1923 L. 684. The rules under the Letters Patent do not amount to a special or local law. Consequently the time requisite for obtaining a copy of the judgment appealed against cannot be excluded in computing the time for filing an appeal under the Letters Patent. 16 L. 448=1935 L. 328 (F.B.). S. 12 does not apply to appeals under Cl. 10 of the Letters Patent. 5 Pat.L.J. 701=59 I.C. 179. S. 12 governs appeals under the Letters Patent from an order passed by a Single Judge of the High Court in the exercise of its original jurisdiction, whether ordinary or extraordinary and from the judgments passed by the High Court in its appellate jurisdiction. I.L.R. (1941) Lah. 191=43 P.L.R. 297=1941 Lah. 257 (F.B.). S. 12 (2) applies to appeals from decrees or orders of the original side of the Rangoon High Court under Cl. 13 of the Letters Patent. 12 R. 525. A party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment. 16 Luck. 638=1941 O.W.N. 352=1941 A.W.R. (C.C.) 106=1941 Oudh 247. *See also* 1939 Lah. 43. Only the time requisite for obtaining a copy of the judgment appealed against and of the decree can be excluded. 1923 L. 461. S. 12 (3) allows to be excluded only the time requisite for obtaining a copy of the judgment against which the appeal is preferred. Where the rules of the Court require the filing of the judgment of the Court of first instance in a second appeal, the time requisite for obtaining it does not fall under S. 12. 1923 L. 96; 1923 L. 461. But *see* 4 R. 310=1925 R. 344. *See also* on the point, 100 I.C. 854=1927 L. 192; 1928 A. 416; 1928 L. 755. *See also* 196 I.C. 654=1941 Pesh. 74. The period till the decree is actually prepared and signed should be excluded for purposes of the limitation if the application for copy is made before the preparation of the decree. 43 P.L.R. 88=1941 Lah. 212. Period between date of judgment and date of signing decree can be deducted. 1939 Rang.L.R. 686. Time spent in obtaining translation of the judgment cannot be excluded under S. 12. 59 I.C. 965. Where an appeal was filed on the last date of limitation deducting the time taken in obtaining copies of the judgment and the decree, but with the memorandum of appeal a copy of the translation of the decree, unsigned by the lower Court was filed, but no copy of decree was applied for. *Held,* that translation of decree unsigned by the lower Court is not a proper substitute for the decree so as to save limitation. 150 I.C. 781 (1)=1934 L. 304 (2). Where a formal decree has been drawn up in a miscellaneous execution case the time, requisite for obtaining a copy of such a decree is to be deducted under S. 12. 1 P.L.T. 33=54 I.C. 630. Date of delivery of judgment communicated to parties. Limitation begins to run from the date when the delivery of judgment was communicated to the counsel for the parties. 98 I.C. 942=1927 L. 59. *See also* 149 I.C. 127=1934 L. 135; (1941), A.W.R. (Rev.) 353; 45 C.W.N. 498=1941 Cal. 378. In order to entitle an appellant to claim deduction of the time requisite to obtain a copy of the decree appealed against under S. 12 it is not necessary that the copy should be applied for before the expiry of the time for preferring the appeal. An appeal which would have been in time if presented on 23-2-1937 was actually presented on 16-2-1937, but without the copies of the judgment and the decree which the Court was asked to dispense with. The Court on 19-2-1937 dispensed with the copy of the judgment, but refused to dispense with a copy of the decree. A copy of the decree was applied for on 23-2-1937, obtained on 1-3-1937 and filed on the same date. *Held,* that even assuming the appeal to have been properly filed on 1-3-1937, the appeal was in time, the appellant being entitled to deduct the time requisite for obtaining the copy of the decree. 40 Bom.L.R. 389=1938 Bom. 288. *See also* 1938 Lah. 707. Where application of copies was made to a wrong Court on account of *bona fide* mistake and subsequent application was properly made and appeal filed out of time, the delay could be excused either under S. 12 or S. 5, Limitation Act. 1929 O. 348. Appeals filed in time with copies of judgment and subsequently with copies of decrees within period of limitation are not time-barred. 13 R.D. 356.

AWARD.—The period taken for obtaining a copy of the award must be excluded in computing the period of limitation for an application to set aside the award. 46 C. 721=53 I.C. 46=23 C.W.N. 280. *See also* 29 I.C. 860; 142 I.C. 835=1933 R. 38; 140 I.C. 11=1932 M. 588.

COMPUTATION OF TIME.—*See* 37 P.L.R. 235. In computing the period of limitation

NOTES.

prescribed for an appeal two periods are to be excluded. They are: (1) the day on which the judgment is pronounced; and (2) the time (*i.e.*), the days requisite for obtaining copy of the decree. These two are distinct and separate in their purpose. It cannot be contended that the day on which an application for copy is made is not a day requisite for obtaining the copy. Therefore it is clear that an appellant is entitled to a deduction of the number of days beginning with the day on which he applies for, to the day on which he obtains the copy, from the number of clear days of limitation prescribed by statute. It may be that in an exceptioned case, where the copy is applied for on the same day as the judgment is delivered, one day happens to be excluded twice. I.L.R. (1939) Nag. 185=1939 N.L.J. 173=1939 Nag. 150. *See also* 40 Bom.L.R. 1211=1939 Bom. 46 (Day on which copies are ready would also be excluded). Under S. 12, only the time from the date of making the application for copies to the date on which the copies are ready for delivery can be excluded. 1923 L. 696. As to exclusion of time taken to communicate appellant that copy is ready, *see* 149 I.C. 127=1934 L. 135. *See also* 1938 R.D. 78=1938 A.W.R. (B.R.) 63. Application for copy must be before expiry of the period allowed. 58 I.C. 408=32 C.L.J. 127; 61 P.L.R. 1911=9 I.C. 381. Application for copy—Dismissal—Fresh application whether a continuation. 1932 M.W.N. 328. Where the time for obtaining copies of judgment of decree and judgment are two distinct periods and not overlapping, both periods can be deducted under S. 12. 48 B. 433=1924 B. 425=26 Bom.L.R. 362. *See also* 65 C.L.J. 415; 37 P.L.R. 510; 75 I.C. 265; 1925 A. 436; 47 A. 539=87 I.C. 484; 106 I.C. 57=1928 N. 131. The question as to the time requisite for obtaining copies is one of fact. 1922 L. 423; 37 P.L.R. 510. The appellant applying for copies on the day on which the judgment is delivered is not entitled to exclude that day twice over. 40 I.C. 425=13 N.L.R. 89; 1930 N. 129. *See also* 1922 L. 170; 62 I.C. 649=6 P.L.J. 350 (F.B.). But *see* 1924 L. 599, where it is held that the date on which judgment is pronounced has to be excluded and then the time requisite for obtaining copies. In a suit filed on 9th May, 1910, a Monday, on a promissory note, dated 7th May, 1907, *held*, that limitation began to run from the expiration of the 7th May, 1907, and expired, at 12 midnight on 7th May, 1910 and hence the suit was barred by time. 18 I.C. 574. In computing the time required for obtaining copies for the purpose of appeal, an extra day cannot be allowed for the delivery of the copies in addition to the day they are ready for delivery. 38 I.C. 464=10 S.L.R. 165. *See also* 142 I.C. 230=1933 Pesh. 22 (copy despatched by post). Judgment—Deduction of time—When allowed. 103 I.C. 498=1927 L. 717. Time spent by copying agent in getting estimate and putting in application cannot be deducted. 104 I.C. 586. *See also* 35 P.L.R. 713. But *see contra* 17 L. 429=1936 L. 771 (F.B.); 38 P.L.R. 220=1936 L. 550; time spent by laches of copying department should be deducted. 1936 L. 650. As to delay caused by the ignorance of the procedure in the copyist department, *see* 132 I.C. 777=1931 O. 314. As to effect of copying department not following the prescribed rules, *see* 38 P.L.R. 852=161 I.C. 215=1936 L. 670. A copying agent in dealing with an application presented in accordance with the rules, does not act as a private agent of the applicant, but as an official of the Copying Department, which is entrusted with the duty of preparing and certifying copies. 17 Lah. 429=1936 Lah. 771. Where appeal is filed in time as regards judgment, it is not time-barred, though the decree copy was applied for after expiration of limitation period. 9 L.R. 268 (Rev.)=12 R.D. 603. *See also* 13 R.D. 356. The period occupied by a party appealing against an order, in an attempt to obtain a variation of the order and in making application to the Registrar for something which was connected with the settling of the order, could not be charged against him, and could be deducted by him in computing the period of limitation prescribed for the appeal. 1937 P.C. 107=(1937) 1 M.L.J. 702 (P.C.). Where an application for amendment of decree was rejected, period cannot be allowed to be computed from the date of rejecting the application. 113 I.C. 580=1928 P. 265. Where a party applies for a copy of the judgment alone and sometime later applies for a copy of the decree, the time required for obtaining the copy of the judgment *plus* the time requisite for obtaining a copy of the decree should be excluded, provided that days on which both copies were being prepared cannot be doubly excluded, from the computation of the period of limitation. It is immaterial whether the period of limitation prescribed in Sch. I to the Limitation Act had expired when a copy of the decree was applied for. 26 N.L.R. 66=1930 N. 113 (F.B.). 39 Bom.L.R. 32=168 I.C. 77=1937 B. 162 (F.B.); 164 I.C. 1069=1936 Pesh. 179; 165 I.C. 712 (F.B.); 165 I.C. 578 (2)=1936 O.W.N. 1008=1936 O. 65. The words "period prescribed for a suit" have reference only to the period prescribed at the end in the schedule. 35 C.W.N. 370=58 C. 1148=1931 C. 785.

"TIME REQUISITE".—The time requisite in S. 12 is the time beyond the appellant's control occupied in obtaining the copy which accompanies the appeal and not an ideal lesser period which might have been occupied if the application for copy had been filed at some other date. Thus, the Court cannot restrict the time granted by the statute by adding to it a limitation that, where an appellant has got more than one copy of

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

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judgment and decree, he ought, if he seeks exclusion of time for obtaining the copy, to use the first copy obtained by him. 57 M. 560=1934 M. 306=66 M.L.J. 687 (F.B.). Day on which copy is notified to be ready should be excluded. 48 L.W. 242=1938 Mad. 823=(1938) 2 M.L.J. 283, copy stopped for want of correct information—Intervening holidays to be deducted. I.L.R. (1938) Nag. 342=1936 Nag. 289. The 'time requisite' means time properly required. Though a party gives a wrong suit number, if the office takes time to find out the mistake, the party should not suffer for such delay. The time during which copying is stopped for want of funds should not count, but should be excluded where there was neither want of *bona fides* nor delay in supplying the extra charges. I.L.R. (1940) Nag. 312=1938 N.L.J. 159=1938 Nag. 287. The question whether the time was requisite is always one of fact to be decided in the circumstances of each case and the Court cannot impose upon the statutory right of the appellant a restriction not warranted by the Act. I.L.R. (1937) Bom. 443=39 Bom.L.R. 32=1937 Bom. 162 (F.B.). Where there were two different applications on two different dates for copies of judgment and decree, the time taken in obtaining the copy of the decree, can be excluded for purposes of computing the period of limitation even though the application for such a copy was filed after expiry of the time allowed for filing appeals, provided that it was in time after taking into calculation the time taken in obtaining the copy of the judgment. 1938 A.W.R. (B.R.) 140. *See also* 165 I. C. 712; 1936 Pesh. 179. Time unnecessarily occupied is not time requisite within the meaning of the section. 54 C. 481=1927 C. 623; 97 I.C. 728; 43 M.L.J. 765; 52 C. 342; 69 I.C. 999; 103 I.C. 235 (2). *See also* 101 I.C. 136=1927 O. 129; 1936 Rang. 201; 17 Lah. 574=38 P.L.R. 1050. In applying S. 12 (2) the Court has to consider whether the appellant has exercised reasonable and proper diligence in obtaining a copy of the order appealed against. 38 Bom.L.R. 1281=1937 B. 64. Wrong information supplied to copying department—Delay caused by—Right to exclusion of time. 155 I.C. 588=1935 N. 109. "Requisite" is a strong word. It means properly required. 6 R. 302=55 I.A. 161=54 M.L.J. 696 (P. C.). The application for the copies need not be made by the appellants in person. 149 I.C. 1127=1934 L. 135. *See also* 1936 Lah. 771=17 Lah. 429. An application for a copy, whether made in person or by post, which bears the necessary Court-fee stamp and is addressed to the proper officer is a valid application, even if it is not accompanied by the full cost of preparing and certifying the copy. Under the rules for the supply of copies, the time necessary for ascertaining the cost of preparing a copy is time 'requisite' for obtaining the copy. 17 Lah. 429=1936 Lah. 771. Where the applicant for copies of the judgment and the decree deposits Rs. 5 along with his application and also pays the further sum demanded without delay, in accordance with the rules prescribed, the whole period from the date of the application to the date of the supply of the copies must be held to have been 'requisite' for obtaining the copies. 17 L. 574=38 P.L.R. 1050. It would not make any difference even if there was a delay of three or four days to deposit the amount called for. 1936 L. 1007. *See also* 167 I.C. 250=39 P.L.R. 374 (application for copy not accompanied by deposit of fees as required by rules not proper—Time cannot be deducted). Time requisite to obtain a copy of the decree, when the necessity of filing a copy of the decree is dispensed with by the rules, cannot be deducted. 1927 R. 20=5 Bur.L.J. 187. In an application for leave to appeal to Privy Council the time taken in obtaining the copy of the decree can be deducted and not the time taken in obtaining the copy of the judgment. 118 I.C. 212=1929 S. 206; 152 I.C. 384=1935 A. 99. *See also* 1935 A.L.J. 291=1935 A. 258. The expression "decree appealed from" in S. 12 (3) in the case of an application for leave to appeal really means "when a decree is sought to be appealed from." 48 M. 933=1925 M. 1241=49 M.L.J. 418. *See also* 1939 Lah. 378 (time spent in obtaining copy of first Court's judgment); 1937 Lah. 691 (time spent in getting copies of grounds of appeal before lower appellate Court). It is not necessary for the applicant to obtain a copy of the judgment for the purpose of making his *application for*

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review. If however he does make an application for copy, the time taken for obtaining the same may be excluded under S. 12 (2). 1933 A.L.J. 1631=1934 A. 367. *See also* 41 C.W.N. 129, where it was held that, in computing the period of limitation for an application for review of judgment on the original side of the High Court, the applicant is entitled to exclude the time between the decree and the filing thereof and also the period required for obtaining a copy of the decree, because of R. 27 of Ch. 16 of the High Court Rules (Calcutta). *For a revision petition* a copy of the judgment of the trial Court is required as a matter of practice, but that is more in the interests of the petitioner himself than an absolute necessity for the validity of the petition. A petitioner must therefore apply for both the copies simultaneously, that is to say, for the copy of the lower appellate Court's judgment and of the trial Court's judgment. If he is unable to get the trial Court's judgment within the period of limitation, he must present his revision petition with the copy of the lower appellate Court's judgment attached to it, and if he satisfies the High Court that he had applied simultaneously, ordinarily time would be given to his petition. Else, time required for trial Court's judgment is not excluded under S. 12. 35 P.L.R. 274=1934 Pesh. 9. *See also* 1935 L. 341. The amended S. 29 makes S. 12 applicable to all special and local laws, but the rules of the High Court do not come under that category. Under the Patna High Court Rules, a copy of the judgment or decree is not necessary for filing *a letters patent appeal,* and so the time taken for obtaining a copy cannot be deducted in computing the period of limitation for a letters patent appeal (*i.e.*, thirty days). 15 Pat. L.T. 301=1934 P. 353. But *see also* 8 B. R. 330. When it is not necessary to file a copy of the decree along with the application, the time between the judgment and the signing of the decree cannot be excluded under this section. 1935 L. 341. Nor can the time spent in obtaining copy of the decree be excluded, where the copy is not filed together with the application, but has been filed in some other proceeding. 1935 R. 184.

DECREE LATER THAN JUDGMENT.—The "date of decree" for calculating time for appeal is the date of the judgment, but when the decree is drafted later owing to time being granted for extra Court-fee, the time given must be excluded under S. 12 (2). 25 I.C. 67. The period between the delivery of judgment and the preparation and signing of the decree would be excluded from the period of limitation prescribed for filing the appeal if the application for copy is made before the preparation of the decree. 75 I. C. 265=1 P.L.R. 459. *See also* 1939 Rang. L.R. 686; 7 R. 13=1929 R. 116; 56 C. 709 =1929 C. 734; 29 N.L.R. 220=1933 N. 125. But *see also* 63 I.C. 278=6 P.L.J. 237; 25 I.C. 67; 10 I.C. 542=15 C.W.N. 787; 20 C.W.N. 967=35 I.C. 348=24 C. L.J. 235; 98 I.C. 1057=1927 N. 1; 1939 Cal. 711=43 C.W.N. 1139. *See also* 42 Bom.L.R. 872=1940 Bom. 415; 15 Luck. 376=1940 Oudh 173; 20 Pat.L.T. 316=1939 Pat. 135; 1937 Cal. 732. No period between the date of the judgment and the date of the decree can be deducted from the period of limitation as requisite for obtaining copies under S. 12. 63 I.C. 278=6 P. L.J. 237. To entitle the appellant to exclude time under S. 12, it is not sufficient to say that there is no decree or order in existence of which a copy could be obtained. Any delay in obtaining a copy of the decree or order, for which delay the appellant is responsible, cannot be deducted in computing the time requisite for obtaining such copy. 61 C. 306=38 C.W.N. 702=1934 C. 543; 15 Pat.L.T. 649=1934 P. 266. But *see* 1936 L. 976, where it was held that where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date. [13 C. 104 (F.B.); 1 P.L.J. 573 (F. B.) and 1924 N. 271, Foll.] In the case of an appeal from the Original Side, 'the time requisite for obtaining a copy of the decree or order, which can be excluded under S. 12 may include the period prior to an application for a copy of the order, where such application, though not made within twenty days from the date when the order was pronounced, was made before the order was formally drawn up and the delay in the drawing up of the order was not due to the laches of the party. 59 C. 1215=36 C.W. N. 469=1932 C. 331 (F.B.). The delay in signing a decree cannot entitle an appellant to His Majesty in Council to deduct the period between the signing of the judgment and of the decree in computing the period of limitation, except when the appellant has made an application prior to the signing of decree, but if no application is made, the non-signature has no effect. 57 I.C. 312=1 Pat.L.T. 262. *See also* 118 I.C. 212=1929 S. 206; 152 I.C. 419=11 O.W.N. 1359. The time which elapsed between the delivery of the judgment and the signing of the decree should be excluded in calculating the period of limitation for the appeal. 49 I.C. 664. *See also* 62 I.C. 537=5 S.L.R. 16.

HOLIDAYS.—The period during which the Court was closed for the long vacation was time requisite for obtaining copies within S. 12. 49 I. C. 664. Where immediately after the signing of a decree, the Court is closed, the period during which it is so closed ought to be excluded in computing the period of limitation. 11 I.C. 387=13 C. L.J. 544. *See also* 34 A. 41=12 I.C. 183 =8 A.L.J. 1095; I.L.R. (1938) All. 209

Exclusion of time of defendant's absence from British India and certain other territories.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of [1][the Central Government or the Crown Representative] shall be excluded.

14. (1) In computing the period of limitation prescribed for any suit, the

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[1] Substituted for "the Government" by the A.O., 1937.

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=1937 A.L.J. 1279=1938 All. 106; 1941 O.W.N. 1223=1941 O.A. 85; 49 I.C. 664; 63 I.C. 922=12 L.W. 460; 43 M. 644=38 M.L.J. 465; 1929 P. 615; 29 I.C. 833 (N.). So also where Court closed from the next day after judgment. 146 I.C. 931. The publication of a notification that copies will be granted during the long vacation prevents the vacation from being excluded as the period for granting a copy of the judgment or decree. 36 M.L.J. 122=50 I.C. 518. *See also* 49 I.C. 626=36 M.L.J. 62; 14 R. 276=162 I.C. 853=1936 R. 201. Sundays intervening after the calling for the stamps and the date of the copies being announced as ready must be included in the time requisite for obtaining copies and should be deducted in calculating the time for appeal. 25 M.L.J. 354=21 I.C. 192; 1933 N. 362. Holidays—Judgment delivered during vacation—Application made long after re-opening—Deduction not to be allowed. 11 I.C. 339=(1911) 1 M.W.N. 364. Under Cl. (2) of the Rule in General Letter No. 16, whenever there is any holiday or holidays immediately following the day of application for the copy of the decree and the date of notification of the requisite number of stamps and folios such holiday or holidays must always be excluded in computing the period of limitation for appeal. This exclusion is not restricted to the cases where the stamps and folios are supplied on the re-opening day. 58 C. 969=35 C. W.N. 451=1931 C. 731. *See also* 145 I.C. 742=1933 N. 218 as to the practice in Nagpur. An application for a copy was made in order to file an appeal. But the copying was stopped for want of correct information from the applicant. Holidays having intervened, the applicant supplied it during the holidays. *Held,* that the applicant was entitled to deduct the holidays in computing the time requisite for obtaining the copy. 1936 N. 289. An applicant for a copy should pay in advance a sum sufficient for the preparation of the copy. If there is a further demand and he supplies it immediately following a holiday, the holidays may be excluded in computing limitation. 61 I.C. 889. Where a copy application is made through post, the time occupied by the Post Office in conveying the application and fees to the copying office and in carrying back the copies to the applicant is outside the computation under S. 12. A tender of copying fees transmitted by money order and reaching the office on a holiday is not a tender at the proper time. 26 I.C. 819=10 N.L.R. 139. *See also* 17 I.C. 624=8 N.L.R. 172. Holidays—Copy of judgment—Time taken—Deduction of—Intervention of vacation. 25 O.C. 71=9 O.L.J. 436. Holidays—Application for copies to be made on the day following the holidays. 60 I.C. 493. *See also* 1938 All. 106; 1938 Lah. 317=40 P.L.R. 74; 1942 O. W.N. (B.R.) 132=1942 R.D. 198. Time requisite for obtaining a copy need not be continuous; hence vacation is part of such time. 20 C.W.N. 1303; 1 P.L.J. 48=35 I.C. 888. Period for preferring appeal expiring during vacation, a copy application was filed after re-opening and appeal preferred immediately after obtaining copy—Limitation is saved. 6 R. 743=1929 R. 96 (1); *see also* 8 O.W.N. 191=1931 O. 314.

Sec. 13.—Strict proof of the duration of the defendant's absence from British India must be adduced by the plaintiff. 9 I.C. 568; 9 M.L.T. 217. Basra is not a territory under the administration of the Government of India within the meaning of S. 13. 45 A. 18=20 A.L.J. 786=1923 A. 64. A plaintiff is entitled to deduct the time during which the defendant had been absent in Basra. (*Ibid.*) Secundrabad cantonment is under the administration of the Government of India within the meaning of S. 13, and the period of time during which the defendant has been living in Secundrabad cannot be excluded. 39 Bom.L.R. 263=1937 Bom. 242. *See also* 40 P.L.R. 92=1938 Lah. 225. In a suit against a Native Prince, his residence is immaterial as the Prince could be sued by his agent. 30 Bom. L.R. 1463. Applicability of—Cause of action arising out of British India—"Absence from British India"—Meaning of. *See* 1928 M.W.N. 543=1928 M. 1088. 1941 A.M. L.J. 41.

Sec. 14: OBJECT.—S. 14 should be liberally construed, the principle being that limitation would remain in suspense while the plaintiff was *bona fide* litigating on his rights in a Court of Justice. 44 M.L.J. 179=1923 M. 347. A person claiming the benefit of S. 14 must show that he comes within it and the burden is on the plaintiff to prove that he acted in good faith in instituting the earlier proceedings. I.L.R. (1941) Mad. 347=1941 Mad. 319=

Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

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(1941) 1 M.L.J. 257 (F.B.). If a claim by a person is fully satisfied either by an agreement or by a decree of a Court, and if that satisfaction is subsequently annulled by another decree of Court, a fresh cause of action arises, apart from the deduction of time under S. 14. 40 Bom.L.R. 1169=1939 Bom. 26. Ss. 4, 9 to 18 and 2, would apply to a case unless expressly excluded. 33 C.W.N. 227. Ss. 4 and 14 can be applied to the same case. 1929 C. 315. Ss. 4 and 14 distinguished. 68 M.L.J. 665; I.L.R. (1937) Nag. 217.

CONSTRUCTION OF SECTION.—The principle is well settled that S. 14 must be liberally construed, and if on the facts of a particular case the Court finds that the plaintiff was prosecuting in good faith another civil proceeding against the same defendant founded on the same cause of action, the time taken up in such proceeding should be excluded. I. L. R. (1939) Bom. 9=40 Bom.L.R. 1169=1939 Bom. 26.

APPLICABILITY AND SCOPE.—Former suit dismissed without plaint being returned for want of jurisdiction—Plaintiff is entitled to claim the benefit of the provision in S. 14 whether he comes upon on the second occasion with the original plaint or with a new plaint. 153 I.C. 155 (2)=1935 P. 82. S. 14 does not apply in case of continuance of same proceeding. 36 P.L.R. 215=1934 L. 412. The three requisites for application of S. 14 are (1) identity of the cause of action, (2) good faith of the plaintiff, and (3) the absence of jurisdiction or other cause of a like nature in the Court which entertained the prior litigation. 1939 Mad. 724=(1939) 2 M.L.J. 329. It is only when the civil proceeding is prosecuted in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it that S. 14 can apply. 130 I.C. 157=1931 N. 47; 104 I.C. 726=26 Punj.L.R. 403. Section applies only to cases where the person who claims exemption was *bona fide* litigating the claim in the prior proceedings. 1925 M.W.N. 241=1925 M. 922. One essential condition for the application of S. 14 is that the plaintiff in the later suit must have been prosecuting with due diligence another civil proceeding. Where the plaintiff in the later suit was a defendant in the prior suit, he cannot be said to have been prosecuting a suit or civil proceeding at the time. Merely defending a suit is not, and cannot amount to, the prosecution of a suit. I.L.R. (1939) Bom. 173=40 Bom.L.R. 1134=1939 Bom. 1. S. 14 does not require that the earlier proceeding must have been a suit; nor does it require that it must have been initiated by the plaintiff in the later suit seeking advantage from the section. I.L.R. (1941) Kar. 495. Although the person initiating proceedings contrary to a clearly expressed provision of law, cannot be regarded as prosecuting in good faith and is not therefore entitled to claim the benefit of S. 14, yet where there is no clear indication in law as to the procedure to be followed, the person carrying on abortive proceedings, is entitled to claim the benefit of S. 14. 162 I. C. 865=1936 R. 184. So also, where there was a recent change of law and proceedings were taken in ignorance of the same. 1937 A.L.J. 176=1937 R.D. 113=1937 A. 333. It cannot be argued that, since an objection to jurisdiction was taken by the defendants in the earlier suit, the plaintiff cannot be considered to have been prosecuting his suit in good faith in that Court, when such objection was overruled by that Court and upheld only in appeal. 153 I.C. 155 (2)= 1935 Pat. 82. *See also* 1940 Mad. 689=(1940) 1 M.L.J. 590; 1939 Mad. 397; 1941 Lah. 256. It is not diligence but *bona fides* which should be considered when judging the mistake in selecting the forum. 1941 O.W.N. 713=1941 A.L.J. (Supp.) 92. *See also* 1941 Pesh. 3. The establishment of good faith is a pre-requisite condition before the benefit of S. 14 can be allowed. Where the good faith of the party prosecuting his remedy in a different proceeding was open to grave doubt and where the parties to the different proceedings were not identical it was held that benefit of S. 14, could not be claimed. 1941 A. W. R. (Rev.) 1041=1941 O.A. (Supp.) 850. *See also* 1941 Oudh 161. S. 14 will not apply where the prior suit has failed owing to the negligence or laches of the plaintiff. 62 C. 510=39 C.W.N. 606. S. 14 is not applicable if, in the prior litigation, the period of the pendency of which is sought to be deducted, the parties and the cause of action were not the same. 1 R. 402=1924 R. 123. *See also* 20 I.C. 513=17 C.L.J. 596; 1925 M.W.N. 361=1925 M. 675; 145 I.C. 630=35 Bom.L.R. 929=1933 B. 450. Section would not apply when the causes of action in the two suits are entirely distinct. 20 I.C. 513=17 C.L.J. 596. (14 B. 365, approved; 5 R. 600=105 I.C. 701); 98 I.C. 1050=1927 A. 181. *See also* 108 I.C. 134 =1928 A. 10; 1929 A. 101; 1939 Mad. 724= (1939) 2 M.L.J. 329; 138 I.C. 621=33 P. L.R. 360. For application of section not

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only cause of action *but also the relief sought* should be the same. 38 L.W. 595=1933 M. 778. [But see *contra* 1934 A.L.J. 630=1934 A. 824.] An application for execution of a preliminary mortgage decree is not an application "for the same relief" (within the meaning of S. 14), as an application for a final decree for sale. Consequently in computing the period of limitation for a final decree under Art. 181 of the Act, the applicant cannot exclude the period spent in the prior execution proceedings. 62 I.A. 80=57 A. 242=1935 P.C. 85=68 M.L.J. 665 (P.C.); 1935 A.L.J. 201=1935 A. 323. S. 14 is not applicable to appeals. 28 I.C. 211=19 C.W.N. 478. The proceedings in a Revenue Court do not fall under S. 14 so as to extend the period of limitation. 83 P.R. 1914=26 I.C. 441. *See also* 36 I.C. 770=3 O.L.J. 445; 6 N.L.R. 205=1923 N. 306. But *see* 9 I.C. 642 (M.). S. 14 does not apply to a case where the Zamindar sues for possession of lands on the ground that the Collector, who during his minority managed the estate, treated the lands granted for *Jadha* service as Government property and dealt with them as such. 25 I.C. 878=1 L.W. 662. The expression "prosecuting" referred to in S. 14 is generally applicable to proceedings by a person as a plaintiff or an applicant, and not to proceedings in which such person is merely resisting, as a defendant or respondent, the claim of another. 1933 S. 379. But *see* 40 Bom.L.R. 1134=1939 Bom. 1; 32 S.L.R. 151=1938 Sind 50. S. 14 only applies when time has been spent in litigation in a Court which for want of jurisdiction or other similar cause was unable to give relief. It does not apply when there is no want of jurisdiction and when the competent tribunal refuses to interfere with the order of a lower Court. 23 Pat.L.T. 263. In execution of decree, defendants raised objection under S. 47, C.P. Code, and the same was allowed and execution petition was held not maintainable. There were appeal and second appeal which both proved infructuous. Plaintiff then filed a suit in respect of the same matter, and claimed deduction of time occupied in the execution proceedings. It was held that the fact that there was an objection raised by the judgment-debtors under S. 47, C. P. Code, did not operate as a bar to the applicability of S. 14 of the Limitation Act; nor did it place the plaintiffs in the position of defendants or opposite parties resisting the objection of the defendants in contradistinction with plaintiffs and applicants under S. 14, regarding exclusion of time during which another proceeding was being prosecuted with due diligence. 40 C.W.N. 914=1936 C. 400. Plaintiff defending another suit concerning the same subject-matter—Time occupied when cannot be deducted. 25 Bom.L.R. 863=1924 B. 39. Where in a prior suit the defendant was defending a money suit and nothing that he did would have entitled him to a decree in his favour and there was nothing to restrain him from filing his suit, he was not entitled to exclusion of time under the section. 28 N.L.R. 348. Section is comprehensive enough to cover execution applications. 138 I.C. 646=1932 L. 531. Where a suit is originally filed in the Small Cause Court, and that Court ultimately decides that it has no jurisdiction and returns the plaint for presentation to the proper Court, the plaintiff is entitled to the benefit of S. 14 for the period from the date of institution of the suit and the date of its return. 155 I.C. 1092=1935 A. 759. *See also* 1937 Nag. 69. The provisions of the Act are not applicable to proceedings under the Prov. Ins. Act. 39 M. 74=27 I.C. 144=29 M.L.J. 451. *See also* 5 L.W. 123=36 I.C. 828. A Berar Court is not a Court contemplated by S. 14. 1923 N. 321. S. 14 is only applicable to suits in British India and not to proceedings in foreign Court. 8 L. 54=102 I.C. 523 (2)=1927 L. 200; 35 B. 139. Section does not apply where special act provides special rule of limitation. 98 I.C. 1050=1927 A. 181. Where a suit to recover unpaid purchase calls from a shareholder was filed out of time, as the official liquidator had taken some proceedings against him in some other Court, it was held not maintainable and S. 14 did not apply. 52 B. 477=1928 B. 252. Where a suit was withdrawn with permission to bring a fresh suit under O. 23, R. 1, the section is inapplicable and the limitation for the latter runs from the date of the original cause of action. 1928 A. 402 (2); 39 M. 936=29 M.L.J. 569 (29 B. 219; 20 C. 205, Foll.); 1932 A.L.J. 421=1932 A. 377; 37 Bom.L.R. 225; 1934 A. W.R. 806 (F.B.),; 1936 A.W.R. 1014. Suit under S. 79, Agra Tenancy Act—Prior proceedings under S. 145, Cr.P. Code—Limitation not saved. 9 L.R. 11 (Rev.). S. 184, B.T. Act, does not exclude the application of S. 14, Limitation Act. 33 C.W.N. 227=1929 C. 325. The provisions of the section can be availed of in the case of suits governed by the special rule of limitation enacted by S. 5 of the Repealing (Punjab Loans Limitation) Act III of 1923. I.R. 1932 L. 630. Where a suit is dismissed for default of prosecution under O. 9, R. 2, and a fresh one is brought under R. 4 of the same order, S. 14 Limitation Act, is not applicable, as the prior suit failed for plaintiff's negligence in prosecuting it and not because of defect of jurisdiction or other cause of a like nature within the meaning of S. 14. 25 N.L.R. 99=116 I.C. 509=1929 N. 219. *See also* 62 C. 510=39 C.W.N. 606. And the time covered by restoration proceedings in such a case cannot be excluded, as the cause of action in the restoration proceedings is not the same as that in the subsequent suits, nor can it be said that the restoration proceedings failed for want of jurisdiction. 1929 N. 219. There is no

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

NOTES.

provision in the Limitation Act or in the C.P. Code for allowing further time to re-file a plaint. 35 I.C. 595=24 C.L.J. 355.

APPLICABILITY TO APPEALS.—In regard to the admission of appeals, the Court may in its discretion apply S. 14, though it is not made expressly applicable to appeals. 35 C.L.J. 106=1922 C. 247. *See also* 53 I.C. 955=30 C.L.J. 522; 152 I.C. 939=1935 A. 92; 1936 O.W.N. 325; 30 S.L.R. 301=162 I.C. 257=1936 S. 43. Appeal filed in wrong Court owing to *bona fide* mistake—Due diligence on the part of the party—S. 14 must be applied. 49 A. 255=25 A.L.J. 410=1927 A. 719; 38 P.L.R. 311.

EXECUTION PROCEEDINGS.—S. 14 (2) applies to execution applications in suitable cases and Art. 182 cannot bar its application. The words "any application" in S. 14 include an application for execution, and a decree-holder is entitled to exclude the time during which he has been prosecuting his execution *bona fide* and with due diligence before a Judge whom he believed *bona fide*, though erroneously, to have jurisdiction. 19 Pat. 354=1940 Pat. 677. The time taken in proceedings connected with an execution application which is not in accordance with law cannot be deducted or excluded under S. 14, in computing the period of limitation for a subsequent execution application. 1937 M.W.N. 355=1937 Mad. 760. *See also* 1936 Cal. 400; 1939 Cal. 791. Where a defeated claimant, instead of instituting a suit, *bona fide* prefers an appeal from the adverse claim order, in accordance with the view of law then prevailing, and succeeds but on second appeal his claim is dismissed on the ground that the remedy of the claimant is by way of suit under O. 21, R. 63, C.P. Code, the time taken in the appeal and second appeal can be excluded in computing the period of limitation for a suit under O. 21, R. 63, C.P. Code, in virtue of S. 14 (2). 1937 M.W.N. 141=1938 Mad. 41.

DEFECT OF JURISDICTION.—The words "defect of jurisdiction" in S. 14 mean a defect of jurisdiction peculiar to the Court in which proceedings were taken, and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie at all in any Court. 22 P.R. 1912=11 I.C. 880; 1927 L. 785. Defect of jurisdiction—Order made not without jurisdiction but passed too late—Time occupied cannot be excluded. 79 I.C. 696=1924 P. 40. Time spent in previous litigation cannot be excluded, when the previous suit does not fail from any defect of jurisdiction or other causes of like nature, but fails because it is misconceived. 121 I.C. 70=1930 L. 211. S. 14 was intended to protect a *bona fide* plaintiff from the conseqence of some mistake made by his advisers in prosecuting his claim. The word 'jurisdiction' in the section should be construed liberally. If the other conditions mentioned in the section are satisfied, the benefit given by the section cannot be taken away, merely because the course adopted before was not a well-conceived one. Where, in the prior execution proceedings, the minor attacked the validity of the decree on the ground that the guardian had acted collusively and fraudulently and in the later suit he sought to set aside the decree. *Held,* that the prior proceedings were not entirely misconceived and that time taken therein should be excluded. 140 I.C. 270=1932 M.W.N. 1317. *See also* 43 M.L.J. 184=1922 M. 417.

Cl. (2): CAUSES OF A LIKE NATURE.—*See* 1939 A.L.J. 460=1939 All. 590, What is a "defect of a like nature" within the meaning of S. 14 must depend upon the facts of each case. The expression must mean and connote something which is quite distinct from defect of jurisdiction. Defects as to wrong plaintiffs or wrong defendants are also provided for in the Act. **"Because the prior suit** was dismissed as premature on the ground that the cause of action had not accrued, it cannot be said that S. 14 will not apply. I.L.R. (1939) Bom. 9=40 Bom.L.R. 1169 =1939 Bom. 26. There is nothing in the terms of S. 14 to justify the conclusion that the want of jurisdiction or other cause of a like nature referred to in the section must be in existence at the very institution of the suit. Want of jurisdiction or other cause of a like nature may arise at any stage of a suit or proceeding. 1939 A.L.J. 1075=1940 All. 145. Where the jurisdiction of a Court to entertain a particular suit depends upon leave being granted by that Court, and leave is so granted, the subsequent recalling of the leave brings the case within the words "other cause of a like nature" in sub-S. (1) of S. 14. Hence time from the granting of leave till it is recalled should be excluded under S. 14. 20 Pat.L.T. 893=1939 Pat. 86. Causes of a like nature—Proceedings infructuous—Misconception as to law—Deduction of time. 44 A. 296=20 A.L.J. 147 =1922 A. 74. If the unsuccessful respondent to an appeal in the High Court applied to the High Court under Cl. 13, Letters Patent, there is no defect of jurisdiction or anything analogous to it in the High Court dismissing it, and the period spent in that application cannot be deducted under S. 14 for computing the time for a subsequent application for review. (3 P. 42, Diss.

NOTES.

from.) 152 I.C. 415=1934 R. 158. The words "causes of like nature" include misjoinder of parties and causes of action. 14 I.C. 437=6 L.B.R. 43. *See also* 8 P.R. 1911=9 I.C. 680. *See further* 108 I.C. 134=1928 A. 10. For purposes of S. 14 there is no distinction between misjoinder and non-joinder, though only the latter word alone is used in Expl. III. Both are only variations of the same defect. 62 I.C. 507 =15 S.L.R. 11. *Res judicata* does not constitute 'other cause of a like nature'. 2 Pat.L.T. 585=63 I.C. 593=6 P.L.J. 593. The failure to give notice under S. 80, C.P. Code, is not a 'case of a like nature' with defect of jurisdiction within S. 1413 I.C. 260=5 S.L.R. 181. A plaintiff cannot invoke the aid of S. 14 to bring his claim within limitation for the simple reason that the proceedings in insolvency failed not for want of jurisdiction or other cause of a like nature within the meaning of S. 14, but on account of the plaintiff's negligence in not effecting service of notice of the order admitting his petition on the defendant according to law. 112 I.C. 55. A decree was passed on 22nd November, 1922, and the money claimed was payable within one year from that date. In December, 1922, however, one of the parties applied to have the decree set aside under O. 9, R. 13. The same was dismissed in 1923 and an appeal having been preferred the latter was dismissed on 28th July, 1926. An application for execution was filed in January, 1928. *Held,* that S. 14 was inapplicable to the circumstances of the case. 35 C.W.N. 155 =1931 C. 332.

CIVIL PROCEEDINGS—PARTIES.—To obtain the benefit of S. 14, the proceedings, the time spent in prosecuting which is to be excluded, must be between the contesting parties. 60 I.C. 698=33 C.L.J. 366. *See also* 1 R. 402; 1925 M. 675. Objection to attachment dismissed—Suit filed in wrong Court *bona fide*—Order returning plaint to proper Court challenged in appeal—Period of appeal—Exclusion of. I.L.R. (1937) N. 291 =1937 N. 1. Where a plaint is filed against a person who is in fact dead at the time of presentation of the plaint, the period between the date of the institution of the suit and the date of the application to implead the legal representatives cannot be deducted under S. 14. 37 L.W. 489=143 I.C. 596 =1933 M. 454. 'Civil proceedings' include execution proceedings also. So, where, after the execution of a mortgage decree for sale has proceeded a long way, it is found that the Court which passed the decree had no jurisdiction to pass the decree in so far as it directed sale of properties situate within a particular territory, and a fresh suit becomes necessary, in computing the period of limitation for the suit, the plaintiff is entitled to deduct not only the period from the date of institution of the former suit to the date of the decree, but also the period during which the decree in the prior suit was *bona fide* sought to be executed. I.L.R. (1937) M. 161=1937 M. 357= (1937) 1 M.L.J. 303. *See also* 1940 Pat. 677. The words "civil proceeding" in S. 14, Limitation Act, are wide enough to include not only an appeal but also an application in revision, and the time taken in prosecuting a civil revision petition can therefore be excluded under S. 14. But the only period that can be excluded is the actual period of pendency of the revision petition, *i.e.,* the period between the date on which it is filed and the date on which it is disposed of and no more. I.L.R. (1938) All. 192=1937 A.L.J. 1308=1938 A.L.R. 146=1938 All. 78. *See also* 17 I.C. 593; 1938 A.W.R. (B.R.) 228 (Time spent in review). "Another civil proceeding" does not mean one in another Court. 62 I.C. 507=15 S. L.R. 11. *See also* 1923 B. 218. The words "civil proceedings in a Court" cover civil proceedings before arbitrators whom the parties have substituted for the Court of law to be judges of the dispute before them. 56 C. 1048=1929 P.C. 103=115 I.C. 713 (P.C.). *See also* 56 C. 639. But *see* 1933 N. 130=144 I.C. 948=29 N.L.R. 272 in which 56 C. 1048 (P.C.) is distinguished. A suit against a firm, and a subsequent suit against the surviving partners of the firm and the heirs of a deceased partner are both against the same parties within the meaning of section 14. 27 A.L.J. 73=112 I.C. 715.

COMPUTATION OF TIME.—Where a plaint, presented in a wrong Court, is returned to be presented to the proper Court, the plaintiff is entitled to exclude the time between the date of institution in the wrong Court and the date of the return of the plaint. 24 O.C. 137=61 I.C. 203. *See also* 36 M. 482=22 M.L.J. 377; 20 Bom.L.R. 918=43 B. 201; 1928 N. 227; 1930 B. 187; 138 I.C. 108= 1932 A. 377. Where a Court has jurisdiction to try a suit, but holds that it has no jurisdiction and returns the plaint for presentation to the proper Court, the plaintiff who files the suit in the proper Court on such return is entitled under S. 14 to deduct the period spent in prosecuting the suit in the Court in which it was first presented. 1937 N. 69. The prior proceeding can be considered to have terminated not on the date when an order for return of plaint was made, but only when in accordance with that order it is actually returned to the plaintiff. 60 C. 1122=1933 C. 914. A plaintiff, though entitled to deduct time of actual pendency in a wrong Court, cannot exclude any extra day on the ground that it is a holiday. 35 I.C. 292=14 A.L.J. 310. *See also* 43 M.L.J. 579=1923 M. 114 (2). The date of institution of a suit is the date on which the plaint is filed in the proper Court excluding for the purpose of reckoning limitation only the periods excluded under this section. 18 I.C. 121=17 C.W.N. 515. Computation of time—Expiry of time during Court's vacation—Institution in wrong Court on re-opening day—Re-presentation after return in the proper Court—Exclusion of time. 44 M. 817=41 M.L.J. 84. Suit filed in wrong Court—Direction to file the same in proper Court—Time taken for suit and application for copy cannot be deducted. 46 C.L.J. 452=1928 C. 40. Time taken in proceedings for possession before Revenue Officer cannot be deducted. 101 I.C. 254=1927 L. 186. A plaint presented in wrong Court was returned and presented in proper Court. Law of limitation was altered meanwhile. The law of limitation applicable to the suit was that in force on the date on which the plaint was presented to the proper Court. 117 I.C. 900=1920 L. 877 (2).

Return for want of Jurisdiction.—I.L.R. (1937) Nag. 291=1937 Nag. 1. Time spent in prosecuting an infructuous appeal due to wrong valuation may be deducted in computing the period of limitation. 50 I.C. 645=70 P.R. 1919. No litigant should be made to suffer on account of the laches or delay of the Court or its officers. The time between the date of the order of the return of a plaint for presentation to proper Court and the date when the plaint was ready to be returned is to be deducted for the purposes of limitation and the proceedings are not to be considered at an end for the purposes of S. 14, Expln. 1 until the endorsement is made and the plaint is ready for return. The plaintiff is entitled to exclude under S. 14 (2) the period till the plaint is ready for return. 41 P.L.R. 371= 1939 Lah. 47. Proceedings before a Court do not terminate when the plaint is ordered to be returned for filing in proper Court, costs being awarded to the defendant, because the decree that is to be prepared requires the presence of the plaint on record and proceedings can only be held as terminated when the decree is signed and complete. Time required for this can be excluded in computing period of limitation. 1938 Pat. 203. When a Court records an order that a plaint should be returned for presentation to the proper Court, the proceedings in that Court do not necessarily come to an end on that date. Certain necessary endorsement have to be made on the plaint and hence that Court continues to have seisin of the plaint till it is actually returned to the plaintiff. Hence where a plaint is ordered to be returned for presentation to the proper Court, the proceedings come to an end within the meaning of S. 14, Expln. I of the Limitation Act, not on the date on which the order is passed but on the date on which the plaint is actually returned to the plaintiff. I.L.R. (1939) All. 709=1939 A.L.J. 460=1939 All. 590. A plaintiff who institutes a suit on the very last date of limitation does so at his peril, and the law does not make any provision for extension of time except in cases coming under S. 14. A plaintiff whose plaint is returned by a Court on the ground that it has no jurisdiction to entertain it can only exclude the period during which it was pending in that Court, *i.e.*, the period between the date of its presentation to that Court and the date of its return by that Court for presentation to the proper Court. He cannot exclude any further period which the Court returning the plaint gives him for such representation. A Court which has no jurisdiction to entertain the suit and which returns it on that ground has no power to grant any time to the plaintiff for presenting it to the proper Court. If the Court wrongly gives any such time by its order returning the plaint, the plaintiff cannot take advantage of that order and claim to deduct that period also under S. 14 of the Limitation Act. 18 Pat.L.T. 250=1937 Pat. 495. Suit on pro-note instituted in wrong Court —Plaint returned without endorsement reqired by O. 7, R. 10, C.P. Code—Pro-note not returned with plaint but couple of days later—Time deductible. *See* 1937 Lah. 464. Where plaint was returned for want of pecuniary jurisdiction and delay is caused owing to change in law, suit must for purposes of limitation be taken to have been instituted on the day of presentation in the wrong Court. 35 I.C. 808=18 P.W.R. 1916. The plaint in a suit on an unregistered mortgage was amended by scoring out the relief to sell the mortgaged property. As it was then found that the valuation of the suit was within the cognizance of the Court of Small Causes, the plaint was returned to be presented to the proper Court and was so presented on the same day. On a question as to whether the plaintiff in such a suit could claim the benefit of S. 14, it was held that the question whether the two proceedings were based upon the same cause of action or different causes of action, could not be decided upon the terms of the reliefs claimed in either proceeding and that there was no justification for holding that the preceeding on the Small Cause Court side was based upon some cause of action different from that upon which the proceeding on the regular side was founded, and that hence the plaintiff would be entitled to claim the benefit of S. 14. 1939 A.L.J. 1075=1940 All. 145. Where a plaintiff, who filed his suit at *R*, and whose plaint is returned by the Court at *R* for presentation to proper Court at *A*, presents an appeal against the order returning his plaint in the Court of the District Judge at *R* within the period of limitation, it cannot be said that he was not prosecuting with due diligence his civil proceeding in the Court of appeal at *R*, and the entire period spent by him in prosecuting his case in the Courts at *R* must be excluded under S. 14. 41 P.L.R. 371= 1939 Lah. 47.

Delay after order of return.—Where a plaint was actually returned for presentation to the proper Court only three days after the order directing the plaint to be returned was signed. *Held*, that for purposes of S. 14 the date on which the plaint was actually returned must be taken to be

NOTES.

the date on which the order was promulgated. 20 I.C. 183=17 C.W.N. 1043. *See also* 23 Bom.L.R. 1023=1922 B. 160; 52 B. 477. Where a plaint is returned and costs ordered, the proceedings terminate on the day of the return and not on the day when the costs are assessed. 35 I.C. 595=24 C.L.J. 353. For the purposes of limitation, an applicant for re-presentation is entitled to deduct the time spent in the District Munsif's Court after order of return. 9 I.C. 157=9 M.L.T. 374. Where a plaint is returned for presentation to the proper Court, the suit is within time if it is presented to the proper Court on the same day on which it is actually returned by the wrong Court. 45 B. 443=59 I.C. 743=22 Bom.L.R. 1387.

DUE DILIGENCE.—S. 14 cannot help a party guilty of negligence, laches, inaction or bad faith. 9 O.W.N. 430=1932 O. 220. Applicant must prove first that he had prosecuted the former proceeding with due diligence and secondly that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. 41 P.R. 1916=32 I.C. 497. *See also* 20 I.C. 3=159 P.W.R. 1913; 138 I.C. 621=33 P.L.R. 360; 1938 Rang. 318; 1940 A.M.L.J. 120. The fact that a litigant acted on the advice of a pleader will not improve his position if the error made is so patent that it would have been avoided with the exercise of due care. 51 I.C. 590=22 O.C. 39; 8 Bur.L.T. 93=27 I.C. 829. But *see* I.R. 1932 L. 665. A party who proceeds in ignorance of law cannot be said to proceed with due diligence or in good faith. 1924 P. 716; 1933 L. 589=144 I.C. 690=34 P.L.R. 780. But *see* 15 R.D. 799; 1937 A.L.J. 176=1937 A. 333.

GOOD FAITH.—An applicant who takes a proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting a civil proceeding in "good faith" within the meaning of S. 14 (2). 41 Bom.L.R. 1190=1940 Bom. 5. Generally negligence on the part of counsel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application 'in good faith' though in wrong Court. In a case of gross negligence applicant is not entitled to the benefit of S. 14. 1938 Oudh 112=1938 O.W.N. 360. Where plaintiff acted in good faith and neither the Court nor the defendant objected to the cognizance of the suit, he is entitled to the benefit of S. 14. 40 I.C. 447=15 A.L.J. 573. *See also* 43 C. 660=20 C.W.N. 522=30 M.L.J. 529 (P.C.); (1940) 1 M.L.J. 590; 45 I.C. 991=16 A.L.J. 429; 1938 Cal. 377=62 Cal. 510; 38 P.L.R. 311; 1936 Lah. 857. "Good faith" as used in S. 14 means 'exercise of due care and attention'. Where the circumstances are such as would justify either view as regards the value of the property, the plaintiff cannot be regarded as having acted dishonestly and without due care and attention, if he has adopted the lower valuation of property and filed his suit in a wrong Court. I.L.R. (1939) Nag. 422=1938 N.L.J. 107=1938 Nag. 300; 62 I.C. 957; 1930 B. 187; 1933 L. 264. Claim suit filed in wrong Court—No objection by opposite party—Discovery of mistake by Court and return of plaint for presentation to proper Court—Time spent in former Court—Exclusion of. 146 I.C. I.C. 125=1933 L. 652. Whether a party acted in good faith is a mixed question of law and fact. 36 I.C. 702=19 O.C. 367. *See also* 28 I.C. 347=54 P.W.R. 1915; 1923 N. 24; 138 I.C. 646=1932 L. 531. A Court can grant the indulgence allowed by S. 14 only where the error is one that might be committed by a reasonable and prudent man, exercising due diligence and acting in good faith. 36 I.C. 702=19 O.C. 367. *See also* 1937 M.W.N. 715; 1940 O.W.N. 818. In order that the Court should arrive at the period which is to be excluded under S. 14, it must also determine how much must be included, whether by reason of prosecution in bad faith or owing to any other reason. 30 N.L.R. 294=149 I.C. 956=1934 N. 145. But, where the plaintiff is entitled to exclusion of time under Ss. 14 and 15, the Court is not concerned as to how the plaintiff has spent his time till the expiry of the ordinary period of limitation, excluding the time allowed under the above sections. 30 N.L.R. 294=149 I.C. 956=1934 N. 145. Where there is nothing to show a deliberate or reckless under-valuation, S. 14 will apply. 25 I.C. 403=17 O.C. 210. *See also* 18 I.C. 92; 14 I.C. 86. Plaintiff who can institute his suit in more than one Court is not bound to consider the convenience of defendant. If the effect of his choice is to cause inconvenience to the defendant, it does not constitute lack of good faith on the part of the plaintiff in the sense in which that phrase is used in S. 14. 182 I.C. 632=20 Pat.L.T. 898=1939 Pat. 86. The time taken by the plaintiff in proceedings necessitated for ascertaining the correct value of the suit can be allowed to be deducted under S. 14, where it is found that the plaintiff acted *bona fide* throughout and did not intentionally under-value the suit. 138 I.C. 349=36 C.W.N. 326=1932 C. 504. What amounts to good faith is to be decided on the facts of each case. 32 I.C. 616=9 S.L.R. 167. *See also* 53 I.C. 892 (2)=1919 P.H.C.C. 409; 10 I.C. 21; 8 L.R. 23 (Rev.); 1929 C. 325. *See also* 144 I.C. 184=1933 L. 264. Where an appeal was filed in a wrong Court owing to *bona fide* mistake as to the nature of the suit, the delay was excused. 106 I.C. 812=1928 L. 136. *See also* 1933 L. 264=144 I.C. 184. S. 14 has no application when bad faith is established. Where a person obtained an *ex parte* decree by fraud and subsequently sued the proper person for rent, limitation is not suspended. 8 P. 851. An application for leave to sue as a pauper filed in bad faith

NOTES.

was dismissed. The sufficient payment of Court-fees cannot operate retrospectively for the purposes of calculation of limitation. 1929 N. 268. Mere error of judgment is quite different from bad faith. 27 A.L.J. 73=112 I.C. 715. A proceeding contrary to a clearly expressed provision of law is not in good faith. 7 R. 466=1929 R. 297. Suit for possession—Profits not claimed in plaint—Plaintiff obtaining mere decree for possession in prior suit—Unsuccessful attempt to recover profits in restitution—Subsequent suit for profits—Right to deduction of period occupied by restitution proceedings. *Held,* that plaintiff was not entitled to benefit of S. 14. 41 L. W. 138=68 M.L.J. 487.

Ignorance of Law, may afford a good ground for application of S. 14. 1937 A.L.J. 176=1937 All. 333. S. 14 requires both diligence and good faith. As regards good faith ignorance of law is not necessarily an adequate plea. But where the wrong remedy adopted is considered by one of the Courts to be the proper one, that would imply good faith on the part of the party and the benefit of S. 14 would be available to him. 1940 O.W.N. 818=1940 O.A. 1106. Indulgence should be granted under S. 14 only in cases where an error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution. (36 I.C. 702, Foll.). 40 P.L.R. 631=1938 Lah. 704. Where a person in ignorance of the provisions of the Agriculturists Relief Act relating to the special form prescribed by the Act, files a suit in a wrong Court and on its being returned, presents it to the proper Court, the time spent in the wrong Court can be excluded under S. 14, for the plaintiff should be deemed to have been prosecuting with due diligence and in good faith the proceedings in the wrong Court. 1940 Oudh 412=190 I.C. 93.

Proceeding in Revenue Court.—The plaintiff is entitled to a deduction of time from the date of institution of the suit wrongly in the Revenue Court to the date on which the plaint was returned for re-presentation. 9 M.L.T. 315=9 I.C. 642. But *see* 26 I.C. 441 (Punj.); 36 I.C. 770 (Oudh). Where order was made under S. 169 (1) (*b*), C.P. Land Rev. Act, to file suit in Civil Court within 6 months, time spent *in appeal in Rev. Court* cannot be excluded under S. 14 of this Act. 1933 N. 340. Suit for arrears of rent—Plea of occupier, of payment to landlord—Landlord impleaded—Payment found true—Appeal dismissed—Subsequent suit under S. 37 of Agra Tenancy Act—Time taken up by previous litigation—Deduction of. 14 L.R. 99 (Rev.)=17 R.D. 168. *Quaere*: Whether S. 14 of the Limitation Act can have an application to any insolvency matter and whether proceedings in insolvency are completely outside the scope of S. 14. 55 L.W. 301=(1942) 1 M.L.J. 588. *See also* 1939 Lah. 270.

Prosecution of Proceeding.—It cannot be said that a plaintiff is not prosecuting a suit with due diligence in a Court of first instance when the delay is caused by the action of the Court itself. 1922 A. 404. Time during which insolvency proceedings are pending, if can be deducted in computing the period of limitation. 24 Bom.L.R. 509=1923 B. 33. *See also* 47 B. 244=24 Bom. L.R. 509=1922 B. 33; 64 I.C. 50=13 Bur. L.T. 197; 1 P. 506=3 Pat.L.T. 709. *See* Pro. Ins. Act, V of 1920, S. 78. But *see* 52 I.C. 934=12 Bur.L.T. 83. Where the mistake of the advocate is *bona fide,* the time spent in the prosecution of a prior proceeding can be excluded. 1933 O. 231=10 O.W.N. 424. A mere routine order registering an application for review does not constitute a *bona fide* prosecution of a civil litigation. 31 I.C. 705=19 C.W.N. 1113. An applicant to file an award could not be allowed to deduct the time spent by him as defendant in setting up the award in bar of a prior suit instituted by the plaintiff. 52 I.C. 561=89 P.R. 1919. *See also* 32 S.L.R. 151=1938 Sind 50; 43 C.W.N. 648=1939 P.C. 128. Prosecution of proceedings—Execution proceedings—Non-joinder of party—Rejection of application. 15 S.L.R. 11. An unsuccessful prosecution of an application by one of the defendants, to set aside an *ex parte* decree passed against him in the first Court will extend time for an application made by him to the appellate Court for re-hearing the appeal, filed by the other defendants and disposed of, without notice taken out to him. 54 A. 423=140 I.C. 178=1932 A. 340.

Time spent in Execution Proceedings.—Extension of time if allowable. 43 I.C. 6=33 M.L.J. 463. *See also* 58 I.C. 40=1 P.L.T. 612; 74 I.C. 279; 19 Pat.L.T. 250=1938 Pat. 321. Execution application filed in wrong Court but re-filed in right Court after limitation—Mistake not *bona fide*—Decree-holder not entitled to benefit of section. 8 Pat.L.T. 561=1927 P. 256. The period during which an injunction not to execute a decree is in force will be deducted from the period of limitation for execution of the decree. 38 I.C. 85=2 P.L.J. 24. Where the relief sought in the two proceedings were wholly distinct, time cannot be excluded. 50 A. 670=1928 A. 368. While counting limitation for the presentation of an application for the preparation of the final decree, time spent in prosecuting previous application for the execution of the decree cannot be excluded as the two reliefs are different. S. 14 (2) will not be applicable. 118 I.C. 670=1929 A. 677.

Time spent in Revision.—Time cannot be deducted under S. 14 in favour of a person occupied in prosecuting a revision petition in the High Court when he had another remedy open to him. 39 M. 62=27 M.L.J. 640; 14 I.C. 259; 1937 M.W.N. 465; 42 C.W.N. 1051=1936 Cal. 577; 1935

Explanation I.—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III.—For the purposes of this section, misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

NOTES.

A.M.L.J. 117. *See also* 7 R. 466 (a Rangoon case where the law was that the High Court does not generally interfere with orders under O. 21, R. 63, C.P. Code); 32 Bom.L.R. 1186. The principle that party who proceeds contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith is sound but should not be applied with rigidity. If in the revision proceedings there is no want of diligence and good faith there is no reason why the plaintiff should not have the benefit of S. 14 because of the negligence of his advocate. (7 R. 466. Dist.) 130 I.C. 145=1931 N. 17. The High Court will not interfere with the discretion exercised by the lower appellate Court under S. 14, when such discretion has not been exercised improperly. 14 Luck. 4=1938 O.W.N. 257=1938 Oudh 100 (S.B.).

"Unable to Entertain"—Meaning of.—"Unable to entertain" is not equivalent to "unable to decide". 8 P.R. 1911=9 I.C. 680 (34 P.R. 1898; 28 M. 338; 35 C. 728, Foll.; 22 A. 248, Dist.) The words "unable to entertain it" do not merely mean that the Court has expressed its mind that the suit is defective but must mean that the Court has passed an order terminating the suit or proceeding on the ground that there is a defect of jurisdiction. 150 I.C. 135=1934 A.L.J. 535=1934 A. 688 (F.B.). *See also* I.L.R. (1939) 2 Cal. 316=43 C.W.N. 1074=1939 Cal. 625. Appellant filed a suit against two sets of defendants on babi-khata accounts. A preliminary objection was taken to the plaint in the earlier suit and it was held in the end that the plaint was bad because of misjoinder of parties. The appellant was ordered in that suit to make his election as to which part of the claim he wished to proceed with. Upon this order the appellant stated that he wished to proceed against one set of defendants and he withdrew the part of the claim directed against the respondents in the appeals. His suit against the other set of defendants was decreed. *Held,* that the plaintiff was not entitled to claim the benefit of S. 14 (1) on account of the previous suit he had withdrawn. 1934 All. 688; 1939 Cal. 625; I.L.R. (1940) Kar. 225. A plaintiff who withdraws his suit under O. 23. R. 1, C.P. Code, is not entitled to the benefit of S. 14 in a subsequent suit founded on the same cause of action. (1934 A.W.R. 806 (F.B.). Foll.). 1937 All. 124. *See also* 40 Bom.L.R. 377; I.L.R. (1940) Kar. 225. *See also* 40 Bom.L.R. 377; I.L.R. (1940) Kar. 225.

Miscellaneous.—Where a party was prevented from instituting the suit for setting aside the sale earlier because the property was in *custodia legis* under an order of Court, limitation is saved. 13 L. 70=137 I.C. 820=1932 Lah. 281. In counting the period for an application for refund of excessive moneys levied in execution of a decree the time taken up by the defendant in prosecution of a suit for the purpose in another Court under an error of law, ought to be deducted under S. 14. 44 B. 97=55 I.C. 967, Prosecuting one suit for several claims—Deduction of time. 26 P.W.R. 1915=27 I.C. 927. Wrong remedy—Time spent in prosecution of. 52 I.C. 465=9 L.W. 345. *See also* 36 C.W.N. 40=1932 C. 171. The pendency of suit for possession does not save limitation for the rent suit. 23 I.C. 942=1 L.W. 438. *See also* 39 I.C. 865. Suit by temple trustees for recovery of offerings taken by Archakas—Prior declaratory suit against the same defendants that the right to take collection illegal—Pendency of appeal—Trustees not entitled to deduction of time. 89 I.C. 938=1925 M. 1188. Prior suit by a lessee against his sub-lessee to recover possession and rent—Recovery of possession—Subsequent suit for compensation—Limitation was suspended. 6 R. 691=1929 R. 55. So also where the prior proceeding related to the validity of an award of arbitrators and the subsequent suit was for damages for breach of contract. 56 C. 639=1930 C. 5. Where a suit to set aside a summary order in claim proceedings was finally dismissed by the High Court as it considered that the application was one under S. 47 and that only appeal lay, and the applicant filed appeal accordingly, the claimant was held to be diligently prosecuting his case and hence time taken in suit was excluded. 1930 P. 307. High Court will not interfere in second appeal with a discretion exercised by the lower Court under this section. 131 I.C. 461=1931 M. 632. Application under O. 21, R. 89, C.P. Code, to set aside sale—Court ordering petition to be dismissed as withdrawn—Sale upheld in appeal—Fresh application to set aside sale—Continuance of earlier petition—Extension of time—*Held,* that the Court could not entertain the later

Exclusion of time during which proceedings are suspended.

15. (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

NOTES.

application on any general ground of equity based on the principle of S. 14 of the Lim. Act, because the applicants had, in withdrawing their original application, acted at their own risk. 1934 M. 593=67 M.L.J. 189.

Sec. 15: SCOPE OF.—S. 15 speaks only of the computation of periods of limitation with reference to the periods prescribed in the schedule to the Act. 43 M.L.J. 168=44 M. 785.

INTERPRETATION—PRESCRIBING A PERIOD OF LIMITATION—MEANING OF.—If the result of a statutory provision is in substance to fix a period within which a person must take appropriate and necessary action if he desires to assert his rights in a Court of law, that provision prescribes a period of limitation. I.L.R. (1939) All. 647=1939 A.L.J. 522=1939 All. 403 (F.B.).

APPLICABILITY.—S. 15 relates to injunctions or orders of Court and not to Royal proclamations which prevent the institution of suits by alien enemies. 47 I.C. 122. S. 15 (1) contemplates the stay of execution of a decree either by injunction or by order. 64 I.C. 594; 34 C.L.J. 163. *See also* 64 I.C. 849=35 C.L.J. 135; 47 I.C. 907. But *see* 1935 M. 352. To enable the later application to be treated as one in continuation or to revive the former one, there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which had existed but which had been subsequently removed. 143 I.C. 1=56 M. 490=37 L.W. 607=1933 M. 418=64 M.L.J. 664 (F.B.). In order to make S. 15 applicable to a case, it must be shown that the suit or execution of the decree had been stayed by an injunction or order. If the decree-holder could not bring himself within the exemptions provided in the Act, he could not escape the bar of limitation by pleading in equity an implied order or a collateral litigation which would render his proceedings futile. 64 M. L.J. 664 (F.B.). Where the next friend of a sole plaintiff or sole surviving plaintiff dies and the suit stands stayed or in abeyance under O. 32, R. 10, C.P. Code, the right to apply for a final decree in such a suit is suspended, and the period during which the suit stands stayed ought to be excluded in computing the period of limitation to apply for a final decree. S. 15 in terms does not apply, but the principle of the section ought to be applied. I.L.R. (1941) Bom. 435=43 Bom.L.R. 329=1941 Bom. 203. Application for revival of pending execution is not prohibited—S. 15 would apply only to an application for execution of a decree and not to an application for revival of pending execution. 49 A. 276=100 I.C. 692=1927 A. 16 (F.B.). S. 15, sub-S. (2) does not extend the period of six months mentioned in S. 104-A of the B.T. Act. 45 C. 934=45 I.C. 228. S. 48, C.P. Code, contains an unqualified prohibition against execution of decrees more than 12 years old and this is not controlled by S. 15. 43 M.L.J. 168=44 M. 785; 24 I.C. 195=27 M.L.J. 25. *See also* 1941 Pat. 499; I.L.R. (1939) Bom. 87=40 Bom.L.R. 1278=1939 Bom. 75. The general provisions of S. 15 are intended to apply to periods of limitation prescribed in the C. P. Code and are not confined in their operation to periods prescribed by the Limitation Act or by Sch. I, S. 48, C.P. Code, does prescribe a period of limitation. Hence S. 48 of the Code is not uncontrolled by the provisions of S. 15. In other words, S. 48 of the Code does not impose a complete bar to the execution of a decree after the expiry of the period of 12 years irrespective of the provisions of S. 15. I.L.R. (1939) All. 647=1939 A.L.J. 522=1939 All. 403 (F.B.); 1928 M. 1154; 8 O.W.N. 642=132 I.C. 257=1931 O. 351; 137 I.C. 603=1932 O. 246 (position doubted). A mortgagee holding a decree against an estate under the Court of Wards management is not entitled to the benefit of exclusion of the period of management by the Court of Wards, when the decree itself was not transferred to the Collector for execution. 29 I.C. 556. *See also* 24 I.C. 195=27 M.L. J. 25. Whether partial stay order is governed by S. 15. 1928 M. 627. S. 15 contemplates an absolute stay of execution. 1925 P. 597. Where after a decree had been obtained and when no execution application was pending therein, the Judge ordered in a connected suit that the decree-holder might wait for some time for payment, *held,* that the order did not suspend limitation and did not operate as stay of the execution proceeding in the prior suit. 60 I.A. 43=12 P. 195=64 M.L.J. 599 (P.C.).

INCONSISTENT DECREES RENDERING EXECUTION OF ONE IMPOSSIBLE.—S. 15 does not contemplate the case of one decree being rendered impossible of executing by a subsequent decree inconsistent therewith passed in another suit. A person obtained a decree for possession of a temple in 1926. Before he could execute his decree by an application for execution, a suit was brought by the pujari of the temple who obtained a decree in 1928 declaring the pujari to be

NOTES.

the owner of the temple and restraining the decree-holder in the previous suit from taking possession of the temple. This decree was set aside by the High Court in 1931. The decree-holder in the previous suit made an application for execution in 1933; *held,* that the decree of 1928 did not operate as an injunction or stay of execution within the meaning of S. 15 and hence the decree of 1926 was time barred in 1933 when the decree-holder made an application for execution. I.L.R. (1939) All. 207=1939 A.L.J. 29=1939 All. 82.

Injunction.—Where a decree-holder is prevented by an injunction from executing his decree he must apply for execution within three years from the termination of the injunction period to save his decree from being barred. 56 I.C. 1006=18 A.L.J. 642. *See also* 51 I.C. 64=17 P.W.R. 1919; 6 P. 635=102 I.C. 327; 64 M.L.J. 664 (F. B.). Exclusion of time—Pendency of claim suit. 34 A. 436=14 I.C. 343. The words "injunction or order" in S. 15 do not include "attachment". 42 M. 637=50 I.C. 380; 40 I.C. 816=21 C.W.N. 1147. An attachment before judgment of a decree and a consequent order prohibiting the execution of the decree amounts to an injunction, and the period of its pendency is excluded under S. 15. 47 M. 641=1924 M. 673=47 M.L.J. 4. *See also* 30 I.C. 587. A party cannot claim to exclude under S. 15 in his favour the time during which no injunction was in force against him. 26 I.C. 267=27 M.L.J. 734. *See* 1928 P. 86. An injunction or order which prevents a party from instituting a suit may be either express or implied. A decree which declares that the plaintiff is in possession of the property of the suit as sole owner and orders the defendant never to deprive the plaintiff of his possession or to cause obstruction in any way to plaintiff's taking the crops raised, and which orders the defendant not to accept or recover the rents of the property cannot be held to operate as a stay of a suit for possession by the defendant or as an injunction restraining him from filing a suit for possession of the property, especially when the plaintiff in that suit has never sought an injunction or an order restraining the defendant from going to a Court of law and asserting his rights to possession of the property to which he may have been entitled. Such a decree cannot amount to an order staying the institution of a suit within the meaning of S. 15 so as to entitle the defendant in the prior suit to a deduction of time under that section. I.L.R. (1939) Bom. 173=40 Bom.L.R. 1134=1939 Bom. 1.

Stay of Execution.—An order granting time to the judgment-debtor for the payment of the decree amount is not an order staying execution within S. 15. 40 A. 198=44 I.C. 24. *See also* 1927 L. 106=100 I.C. 475; 16 Luck. 495=1941 Oudh 93. Where the order on an application for execution shows that it had been dismissed on account of the decree-holder's absence, it cannot be treated as an order for stay of execution within the meaning of S. 15. 131 I.C. 345=1931 L. 125. Where, in an appeal, an order staying the execution of a decree was obtained, the decree-holder was entitled under S. 15 (1) to exclude the period of stay in computing time for another execution application. 38 B. 153=21 I.C. 713. Adjournment of execution application does not operate as stay of execution. 36 I.C. 939; 7 P. 829. An attachment of a decree operates as a stay of execution. 30 I.C. 587. *See also* 47 M. 641. Mortgage decree against three persons—Stay order on application by one—Fresh application for execution after stay order withdrawn, saved by S. 15. 20 I.C. 439. The pendency of insolvency proceedings at the instance of the judgment-debtor will not arrest the running of time as against the decree-holder seeking execution unless the proceedings are stayed by the Insolvency Court or Executing Court. 80 P.W.R. 1912=14 I.C. 335; 21 Pat.L.T. 618=1940 Pat. 149; 1938 P. W.N. 397; 1939 Lah. 270; 47 I.C. 798=1918 P.H.C.C. 357. *See also* 1928 M. 627 (as to whether insolvency operates as stay). Stay of execution—Order permitting execution on security—Deduction of time during which order was in force allowed. 5 P.L.J. 39=53 I.C. 9; 1939 Lah. 270. Where stay is ordered subject to giving security and the security is furnished subsequently, the stay order should be held to be in force from the date of the original order. 1927 M. 391=99 I.C. 632. Decree accepted as security for costs of appeal does not operate as stay of execution. 44 I.C. 570=3 P.L.J. 132. *See also* I.L.R. (1940) Nag. 627=1939 N.L.J. 40=1939 Nag. 81. Where there was nothing to prevent the decree-holder from prosecuting the execution such as an order staying further execution, the decree-holder is not entitled to deduct the time spent in proceedings started by the judgment-debtor. 42 I.C. 811. A partial stay of execution in respect of a particular property against which execution is sought amounts to a stay of execution. 46 I.C. 399. *See also* 1928 M. 627. Suspension of execution through act of Court—Application not time-barred. *See also* 1927 P. 105=8 Pat.L.T. 189; 53 M.L.J. 520=1927 M. 997=105 I.C. 304; 87 I.C. 205=1925 A. 572. Stay order against one judgment-debtor—Period of stay cannot be excluded as against other judgment-debtors. 1928 M. 627. But *see* 1928 L. 349; 1927 P. 344; 1922 P. 549. Application for possession under O. 21, R. 95, C.P. Code, held up by orders of Court—Subsequent application after termination of those proceedings—Party is entitled to deduction of time. 99 I.C. 632=1927 M. 391.

Stay of suit.—Limitation for a suit for rent is not suspended by an ejectment suit. 57 I.C. 992=48 C. 65. Where, pending an

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

Exclusion of time during which proceedings to set aside execution sale are pending.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Effect of death before right to sue accrues.

17. (1) Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of an hereditary office.

NOTES.

appeal from the preliminary decree in a mortgage suit a receiver is appointed, the order of the appellate Court is one in effect staying further proceedings and the period during which it was in force should be excluded in calculating the time for applying for a final decree. 3 P.L.J. 565=1 P. 435.

Sec. 15 (2): NOTICE.—When notice to Government is compulsory under S. 80, C. P. Code, the period of two months should be excluded in computing the period of limitation prescribed for the suit against Government. 38 I.C. 600=52 P.R. 1917. *See also* I.L.R. (1939) All. 392=1939 A.L.J. 154=1939 All. 277; 22 O.C. 342=54 I.C. 535. Suit against Court of Wards—Time taken up in giving notice to defendant—Time extended by two months. 12 R.D. 452=1928 A. 625. *See also* 1938 M.W.N. 435. The notification of the claim under S. 17 of the U.P. Court of Wards Act is merely an information to the Collector of the particulars of the claim and S. 15 (2) would not apply to it. 1931 A.L.J. 949=1931 A. 752 (2). Notice—Single suit against several defendants—Notice under S. 77 of the Railways Act to one defendant—Effect. 3 Pat.L.T. 643=1922 P. 549. In a suit against several defendants if the plaintiff is entitled to deduct time against one defendant, he is entitled to deduct the period against all defendants. 1928 L. 349; 1930 A. 742. But *see* 1928 M. 627.

MISCELLANEOUS.—Agreement not to execute—Running of time. 38 I.C. 381=13 A.L.J. 305. Period of pendency of insolvency proceedings cannot be deducted when the question of limitation arises in a suit by a creditor for sum due. 24 Bom.L.R. 509=47 B. 244. *See* Pro. Ins. Act V of 1920, S. 78. *See also* I.L.R. (1942) Nag. 306. Limitation for proving debts ceases to run during insolvency proceedings. Where therefore a creditor sues after ordinary period of limitation is over but before annulment of adjudication order, the proper course is not to dismiss the suit but to permit him to withdraw suit with liberty to sue again after annulment of adjudication. 1933 R. 75=146 I.C. 124. A sale was effected in 1900 but up to March, 1917, the property was in *custodia legis* under an erroneous order of the Insolvency Court and the plaintiff could not during that period have instituted the suit. The suit was filed in 1919 to set aside the sale. *Held,* that limitation was saved by Ss. 14 and 15. 13 L. 70=1932 L. 281. Execution—Limitation, suspension of. 54 I.C. 426=6 O.L.J. 656. An application *prima facie* barred could be deemed to be in continuation of a former application only if the decree-holder shows that he has not been remiss. 35 I.C. 579 (17 C.L.J. 125, Dist.).

Sec. 16: APPLICABILITY OF SECTION.—auction-purchaser, obtaining symbolical possession, but kept out of actual possession—Suit for possession—Limitation. 26 C.W.N. 364=1923 C. 282 (2). *See also* 21 C.W.N. 304=38 I.C. 547. The word 'proceeding' is comprehensive and includes a suit as well as an application. 21 C.W.N. 304=38 I.C. 547.

Sec. 17.—The intention of S. 17 is to limit the time during which an action may be brought, and not to take away the rights of a person who is a possible defendant to an action, and it was not intended to accelerate any right of action against such a

Effect of fraud.

18. Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

NOTES.

person. 63 I.A. 429=1936 P.C. 309=71 M.L.J. 831 (P.C.). *See also* 1937 M.W.N. 1153=46 L.W. 880. Where, therefore, *X* who has a right to recover a certain sum of money from *Y* on his attaining the age of twenty-one dies before attaining that age, the right to sue for the amount does not accrue at the time when *X* dies, and *Y* would be quite entitled to say that no action could be brought against him to recover the amount until the date when *X* would have attained twenty-one. Accordingly, S. 17 not having the effect of accelerating the right against *Y* has no effect as causing time to run from that date. 71 M.L.J. 831 (P.C.). There is no legal warrant for placing on the words 'capable of instituting a suit' in S. 17, the limited interpretation as 'capable of instituting a suit and obtaining a decree'. S. 214. Succession Act, is against such interpretation. 172 I.C. 805=1937 Sind 318. The definition of legal representative as given in S. 2 (11), C.P. Code, is clearly not restricted to executors, administrators and heirs, for it includes even an administrator *de son tort*. A residuary legatee under the will of a Hindu residing in Sind is, even before obtaining letters of administration, 'legal representative capable of instituting suit' within the meaning of S. 17. 172 I.C. 805=1937 Sind 318. All that S. 17 contemplates is that if there is no legal representative who is capable of suing, the statute of limitation would not run. The heir-at-law may be a minor on which case limitation would not run by virtue of S. 6, but as soon as an administrator of the estate is constituted, limitation would begin to run against him, and the fact that there is an heir-at-law who is a minor would not prevent the operation of the law of limitation. The section does not have the effect of preventing the estate from vesting in the heir-at-law where the executor leaves a will though the executor under the will declines to accept office. "Legal representative" would also include an heir. I.L.R. (1938) Mad. 533=1938 Mad. 157=(1938) 1 M.L.J. 146. The right of an executor to sue begins from the date of the death of the testator. 24 I.C. 852=37 M. 175. The executor of a will capable of probate in British India is a legal representative capable of instituting a suit within S. 17 (1) from the date of the testator's death and not only from the date when he obtains probate. 20 C.W.N. 833=43 I.C. 113=35 I.C. 323 (P.C.). Limitation will not run where there is no person competent to sue and a trespasser of the temple properties cannot be said to be in adverse possession till some person is appointed as trustee. 18 I.C. 373.

Sec. 18: APPLICABILITY.—S. 18 applies to a suit brought to set aside the order of the Magistrate under S. 145, Cr.P. Code. 9 M.L.T. 91=9 I.C. 285. Only when a party is kept by fraud from knowledge and not from exercising his right. 25 I.C. 884. *See also* 16 C.W.N. 923=13 I.C. 63; 1 Bur.L.J. 226=1923 R. 103; 1928 C. 349. Section does not apply to an application by the judgment-debtor to set aside sale on the ground of fraud by the auction-purchaser. 86 I.C. 745=1925 C. 1227. The view of the Madras High Court is otherwise. *See* 56 M. 734=143 I.C. 388=38 L.W. 131=1934 M. 626=65 M.L.J. 139. Where in an execution sale which was conducted fraudulently by the decree-holder, the property was purchased *bona fide* by a third party and an application to set aside the sale was made by the mortgagee of the property beyond 30 days. *Held,* that S. 18 did not apply as the section applied only against a person claiming through another otherwise than in good faith and for valuable consideration. 1936 C. 706. Fraud must be by the decree-holder and fraudulent concealment of the proceedings has to be proved. 47 A. 850=1925 A. 778; 85 I.C. 622=6 Pat.L.T. 567; 83 I.C. 747. *See also* 108 I.C. 899=1928 A. 354; 1936 Cal. 706. The section applies to applications under S. 174 of the amended B.T. Act. 37 C.W.N. 927=1933 C. 782=60 C. 970. *See also* 8 B.R. 397; 60 C.L.J. 36.

CONSTRUCTION.—The words "against any person" should be understood to follow the words "a suit" in the beginning of the section. 89 P.R. 1911=10 I.C. 114.

EXECUTION SALE.—Where owing to the fraud of the decree-holder or other parties certain irregularities in the conduct of a sale are concealed from the knowledge of the judgment-debtor, the latter is entitled to apply for setting aside the sale in spite of confirmation and the time for the application is to be computed from the date when the fraud comes to the knowledge of the applicant. 45 A. 316=21 A.L.J. 176. *See also* 24 I.C. 249=19 C.W.N. 553; 16 I.C. 436.

ONUS AS TO FRAUD.—Where a suit is on the face of it barred, the plaintiff in the first instance, to invoke the aid of S. 18 must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Mere suggestions of fraud do not amount to such knowledge as is required by the section and the knowledge must be clear and definite knowledge of the facts constituting the particular fraud. 36 P. L.R. 114=1934 L. 878; I.L.R. (1939) 2 Cal. 163=43 C.W.N. 862=1939 Cal. 663. The onus is on the person committing the fraud to prove that the person injured thereby has had clear and definite knowledge of the fact constituting the fraud at a time too remote to allow him to seek the assistance of the Court. 46 I.C. 221=27 C.L.J. 528. *See also* 17 I.C. 10=14 Bom.L.R. 771; 36 C. W.N. 758=55 C.L.J. 420; 1928 C. 349; 1930 P. 58. It is not enough for him to show that the plaintiff had means available to him for coming to know of the fraud. 36 C.W.N. 758=55 C.L.J. 420. Fraud—Suit to set aside decree obtained by fraud—Burden of proof. 41 I.C. 385. *See also* 20 I.C. 538; 47 C.L.J. 351=1928 C. 349. Where there is fraud at the outset in conducting the sale, an application to set aside sale the onus is on the decree-holder to establish the precise point of time when the judgment-debtor had knowledge of the fact. 1928 P. 228; 1930 P. 58. The party guilty of fraud must show that the continuing effects of fraud have been removed, and then only limitation would operate. 4 Pat. L.T. 306=1923 P. 435. In ordinary cases the initial burden is on the plaintiff who alleges fraud to lead evidence *prima facie*, at any rate establishing the date of his knowledge. But if the defendant's pleadings are evasive and do not raise specifically an issue as to the date of plaintiff's knowledge, the burden of proving the date is on him. 1929 A. 721 (2). It is incumbent on the plaintiff to distinctly allege the particular fraud by which he has been kept from a knowledge of his right of suit against the defendant specifically and with detailed particulars. 101 I.C. 322=1927 A. 437; 99 I. C. 946=44 C.L.J. 565. *See also* 1929 M. W.N. 811.

FRAUD, NATURE OF ILLUSTRATIVE CASES.—Fraud antecedent to an execution sale does not necessarily indicate fraud subsequent to the sale. It is also clear that fraud antecedent to the sale may have an important bearing on the question whether there was fraud subsequent to the sale sufficient for the purpose of S. 18. 17 C.W.N. 478=17 I.C. 972. Mere ignorance of a plaintiff of his right to sue would not prevent time from running against him; such ignorance must have been brought about by the fraud of his opponent. 16 I.C. 547. *See also* 36 C.W. N. 758=55 C.L.J. 420. In order to constitute fraud, there must be some abuse of confidential position, some intentional imposition, or some deliberate concealment of facts, a designed fraud by which a party knowing to whom the right belongs conceals the facts and circumstances giving that right. 36 C.W.N 758=55 C.L.J. 420. Fraud—Misstatement of value of property in execution petition not fraudulent concealment. 16 I.C. 464=16 C.W.N. 894. *See also* 41 C.W.N. 993; I.L.R. (1937) 2 Cal. 496; I.L.R. (1939) 2 Cal. 163=43 C.W.N. 862=1939 Cal. 663. For getting benefit of S. 18 in setting aside an *ex parte* decree fraud in keeping defendant ignorant of the decree must be proved. Mere fraud in getting decree is not sufficient. 57 I.C. 15. The party must also show that he was prevented by fraud from knowledge of his right to institute a suit or make an application. Fraud in any other connection is immaterial. 2 P.W.R. 1919=50 I.C. 610. Fraud—Concealment—Alienation by a sonless male proprietor—Limitation—Burden of proof. 177 P.L.R. 1912=16 I.C. 844. Fraud—Failure to give pre-emptor notice of sale. 11 I.C. 313. *See also* 16 I.C. 804=32 P. R. 1913. A mere omission to inform the pre-emptor or the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor, there would undoubtedly be a fraud within the meaning of S. 18. 115 I.C. 798=1929 A. 213. *See also* 180 I.C. 525=1938 A.W.R. (H.C.) 847=1939 All. 113. 5 Luck. 492 (P.C.) (held no fraud). Silence on the part of a co-sharer coming into possession of property belonging to himself and another who was ignorant of it, amounts to fraud which will save limitation. 36 C.W.N. 758 =55 C.L.J. 420. Neglect to settle accounts with the object of concealing his misconduct from the principal is not 'fraud' within this section. 36 I.C. 418=9 Bur. L.T. 130. Mere carelessness or negligence does not substantiate a finding of fraud. 8 Pat.L.T. 28=97 I.C. 798=1926 P. 397. It is doubtful if the section applies to a case in which the fraud was antecedent to the accrual of right. 11 I.C. 295=15 C.W.N. 965. Execution sale and symbolical delivery of possession—Party in possession having notice of the same subsequently—Limitation should be computed, only from the period when his possession was sought

Effect of acknowledgment in writing.

19. (1) Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

NOTES.

to be interfered with. 1928 M.W.N. 811. A mere omission by a mortgagor to inform the mortgagee regarding his want of title in the property mortgaged is not enough to constitute active fraud so as to attract the application of S. 18. The section is directed against cases of active and designed fraud. 7 O.W.N. 1045. S. 18 is also applicable to proceedings under U.P. Encumbered Estates Act. 14 Luck. 494=1939 O.W.N. 227=1939 Oudh 227; 1939 A.L.J. 447.

PLEADINGS.—Fraud—Plea of express averment—Necessity of. 16 I.C. 804=32 P.R. 1913.

KNOWLEDGE OF FRAUD.—To bring his case within S. 18 the plaintiff must allege when the fraud pleaded came to his knowledge. 49 I.A. 312=1922 P.C. 336 (P.C.). Knowledge of fraud—Guardian's knowledge, if binds ward. 37 B. 158=19 I.C. 405. Time for application to set aside sale of immovable property of insolvent by Insolvency Court on ground of fraud runs from the moment fraud becomes known to applicant. 23 I.C. 397. Knowledge of fraud—Auction sale—Judgment-debtor fraudulently kept in ignorance of sale—Effect. 17 L.W. 152=1923 M. 353. *See also* 1928 C. 349 (a case under O. 21, R. 90); I.L.R. (1938) 1 Cal. 512=1938 Cal. 263. Knowledge of fraud—Deed void *ab initio*—Suit to set aside—Limitation. 70 I.C. 525=26 C. W.N. 479.

KNOWLEDGE OF RIGHT.—When the true nature of rights was not discovered by the plaintiff earlier than that time at which his demand for possession was resisted. *Held*, limitation began from the date of resistance. 45 A. 179=50 I.A. 69=44 M.L.J. 489 (P. C.). *See also* 52 I.C. 958; 43 I.C. 671. A person desiring to invoke the aid of S. 18 must establish that there has been fraud, and that by means of such fraud he has been kept from the knowledge of his right to sue. 36 C.L.J. 295=49 C. 886. *See also* 80 I.C. 590=1924 N. 94=20 N. L.R. 23; 7 R. 104=1929 R. 62; 1929 A. 721 (2); 42 I.C. 548; 48 I.C. 970; 1933 R. 110=144 I.C. 980. Knowledge of right—Benamidar impleaded defendant—Real owner added after period of limitation—Effect. 26 I.C. 860. In the case of an uncertified adjustment, it is not open to the judgment-debtor to claim an extension of time to apply under O. 21, R. 2, C.P. Code, on the ground of fraud. 16 C.W.N. 923=13 I.C. 63=16 C.L.J. 174. *See also* 11 L.B.R. 363=1923 R. 103. S. 18 does not deal with the exercise of the right, but with knowledge of the right. Where it was alleged that the decree-holders had fraudulently kept the judgment-debtor from exercising his rights under O. 21, R. 2 by giving him assurances, no extension was granted. 11 L.B.R. 363=1923 R. 103. As to knowledge of right, *see also* 41 M. 488.

Sec. 19: SCOPE OF.—*See* 40 M. 698; 40 A. 360. There must be clear acknowledgment of liability. 1936 A.L.J. 625=1936 All. 522. The section is not confined to acknowledgments in respect of debts, but applies to cases in which a plea of limitation is raised to bar a claim to movable or immovable property and also to acknowledgments saving the bar of limitation in cases of applications for execution of decrees. 53 A. 963=137 I.C. 243=1932 A. 199. For a case to be brought within the purview of S. 19 there must be a definite or unequivocal acknowledgment of the debt. 1935 R. 152. The acknowledgment contemplated by S. 19 is an acknowledgment of liability. Where the party pleads payment of the entire amount of a certain date there is no question of acknowledgment. 28 N. L.R. 348. An admission of execution of a promissory note coupled with denial of liability on the ground of having received no consideration does not amount to an acknowledgment. [33 C. 1047 (P.C.), Dist.]. 151 I.C. 376=36 Bom.L.R. 334=1934 B. 186.

BEFORE THE EXPIRATION OF THE PERIOD.—[*See* notes under S. 4, *supra*.] The acknowledgment must be made before the expiration of the period. 6 C. 340; 2 A. 443. S. 4 of the Limitation Act can come into operation only after the period of limitation prescribed has already expired, while, under S. 19, it is necessary that the acknowledgment should be signed before the expiration of the period prescribed. S. 19 cannot also include the period extended by S. 4. 1937 M. 367=(1937) 1 M.L.J. 262. *See also* 1940 N.L.J. 607; 1937 Lah. 162; (1937) 2 M.L.J. 703=1938 Mad. 19. So, where limitation for suit on promissory note expires during vacation, an acknowledgment after that date but before re-opening of Court will not avail. (*Ibid.*) *See also* 35 C.W.N. 370; 36 B. 782. But *see contra* 38 P.L.R. 934=164 I.C. 650; 110 I.C. 76=1928 N. 192; 48 A. 726. S. 19 cannot apply to an acknowledgment made after expiry of period of limitation prescribed, but during the period excluded by S. 52 of the U.P. Court of Wards Act, and so such an acknowledgment cannot ex-

NOTES.

tend time. I.L.R. (1938) All. 363=1938 A.L.J. 252=1938 All. 217 (F.B.). Plea of *jus tertii* in a prior suit cannot be relied on in a subsequent suit as it did not constitute an acknowledgment within the meaning of S. 19. 1933 L. 491=145 I.C. 343=34 P.L.R. 841. Per *Sulaiman, A.C.J.*—The onus lies on the creditor to prove that the acknowledgment to pay a money debt was made within time. 53 A. 963=137 I.C. 243 =1932 A. 199. A payment within the period of limitation saves limitation provided there is an acknowledgment in writing. It does not matter even if the acknowledgment is made beyond the period of limitation as it is the payment and not the acknowledgment which saves limitation. The acknowledgment is merely a matter of evidence provided it is signed before the suit is commenced, is sufficient. 57 B. 453=35 Bom.L.R. 471= 1933 B. 252. As to acknowledgment during holidays, *see* 26 B. 782; 25 B. 586=30 Bom. L.R. 733. An acknowledgment after limitation period cannot save the operation of the Act, 42 A. 390=58 I.C. 597; 42 A. 575 =56 I.C. 986 (F.B.); 1930 L. 985; 1930 O. 287; 1930 A. 467. A series of acknowledgments each within three years of the one next preceding will save limitation. 6 C. 340; 25 B. 586. The word *"prescribed"* in S. 19 means prescribed by the Schedules. 1922 N. 250 (26 B. 782). It means prescribed by any law for the time being in force and not merely by the Limitation Act, First Schedule. 80 I.C. 743=1925 A. 68. *See also* 1927 A. 114=49 A. 67=98 I.C. 1005; 30 Bom.L.R. 733; 32 L.W. 502; (1937) 2 M.L.J. 703=1938 Mad. 19=46 L.W. 559=I.L.R. (1938) Mad. 439. But a promise under S. 25, Contract Act, may be made after the period. 1928 N. 124. An acknowledgment subsequent to the period of twelve years after the execution of a mortgage but within the extra period allowed by S. 31 will not save limitation. 1929 M. 791=57 M.L.J. 353. *See also* 1930 M. W.N. 1930=32 L.W. 502. Though an unconditional acknowledgment has been held to imply a promise to pay, it is not by itself sufficient to constitute a "promise" within the meaning of S. 25 (3) of the Contract Act. So an acknowledgment made after the expiry of the period of limitation on the original note cannot form the basis of a suit. 1930 P. 604. As to *plea of novation* of contract on settlement of accounts, *see* 130 I.C. 503 (1)=1931 O. 97. Mortgage by conditional sale—Failure of mortgagee to take possession after stipulated period—Unregistered acknowledgment of amount due—Effect of. 145 I.C. 159=1933 L. 174. As to the meaning of the words "before the expiration of the period prescribed for a suit," *see* 1933 L. 47=34 P.L.R. 252.

APPLICABILITY.—Section applies to execution proceedings. 79 I.C. 897=1925 P. 197. *See also* 20 C.W.N. 272=43 C. 207; 20 C.W.N. 952; 1 P.L.J. 214. Also to suits governed by Punjab Loans Limitation Act of 1904, 1929 L. 124. There is a *distinction between an acknowledgment of a right to an account and an acknowledgment of a debt.* For an acknowledgment of a right to an account there need not be an acknowledgment that a debt or even a specified amount thereof is actually due. Where the parties in effect state that there is a right to a pending account between them and each has got a claim to recover the balance which may be found due on the accounts being looked into by certain arbitrators and each agrees to pay the other the balance so found due, there is a sufficient acknowledgment of a right to an account. 169 I.C. 340=1936 M.W.N. 998=1937 Mad. 38. An acknowledgment falling under S. 19, need not necessarily be a stamped acknowledgment falling under Sch. I, Art. 1 of the Stamp Act. The latter must be written with the intention of supplying evidence of the debt; whereas a document containing an admission of liability, such as a letter reciting a settlement of accounts, would save limitation under S. 19, though not stamped. I.L.R. (1939) Nag. 695= 20 N.L.J. 276=1938 Nag. 51. A document as an acknowledgment under S. 19 cannot operate to save limitation unless it has been executed within time; also in such a case the suit must be found on the original cause of action. The document itself cannot be used as the basis of the suit. I.L. R. (1940) Nag. 441=1938 Nag. 180. A subsequent acknowledgment containing clearly a promise to pay the balance due on a promissory note can be the basis of a suit, even though the original promissory note is not admissible in evidence. (1938 Lah. 503, Rel. on). 40 P.L.R. 801=1938 Lah. 505. Where acknowledgment implies a promise to pay, a suit can be brought on the basis of such acknowledgment considered as an agreement provided consideration is proved. Where a suit is brought on such basis, the plaintiff must be taken to allege a valid agreement and if the defendant does not plead lack of consideration, then consideration must be taken to have been proved. I.L.R. (1938) Lah. 193=40 P.L. R. 533=1938 Lah. 234 (F.B.).

CONSTRUCTION.—S. 19 must be construed liberally. 86 I.C. 859=1925 L. 529; *see also* 139 I.C. 218=1932 B. 531.

"LIABILITY IN RESPECT OF SUCH PROPERTY OR RIGHT."—An acknowledgment must be one from which an absolute promise to pay can be inferred or an unconditional promise to pay a specific debt or there must be conditional promise and evidence that the condition has been performed. 16 M.L.J. 300 =33 C. 1047 (P.C.); 16 M.L.J. 563=29 M. 519; 49 A. 801=1927 A. 488 (2); 49 A. 726=102 I.C. 111; 1927 A. 577. An unconditional acknowledgment implies a promise to pay. 1929 L. 263=10 L. 745; 1929 L. 264. As to effect of conditional acknowledgment, *see* 1939 Lah. 31; 1937 Pat.

NOTES.

616; 1937 Lah. 827 (Debt need not be expressly specified); It need not necessarily contain a promise to pay, or amount to a promise to pay. The endorsement made by the debtor acknowledging the correctness of an account which showed him a debtor to the extent stated is a clear acknowledgment of the debt, with the ordinary implication of a promise to pay, and is sufficient for the purposes of S. 19. 174 I.C. 585=1938 Pat. 139. S. 19 is not controlled or limited, by the language of the proviso to Column 3 of Art. 183 of the Limitation Act. An admission of liability in respect of a decree of a High Court which amounts to an acknowledgment within the meaning of S. 19 is sufficient to extend the period of limitation for execution of the decree, although the admission is not made to the decree-holder. I.L.R. (1939) 2 Cal. 523=44 C.W.N. 322=1940 Cal. 210 (1). The acknowledgment must be in respect of the property or right, subject or litigation. 23 O.C. 176; 104 I.C. 572. There must be a clear acknowledgment of liability in respect of a right. 1936 A.L.J. 625=1936 A. 522. Acknowledgment of present liability only is necessary. 41 M. 693=47 M. L.J. 840. Whether an acknowledgment is one of an existing liability or not, depends upon the terms of the acknowledgment, and subsequent events or external evidence cannot be relied upon with a view to show that there was an existing liability at the time and thus to place upon the acknowledgment an interpretation of which it would not otherwise admit. 34 Bom.L.R. 953=1932 B. 531. *See also* 1939 A.L.J. 2=1939 All. 179 (letter promising to send money in 2 or 4 days). 15 Luck. 537=1940 O.W. N. 425=1940 Oudh 305; 1939 Rang.L.R. 594=1939 Rang. 401; 8 Cut.L.T. 1; 1939 Rang. 280 (payment on account); I.L.R. (1937) Nag. 374=1937 Nag. 304; 1940 Lah. 102 (Endorsement of payment by debtor on back of the bond); 1938 A.M.L.J. 139 (filing of schedule of creditors by an insolvent-debtor in his Insolvency petition); 41 P.L.R. 356=1939 Lah. 31 (List of debts due from a minor's estate filed by guardian). A receipt bearing one anna stamp can serve as proof of acknowledgment, though inadmissible as bond for want of proper stamp. 1929 A. 980. *See also* 13 Luck. 376=1937 Oudh 387=1937 O.W. N. 622. But a defectively or insufficiently stamped promissory note cannot be used in evidence as an acknowledgment of a debt under S. 19. Nor can it be impounded under S. 33 of the Stamp Act and then admitted in evidence. S. 35 of the Stamp Act prohibits its admission in evidence for any purpose. 63 C. 813=40 C.W.N. 399; *See also* 1938 N.L.J. 145. An express repudiation by a letter, of the plaintiff's claim coupled with a denial of existing liability is not an acknowledgment of liability under S. 19. 20 I.C. 10=11 A.L.J. 601; 33 C. 1047 (P.C.); 42 Mad. 637; 11 Pat. L.J. 551=78 I.C. 919; 41 P.R. 1916=32 I.C. 497; 1927 A. 317=100 I.C. 199. Entries as to payment of rent in an account book not signed by defendant or his authorized agent are not acknowledgment. 34 A. 464=10 A.L.J. 1. *See also* 1930 A. 124. The question whether any particular endorsement amounts to an acknowledgment or not within the meaning of S. 19 must depend on the actual words which have been employed. The Court cannot go beyond those words for the purposes of the section. The endorsement itself must contain the acknowledgment either express or implied. I.L.R. (1939) All. 200=1938 A. L.J. 1233=1939 All. 177. An admission by the debtor of the existence of an unsettled account between him and the creditor coupled with an expression of willingness to have it settled with him and a query whether anything would be done implies an admission of liability for the amount that may be found due upon the settlement. A denial of liability for the amount claimed by the creditor based upon certain calculations by him cannot be read as a total denial of liability for any amount, but is only a denial of liability to the extent asserted by the debtor. A letter containing such an admission sent by the debtor in reply to a notice of demand made by the creditor is an acknowledgment of liability sufficient to save limitation under S. 19. 49 L.W. 106=1939 Mad. 300. An admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction is a sufficient acknowledgment of liability for the purpose of saving limitation. 47 L.W. 351=1938 Mad. 496=(1938) 1 M.L.J. 450. On a settlement of mutual accounts entry as to the amount payable by one to the other is a distinct promise to pay and saves limitation. 1929 L. 695; 137 I.C. 840=33 P. L.R. 940=1932 L. 470. A signature written by a third person under the directions of the person whose signature is in question, and in his presence, is proper signature and is personal signature for the purposes of S. 19. 10 I.C. 215. Whether an acknowledgment after the period of limitation is sufficient to form the basis of a fresh action, *see* 23 Bom.L.R. 1186=1922 B. 168; 1931 L. 69. An acknowledgment must distinctly refer to the liability in dispute; it may be express or may be left to implication which however must be a necessary implication. It need not be addressed to the creditor. 45 B. 934=61 I.C. 406; 24 Bom.L.R. 713=46 B. 1000; 89 I.C. 617 =23 A.L.J. 869=1926 A. 75; 91 I.C. 461 =1926 C. 686; 104 I.C. 572; 6 O.W.N. 943; 7 O.W.N. 1195. An acknowledgment need not contain an admission that a precise sum is owing but an acknowledgment that something is or may be due is sufficient. 1933 R. 147=144 I.C. 996; 162 I.C. 806= 1936 L. 276. *See also* 41 P.L.R. 557= 1939 Lah. 216. The signing by a mortgagee

NOTES.

of an entry in the register of sanads granted to him and reciting the mortgage amounts to an acknowledgment within S. 19. 45 B. 934. *See also* 91 I.C. 461=1926 C. 686. So also a statement setting out the admission of a liability in general terms. 35 B. 302=10 I.C. 888. A stranger purchasing property at a sale in execution does not acknowledge a mortgage on the property by reason of the fact that the sale proclamation and the certificate of sale state that the property is subject to mortgage. Sale proclamations do not conclude questions of title, 59 M. 312=44 L.W. 887=1936 M. 70. A statement by a decree-holder under O. 21, R. 66, C.P. Code, was held not to amount to an acknowledgment. 1931 A.L.J. 862. An acknowledgment of the debt in an application before a Debt Conciliation Board, if made before the period of limitation expired, it would extend the period of limitation for a suit in respect of the debt. 190 I.C. 818=1940 N.L.J. 217=1940 Nag. 214. An acknowledgment does not require new consideration nor an actual promise to pay. 50 C. 974=28 C.W.N. 322; 48 M. 693=47 M.L.J. 840; 25 M.L.J. 259=21 I.C. 30; 1936 M. 939. But *see* 20 I.C. 501. Loan of money in 1920—Pledge of shares in 1922 not in writing—If acknowledgment—Payment of interest in 1924—Limitation—If saved. 37 Bom.L.R. 165. An *acknowledgment of a barred debt* is of no avail to save limitation. 67 I.C. 298; 1933 L. 209=34 P.L.R. 480. But *see* 38 P.L.R. 939=1937 Lah. 162; 132 I.C. 420; 54 A. 506=140 I.C. 783=1932 A. 461. The onus of proof lies on the plaintiff to show that his case comes within the period of limitation on account of such acknowledgment. 45 A. 506=1932 A. 461. A *deposition* made by the defendant in another case which was not signed by him or his duly authorised agent is not a valid acknowledgment. 45 I.C. 99=34 P.R. 1918. *See also* 12 R. 610=1934 R. 282. Where in a sale deed it was recited that the property was conveyed as part payment towards the principal amount due to the vendee on an earlier mortgage and it was so endorsed, and where further the executant appeared before the Registrar and admitted execution of the same, on a question whether there was thereby an acknowledgment of the mortgage debt. *Held,* that the appearance before the Registrar and acknowledgment of the execution of the sale-deed amounted to an admission not only of execution of the deed in question but also of all matters set out in the deed itself. The acknowledgment in writing before the Registrar is an acknowledgment which could be availed of to save limitation. 1938 M.W.N. 113=1938 Mad. 429. *See also* I.L.R. (1939) Kar. 693=1939 Sind 113 (recital of debt in a reference to arbitration). Legal consequences need not be acknowledged. 42 M. 52=35 M.L.J. 552. An acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree falls under S. 19 and saves limitation for a final decree for sale. 20 I.C. 501=180 P.W.R. 1913. Admission of the existence of relationship of creditor and debtor is necessary for an acknowledgment under S. 19. 31 M.L.J. 231=40 M. 701. Payments in discharge of a debt evidenced by unstamped and therefore inadmissible pro-note are payments against or acknowledgments of the original debt and not on account of the pro-note. 34 I.C. 417; 1926 M. 1148=98 I.C. 75. *See also* 63 Cal. 813=40 C.W.N. 399. A promise to remit money due on a particular document is a sufficient acknowledgment. 29 I.C. 36. Acceptance of an award directing the parties to share equally the outstandings and amounts found payable in the accounts of the partnership is not an acknowledgment. 28 I.C. 864. Reference to the mortgage and its transfer as the title under which a party holds is sufficient acknowledgment of the right. 28 I.C. 69=28 M.L.J. 266. A letter admitting dues on settlement of accounts is an acknowledgment. 12 I.C. 410; 7 P. 238=1928 P. 221; 30 Bom.L.R. 688; 80 I.C. 355 (1)=46 M.L.J. 468. *See also* 32 Bom.L.R. 1390=128 I.C. 911=1931 B. 74. But *see* 23 I.C. 587=19 C.W.N. 170. The contractors were claiming about a lakh and fifty thousand rupees and the officials of the Municipal Committee, who had gone into the matter, admitted an account of Rs. 17,000 odd subject to counter-claims on behalf of the Committee. *Held,* that such a position implied unsettled outstanding account between the parties and that the acknowledgment extended limitation. 17 L. 737=1936 L. 629. Letter agreeing to pay if balance is found due is acknowledgment. 1930 A. 124. A letter written by a debtor to his creditor agreeing to renew a promissory note which is about to become barred by limitation constitutes an acknowledgment. 40 C.W.N. 130. A reply by a customer to a tradesman to his bill with the words "accounts rendered," that detailed account will be sent, does not amount to an acknowledgment. 36 M. 68=21 M.L.J. 1024. *See also* 22 Pat.L.T. 1057. A letter offering to pay as a matter of grace and for the sake of the recommendation of a third person, does not amount to an acknowledgment of any liability. 35 P.L.R. 529=1934 L. 475. Oral evidence is admissible to prove the identity of the debt, or right or the name of the creditor of the person entitled to the right, or the date of an acknowledgment and these need not appear on the face of the writing. Inference from terms of deed permissible. 1930 L. 985; 65 I.C. 279=17 N.L.R. 209; 26 N.L.R. 320. The writing sought to be used as an acknowledgment should in itself import that the person making the acknowledgment is under an existing liability. 65 I.C. 279=17 N.L.R. 209. Mere admission of *kanoms* implies acknow-

NOTES.

ledgment of subsisting *kanom*. 30 L.W. 1045=57 M.L.J. 789. An endorsement on a promissory note, "paid Rs. 350 towards this promissory note and endorsed the payment hereon," can be read as an acknowledgment of liability under S. 19 of the Limitation Act. The use of the words "towards" in itself implies that more remains to be paid, *i.e.*, that the payment is made on account of a larger sum due under the instrument. (1942) 1 M.L.J. 469 (F.B.). *See also* 8 Cut.L.T. 1. There is no rule of law that an admission of a past liability unaccompanied by an allegation of discharge should in all cases be interpreted as an admission of a subsisting liability. The question in each case is, is it a proper inference to draw from the facts and circumstances, that the debtor intended to make an admission that on the date it was made, the debt was existing. 1935 M. 371=68 M.L.J. 73. An acknowledgment to be valid must be in writing signed by the party; where it is merely initialled, it is not a proper acknowledgment. 96 I.C. 700=51 M.L.J. 414=1926 M. 827. A statement made in a criminal Court which did not contain the signature of the party is not a valid acknowledgment. 26 A.L.J. 420=1928 A. 310. Nor an admission of a debt recorded in a deposition by the defendant made in insolvency proceedings, and recorded and certified under C.P. Code, O. 18, R. 5 (Rangoon), but not signed by the defendant. 12 R. 610=1934 R. 282. The clerk certifying cannot be deemed the agent of the defendant. 1934 R. 282. An answer given to interrogatories in a previous suit merely stating the existence of an entry in the firm's books credited to the name of a certain person is no acknowledgment of an existing liability. 1929 L. 883. A document undated and unsigned by the mortgagee or his duly authorized agent cannot save limitation under S. 19 in a suit for redemption of the mortgage. 20 I.C. 62. An entry in the *bahi* of the mortgagee signed by the mortgagor and bearing the name of the former as a scribe cannot be regarded as a valid acknowledgment of the mortgagor's right to redeem. 131 I.C. 349=1931 L. 122. There must be a distinct acknowledgment of an existing liability or jural relation. 15 I.C. 363=5 Bur.L.T. 81. Where on a proper construction, the defendant purported to say 'no doubt there is a contract into which we entered but no money is liable to be paid under the contract because I am prepared to see the contract through'. *Held,* it did not amount to an acknowledgment. 41 L.W. 476=1935 M. 287. *See also* 155 I.C. 721=39 C.W.N. 139=60 C.L.J. 396=1935 C. 255. Letter stating that accounts settled by creditor are correct is not acknowledgment. 91 I.C. 494=1925 M. 1215. It is not necessary that the acknowledgment should be addressed to any particular person and it is a sufficient acknowledgment even if it be accompanied by a refusal to pay. 53 I.C. 898=23 C.W.N. 921. An unconditional acknowledgment implies a promise to pay; consequently, if it is unstamped, it will be admissible on payment of the requisite penalty. 119 I.C. 417 (2); 1933 L. 47=34 P.L.R. 252. *See also* 130 I.C. 570; 1941 Lah. 23; 1941 Rang. 244. Where the debt due on an unstamped pro-note is acknowledged, the acknowledgment is part of the same transaction as the loan by the promissory note and cannot be treated as an independent transaction upon which the plaintiff could frame a cause of action. 1933 A. 280=141 I.C. 130. The endorsement of cancellation on a prior promissory note at the time of execution of a fresh promissory note for the amount due under the earlier one amounts to a valid acknowledgment of liability, so as to keep alive the original liability. 48 L.W. 498=1938 Mad. 34=(1938) 2 M.L.J. 846. Unconditional acknowledgment—Whether constitutes a fresh cause of action—Nature of the plea of limitation in such a case. 53 A. 963=137 I.C. 243=1932 A. 199. A suit lies on an unconditional acknowledgment. 33 P.L.R. 517 (2)=1932 L. 400. Striking the balances by the executant of a bond from time to time imports a promise to pay the debt so as to furnish a fresh cause of action. 116 I.C. 464=1929 L. 421. An acknowledgment by the judgment-debtor of his liability for portion of money by means of an application for adjustment under O. 21, R. 2, gives a fresh start of limitation in respect of the entire amount. 1930 C. 304. Applicability of section—Suit filed in wrong Court—Defendant filing written statement—Acknowledgment by him gives fresh starting point of limitation—Ss. 14 and 19 whether can be read together. 32 Bom.L.R. 58. The inclusion of a debt due on a promissory note executed by a deceased person on the form of valuation filed with a petition for the grant of letters of administration to the estate of the deceased by some of the heirs of a deceased Mahomedan is an acknowledgment against those heirs. 1930 M. 218. If the acknowledgment of the liability is capable of being identified with the liability sought to be enforced in the suit by adducing independent evidence, the acknowledgment should be regarded as a good acknowledgment for the purpose of saving limitation. 1930 A. 368. Acknowledgment in a benami sale-deed is sufficient. 1930 M. 796. A sub-mortgage can amount to a valid acknowledgment that the property was on that date held under mortgage right. 32 Bom.L.R. 1096=1930 B. 466 (F.B.). *See also* 180 I.C. 795=1939 Pat. 427; 8 O.W.N. 541; 8 O.W.N. 522. Admission of liability in a deed of gift by the debtor in favour of his son is sufficient. 1931 O. 54.

DECREE DEBT AND ORDINARY DEBT.—An acknowledgment to save limitation under S. 19, must either be a direct acknowledg-

NOTES.

ment of the debt or an acknowledgment of such a kind that an acknowledgment of the debt is inevitably implied. An acknowledgment of a decree debt is obviously not necessarily the same as an admission that if the debt which had ripened into a decree had still been alive at the time of the acknowledgment he would have been liable. 1937 Mad. 826.

ACKNOWLEDGMENT TO WHOM TO BE MADE.—14 I.A. 168=14 C. 801 (P.C.); 10 C. W.N. 551=30 C. 613. The acknowledgment of a receipt as mortgagees to the Government is a sufficient acknowledgment. 37 B. 326=40 I.A. 68=18 I.C. 909=25 M. L.J. 101 (P.C.), affirming 2 I.C. 469=11 Bom.L.R. 318. An acknowledgment to have the effect of saving limitation need not be addressed to the person entitled to the property. 13 I.C. 603=16 C.W.N. 346; 91 I.C. 461=1926 C. 686; 1926 C. 1140=97 I.C. 710=30 C.W.N. 968; 7 O.W.N. 1195 =1931 O. 54 (communication not necessary). 13 Luck. 334=1937 O.W.N. 719= 1937 Oudh 391 (letter by judgment-debtor to third person to ask decree-holder for time to pay). An acknowledgment, duly signed, although it is addressed to a dead person will operate as a valid acknowledment of a debt to save limitation under S. 19, 1938 Pat. 180; 53 I.C. 898=23 C.W.N. 92'. There is a distinction between addressing the acknowledgment of liability and acknowledging liability to a person. In order to bring his case within limitation the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him. 38 P.L.R. 855=1936 L. 659. So when an acknowledgment of liability is made in favour of only one of the obligees having equal shares, the others are not entitled to the benefit of S. 19. The obligee having the benefit of S. 19 is entitled to recover his share only and not the whole amount; 1936 Lah. 659. An acknowledgment in a deed of assignment executed by the obligor in favour of third person is enough to save limitation. 49 I.C. 868. *See also* 1928 C. 850; 1939 N. L.J. 109=1939 Nag. 113 (Entry in list of documents filed in Court.)

SIGNED, MEANING OF.—If, upon a document which purports to be an acknowledgment of liability, there appears the name of the debtor, and that name is introduced under his authority with a view to authenticate the document, such document is a valid acknowledgment of his liability. It is not necessary that the debtor's name should be written by himself. It is sufficient if it is written by a person acting with authority to write his name and to acknowledge the debt in question. That would constitute his "signature" for the purposes of S. 19. It does not make any difference whether the debtor is literate or illiterate. The section makes no difference between a literate and an illiterate person. If the debtor's name is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, the name, whether written or printed, would constitute his signature under S. 19. Where a letter of acknowledgment is written by a third party at the instance of and on the instructions given by the debtor, and the debtor causes the letter to be posted to the address of the creditor, such letter constitutes a valid acknowledgment of liability under S. 19. 18 Pat. 715 =20 Pat.L.T. 927=1940 Pat. 6.

ACKNOWLEDGMENT BY WHOM—AUTHORITY TO ACKNOWLEDGE.—An acknowledgment of liability by a Hindu woman in possession for her interest, of the estate of her husband or father, will not extend the period of limitation as against the reversioners. 35 A. 227 =40 I.A. 74=25 M.L.J. 131 (P.C.), affirming 32 A. 33. An acknowledgment by principal debtor does not save limitation against the surety unless it is shown that the latter allowed himself to be represented by the person who made the acknowledgment. 132 I.C. 590=1931 L. 691. *See also* 8 O. W.N. 544; 44 C.W.N. 322=1940 Cal. 210. But S. 19 or 21 do not contemplate that the authority to be given to the agent must in every case be an express authority. 133 I.C. 155=1931 A. 398. An agent who had general authority to settle the purchase price of the goods could plainly also arrange to prevent the time from becoming a bar to it. 24 C.W.N. 153=55 I.C. 543 (P.C.); 100 I.C. 784=4 O.W.N. 275. Also a letter by a general agent written at the instructions of the debtor and signed by the agent. 1929 O. 479. Where the letters forming part of the correspondence between the parties in connection with the payment of a loan were written by persons who were not only general agents of the debtor but one of them was the assistant manager and the other the manager of the estate, the Court can presume them to be persons who were duly auhorised to make acknowledgments on behalf of the debtor. 162 I.C. 362=1936 O. 280. When the acknowledgment is written by an agent duly authorized in that behalf, if he affixes thereto the name of his principal in any position, even by impressing it with a rubber stamp, such affixation of the name of the principal must be held to be a signing of document within the meaning of S. 19. 13 R. 522=1935 R. 160. As to effect of acknowledgment by *agent of mortgagee, see* 1933 L. 345=34 P. L.R. 862=14 L. 587. *See also* 12 Luck. 531=1937 Oudh 26 (acknowledgment by officer of Court of Wards binds minor ward.) *See also* 1938 A.L.J. 252 (Collector in charge of Court of Wards. *See also* 41 Bom.L.R. 391= 1939 Bom. 237); 16 Luck. 701=1941 Oudh 254 (Letter by Pleader acknowledging liability). An acknowledgment by the *mukhtar-i-am* of a person not specially empowered to make such acknowledgment is not valid. 44 A. 546=20 A.L.J. 359=1936

NOTES.

O.W.N. 957=1936 O. 332. An acknowledgment of liability by a guardian *ad litem* of a minor, who is also the lawful guardian under the personal law of the minor, is effective against the minor, whether or not such acknowledgment is for his benefit. I.L.R. (1939) 2 Cal. 33=69 C.L.J. 543=43 C.W.N. 604=1939 Cal. 399. *See also* 41 Bom.L.R. 391=1939 Bom. 237. An acknowledgment of a debt due by a firm under dissolution made by a receiver of that firm is valid to save limitation if he is authorized by the order appointing. 48 I.C. 179 =35 M.L.J. 571. A *receiver* may be an agent authorized to make an acknowledgment within S. 19, Expl. II, 35 M.L.J. 571; 1937 Mad. 764=(1937) 2 M.L.J. 627. But not the *Official Assignee*. 35 Bom. L.R. 12=1935 B. 91. Nor is the person appointed under Ss. 37 and 43, Provincial Insolvency Act, to receive the property of the insolvent, on annulment of his adjudication. 1935 R. 152. Admission of liability by a partner in his insolvency schedule does not bind the other partners but it binds the Official Assignee. 36 I.C. 389. In the absence of express evidence of authority, an acknowledgment of a partnership debt by an ex-partner, after the dissolution of partnership does not bind any ex-partner. 18 M.L.T. 273=30 I.C. 675. Acknowledgment by *partner* after dissolution binds the firm if the creditor had no notice of the dissolution. 1929 L. 266=118 I.C. 529. *See also* 39 P.L.R. 21=1937 Pat. 507 (Acknowledgment by mortgagee after sale of equity of redemption); I.L.R. 1940 M. 872=(1940) 1 M.L.J. 766 (F.B.); 1937 Mad. 826. Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners. Where the endorsement was made and signed by one of partners in the ordinary course of business and such an endorsement was made with the implied consent of the other partners, *held,* that he had authority and it saved limitation. 1935 L. 559. Acknowledgment by surviving partner—If binds heirs of deceased partner. 37 Bom.L.R. 516. A partner of a money-lending business which is being wound up, has no authority to give an acknowledgment for a subsisting debt so as to bind the firm. 8 L. B.R. 363=36 I.C. 225. An acknowledgment by one of two mortgagees of the title of mortgagor would not save the mortgagor's right to redeem from being barred by limitation where the mortgage was a joint mortgage. 34 A. 371=14 I.C. 132. *See also* 5 Lah.L.J. 117; 151 I.C. 385 (1)=1934 L. 293 (1). An acknowledgment of liability by one of several mortgagors will ordinarily give a fresh start of limitation against the mortgagor who acknowledges the same. It is only when he makes the acknowledgment on behalf of the others also under circumstances which would make him an agent of the other co-mortgagors under S. 21, that limitation would be saved against the others as well. 18 Pat. 434=184 I.C. 597=20 Pat.L.T. 619=1939 Pat. 451. A letter written by the debtor (mortgagor) to a third person, in which he agrees to give him a lien over certain properties "now with the creditor mortgagor as collateral security" (the title deeds having been deposited with the creditor as equitable mortgage previously), is an acknowledgment of the existence of the ***equitable mortgage*** which would save limitation under S. 19. The fact that the letter is not registered does not make it inadmissible in evidence, because it is relied on only as evidence of a collateral fact, namely an acknowledgment by the debtor-mortgagor under S. 49 of the Registration Act. A compulsorily registrable document, though unregistered and inadmissible in evidence of a transaction affecting immovable property, may be admitted as evidence of a collateral fact or for any collateral purpose. 48 L. W. 292=1938 Mad. 865=(1938) 2 M.L.J. 534. An acknowledgment of liability by some only of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage has been passed does not operate to save limitation as against the other heirs of the mortgagor. (41 A. 111 and 1927 A. 209, Overr.; 26 A.L.J. 723, Appr.) 1936 A.L.J. 1140=1936 A. 820 (F.B.). *See* 56 M.L.J. 630; (1940) 2 M.L.J. 326=52 L.W. 364; 19 Pat. 938=1940 P.W.N. 608 for the ***effect of acknowledgment by one of the co-heirs.*** An acknowledgment by a ***judgment-debtor*** may save limitation against the auction-purchaser. 44 I.C. 533=22 C.W.N. 278. Court of Wards has power to give an acknowledgment so as to give a new period of limitation. 34 I.C. 209=43 C. 211; 1936 O.W.N. 967=165 I.C. 269. An acknowledgment in writing by some of several judgment-debtors within three years from the date of the last execution application saves limitation against all. 22 I.C. 709; 27 L.W. 820=54 M.L.J. 150. But *see* 16 C.W.N. 493=13 I.C. 702; 25 M. 220; 32 M. 421; 27 A. 575. An acknowledgment of a debt made within limitation by the manager of a joint Hindu family binds other members of the family. 36 A. 264=23 I.C. 429; (1941) 2 M.L.J. 311; 41 C.L.J. 535=1925 C. 1153; 86 I.C. 693=1925 O. 394. But *see* 1923 L. 135; 10 L. W. 466=84 I.C. 318. *See also* 31 I.C. 30=19 C.W.N. 860; 26 I.C. 511; 1924 M. 96; 32 I.C. 997. Where the members of a Hindu trading family which has incurred a debt have separated, an acknowledgment signed by some members of that firm only cannot save limitation as regards the other members in the absence of proof by the

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

NOTES.

plaintiff creditor that the acknowledgment was made on behalf of and with the authority of those other members as well. In the absence of such proof, the acknowledgment cannot bind the other members. It would bind only the persons making it. 1937 M. W.N. 1312. A Mahomedan mother cannot make a valid acknowledgment on behalf of minor son. 61 P.L.R. 1917=42 I.C. 17. A guardian cannot renew or acknowledge a debt unless it is for the benefit of the minor or unless the document appointing him guardian expressly gives him such power. 43 I.C. 865=6 L.W. 640. *See also* 41 M. 561=34 M.L.J. 381; 108 I.C. 529=1928 M. 226; 1939 Cal. 399; 1939 Bom. 237. A mere acknowledgment of payment by one of the trustees who did not really receive the money, cannot bind the institution. 15 I.C. 186=1912 M.W.N. 181. *See also* 43 C.W. N. 943. An executing Court which merely records an admission or plea of the judgment-debtor that a certain sum of money was paid towards the decree under execution is not "an agent duly authorised" of the judgment-debtor for purposes of S. 19. 174 I.C. 28=1937 M.W.N. 355=1937 Mad. 760. In order that a document signed by an agent should be a valid acknowledgment, not only must the agent have been duly authorised to sign the document in question but he must have been authorised to sign for the purpose which S. 19, contemplates, that is to say he must have been authorised to sign on behalf of the person sought to be made liable, for the purpose of acknowledging liability. This authorisation need not be direct, it can be implied, but it must be to acknowledge the liability in question and not merely to sign the document. Where a Judge signs the deposition of a witness, he is in no sense his agent. The fact that it is a party whose deposition it is that is signed and not that of a witness does not make any difference. His voluntarily going into the box does not authorise the Judge to sign the deposition containing an acknowledgment. The kind of authorisation contemplated by S. 19 implies the conferral of powers on a person who does not already possess them. 1940 N.L.J. 445=1940 Nag. 354. In a case of a promissory note executed by four persons, one of them made a part-payment within 3 years of the execution and endorsed it on the same. Within 3 years of the date of the said part-payment, another executant made a second part-payment and endorsement, within 3 years thereafter all the executants made part-payment and endorsements. *Held,* that, by reason of the endorsements, all the promisors must be deemed to have authorised and ratified the prior endorsement under this section. 1928 M. 173=27 L.W. 820. A mortgage was executed by two persons in favour of the father of the plaintiff. The plaintiff was then a minor living jointly with his father. The father died in 1912 and in 1913 the mortgagors executed a second mortgage in favour of another including in that mortgage the whole of the amount due under the earlier mortgage. In 1928 the plaintiff sued to recover the amount and claimed that he was entitled to do so within three years of his attaining majority. *Held,* that time began to run from the date of the execution of the mortgage, but the mortgage of 1913 contained an acknowledgment and therefore saved limitation. *Held, further,* hat the plaintiff being a minor at the time from which limitation has to be reckoned, the suit filed within three years of the plaintiff attaining majority was competent. 1932 A.L.J. 1012. An acknowledgment made by one of three directors of a company in the course of business saves limitation and proof of authorisation by other directors is not necessary. 33 C.W. N. 833=1929 C. 155. An acknowledgment made by the vendee after a claim for pre-emption has been brought is binding on the pre-emptor. 1932 A.L.J. 878=1932 A. 700. An acknowledgment made by one of the heirs of the mortgagee who have divided the mortgage property among themselves without the consent of the mortgagor is binding on him or his heir so far as regards the property in his possession though it may not be binding on the co-heirs of the mortgagee. 32 Bom.L.R. 1096=1930 B. 466 (F. B.). A President of a Committee who is authorized to purchase goods has equal authority to acknowledge. Such authority need not be express. 37 L.W. 429=1933 M. 332.

EFFECT OF ACKNOWLEDGMENT.—An acknowledgment of liability only extends the period of limitation and does not confer title and is not a "thing done" within S. 6 of the General Clauses Act. 35 A. 227=40 I.A. 74=25 M.L.J. 131 (P.C.). An acknowledgment of liability cannot form the basis of a fresh cause of action. 106 I.C. 619= 1927 M. 1200; 8 O.W.N. 1210; 1933 A.L. J. 1530 (1929 A.L.J. 1779, Not foll.). But *see* 14 L. 748; 115 I.C. 853 (an unconditional acknowledgment can form the basis of a suit). 130 I.C. 570. An acknowledgment of liability by a Hindu widow will not bind the reversioners who do not claim through her. 86 I.C. 353=1925 C. 862. An acknowledgment invalid under Act XIV of 1859 but valid under subsequent Limitation Acts is valid within S. 19. 34 A. 109 =12 I.C. 604. Where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknow-

NOTES.

ledgment, must be fulfilled. Where there was a conditional promise to pay if the arbitrator found the sum to be due, and the arbitration proceedings proved abortive. *Held,* the condition was not fulfilled and that there was no acknowledgment which was sufficient to save limitation. 1934 L. 973 (2). Where there is a liability to account and it is admitted in part, the admission has complete power to save the entire right. 22 C.W.N. 104=43 I.C. 893. *See also* 17 L. 737=165 I.C. 723=1936 L. 629. If a balance be struck or an acknowledgment be made in favour of a minor, the period of limitation is to be computed from the date when the plaintiff becomes a major. 52 I.C. 115=37 P.L.R. 1919. A valid acknowledgment of a judgment-debt in a written petition by judgment-debtor to the executing Court gives a fresh starting point. 80 P.W.R. 1912=14 I.C. 335. Statement in a plaint admitting mortgage in plaintiff's favour—Defendant's right to redeem. 82 P.W.R. 1911=11 I.C. 377. An acknowledgment does not revive a right which has become barred at the date of acknowledgment. 43 I.C. 50=33 M.L.J. 753. An admission of a barred debt is not an "acknowledgment of the debt". 24 C. 507. *See also* 5 P.L.J. 371=1 P.L.T. 190. A time-barred debt may be revived by an express contract to that effect and a simple acknowledgment is not sufficient for that purpose. Where, in acknowledging the debt, the debtor expressed his willigness to renew the debt, *held,* that there was no fresh contract. 37 C.W.N. 326=1933 C. 658=60 C. 714. Where a series of debts entered in accounts are acknowledged with the endorsement as correct at the end of the account, the acknowledgment would not imply a promise to pay but would give a fresh period of limitation to such of the items as were not barred at the time of acknowledgments. 8 P. 706=1928 P. 258 (2). If a payment is made by way of an acknowledgment on foot of general debt, a new cause of action springs from it and limitation begins to run afresh. 38 I.C. 85=2 P.L.J. 24. This liability to pay being admitted, the creditor can pursue his claim, in any way recognised by law. 1928 M. 713 (F.B.). The validity of an acknowledgment set up by plaintiff as saving limitation in his favour must be decided with reference to the law in force when the suit is brought and not with reference to that in force when the acknowledgment was made. 34 Bom.L.R. 953=1932 B. 531. Under S. 19 the period has to be commuted from the date of signing the letter of acknowledgment. 106 I.C. 619=1927 M. 1200. The effect of a promissory note for the amount secured by an equitable mortgage is merely to extend the period of limitation in respect of the personal liability of the mortgagors. 105 I.C. 765=1928 S. 17. Although an acknowledgment may imply a promise for extending limitation, it is, without a promise, insufficent to create a contract and cannot be enforced as such. Being neither contract, grant nor disposition of property nor analogous to any of them, it is not a document contemplated by S. 92 of the Evidence Act. So the prohibition regarding the admissibility of oral evdence is not applicable to an acknowledgment. 26 N. L.R. 320. Where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional. 1933 A.L.J. 170 =1933 A. 175=144 I.C. 1005. There is no reason for construing the word "signed" in S. 19 of the Limitation Act as meaning "signed in full". Initials are equivalent to signature. The object of the Act is to regard as sufficient what the writer intends to be equivalent to his signature, the form being immaterial so long as it verifies the acknowledgment. 41 L.W. 744=68 M.L. J. 623. *See also* 16 Luck. 777.

Form of Acknowledgment.—So long as the intention of the debtor is unequivocally conveyed in the acknowledgment, it is not necessary for him to use any particular formula of words. 1937 N. 165. An acknowledgment is sufficient though it is addressed to a person other than the person entitled to the property or right in question. It is not necessary that it should be addressed to the creditor or to some one on his behalf. It is immaterial in what connection and for what purpose and what form the acknowledgment is made. 183 I.C. 225=41 Bom.L.R. 391=1939 Bom. 237. Before S. 19 can apply, there must be words which clearly indicate an acknowledgment of liability of the particular debt. It is not for the Court to overstrain the meaning of the words used; there is no warrant for holding that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment. 54 L.W. 718= 1941 Mad. 892=(1941) 2 M.L.J. 460. Form of acknowledgment—Receipt in Collector's books may amount to acknowledgment. 37 B. 326=40 I.A. 68=25 M.L.J. 101 (P.C.) (Affirming 2 I.C. 469=11 Bom.L.R. 318). An admission in a *plan* filed with a plaint, but *unsigned,* does not amount to an acknowledgment. 86 I.C. 859=1925 L. 529. The mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability. 45 A. 679 =1924 A. 70. But the defendant's admission in his written statement of the plaintiff's allegation that defendant had mortgaged property to third person is sufficient acknowledgment and could be relied upon by the mortgagee of the defendant. 6 O. W.N. 943=1930 O. 67. *See also* 1933 A. 352=144 I.C. 903. The acknowledgment contained in the *dakhalnama* executed by defendant's predecessor is mere description of the property purchased and not an acknowledgment of liability within S. 19. 38 A. 540=36 I.C. 452. But *see* 1932 A.

NOTES.

L.J. 1010. An *admission by a pleader* in petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors, or guardian for minors. 133 I.C. 155=1931 A. 398. An acknowledgment in a statement made and signed before a judge in a suit is sufficient within S. 19. 35 A. 437=20 I.C. 27. An acknowledgment of liability signed by a debtor on the *khata* of his creditor before the limitation period has expired implies a promise to pay and a suit can be based thereon. 63 I.C. 923=23 Bom.L.R. 606. An acknowledgment contained in a communication addressed to a third party does not require registration. 59 I.A. 130=11 P. 272=62 M.L.J. 296 (P.C.). Reference in a promissory note of a debt due under a mortgage executed some years previously as an extra or additional debt amounts to an acknowledgment of that debt. 38 B. 177=23 I.C. 353. The inclusion by an insolvent debtor of a debt in his schedule which is signed by him is an acknowledgment. 35 B. 383. *See also* 14 I.C. 1; 140 I.C. 774=63 M.L.J. 785; 143 I.C. 681=1933 M. 565; 117 I.C. 570; 117 I.C. 574; 6 R. 533=1928 R. 326; 1928 R. 327. A *hatchitta* is an acknowledgment within S. 19. 53 I.C. 854=46 C. 746. *See also* 24 Bom.L.R. 713=46 B. 1000. A payment by a cheque and hundi which were dishonoured on presentation does not constitute an acknowledgment within S. 19. 46 C. 168=27 C.L.J. 392. Where liability to pay interest on a previous mortgage has been admitted in subsequent bonds it means an acknowledgment of liability. 2 L.L.J. 549. *"Ruqqa"* which is an admission of indebtedness is not an express or implied agreement to pay upon which to base a suit. 76 P.R. 1915=31 I.C. 209. An application signed by the widow of the deceased mortgagor distinctly admitting the mortgage constitutes an acknowledgment under S. 19. 75 P.R. 1911=10 I.C. 147. *See also* 1941 P.W.N. 667. *Deposition* containing an admission may amount to an acknowledgment for the purpose of S. 19 if it is signed by the deponent. 194 P.W.R. 1911=10 I.C. 142; 26 A.L.J. 420=1928 A. 310. *See also* I.L.R. (1942) Nag. 182. Where a judgment-debtor became insolvent and the schedule of assets and liabilities filed by him contained an acknowledgment of liability as regards the suit claim, but the schedule contained a date that had been struck out, which, if taken into account, would bar the later execution application, *held,* that for purposes of S. 19 (2) the writing containing the acknowledgment should be taken to be undated and evidence may be given as to its correct date. 140 I.C. 774=63 M.L.J. 785. As to *practice of Nattukottai Chetties* who do not sign their letters at the foot but begin by saying that the sender is such and such a firm, *see* 6 L.W. 790=43 I.C. 20. *See also* 26 I.C. 911=27 M.L.J. 631; 1927 C. 495=31 C.W.N. 619. Where, on a promissory note, an endorsement written out by the plaintiff is signed by the defendant, it is sufficient acknowledgment of liability. 27 I.C. 747=17 M.L.T. 80. Recitals in reference to arbitration—Reference proving infructuous—Recitals operate as acknowledgment. 104 I.C. 572. Trespasser—Admission as to ownership—Suit for ejectment—Saving of limitation. 60 C. 404=1933 C. 414.

IMPLIED ACKNOWLEDGMENT.—An acknowledgment within the meaning of S. 19 may be either express or implied, and each case must be decided on its merits. Where an executant of a promissory note pays a certain sum of money to the promisee and endorses that payment on the back of the note on a subsequent date, the endorsement is an acknowledgment within the meaning of the section. 1937 Rang.L.R. 421=1938 Rang. 84. Where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid. It cannot however be said that the remaining liability shown by evidence *aliunde* should be deemed to have also been acknowledged. 55 A. 632=1933 A.L.J. 930=1933 A. 453 (2). No admission amounting to an acknowledgment under this section can be inferred from the rubkari of proceedings under Regulation XVII of 1806. 63 I.C. 490. Implied acknowledgment — Account debiting a particular sum, effect of. 59 I.C. 941=41 A. 260. Payment should be made as interest. Mere appropriation by creditor for interest will not constitute acknowledgment. 55 A. 632=1933 A.L.J. 930=1933 A. 453 (2). Implied acknowledgment—What is. 39 A. 357=15 A.L.J. 305. *See also* 131 P.R. 1919=53 I.C. 425; 58 I.C. 787=1 L. 357. An acknowledgment that interest is due implies that some principal also is outstanding. 1937 M.W.N. 1312. Letter calling for a copy of the accounts showing what amount was due would clearly be an acknowledgment. 101 I.C. 544=9 L.L.J. 147. A letter from the railway company informing the consignee that a certain sum, namely, the balance of the sale proceeds of the property was payable to him on certain conditions, namely, that he should accept it in full satisfaction of his claim, cannot be taken as an acknowledgment of any liability for the price of the goods or compensation for any wrongful detention or compensation for non-delivery and would not give a fresh starting point of limitation for a suit for compensation for non-delivery. 1933 A. 348=144 I.C. 1029. Mere statement by a person that a decree was passed against him does not amount to acknowledgment of existing liability. 21 L.W. 593=1925 M. 675. *See also* 1923 M. 634=17 L.W. 674. Where the document merely stated that a certain amount had been paid in cash in lieu of a decree debt and it

NOTES.

further provided that nothing remained by the writer in respect of the decree, *held,* that it would not be said to be sufficient acknowledgment regarding the executant's liability to deliver possession of certain plots of land under the decree. 134 I.C. 1022=8 O.W.N. 1117. When a document is presented for registration, the executants not only admit the fact of its execution but admit the contents of the document, namely, their liability on it. Hence if a person admitted before the Sub-Registrar execution of a mortgage bond which recited that old accounts had been looked into and the sum arrived at had remained due, his acknowledgment of liability was implied. 1933 M. 713=65 M.L.J. 380. The inclusion of a decree debt in the insolvency petition which has to be signed by the insolvent amounts to an acknowledgment within the meaning of S. 19. So also the mention of the decree debt in a statement made by the insolvent in an examination for ascertaining his assets and liabilities without any further mention of any payment towards its discharge amounts to an implied admission that the liability under the decree was then subsisting. 38 L. W. 204=1933 M. 565 (1). An admission of a past liability unaccompanied by an allegation of discharge should not in all cases be interpreted as an admission of a subsisting liability. 42 M.L.J. 266=45 M. 443. A sum sent by debtor by insured post with directions to credit in his accounts amounts to acknowledgment. 36 I.C. 593 =4 L.W. 481. Where an endorsement of payment is made on a promissory note without any money being paid, the endorsement will be sufficient as an acknowledgment to save limitation. 28 I.C. 15=17 M. L.J. 139; 1937 Rang. 503 (Endorsement on policy of life assurance referring to assignment of policy in consideration of loan advanced on pro-note is acknowledgment of liability under the pro-note). An endorsement of payment on the back of the bond in the handwriting of the debtor is good to save limitation. 48 I.C. 724. A bare signature by a debtor on the back of a promissory note executed by him is not an acknowledgment of liability for such a signature, unless an intention is proved, cannot be construed to admit a liability to pay. 152 I.C. 501=1934 R. 287. Where, in respect of liability under an earlier promissory note a fresh note was executed and there was an endorsement on the earlier note to the effect that "in lieu of the earlier promissory note a second note was executed and the former thereby became void" and the latter note being insufficiently stamped was incapable of being sued on and the plaintiff thereupon sued on the earlier note, *held,* that the endorsement on the earlier note was a valid acknowledgment so as to save limitation. 1931 A.L.J. 522=1931 A. 560. *See also* 9 O.W.N. 1024. The acknowledgment must relate to the liability in dispute and not to any liability. 55 I.C. 822=13 S.L.R. 183. An acknowledgment of liability in respect of the amount due as principal does not involve an admission to pay interest. (*Ibid.*) Though a writing owing to some defect does not fulfil the requirements of S. 20, it may nevertheless, as an acknowledgment of liability, operate to save the claim under S. 19. 1935 M. 245=68 M.L.J. 63; 43 L.W. 665=1936 M. 616. In a case where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction, and the remedies are distinct and separate in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. Where a vendee of immovable property executes a promissory note to the vendor for the balance of the sale price due to the vendor, acknowledgments of liability evidenced by endorsements made on the promissory note cannot be treated as acknowledgments of liability in respect of the vendor's lien for the portion of the purchase-money which is due, so as to save limitation to file a suit to enforce claim on the lien as against the immovable properties. 54 L.W. 591=(1941) 2 M.L.J. 939.

ORAL ACKNOWLEDGMENT.—An oral acknowledgment of a debt would not extend the period of limitation under S. 19. 93 P.R. 1911=11 I.C. 445; 75 I.C. 440.

EVIDENCE.—Direct evidence of a specific authority to make acknowledgments can be inferred from circumstances. 41 M. 427= 34 M.L.J. 373 (F.B.). *See also* 65 I.C. 279=17 N.L.R. 209; 1936 O. 280=1936 O. W.N. 489; 45 C.W.N. 208; 1937 All. 640. It is settled law that the identity of the debt acknowledged in writing may be proved by parol evidence. 34 I.C. 417. But *see* 17 L. 737=1936 L. 629; 45 C.W.N. 208; 53 L.W. 102=1941 Mad. 409=(1941) 1 M.L. J. 173. A recital in a second mortgage as to the existence of a prior mortgage in favour of another can be relied on by that other person as an acknowledgment of liability. 140 I.C. 177. In a suit for money, an admission that accounts must be taken and settled does not amount to an acknowledgment. 36 M. 68=21 M.L.J. 1024. But *see* 1924 M. 619 (1)=80 I.C. 355 (1) =46 M.L.J. 468. Person acknowledging need not be liable personally at the time of making acknowledgment so as to be bound by the acknowledgment. 1925 M. 134. If a promissory note is insufficiently stamped, it is inadmissible in evidence not only as a promissory note but also as an acknowledgment. 16 N.L.J. 241=1933 N. 391. But *see contra* 1934 A. 951=4 A.W.R. 657. Where the promissory notes are inadmissible in evidence on the ground of insufficiency of the stamps, receipts which do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory notes of

NOTES.

even date by the executant, cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage. 152 I.C. 370=1934 A.L.J. 1185.

EXECUTION PROCEEDINGS.—An uncertified payment is no step-in-aid to save limitation. But in the execution application itself, the decree-holder may apply to certify the payment and then it would save limitation. 20 C.W.N. 272=43 C. 207. *See also* 35 C. W.N. 1192=1931 C. 719 (F.B.); 22 Pat. L.T. 416. Effect of acknowledgment of right in execution proceedings. 20 C.W. N. 952=1 P.L.J. 214.

MORTGAGOR AND MORTGAGEE.—An acknowledgment by a mortgagor in favour of the first mortgagee is effective against a second mortgagee whose title originated before the acknowledgment was given. 51 I.C. 829= 17 A.L.J. 763. *See also* 8 O.W.N. 1160; 1941 P.W.N. 667. But *see contra* 164 I.C. 725=1936 A.W.R. 516=1936 A.L.J. 586= 1936 A. 636. When a mortgagor had sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the alienation is effective both against the mortgagor and his alienee. 55 M. 758=63 M.L.J. 111. An acknowledgment made by a mortgagor after the sale of the equity of redemption by him is sufficient for extension of time under S. 19. 18 L. 171=39 P.L.R. 21. *See also* 23 Pat. L.T. 328. The acknowledgment by one mortgagee does not bind other co-mortgagees. 10 I.C. 238=8 A.L.J. 605. *See also* 62 I.C. 833=40 M.L.J. 126; 38 I.C. 240=32 M.L.J. 263; 20 Pat. 770; 1941 Pat. 147. An admission by a mortgagor of his liability carries with it an admission of all the remedies to which the mortgagee might be entitled under it. 6 O.L.J. 248=51 I.C. 985.. Acknowledgment containing admission of right to redeem is enough. 1929 A. 209. The mere recital in the judgment of a settlement Court that the person admitted in his examination that he did not get the mutation of names effected, because he held possession as mortgagee in the absence of the deposition, did not amount to an acknowledgment. 1929 A. 332=119 I.C. 565. A mortgage was executed by plaintiff's ancestors to defendant's ancestors in 1834. In 1864, the mortgagee admitted that he held the lands on mortgage in a kabuliyat to the inamdar. In a suit of 1877 by the daughter of the mortgagee, the mortgage was again admitted. The present suit for redemption was brought in 1924. *Held,* that the acknowledgments operated to save limitation and that the suit was not barred. 34 Bom.L. R. 953=1932 B. 531. If any acknowledgment of liability within the meaning of S. 19 is made within six years of the payment of interest and also within six years of the date of the institution of the suit on the basis of a personal covenant contained in a mortgage, the claim for a personal decree must succeed. 1936 O.W.N. 489=1936 O. 280.

Sec. 19, Expl. 1.—Expl. 1 to S. 19 is very wide in its scope. Under it, admissions, however indirect, and even if accompanied by a refusal to pay, constitute sufficient acknowledgment. In answer to a letter by the creditor to the debtor stating the amount due to him, the debtor's secretary sent a letter by post reciting that he had been directed to intimate to the creditor by the debtor that all the arrears of accounts would be paid in a particular month. *Held,* that it was a sufficient acknowledgment of the debt. 11 O.W.N. 880. A reply by a mortgagor to a notice of demand by the mortgagee, stating that under a usufructuary mortgage executed by him to a third person, he has directed the latter to pay off the debt, and that the mortgagee should receive payment of the debt from that third person, that the mortgagee was mistaken in demanding payment from the mortgagor and that he, the mortgagor, will not be liable for any Court costs or damages claimed by the mortgagee, constitutes a sufficient acknowledgment to save limitation under S. 19. 44 L.W. 362=1936 M. 943=(1937) 1 M. L.J. 24. According to explanation 1 to S. 19, it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there is no bar to extrinsic evidence being admitted for the purpose. 1934 L. 835. An application made by the judgment-debtor alleging that the matter had been settled, that in consequence of a part payment the decree-holder had agreed in his letter not to take out execution before the end of the next year and praying that the original letter of the decree-holder may be placed on the record is in substance an admission by him that he still owes something to the decree-holder for which he has obtained a respite; it amounts to an acknowledgment of liability giving a fresh starting point of limitation. 55 A. 393=1933 A. 364.

Secs. 19 and 20.—Ss. 19 and 20 are independent of each other. There may be an acknowledgment of liability, which comes within S. 19, unaccompanied by any part-payment; or there might be an acknowledgment of liability coupled with a part payment which fulfils the requirements of S. 20, in which case, the debt is saved from limitation both under S. 19 and S. 20; but if there is a part payment which does not comply with the terms of S. 20, that cannot prevent the endorsement from operating as an acknowledgment within S. 19. 41 Bom. L.R. 455=1939 B. 252. In S. 19 the acknowledgment is to be made by the party against whom the right is claimed. In S. 20 however no such restriction is found. The reason for this distinction apparently is, that acknowledgment is a mere admission of right, whereas payment is more than a mere admission of right. The

Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II.—For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III.—For the purposes of this section, an application for the execution of a decree or order is an application in respect of a right.

Effect of payment on account of debt or of interest on legacy.

[[1]20. (1) Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, or by his duly authorized agent, a fresh period of limitation shall be computed from the time when the payment was made.]

LEG. REF.

[1] Substituted by Act XVI of 1942.

NOTES.

effect of an acknowledgment in S. 19 is more restricted and in general, it only affects the person giving it. But payment under S. 20 affects not only the person making the payment, but also other persons who are liable 1938 Cal. 129=66 C.L.J. 104=42 C.W.N. 18. *See also* 54 L.W. 579=(1941) 2 M.L.J. 913. There is a fundamental difference between Ss. 19 and 20. Under S. 20 all that is necessary is that an acknowledgment of the payment, should appear in the handwriting of, or be signed by the person, making the payment. But that is not enough under S. 19. 1940 N.L.J. 445=1940 Nag. 354. When there is a bond or note under which a considerable sum is due and the debtor makes towards that bond a payment which is clearly less than the balance due, accompanying the payment with an endorsement to the effect that it is towards the debt in the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the indorsement is made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed, although such a payment, being an open payment or unappropriated payment cannot avail the creditor under S. 20 of the Limitation Act as a payment towards interest as such or towards principal saving limitation. 54 L. express repudiation, by a letter, of the plain-W. 624=(1941) 2 M.L.J. 848. Party confining his case in the trial Court to S. 20—Appeal—New case under S. 19 if can be raised. *See* 1937 Oudh 391. There is a fundamental difference in the theory of acknowledgment according to the *law in India as compared with the Law in England.* In England the acknowledgments or part-payments to be effective must amount to a fresh promise to pay. Under Indian law no promise to pay either express or implied is required. The English authorities cannot therefore afford any guidance. The difference in language used in Ss. 19 and 20 is not merely accidental. 8 O.W.N. 1160. *Money spent on the obsequies of the father* of the minor cannot be deemed to be necessaries supplied to the minor within the meaning of S. 68 of the Contract Act and as such an acknowledgment by the mother as the guardian of a debt borrowed for the above purpose is not binding on the minor. 10 O.W.N. 188=1933 O. 132. S. 20 does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by the person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. The right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period. A payment and endorsement by a mortgagor who has parted with the mortgaged property but is personally liable to pay on his covenant would therefore save limitation against the prior purchaser of the equity of redemption. 54 L.W. 579=(1941) 2 M.L.J. 913. *See also* 42 C.W.N. 18=1938 Cal. 129.

Secs. 19 and 21.—The wife could not be deemed to be "an agent duly authorised in this behalf" and that the acknowledgment made by her could not save limitation. 56 M. 964=65 M.L.J. 355.

Sec. 20: SCOPE OF SECTION.—The amendment to S. 20 by Act I of 1927 has made it less stringent; either there should be an endorsement in the handwriting of the person making the payment, though unsigned, or the writing should be signed by him though not in his handwriting. 68 M.L.J. 63. Under the present law, all that is necessary is that the endorsement should have been signed by the person making the payment. It is quite unnecessary that the whole endorsement should have been written by the person making the payment. 181 I.C. 393=1939 Rang. 112. A payment under S. 20 in order to save limitation must be a con-

NOTES.

scious Act. 37 I.C. 756=32 M.L.J. 317. *See also* 152 I.C. 501=1934 R. 287. Under the English Law there is a distinction between secured and unsecured debts as regards the saving of limitation by payments. But S. 20 contemplates debts of all kinds. Part-payment of principal or interest saves from limitation a debt whether secured or unsecured, under the Indian Law. 66 C. L.J. 104=42 C.W.N. 18=1938 Cal. 129. S. 20 has no concern with suit or an instalment bond which is governed by Art. 75 according to which the *terminus quo* is not the date of the payment but the date of non-payment in accordance with the stipulation of the contract. 130 I.C. 571=1931 C. 157. A statement of payment made in writing by the payer after the expiry of the original period of limitation is a sufficient compliance with S. 20 if the payment itself was made within that period. 19 N.L.R. 6= 1923 N. 117. *See also* 1929 M. 432; 1937 Cal. 284. A cheque proved to be signed by a debtor and given by him in payment, which has been accepted by the creditor and duly honoured by the bank drawn on, would amount to an acknowledgment of payment within the meaning of the proviso to S. 20. 1941 Rang. 344. Endorsement of payment on promissory note—Evidence to prove or disprove such payment—Admissibility. 4 A.W.R. 1342=1935 A. 58. *See also* 29 A. 184 (P.C.); 1937 C. 284. S. 20 of the Act does not apply to payment of interest made beyond the period of limitation and such payments cannot operate to extend the period of limitation. 37 Bom.L.R. 165. The written statement is merely evidence of the fact and date of payment, and it is fact of payment that extends the period and it is the date of payment from which it is extended. (*Ibid.*) *See also* 1937 Cal. 284 =I.L.R. (1937) 2 Cal. 137. A part payment of principal, appearing in the handwriting of the person making it is not required to be expressly stated as being such. 18 A.L.J. 1131=41 A. 260. *See also* 13 L. 448=1932 L. 212; 131 I.C. 867=1931 A. 375; 1937 S. 95 (section construed). But where, without there being a bare naked payment, the debtor expressly states in a letter that the payment is in full discharge, though as a matter of fact something more is found due, far from its amounting to an admission of right, there is an unequivocal denial of it. Such a payment will not have the effect under S. 20 of removing the statutory bar. 41 L.W. 747=1935 M. 371 =68 M.L.J. 73. Payment of part of debt "without prejudice" does not prevent extension of time under this section. 17 L. 737 =1936 L. 629. A written statement filed in a suit which recites payment cannot be called in aid under S. 20 for the purpose of that suit itself. 39 C.W.N. 139=1935 C. 255. Cl. (2) applies to a suit for recovery of mortgage-money by the mortgagee under S. 68 of the T. P. Act. 8 O.L.J. 660= 1922 O. 102. In case of decree debt part-payment and certification must be made before the application for execution is barred by limitation. 64 I.C. 72. Payment of interest after the expiration of limitation but during vacation time does not save limitation. 55 C. 1210. Uncertified payment, if furnishes starting point, 1936 N. 281. Payment of interest by the lessee to one of the mortgagees enures in favour of all the mortgagees so as to save limitation. 110 I.C. 561 (2)=1928 A. 387.

MEANING OF WORDS.—"Before the expiration of the prescribed period"—Meaning of- *See* 47 L.W. 726=1938 Mad. 683; 1940 Nag. 401; 1938 A.W.R. (H.C.) 572. Under S. 20 it does not matter in the least when the endorsement on the document was made, so long as the payment itself was made within the period of limitation, and the date to be looked at is not the date on which the endorsement is written, but the date on which the payment is made. 181 I.C. 765=11 R.R. 485=1939 Rang. 118. *See also* 8 Cut.L.T. 1. The expression *"person liable to pay"* does not mean the whole entire body of persons liable to pay and includes one of several debtors. 90 I. C. 774; 42 C.W.N. 18; 1938 Cal. 129; *see also* 52 L.W. 453=(1940) 2 M.L.J. 726; 1938 Mad. 744=(1938 2 M.L.J. 33 (Joint Hindu family); 1940 Mad. 954= (1940) 2 M.L.J. 369 ("Person duly authorized" in joint Hindu family); 47 L. W. 517=1938 Mad. 579=(1938) 1 M.L.J. 624 (Vendee of mortgaged property authorized to pay the debt). *See also* 51 L.W. 453= (1940) 2 M.L.J. 726; 1938 Rang.L.R. 591 =1938 Rang. 280. A part-payment can avail not merely against the person making the payment or those deriving title under him subsequent to such payment; but even against other persons liable in respect of the same debt. 58 M. 418=1935 M. 101=68 M.L.J. 470, *contra.* The expression "the person liable to pay the debt" is not the same thing as "a person liable to pay the debt" where there is joint liability. Where there are joint contractors, S. 21 (2) makes it clear that the payment of interest by one of them does not extend the period of limitation against the other. 15 P.L.T. 113= 1934 P. 224. *"The person making the payment"* in S. 20 means the person who in substance, though perhaps not in form, makes the payment. 53 C. 163=1926 C. 510. *'Debt'* includes money payable under decree which includes both final and preliminary. 49 A. 147=1927 A. 159; 1930 R. 64. As to meaning of the expression *"Step-in-aid," see* 1932 A.L.J. 1035 and notes under Art. 182, *infra.* "Writing signed by person making payment"—Meaning of. 152 I. C. 501=1934 R. 287.

PAYMENT OF "INTEREST"—MEANING OF.—"Interest" in S. 20 means interest or any part of the interest due. 35 A. 378=11 A. L.J. 477. The addition of the interest due to the principal amount by consent of the

NOTES.

debtor, is payment for interest. 11 I. C. 552; 13 Bom. L. R. 482. *See also* 30 I.C. 77=1915 M.W.N. 755; 29 I.C. 422=4 L. W. 553. A payment for interest by a judgment-debtor for loan bearing no interest will not extend limitation. 35 I.C. 177 =22 C.W.N. 325. Under S. 20 the payment of interest must have been made *as such* either by express declaration, or under circumstances from which such an intention on the part of the debtor may be inferred. 20 I.C. 857=19 C.W.N. 237; *also* 19 I.C. 825; 72 I.C. 492; 31 I.C. 101; 46 I.C. 532. *See also* 44 M. 544; 43 I.C. 812=27 C.L.J. 141; 99 I.C. 694=1927 M. 284; 1928 M. 509; 40 L.W. 595=1934 M. 656; (1937) 2 M.L.J. 54; 18 Pat. 253=1939 P.W.N. 170 =1939 Pat. 389; 1939 Oudh 141; 15 Luck. 524=1940 Oudh 179; 1937 Pat. 410; 41 Bom. L.R. 455=1939 Bom. 252; 1937 Pat. 583; 42 P.L.R. 638=1940 Lah. 442 (Part payment in respect of loan bearing no interest). Where interest is not paid as such, that is, the debtor does not clearly mention that the payment by him was to be appropriated towards interest, it cannot be considered to have been paid by him towards principal. Cases are easily conceivable in which a debtor may pay a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal. In such a case, whether the payment was of interest or principal would depend on the manner in which the creditor exercises his option. If he treats it as payment of interest, it becomes a payment of interest and cannot be subsequently converted into payment of principal only because it is for the benefit of the creditor that he should reconsider his petition as regards payment. 1935 A.L.J. 23=1935 A. 47. It cannot be inferred that he paid interest as such from the fact that at the time of the payment interest in excess of the amount paid is due. 1935 A. L. J. 23=1935 A. 47. The effect of the proviso inserted to sub-S. (1) of S. 20 by the Amending Act of 1927 was to remove the distinction between the two kinds of payments as to all payments made after the 1st day of January, 1928. Though as to payments made before that date the words "as such" in the 1st part of the sub-section have some significance, because they make it clear that in the case of a payment towards interest which is not required to be evidenced by writing it should be clear that the payment was in fact towards interest and not left as a matter of doubt, those words are not material and have no significance as to payments made after that date. 16 Pat. 294=174 I.C. 1005=18 Pat.L.T. 563=1938 Pat. 183. After the 1st of January, 1928, it is a matter of complete indifference whether the payment is of interest or principal or both so long as it is a payment relating to the debt. So where a debtor makes a payment and acknowledges it in his own handwriting that it is in respect of the debt, but does not specify whether it is towards principal or interest, the acknowledgment gives a fresh period of limitation under S. 20 of the Limitation Act. If the acknowledgment is merely of a payment without identifying the debt, it would not be sufficient. Under the amended section it is unnecessary to prove that the payment was towards interest. I.L.R. (1939) Nag. 235 =1939 N.L.J. 205=182 I.C. 572=1939 Nag. 156. *See also* 16 Pat. 294=174 I.C. 1005= 18 Pat.L.T. 563=1938 Pat. 183. A payment intended to be made towards principal is effective to start fresh period of limitation and it does not matter that the creditor afterwards changed his mind and chose to regard the payment as one towards interest. 1935 A.L.J. 304=1935 A. 58. Where the payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both. 58 M. 418=68 M.L.J. 470. Payment of interest on general balance of accounts does not save limitation—Payments not expressly made towards interest do not save limitation. 9 P.W.R. 1916; 31 I.C. 782. The carrying forward of a balance including certain items of interest does not amount to payment of interest within the meaning of S. 20. The effect of a payment of interest must be to lessen the defendant's liability on that account. 152 I.C. 319= 1934 N. 219. Payment of interest saves limitation even though a part of the principal is paid at the same time. 1923 M.W.N. 564 (1)=1924 M. 123. A purchaser of mortgaged property at a Court auction, is a person "liable to pay the mortgage debt" within S. 20 and therefore if he pays into Court a sum equal to the amount due for costs and an excess equal to the amount of interest, the excess must be regarded as payment on account of interest as such. 44 M. 544=40 M.L.J. 218. Question whether payment of interest was as such is one of fact and cannot be raised in second appeal. 59 I.C. 709. An intention to pay interest as such ought not to be inferred merely from the creditor's appropriating payments in accordance with his legal power. But if the method of appropriation is determined at the outset by express contract between the parties, specific appropriation is not necessary. 19 I.C. 849=9 N.L.R. 78. The mere appropriation by the creditor of the payments to interest is not such an indication. 19 I.C. 825; 1927 M. 110=98 I.C. 281. *See also* 1929 M. 811. But when the debtor consents to such appropriation, it is to be assumed to be a payment on account of interest as such within the meaning of S. 20. 16 P. 27=18 P.L.T. 309. A mere payment generally towards "the decree amount, costs, etc.," without any appropriation by the debtor does not save limitation under S. 20. *See also* 1929 O. 479; 1930 O. 287. But under certain circum-

NOTES.

stances, it may be *presumed* to have been made for *interest,* and limitation extended under this section. ((22 L.W. 827; 44 M. 544; 1926 L. 329, F.) 1933 M.W.N. 1023; 1937 A.M.L.J. 118. Where it had been agreed between the parties that interest would be paid first and that anything paid by the debtor would go first towards interest, and the payments made were appropriated towards interest from time to time, it must be held that any payment made was towards interest as such and was sufficient to save limitation. 167 I.C. 244 (P.). Where mortgagor was director and auditor of a Bank, and Bank credited sums which became due to him from time to time by the Bank towards interest due on the mortgage, and when it was being done with his knowledge and acquiescence, *held,* it could save limitation. 1936 M. 946. Payment of interest—Possession of land and receipt of rents—Saving of limitation. 72 I.C. 492. Subsequent usufructuary mortgage in favour of a simple mortgage—Usufruct cannot be regarded as a payment of interest. 49 A. 430=1927 A. 417. But *see* 97 I.C. 941=51 M.L.J. 378; 110 I.C. 560. Where, in a suit to recover arrears of maintenance, the plaintiff relied on certain payments to save limitation. *Held,* that as it was not proved that those payments had been made as *interest,* they did not operate to save the suit from the bar of limitation. 146 I.C. 1033=1934 P. 244. The holder of a decree payable by instalments can, after applying for execution, extend the period of limitation by entering the payment of interest towards the overdue instalments. 60 I.C. 935=14 S.L.R. 198. If either the creditor or the debtor by himself goes on adding interest to principal in his own books, even though the same may be in pursuance of the original agreement, there would not be each time it is done a fresh payment by the judgment-debtor to the creditor so as to extend the period of limitation under S. 20 of the Limitation Act. In order to amount to payment of interest under that section addition of interest to principal must be the result of an agreement between the parties on the date of such payment. 123 I.C. 820=1930 A. 467.

APPROPRIATION.—*See* 16 Luck. 113=1941 Oudh 56. A plaintiff wishing to avail S. 20 has in the case of an 'open' payment, to prove that he appropriated the sum towards the principal debt before the expiry of the period of limitation for a suit on the document in question. Though the writing evidencing the payment may come into existence at any time, the creditor's act of appropriation of the payment to the principal debt, is a very different matter. The language of S. 20 cannot be regarded as satisfied unless within the prescribed period the creditor has in the exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the prescribed period, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true that until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended S. 20, Limitation Act, part payment of principal has not been established. 67 I.A. 160=I.L.R. (1940) L. 470=44 C.W.N. 625=71 C.L.J. 444=42 Bom.L.R. 640=1940 A.L.J. 639=1940 P.C. 63=(1940) 1 M.L.J. 895 (P.C.). Under S. 20 the following propositions dealing with various aspects of part payments by the debtor can be laid down:—(1) If it is claimed that the debtor has made a payment towards interest, this can only save limitation if it is shown that interest was paid by the debtor, as such, that is to say, the intention of the debtor must be shown to have been that the payment should go towards interest: (*a*) It is, however, not necessary that this intention should have been made clear at the time of the payment; (*b*) It may be proved not only by statements made by the debtor at the time of payment but in any other manner as may clearly appear from the circumstances. (2) If the debtor at the time of payment specifies that the payment was towards principal, this would obviously save limitation. (3) If, however, the debtor makes an "open payment," that is a payment without appropriation by him (debtor) either towards interest or in part payment of the principal, the creditor may appropriate it towards principal or interest; (*a*) If the creditor appropriates it towards interest, limitation will not be saved because the payment is not made as such; (*b*) If, however, the creditor appropriates the payment towards part payment of the principal, limitation will be saved provided the appropriation is made before expiry of limitation. Such appropriation need not be made at once but it must be made before the limitation has expired; (*c*) If the appropriation is once made by the creditor towards interest, he cannot transfer it subsequently towards principal. (4) If the payment made is a sum larger than the amount due at the time of payment as interest, a part of it will necessarily be presumed to have been made towards the principal and, therefore, this payment will save limitation. (5) If the debt due does not bear interest, the payment again must necessarily be in part-payment of the principal and, therefore, limitation will be extended under S. 20. 42 P.L.R. 635=1940 Lah. 513; 1940 A.L.J. 332=1940 All. 338; 15 Luck. 573=1940 O.W.N. 647=1940 Oudh 340; 1938 Lah. 347; 1937 Lah. 820; 1941 A.M.L.J. 106; 1938 Rang.L.R. 591=1938 Rang. 280; 8 Cut.L.T. 1; 1940 Lah. 106=42 P.L.R. 103. Where money is paid by a

NOTES.

debtor to his creditor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither a payment of interest as such nor a part payment of the principal which would save limitation under S. 20. If the debtor is shown to have consented to such appropriation or to have been aware of it, it may be treated as a payment of interest as such. 178 I.C. 844=40 Bom. L.R. 968=1938 Bom. 467. Under S. 20, payment must necessarily be made by the debtor or his duly authorised agent. Where a creditor who is in possession of jewels pledged with him as security for a debt, gets them sold, and appropriates the sums realised towards the debt, it cannot be said that they are payments made by the debtor for interest as such or towards the principal. 40 L.W. 270=67 M.L.J. 258. Receipt of the rent and produce of the land may be deemed payment for the purpose of sub-S. (2), 35 C.L.J. 58=1922 C. 114; 1924 P. 169. No actual money need be paid. 47 L.W. 517 =1938 Mad. 579=(1938) 1 M.L.J. 624; 1937 Pat. 410; 1939 Bom. 252=41 Bom. L.R. 455. A creditor has the right to appropriate a payment made by the debtor without instructions towards the principal, if he so likes, but if the creditor wants to save limitation the appropriation must have been made within the period of limitation and the fact that the appropriation has so been made within the period of limitation can appear from the account books of the creditor. I.L.R. (1941) All. 291=1941 O. W.N. 293=1941 A.L.J. 50=1941 All. 132. Under S. 20 payments towards interest must be made as such. 87 I.C. 746=1925 C. 1030; 90 I.C. 774; 28 Bom.L.R. 569. *See also* 1933 A. 453 (2)=1934 M. 656. Where payments are made by a debtor, but there is nothing to show, if it is for principal or interest, the Court is entitled to find out on evidence for what purpose the payments were made. 90 I.C. 774. Payment of interest must be proved to be actually made; creditor's admission of receipt is not of much weight in saving limitation. 1928 M. 509; 7 R. 522=1929 R. 339; 1931 S. 28. Debtor denying payment—Presumption that payment was towards principal and interest. 22 L. W. 827=1926 M. 183 (1). *See also* 14 I.C. 580=1912 M.W.N. 754. Payment may be inferred to be towards interest from the usual course of dealings. 46 I.C. 532. *See also* 44 C. 567=35 I.C. 638 (2)=22 C. W.N. 190; 51 I.C. 240. As to admissibility of oral evidence to prove payment of interest as such, *see* I.L.R. (1937) All. 732 =1937 A.L.J. 792=1937. All. 640. A payment not expressly made as towards interest will be considered as payment towards principal under this section. 44 C. 567=22 C.W.N. 190. *See also* 46 I.C. 532; 1930 A. 392. A debtor made payment to a creditor to whom he owed 2 debts. Mere appropriation of the payment by the creditor to one of the debts cannot in the absence of evidence to show debtor's intention save limitation. 10 L. 750 =1929 L. 288.

MODE OF PAYMENT.—As to mode of payment, *see* 44 B. 500=22 Bom.L.R. 385. Where payment is made in respect of the principal and interest due under a decree, S. 20 comes into play and an application for execution of the decree made within three years from the date of the payment is within time. 32 S.L.R. 415=47 L.W. 606=42 C.W.N. 509=1938 A.L.J. 150=1938 O. W.N. 310=172 I.C. 999 (P.C.). It is unnecessary under S. 20 that money should actually pass as a settlement of account may be as effectual as a real payment. A transaction whereby the parties agree that an amount previously due by the creditor to the debtor shall be treated as amount paid by the latter to the former, is in substance identical with a transaction where the debtor receives actual payment and pays the amount back to the creditor and gives a fresh period of limitation from such date. 174 I.C. 585 =1938 Pat. 139. Mere entering of a fictitious payment could not amount to payment. What the statute required was a payment or at least something which was tantamount to a payment. 168 I.C. 152=1937 A.L.J. 166 =1937 A.W.R. 138=1937 All. 260. Part payment and acknowledgment—Distinction between—Settlement of accounts—Accounts stated, effect of. 36 C.L.J. 228=1923 C. 71. Payment by labour saves limitation. 35 I.C. 480=3 L.W. 552. Rendering service may be equivalent to payment of interest. 33 I.C. 134. If a cheque is deliversed to a payee by way of payment and is received as such by him, it operates as a payment. 29 C.W.N. 496=89 I.C. 508; 1930 A. 392; I.R. 1931 S. 29=129 I.C. 909 =1931 S. 28, following 42 C. 1043; 1937 S. 95. Land held under mortgage, not registered—Receipt of produce not payment of interest. 21 I.C. 281=9 N.L.R. 140; 36 C.L.J. 228=1923 C. 71. It is not necessary that payment of debt should be actually made in money. Any arrangement by which a discharge is effected has the same effect. 36 I.C. 77; 1923 C. 71=36 C.L.J. 228; (1938) 1 M.L.J. 624=1938 Mad. 571; 42 C.W.N. 548=1938 Cal. 538 (payment by cheque is good to save limitation). *See also* 1929 M. 432. Taking of the profits by the plaintiff amounts to payment of interest under S. 20. 25 I.C. 933=7 L.B.R. 138. *See also* 21 I.C. 281=9 N.L.R. 140. But *see* 144 I.C. 641=1933 L. 741. Where a mortgagee with possession was not in fact given possession, but however collected some rents, it was held that it was not effective to save limitation. The section requires a payment or at least something which tantamounts to a payment. 1937 A.L.J. 166= 1937 A. 260. Where a surety undertook to be responsible for part of a debt and creditor accepted the same and made a fictitious entry of payment in his accounts, it would

NOTES.

not amount to 'payment' as contemplated by this section. (*Ibid.*) Where the defendants undertook to pay certain decretal debt and made certain payments and did not deny their liability. *Held*, that such payments were sufficient to extend the period of limitation. 1937 C. 226.

PART-PAYMENT OF PRINCIPAL.—Part-payment of principal portion of decretal amount gives fresh starting point. 45 I.C. 903=46 C. 22; 14 L. 580=1933 L. 341; 1933 A. 363 =55 A. 280. *See also* 44 B. 392=56 I.C. 429. Where a claim is for principal and interest but the decree does not bear interest, any payment by judgment-debtor should be taken as payment towards principal and therefore it should be in the handwriting of the judgment-debtor or his agent duly authorized. 38 I.C. 293. [After the amendment by the Act of 1927, payment whether for interest or principal must be in writing signed.] Endorsement regarding part payment of debt must be by the person making payment. 108 I.C. 727 (1)=1928 L. 157 (1); 1929 C. 432; 30 Bom.L.R. 500. A cheque signed by a debtor and given in part-payment of a debt would save limitation provided the cheque is duly honoured. 42 C. 1043=19 C.W.N. 724; 1933 L. 741=144 I.C. 641. *See also* 1938 Cal. 538. If the cheque has been accepted by creditor before expiry of limitation, for saving limitation it is immaterial that the cheque has actually been cashed after period of limitation. 14 L. 580=1933 L. 341. *See also* 1937 S. 95. The proviso to S. 20 is applicable to payments of instalments fixed by and payable under a bond; payment of each instalment is to be regarded as a part-payment of the principal amount due on the bond. 35 P. R. 1913=16 I.C. 961. Alleged *part-payments made within three years but certified to the Court under O. 21, R.* 2 more than 3 *years* after the date of the first application would extend the period of limitation. 29 M.L.J. 669=31 I.C. 318. *See also* 1936 Nag. 281; 44 C.W.N. 509 (P.C.). It is true that the payment has to be made within the prescribed period but the Act does not provide that the acknowledgment is to be made within that period. It is the payment and not the acknowledgment which extends the period of limitation. The acknowledgment is merely a matter of evidence and provided it is signed before the suit is commenced, it is sufficient. (17 M. 92, Rel. on). 1937 C. 284; 1938 Mad. 601=(1938) 1 M.L.J. 620. *Burden of proving* that a payment made by defendant saves limitation under S. 20 rests on the plaintiff. 22 I.C. 959; 35 P.L.R. 529=1934 L. 475. Agent transgressing his authority cannot give the creditor the benefit of S. 20. 1925 M. 703=48 M.L.J. 506. Suit on basis of "Sarkhat"—No mention of interest either therein or in endorsements of payments—Payments, if must be regarded as payments of principal. 1935 A.L.J. 657= 1935 A. 605 (F.B.).

PAYMENT BY WHOM—AUTHORITY TO PAY.—S. 20 does not limit the extended period to the person who really makes payment, and the payment of interest by one of the debtors will give an extended period of limitation to the debt in respect of which the payment is made. If the debt is one, and indivisible, payment by one will interrupt limitation against all the debtors unless they can come within the exception laid down in S. 21. 1937 C. 191. But if the debt is susceptible of division and though seemingly one consists really of several distinct debts, each one of which is payable by one of the obligators separately and not by the rest, S. 20 will keep alive that debt or rather the portion of the debt which has got to be discharged by the person who has made payment of interest. It cannot affect the separate shares of the other debtors unless on the principle of agency, express or implied, the payment can be said to be a payment on their behalf also. 1937 Cal. 191. The authority referred to in S. 20 is an authority to make the payments, authority to make endorsement unnecessary. 1927 M. 959= 53 M.L.J. 555. A payment of interest (in respect of a mortgage debt) saves time not only against persons paying but also against the subsequent purchasers of the equity of redemption or subsequent mortgagees. 41 A. 111=47 I.C. 845; 44 C.L.J. 475=98 I.C. 381=1927 C. 193. *See also* 140 I.C. 145 (P.). The burden lies upon the plaintiff to prove that payment of interest was made either by the debtor or by his duly authorised agent. 23 I.C. 863. *See also* 54 I.C. 802. As to payment by authorized agent, *see* 3 L.L.J. 250; (1940) 2 M.L.J. 369; (1940) 2 M.L.J. 726. Under S. 20 the authority of the agent may even be implied from the facts and circumstances of the loan. The section does not require any formal authorisation. 73 C.L.J. 356=1941 Cal. 643. *See also* 1941 A.M.L.J. 63. *Leach, C.J. and King, J.: Patanjali Sastri, J., dissenting*)—Where a mortgagee undertakes as a part of the consideration for the mortgage to discharge a debt due by the mortgagor, he cannot be deemed to have authority to make a payment of interest or a part payment of principal, for purposes of S. 20. Whether there is authority to make a part payment is a question of fact. Of course, if the person who is to make the payment is left a discretion in the matter, his principal will have to suffer the consequences of a payment to account, if the conditions of S. 20 for the saving of limitation are also complied with. Where the mortgagee is directed to pay in full the debt due by the mortgagor, it cannot be said that there is any discretion left to the mortgagee in the matter. His duty is to discharge the debt in full and he has no authority to do anything else. If he makes only a part-payment that will not bind the mortgagor and cannot save limitation for a suit against the mortgagor. I.L.R. (1941) Mad. 191= 1941 Mad. 67 (2)=(1941) 1 M.L.J. 77 (F.

NOTES.

B.). But *see* 1941 P.W.N. 667 *contra.* A vendee had no authority to keep a debt alive by making a part-payment when he was asked to pay it by the sale-deed. 1922 M. 401; 54 C. 179. Where one member after partition was allowed to manage the properties on behalf of all, an acknowledgment by him after partition is not binding on the others unless it can be proved that he was then authorized agent under S. 21. 3 L.W. 231=33 I.C. 986. Joint Hindu family —Payment by a karta binds other members. 52 I.C. 436=31 C.L.J. 7; 6 P. 811=1928 P. 156; even where other minor members are executants of document with another person as guardian when such guardianship is invalid. 44 L.W. 467=1936 M. 871. *See also* 48 L.W. 268=1938 Mad. 853=(1938) 2 M.L.J. 501. A payment through a messenger made by a manager saves limitation. 50 I.C. 862=23 C.W.N. 336; 53 C. 163=94 I.C. 657. Payment by mortgagor after parting with equity of redemption saves limitation also as against purchaser. *See* 22 I.C. 510. The purchaser of the equity of redemption is a person liable to pay the debt and can make a payment to save limitation. 54 C. 179=98 I.C. 204=1926 C. 1218. Payment to one partner of a debt due to the firm is a valid discharge of the debt only when the payment is a money payment. 9 I.C. 116=13 C.L.J. 234. *See also* 41 M. 427=23 M.L.T. 261; *also* 37 M. 146=25 M.L.J. 501; 28 I.C. 845. If a mortgagor makes a payment to the sub-mortgagee it saves limitation also as against the sub-mortgagor. 44 I.C. 213=3 P.R. 1918. Payment by one of the mortgagee saving time against all. *See also* 1927 A. 209=99 I.C. 424; 1936 Pat. 361; 1938 Cal. 129=42 C.W.N. 18; 1938 Pat. 383. A Hindu widow can keep her husband's debt alive by making payments under S. 20. 1928 M. 972 [35 A. 227 (P.C.), Dist.]. Agent duly authorized to make payment—Judge, if an agent. 44 M. 971=41 M.L.J. 423. Payment of money by the Court to the decree-holder cannot extend limitation in favour of decree-holder. 87 I.C. 989=1925 M. 703=48 M.L.J. 506. (44 M. 971, Dist.) Payment by the agent through a servant is payment by the agent on behalf of the principal. 54 I.C. 318=1919 M.W.N. 797; 61 I.C. 918=8 O.L.J. 115. A receiver in a partition or administration suit authorized to pay interest on debts can, by his payment, keep alive the debts. 26 I.C. 393; 16 M.L.T. 489. The Official Receiver is not an agent of the insolvent and cannot acknowledge debt on behalf of insolvent. The words 'duly authorised' in S. 20 of the Limitation Act means authorised by the debtor. 1937 A.M.L.J. 101. A mortgagee authorized to pay off a debt due by the mortgagor is not his "duly authorized agent". 23 I.C. 810=26 M.L.J. 509. Payment by parties and privies operates as good payment. 17 I.C. 619=24 M.L.J. 66. Where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the lifetime of the father neither a debtor nor, in the absence of any evidence, an agent of the father for the purposes of S. 20. 17 I.C. 655=5 O.L.J. 419. *See* now sub-S. (3), Cl. (*b*) to S. 21. But *see* 6 P. 811=1928 P. 156, *contra*. Where a Hindu executes a promissory note and keeps it alive, and becomes a convert to Islam along with his eldest son and dies, and subsequently his younger sons make payments and endorse the same, the payments are by persons liable to pay the debt and under S. 20 limitation is saved not only against them but also against the eldest son though the latter has become a Mahomedan. His conversion to Islam cannot operate to rid him of his liability for the debt due under the promissory note of his father. I.L.R. (1939) Mad. 140=1939 Mad. 69=(1939) 1 M.L.J. 68. Payment by co-mortgagor, if binding on the other mortgagors. 45 I.C. 613; 5 O.L.J. 73; 163 I.C. 808=1936 P. 361. *See also* 1941 Rang. 37. payment by one co-contractor will not save limitation against the others under S. 21. 74 C.L.J. 327. Payment by even a *de facto* guardian for the benefit of minor to avoid law suits, extends periods of limitation against the minor. 40 I.C. 809. Burmese married couple of the cultivating class working on land together, work it as partners to all intents. When one is temporarily incapacitated there is a natural presumption that the wife has ostensible authority to act for both on the *quasi* partnership and is an agent within S. 20. 12 I.C. 23=4 Bur.L.T. 217. Where payment of interest is made by one defendant on behalf of another, limitation as against the latter will be saved only on strict proof by plaintiff, that the former had authority to make such payment on his behalf. 11 I.C. 858=4 Bur. L.T. 191. Payment by one of several co-heirs making payments towards a debt saves limitation. In this case payment for interest by the mother who was one of the persons liable to pay the debt was held to save limitation as against her co-heirs also. 1929 M. 419=56 M.L.J. 630. But *see contra* 1937 C. 191 (Case of Muhammadan mother and debt due on hand note). A Burmese Buddhist husband is not necessarily the agent of his wife. It may be that no formal authorization is required under S. 20 but it must be shown that there was at least implied authority. 1939 Rang. 287. Payment of interest by one of two mortgagors keeps alive the mortgage and not only the personal liability of the person who actually pays interest. 119 I.C. 437=1929 A. 380. But *see* 1929 M. 881. Where it is agreed between a third person and the promisor that the former would discharge the latter's debt evidenced by promissory note to the promisee in respect of principal and interest, and it is clear from the promisor's evidence that he left it to the third person to do so, an implied authority from

NOTES.

the promisor to the third person to pay the interest on his behalf as it became due is established so as to save limitation under S. 20. 34 C.W.N. 145=1929 P.C. 297 (P.C.). Payment by mortgagor—Prior assignment of mortgaged property to third person—Effect of payment against third person. *See* 36 C.W.N. 1138.

PAYMENT BY PRINCIPAL—EFFECT OF, AGAINST SURETY.—Payment of interest by principal debtor does not save limitation against surety. 44 C. 978=21 C.W.N. 482 =39 I.C. 705; 8 O.W.N. 544; 44 C.W.N. 985=1940 Cal. 401=I.L.R. (1940) 2 Cal. 362; 20 N.L.J. 140=1924 N. 411; 28 B. 248; 120 I.C. 576=1930 M. 112 (2); 152 I.C. 464=40 L.W. 479=1934 M. 639. But *see also* 21 M.L.J. 455; 53 I.C. 586; 20 N. L.J. 140=1924 N. 411. (Conflict of ruling, *see* cases *infra.*) *See also* 9 I.C. 8=21 M. L.J. 455 (28 B. 248, Foll.); 10 R. 321= 139 I.C. 738=1932 R. 88. A fresh start is given to limitation against the surety under S. 20 by the payment of interest by the principal debtor. 53 I.C. 586=105 P.R. 1919. But *see* 44 C. 998; *also* 44 I.C. 213=3 P.R. 1918; 10 R. 321=139 I.C. 738=1932 R. 88 *contra.*

PAYMENT BY SURETY—CLAIM BARRED AS AGAINST PRINCIPAL DEBTOR—DECREE AGAINST SURETY.—Though the liabilities of the principal debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purpose of application of S. 20. Consequently, even if a suit is barred by limitation as against the principal debtor, if the surety has made certain payments and endorsements on the bond on which the suit is based, thus preventing limitation running as against him, the plaintiff is entitled to a decree though as against the surety only. 10 R. 321=1932 R. 88. *See also* 191 I.C. 608.

WRITING.—Handwriting — Part-payment of principal of the debt—Joint account—Written by one debtor but signed by both is good and saves limitation. 28 Bom.L.R. 354=1923 B. 369. The actual signature of the debtor is not necessary provided that the acknowledgment required by S. 20 is in the handwriting of the person making the payment. But the acknowledgment must appear on its face to be on account of the debt. 196 I.C. 392. Mere signature insufficient without entry in handwriting. 41 B. 166=36 I.C. 359=18 Bom.L.R. 973. An endorsement of a part-payment of the principal bearing no signature or any mark of the payer will not extend the limitation under S. 20. 28 C.L.J. 222=44 I.C. 516 =23 C.W.N. 930. A part-payment of the principal of a debt must in order to be operative under S. 20 not only be in the handwriting of the debtor or his agent but it is also necessary that the writing should show that the part-payment was a payment towards the debt in question. It is not enough that the amount paid by the debtor is placed to his credit generally. 6 L.W. 790=43 I.C. 20. *See also* 1929 C. 479; 163 I.C. 915=1936 P. 386; 1939 Rang. 118 (Payment by daughter of person liable—Endorsement by them necessary). A part-payment of the principal of a debt must be in the handwriting of the person making the payment but this rule does not apply to payment of interest. 1914 M.W.N. 910; 26 I.C. 507; 16 M.L.T. 505. Endorsement of part-payment by the manager of joint family saves limitation. 6 P. 811=1928 P. 156. [*See also* S. 21, sub-S. (3), Cl. (*b*).] Limitation under S. 20 cannot be extended unless the payment towards the principal is in the handwriting of the debtor. 62 I.C. 297=17 N.L.R. 40. *See also* 1922 P. 446; 151 I.C. 426=1934 R. 227. Where the person making part-payment is unable to write himself and therefore gets another person to make the endorsement for him and, on his behalf, the provisions of S. 20 are sufficiently complied with. 62 I.C. 644 =2 P.L.T. 355. Under S. 20 it is sufficient for an illiterate person paying the money to affix a mark below an endorsement written by another person. 12 I.C. 23=4 Bur.L.T. 217; 36 C.W.N. 188=1932 C. 440=137 I.C. 788 (2). In the case of a person who knows how to write, the payment must appear in that person's own handwriting and he cannot be allowed to adopt by mere signing any writing made by somebody else as in the case of an illiterate man. 1930 R. 64. Under S. 20 when an agent makes payment, it is he who should endorse the entry of payment and the debtor's handwriting is not required. 1 P.L.T. 17=54 I.C. 802. Part-payment of a decree amount must be in the handwriting of the debtor to save limitation for an application for execution. 48 I.C. 728=4 P.L.J. 365. Under S. 20 the person making payment should be the person signing the writing. 35 I.C. 375 =1 P.L.J. 474. Money order coupon in handwriting of debtor is sufficient acknowledgment. 1930 A. 123.

Sec. 20 (1).—The first part of proviso to S. 20 (1) as amended by Act I of 1927 is inapplicable to a case where the alleged payment of interest was made before 1st January, 1928. 1929 O. 479. The amendment has been made in favour of the creditor who is not able to prove the writing of the debtor not only relating to the fact of the payment but also to the acknowledgment of the fact of payment. 14 L. 580= 1933 L. 341. On this proviso, *see also* 1932 A.L.J. 1035. S. 20 (1) does not say anything at all about the origin of the money with which the part-payment is made. It is quite sufficient if a part-payment is made and it is made by a person who is authorised to make it. Where two debtors are equally liable jointly and severally on a promissory note and when both of them are pressed for payment one of them makes the payment with the consent of the other, the payment saves limitation against both. 40 L. W.

[1][Provided that, save in the case of a payment of interest made before the first day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.]

Effect of receipt of produce of mortgaged land.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).

Explanation.—Debt includes money payable under a decree or order of Court.

Agent of person under disability.

21. (1) The expression "agent duly authorized in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment.

LEG. REF.

[1] Substituted by Act I of 1927.

NOTES.

590=67 M.L.J. 908. As to effect of the proviso, *see* 16 P. 294. The proviso does not require that the writing itself must indicate that payment was made towards principal or interest. Other evidence can be let in regarding it. 44 L.W. 339=1936 M. 848=(1937) 2 M.L.J. 54. Nor does it require payment itself to be made in any form, and a promissory note may be given by way of payment. 1936 M. 848.

Sec. 20 (1) Proviso.—The proviso to S. 20 (1) inserted by the Amending Act of 1929, applies to sub-S. (1) and does not apply to sub-S. (2) of S. 20. It cannot be said that the proviso applies to the whole section. 21 P.L.T. 770=1940 Pat. 512. Where the fact of payment appears in the handwriting of the debtor there is no reason why the said writing should not be taken as an acknowledgment of payment also. There is nothing in the proviso to S. 20 which precludes the same document as being treated as evidence of the fact of payment as well as an acknowledgment of the payment. I.L.R. (1938) 2 Cal. 320=42 C.W.N. 548 =1938 Cal. 538.

DECREE DEBT—UNCERTIFIED PAYMENT.—Uncertified payment cannot save limitation. 30 I.C. 51=9 S.L.R. 27. *See also* 1933 M. 674; 1936 N. 281. Part-payment by judgment-debtor certified beyond limitation, when saves limitation. 101 I.C. 796. A payment under S. 23 must be of such a nature that it could be an answer to a suit brought by the plaintiff to recover the amount. 30 I.C. 51=9 S.L.R. 27 [19 M. 340; 25 B. 496; 25 C. 852 (P.C.), Foll.].

Cl. (2).—Where a usufructuary mortgagee remains in possession after a final decree on the mortgage has been passed, receipts by him of the profits must be treated as receipts by way of interest and each receipt starts a fresh period of limitation for an application for execution of the decree. S. 20 (2) would clearly apply even when a decree has been passed in favour of the mortgagee. 1941 Mad. 737=(1941) 2 M.L.J. 248. *See also* (1940) 1 M.L.J. 134. Mortgagee in possession after preliminary decree under invalid contract of sale—Receipt of rents and profits saves limitation for application for final decree. I.L.R. (1941) M. 739=1941 M. 475=(1941) 1 M. L.J. 388. For the applicability of S. 20 (2) the receipt of rents and profits must be by a person *in the capacity of a mortgagee*. Where that person is also the owner of the property, the receipt of rents and profits by him cannot be said to be in the capacity of a mortgagee. Where a prior mortgagee in execution of a final decree on his mortgage purchases the mortgaged property and obtains delivery of possession of the same, the receipt of rents and profits by him cannot be regarded to be a receipt by him as mortgagee within the meaning of S. 20 (2), so as to save limitation for a fresh suit by him on his mortgage on dispossession by the purchaser of the same property in execution of a decree on a subsequent mortgage held by a person who was not impleaded in the suit on the prior mortgage. 45 L.W. 684=1937 Mad. 642=(1937) 2 M.L.J. 170. *See also* 51 L. W. 191=1940 Mad. 461=(1940) 1 M.L.J. 134. Where a mortgagor is left in possession of part of the mortgaged property as tenant of the mortgagee, the receipt of rent and profit by the mortgagee should be considered as payments of interest as such within the meaning of sub-S. (1) to S. 20 of the Limitation Act. I.L.R. (1938) All. 218=1938 A.L.J. 18=1938 All. 188. The enjoyment of the usufruct of the property by a person in possession under a void mortgage is not as mortgagee but as a trespasser and such enjoyment of the usufruct by him year after year cannot give a fresh start of limitation for a suit on the mortgage. 19 Pat. 507=21 Pat.L.T. 219= 1940 Pat. 494.

Sec. 21.—On the death of the father of a minor, his mother is not only the natural but also the legal guardian under Hindu Law and being such, she is also a lawful guardian within the meaning of S. 21 and can as such acknowledge debts. 10 O.W.N. 188=1933 O. 132. *See also* 1939 M.L.R. 88 (Civ.); 35 P.L.R. 661=1934 L. 55. The brother under the Hindu Law is not a law-

Acknowledgment or payment by one of several joint contractors, etc.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

NOTES.

ful guardian within S. 21 during the lifetime of the mother. 42 I.C. 472=45 C. 630. Where a person executed a mortgage bond and registered it for himself and on behalf of a minor as guardian and made an endorsement of some payment on the document when the minor had not attained majority, his acknowledgment was proper as he was certainly a person authorised within the meaning of S. 21. 38 L.W. 439=65 M. L.J. 380. A person lawfully acting as guardian though not appointed for the purpose, is lawful guardian when acting for the benefit of the minor. 19 I.C. 362=24 M.L.J. 428. An admission amounting to an acknowledgment within the meaning of S. 19 made by the *guardian of a minor* appointed by the Court is binding on the minor. 13 P.L.T. 509=1932 P. 337. But in order that such an acknowledgment may be effective, the person so appointed must have acted as a *de facto* and not as a *de jure* guardian in making the acknowledgment. 1932 M.W.N. 1193. *See also* 1938 M.W.N. 671 (*De facto* guardian of Mahamadan minor); 1940 Rang.L.R. 603. The authority contemplated by S. 21 need not be special authority given for the purposes of making payment of the particular loan. 1933 C. 826. A *de facto* guardian of a Hindu minor is not an agent duly authorised to acknowledge a debt on behalf of a minor within the meaning of S. 21 as a *de facto* guardian cannot be considered to be a lawful guardian under S. 21; and an acknowledgment by him is not valid and cannot keep the debt alive against the minor. I.L.R. (1939) Mad. 65=48 L.W. 268=1938 Mad. 853=(1938) 2 M.L.J. 501. Joint mortgagors—Payments of interest by one—Effect. 55 I.C. 763. Where the debt is kept alive by part-payment and the liability of the debtors is several, then it should be proved that the person represented the other persons. 32 I.C. 608; 165 I.C. 828=1936 R. 504 (Joint promissory note). But the payment of interest by a debtor does not save limitation against his co-debtors whose agent the payer was not. 59 C. 1128=36 C.W.N. 487=1932 C. 620. S. 21 (2) applies to payments made by one of the joint executants of a promissory note. 1937 R. 195; 1936 Rang. 504; 1939 A.W.R. (H.C.) 98. S. 21 (2) is not exhaustive and the test is whether the person keeping the debt alive had express or implied authority on behalf of others. 32 I.C. 608. The conduct of the parties might show that one joint promisor has implied authority to make an acknowledgment on behalf of the other. 25 I.C. 927=1914 M.W.N. 792. Payment of interest by one *of the heirs* on a debt due by the deceased person does not save limitation as against the other heirs. 9 L.B.R. 78; 40 I.C. 858. *See also* 14 I.C. 128. Where a debt is due by two brothers and, on a partition between them, it is allotted to one of them, payment of interest by such brother will not save limitation as against the other brother unless there is an implied or express authority conferred by the partition arrangement to make such payment of interest. (1929 P.C. 297, Dist.) 1933 C. 826; 45 L.W. 767=1937 Mad. 586. In the case of a going *partnership concern,* there is a presumption that each partner is entitled to sign an acknowledgment on behalf of the firm in the ordinary course of business. 33 P.L.R. 584=1932 L. 456; 34 Bom.L.R. 623=1932 B. 426; 32 Bom.L.R. 201; 1939 Lah. 397=41 P.L.R. 90; 1937 A.M.L.J. 115. The acknowledgment by one *partner* must be shown to be impliedly authorised by others; when it was made in the usual course of business, it will save limitation. 1929 C. 714. Part-payment by one partner after dissolution, if saves limitation. 1925 M.W.N. 707. Acknowledgment of liability by one partner after cessation of business does not bind other partner. 7 L. 403=99 I.C. 563. *See also* 1928 M. 972; 1928 A. 491. As to *joint contractors,* see 26 A. L.J. 723=1928 A. 387; 1939 Rang. 287 (Principal and Surety). An acknowledgment not stating amount of liability acknowledged by *guardian* is not proper. 1928 C. 850. An *admission by a pleader* in a petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors, or guardian for minors. 133 I.C. 155=1931 A. 398. The word "chargeable" in S. 21 (2) *prima facie* means every kind of chargeability possible by reason of Ss. 19 and 20, that is, every kind of chargeability under the original contract, and is not limited to personal liability only in the case of a mortgage. 30 L. W. 677=57 M.L.J. 588. In the case of a pronote executed by a Hindu undivided father and son, a payment by the father alone cannot save limitation against the son in the absence of proof that the loan was contracted for the benefit of the entire family. Mere proof that the father was the manager of the family cannot save limitation. [25 Mad. 220 (F.B.), Rel. on.] 195 I.C. 52=1941 Pat. 208. A payment made after partition by a member of a Hindu family of interest due on a promissory note executed by the managing member when the family was joint will not start a fresh period of limitation against the other

[1][(3) For the purposes of the said sections—

(*a*) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorized agent of, any widow or other limited owner of property who is governed by the Hindu Law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(*b*) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.]

Effect of substituting or adding new plaintiff or defendant.

22. (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

LEG. REF.

[1] Inserted by Act I of 1927, follows the ruling in 1928 M. 972.

NOTES.

members of the family, the payment having been duly acknowledged by the person who made it. While the family remains joint only the manager or his duly authorised agent can extend the period of limitation against family. After partition there is no manager, and therefore no one can extend the period of limitation in respect of a family debt so as to affect the erstwhile members. 1941 M.W.N. 1012=54 L.W. 596=1941 Mad. 925=(1941) 2 M.L.J. 883 (F.B.). S. 20 does not contemplate the interruption of limitation where payment is made by one judgment-debtor independently of the other judgment-debtors. S. 21 (2) does not lend any support to the view that payment by one of the judgment-debtors should have the effect of interrupting the running of limitation as against the other. Sub-S. (2) of S. 21 is merely explanatory, it does not lay down exceptions to the general principle embodied in S. 20. I.L.R. (1939) All. 258=1939 A.L.J. 66=1939 A. 230. Where a manager and other members of a Hindu undivided family are liable to pay a debt and a payment is made by the manager, it may be possible to infer from the circumstances that the payment was made by the managing member on behalf of the other member as well on the principle of implied agency and that in that connexion the very fact of his being a managing member would itself be a factor of importance. 58 M. 418 =1935 M. 101=68 M.L.J. 470. *See also* 42 C.W.N. 18=1938 C. 129; 70 C.L.J. 201 =44 C.W.N. 299=1940 Cal. 137. But it would be different after partition when there cannot be any manager. 45 L. W. 767=1937 M. 586. *See also* 1938 M. 774= (1938) 2 M.L.J. 33. On the death of the parents neither by Hindu Law nor by custom is the grandmother recognised as the lawful guardian of the minor and endorsement of payments by the paternal grandmother cannot bind the minor and save limitation. I.L.R. (1940) Mad. 358=1940 Mad. 33= (1939) 2 M.L.J. 884 (F.B.). The term "joint contractors" in S. 21 (2) also includes joint mortgagors. S. 21 (2) must be read in conjunction with Ss. 19 and 20. Hence payment of interest as such by one of the joint mortgagors who is not an agent of the other does not itself serve to keep alive the debt as against the other who has not authorized the payment. The claim against the other is barred personally as well as against the share of the property pledged by him. 1939 Rang. 287; 46 L.W. 688=1938 Mad. 111; 1936 Rang. 504; 1940 Rang. 603. Payment of interest made by some of the descendants of a deceased mortgagor binds also the other descendants even though these latter were divided from the family before the payment was made. S. 21 (2) cannot save them because the categories mentioned in the section are not merely illustrative, and it does not cover cases relating to *co-heirs* and other persons who derive their liability not from direct contract with the promisee. 1930 M. 738.

Sec. 21 (3).—S. 21 (2) has no application to a case of a joint Hindu family in which the father makes a payment on behalf of the family. For such a case express provision has been made in Cl. (3) (*b*) of S. 21. Where a father makes a payment, in order to stay the hands of the decree-holder in executing the decree and time was given to pay in consideration of the payment made, such payment is as manager of the joint family and saves the time against father and sons. 1938 A.L.J. 973=1938 All. 638. *See also* 1940 Cal. 137. Under the law of limitation as it stood prior to the enactment of Cl. (3) of S. 21, a widow having a life estate was not competent to give an acknowledgment which would bind the reversioners. 1936 A.L.J. 1373=1936 All. 858. Scope and effect of—Hindu limited owner—Power to acknowledge debt —If includes power to pay barred debt. 17 Pat.L.T. 780; 1937 Nag. 327; 1937 Mad. 586.

Sec. 22: SCOPE OF.—S. 22 (1) contemplates cases in which a suit is defective by

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

NOTES.

reason of the right persons not having been made parties, but not cases in which the suit was originally properly instituted but has become defective owing to a devolution of interest. 20 C.W.N. 833=18 Bom.L.R. 642=43 I.A. 113 (P.C.). Joinder after limitation of a party not necessary. 1923 L. 438 (1). *See also* 1922 N. 213; 62 I.C. 636=6 P.L.J. 463.

APPLICABILITY.—S. 22 does not apply to cases where *pro forms* defendants are made plaintiffs. 14 I.C. 556=84 P.R. 1912; 139 I.C. 535=13 Pat.L.T. 392. Nor where in a suit by the manager of a joint Hindu family, the other members of the family are brought on record by amendment of the plaint. (12 B. 158, Foll.) 36 Bom.L.R. 327=58 B. 348=1934 B. 178. This principle applies even where the suit is not by the manager, but only by a member. 1937 L. 193. Where a suit is originally brought against the defendants as members of a joint undivided family and subsequently the plaintiff was allowed to amend his plaint by adding an alternative claim against them as partners, there is no change in the "*persona*" of the parties but only a change in the basis on which the same parties were sought to be held liable and with reference to them, they cannot be deemed to be newly added under S. 22. 33 Bom.L.R. 1385=1931 B. 590. Where in a suit on a promissory note signed by a person on his own behalf and as guardian of a minor, only relief against the assets of the minor in the guardian's hands was asked for. But subsequently an amendment claiming relief against the guardian personally was allowed. *Held,* that the effect of the amendment was not to add a new person as defendant but to alter the ground on which a person already a defendant was to be held liable. Consequently once the amendment was allowed. S. 22 did not apply. 154 I.C. 582=1935 M. 160. S. 22 (1) will not apply where a defendant who was made such by the plaintiff at the time of the institution of the suit is transferred in that suit as co-plaintiff. 90 I.C. 82. The section applies even to cases where a person is added as a party at the instance of the Court under O. 1, R. 10. 79 I.C. 914; 6 R. 29 (P.C.). The effect of striking off a person's name from the array of the defendants, even if it is made under a mistake, is that the suit so far as he is concerned comes to an end. If his name is added at a later date, a new suit must be regarded as having been brought against him and if such is not brought within time it is barred by limitation. 199 I.C. 196. S. 22 governs suits and not applications for a substitution of legal representative. 49 I.C. 34=15 N.L.R. 21; 1923 P. 88; 58 C. 55=1931 C. 385. Nor to applications under O. 21, R. 10. Nor to execution proceedings. 62 I.C. 30=6 P.L.J. 358. The section will not apply when a suit is brought by an agent on behalf of a firm of partners, merely because it is barred when the other members of the partnership are impleaded as co-plaintiffs. 28 I.C. 210=2 L.W. 239. Section applies to cases where a new plaintiff has been introduced and is not applicable in cases where there is only an amendment with regard to the description of the plaintiff. 32 C.W.N. 396. *See also* 109 I.C. 785. Nor to cases where defendant has been wrongly described in plaint, but amended afterwards. 162 I.C. 280=1936 L. 147. But it would be otherwise if it amounts to something more than mere misdescription. 38 P.L.R. 827=163 I.C. 734=1936 L. 485. As to whether section applies in cases of mere transposition of parties, *see* 3 Luck. 241; 1931 A.L.J. 863=1931 A. 725. S. 22 does not apply when a defendant is made a plaintiff. 28 I.C. 45=28 M.L.J. 147. *See also* 21 I.C. 421=25 M.L.J. 452; 66 I.C. 873; 1922 S. 13. Defendant adjudicated insolvent pending mortgage suit—Official Receiver added as a party—It is only a continuation of old proceedings and S. 22 does not apply. 53 M.L.J. 142=1927 M. 693. Suit against wrong legal representative—Proper person added after time—Validity. 33 P.L.R. 253=1932 L. 314. *See also* (1941) 1 M.L.J. 580.

ADDITION OF PARTIES.—S. 22 refers only to the parties subsequently added; the suit cannot fail as against the original defendants, merely because the plaintiffs may have lost their remedy as against the newly added defendants unless such a result follows from the nature of the suit. 33 Bom.L.R. 1385=1931 B. 590. Against a party subsequently added, limitation is to be calculated from the date when he has been brought on the record. 12 I.C. 586=13 Bom.L.R. 1014; 50 M. 372=52 M.L.J. 199. *See also* 55 I.A. 7=6 R. 29=54 M.L.J. 88 (P.C.). Where an application is made to join certain persons as parties, they become parties to the suit from the time when the application is presented and not when the Court passes its order joining them as parties. 1930 S. 259. Section is not applicable in the case of transferee *pendente lite*. 1930 A. 597; *see also* 7 Cut.L.T. 49. If a party is added to a pending suit after lapse of the period of limitation fixed for the suit, the bar of limitation would not be saved. 85 I.C. 961=1925 M. 917; 75 I.C. 781. If one of the several legal representatives of a creditor is added as a plaintiff after the expiry of the time prescribed for the institution of the suit, a suit instituted by one of

NOTES.

the legal representatives for the recovery of the whole amount or of his share is maintainable. 1932 L. 652. Under O. 30, R. 2, C.P. Code, once partners have been declared the persons whose names have been declared are to be regarded as parties to the suit. There is however nothing to prevent a party from making a further declaration the effect of which might afterwards full to be considered by the Court. But if it is made after the period of limitation, it will have no effect and the Court would regard the suit as being one by the parties whose names were originally declared. 60 C. 1217=37 C.W.N. 1105. Addition of parties—Partnership—Suit for dissolution. 50 C. 549=1924 C. 74. When a partner sues only one of his partners for accounts of partnership and the other partners are added after the period of limitation has elapsed, the suit must be dismissed. 143 I.C. 900=1933 S. 121. A principal cannot be added out of time in the place of his benamidar who is sued within time. 18 I.C. 392. Where a party is added to the suit not in order to validate the suit but to settle the dispute finally, the original defendants cannot claim limitation from the date the new party is added to the suit. 1930 A. 436. In a suit to enforce rights of trust, by persons interested in the trust, additions of more representatives out of time does not bar the suit. 9 L.W. 377=50 I.C. 353. The date of institution of a suit as against a newly added party must be the date on which he was added as a party. 38 I.C. 169=5 L. W. 222. Where a plaintiff is added in consequence of the assignment of the rights of the original plaintiff his right to a decree is not affected by S. 22. 40 M. 722=32 M. L.J. 407. In a suit for possession of property after declaring that a certain alienation was invalid, the alienee defendant pleaded that he held a portion of the property on behalf of an idol, he having transferred it to the idol. The idol was thereafter impleaded, but only after the period of limitation had expired. *Held*, S.22, applied to the case and that the suit as against the idol was barred by limitation. 15 Pat.L.T. 596. If a mortgagee sues the mortgagor for sale and then after the expiry of twelve years from the date of the mortgage impleads a puisne mortgagee, his suit as against that mortgagee is barred by S. 22. 1932 M.W.N. 330. Bond in favour of *A*—On *A's* death suit on it by father in his personal right as *A's* heir—Subsequent application for substitution of *A's* minor son as plaintiff after limitation—Suit is governed by S. 22. 39 P.L.R. 585=1937 L. 369. *See also* 1940 Lah. 262. The joinder of a person already represented in the suit as a party to it is not joinder within the meaning of S. 22. 56 I.C. 386. The joinder of parties after time involves a bar only if the joinder was necessary to the suit. 35 I.C. 551=10 S.L.R. 38. The substitution of the Official Assignee in a suit brought by a person who has been adjudicated as an insolvent amounts to an addition of new plaintiff. 28 Bom.L.R. 554.

AMENDMENT.—Amendment of a plaint with reference to a non-essential particular made after time without adding a new plaintiff or defendant is not affected by S. 22. 19 O.C. 221=36 I.C. 941. Suit on behalf of minor plaintiff—Subsequent discovery that the plaintiff was a major at the date of suit—No question of limitation arises by reason of such amendment. 100 I.C. 469=1927 C. 477. So also in a suit by a Chairman of a District Board, the amendment of the cause title so as to make District Board itself the plaintiff. 32 C. W.N. 396=1928 C. 485. So also in a suit against manager of a Hindu idol an amendment so as to implead idol as party. 6 O. W.N. 1036. Where in a suit instituted within time against the Government as responsible for the administration of the railways, the plaint described the Government as the Secretary of State for India, and the plaint was subsequently amended after the period of limitation had elapsed altering the description to the Governor-General in Council as required by S. 79, C. P. Code, as amended. *Held*, that as the claim had always been against the same Government it could not be anything more than a matter of misdescription and that the suit was, therefore, not barred by limitation. 46 C.W.N. 18.

HEIRS ADDED AS PARTIES.—Effect of. 39 B. 729=31 I.C. 180=17 Bom.L.R. 685.

NECESSARY PARTY.—Where in a suit, some persons against whom the suit is barred are added as defendants, S. 22 does not bar the whole suit, if the added parties are *pro forma* defendants against whom no relief is claimed. 45 B. 1009=61 I.C. 590=23 Bom.L.R. 405. Necessary party—Suit for pre-emption—Impleading one of the vendees after limitation—Effect. 1924 L. 230. If a necessary party without whose presence on the record the suit cannot be adjudicated upon has been omitted and is added after the period of limitation, the suit is barred against all the defendants. 57 I.C. 32; 1937 Rang. 124. *See also* 26 C.W.N. 488=1922 C. 149; 1937 R. 124. Co-executor added late. 40 M.L.J. 532=63 I.C. 104. An alienee *pendente lite* is not a necessary party to the suit. 38 M. 535=26 M.L.J. 449; 17 Pat. 588; 47 L.W. 665=1938 Mad. 687. In mortgage suits, the puisne mortgagee is a proper but not a necessary party. A necessary party is a proper party but a proper party is not always a necessary party. 1922 P. 326; 1923 P. 651. S. 22 does apply to a case even where a person is not a necessary party but only a proper party to a suit and such a person cannot be added as a party after limitation period. 1929 C. 188 =33 C.W.N. 248. If a plaintiff sues to recover the joint property of two or more

NOTES.

persons, and at the time of trial omits to join all proper and necessary parties and if the rights of those who ought to be added as parties to the suit are barred by limitation, the suit must be dismissed for want of proper or defective joinder of parties. 36 I.C. 77. The principle applies to cases where several persons jointly seek to recover the assets of a deceased person. 36 I.C. 77. When a suit can be, and is, constituted without joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the provisions of S. 22 do not apply. 38 C.W.N. 409=1934 C. 187. *See also* 17 Pat. 588; 1938 Mad. 687. Defendant claimed in written statement that certain persons in whose possession lands of the deceased were should be added as parties. Neither trial Court nor plaintiff chose to add them. Case was remanded in appeal, and they were added. *Held,* that the addition should be deemed to have been made when written statement was filed. 1937 R. 175.

NEW DEFENDANT.—Where the real purchaser was joined as a party to the application after period of limitation, *held,* that the addition of party after the period of limitation does not entail the dismissal of the application as against the newly added real purchaser. 1923 A. 462. New defendant—Clerical mistake—Misdescription of defendant—Amendment. 32 I.C. 872. If parties are effectively represented through those whose actions bind them, so that a decree passed against them is binding on such parties a specific mention of the name of such party subsequently made in the title of the suit cannot be regarded as addition of a new defendant for the purposes of limitation. Rule applied to the case of members of joint Hindu family subsequently impleaded as parties to a suit in which they were effectively represented by the manager. 1931 A. L.J. 421=1931 A. 585.

NEW PLAINTIFF.—Where in a suit by the manager of a joint Hindu family junior members are added as parties after the expiry of the period of limitation, they are merely formal parties and the suit is not barred. 33 A. 272=38 I.A. 45=21 M.L. J. 378 (P.C.). *See also* 1929 L. 505=1937 L. 193; 22 I.C. 798=19 C.L.J. 5. New plaintiff—Suit amended as on behalf of company. 33 I.C. 357=30 M.L.J. 57. Hindu joint family—Suit in names of members with word "firm" affixed—Amendment after limitation by deleting word "firm". No bar of limitation. 1939 Pat. 40. Suit for redemption—Defendant impleaded in personal capacity—Amendment after limitation for permission to sue him as representing unincorporated association—Is addition of fresh parties—Suit barred. 1940 Mad. 639. Suit in private capacity—Amendment of suit as managing director—Effect. 25 I.C. 945 =16 M.L.T. 251. Party not signing or verifying pleading. Wrong description of party—Effect. 17 I.C. 580=25 M.L.J. 174.

SUBSTITUTION OF PARTIES.—A person originally impleaded as a *pro forma* defendant but subsequently made a plaintiff is not a new party to whom the provisions of S. 22 apply. 19 C.W.N. 1269=30 I.C. 34; 1 Luck. 546=105 I.C. 473=1927 O. 484; since the object of S. 22 (2) is to provide for cases of this nature. 14 Pat.L.T. 252=1933 P. 239. *See also* 151 I.C. 452=11 O.W.N. 1071=1934 O. 462; 40 L.W. 900=1935 M. 95. But the provisions of S. 22, Cl. (2) can be availed of only in cases where the plaintiff and the defendant have a joint cause of action and not when their causes of action are different. 156 I.C. 455=69 M.L.J. 30. The general rule enacted in S. 22 is subject to certain exceptions contained in Cl. (2), one of the exceptions being that that rule of limitation enacted in the main part does not apply where there has been a transposition of the parties already on the record. I.L.R. (1937) Mad. 970=46 L. W. 375=1937 Mad. 843=(1937) 2 M.L.J. 728. Amendments made in the plaint by the leave of the judge cannot amount to an addition or substitution of party within S. 22. 28 I.C. 818=19 C.W.N. 1193. In a suit against a firm, correction of the description of the proper representative of the firm is neither substitution nor addition of a new party. 109 I.C. 785=1928 N. 319. The essential difference between an alteration that comes under the head of mere *misdescription* and an alteration that comes under the head of *substitution* is that in the case of a misdescription there is the same person or legal entity throughout; merely the name of the person is to be altered, but when one person, be it a legal or other person, is to be substituted for another, then the alteration cannot fairly come under the head of misdescription. It is a case of substitution, and S. 22 applies. Therefore an amendment of a plaint which seeks to substitute one legal entity for another after the period of limitation has passed cannot be allowed. I.L.R. (1939) Kar. 275=1939 Sind 172. *See also* 1940 M. 639.

SUIT AGAINST WRONG DEFENDANT.—Where the mistake in the name of the defendant is clerical mistake the suit is within time and such amendment is also within ttme. 32 I.C. 872; 162 I.C. 280=1936 L. 147. Where a wrong person sues on a pro-note and after the period of limitation the right person is substituted, the suit so far as the right person is concerned, shall be deemed to be instituted on the date of the substitution, and if it is barred on that date, it shall be dismissed. 1940 N.L.J. 333=1940 Nag. 274. Where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit has been represented throughout, and there is no change of party in the real sense of the word, so as to invoke the opera-

Continuing breaches and wrongs.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

NOTES.

tion of S. 22. 53 L.W. 501=1941 Mad. 609=(1941) 1 M.L.J. 580.

Suit against dead Person.—A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purposes of extending the period of limitation against his heirs. 47 I.C. 894=5 O.L.J. 546; 143 I.C. 596=1933 M. 454=37 L.W. 489 and cases referred to therein. Same principle applies to a suit on foreign judgment against foreign firms which had become dissolved at the time of suit; and amendment is afterwards sought to implead individual partners thereof. 38 P.L.R. 827=163 I.C. 734=1936 L. 485.

Sec. 23: Applicability.—To a suit for a declaration of public right of way as the obstruction is a continuing wrong. 26 C.W.N. 587; 146 I.C. 408. An obstruction which prevents someone from exercising a right of way falls within the scope of the term 'continuing wrong' and a fresh period of limitation begins to run under S. 23, Limitation Act at every moment of the time during which the wrong continues. 1941 A.W.R. (H.C.) 376=1941 A.L.J. 706. There is nothing in S. 23 upon which a distinction can be made between the case of an encroachment upon private land and that of an encroachment upon public land. Whether the wrong is a continuing one or not must depend upon the nature of the wrong and not upon the nature of the land over which it is committed. If in the one case limitation may run, there is no reason why it should not also run in the case of a precisely similar act committed upon public land. 22 Pat.L.T. 1001. *See also* 19 Pat. 208=1940 P.W.N. 829=1940 Pat. 449. S. 23 is not applicable to a suit by a Union Board for possession of land claiming it as part of a public road vested in it. 45 C.W.N. 802=73 C.L.J. 608=1942 Cal. 151. Dispossession is a trespass and in one sense a continuance of possession thereafter is a continuance of the original wrong, but that is not the meaning of S. 23. The Limitation Act must be read as a whole and due regard paid to its different provisions. It must be clearly construed in such a manner that there is no conflict between S. 23 and Arts. 142 and 144. Complete usurpation of possession and occupation and consequent dispossession of the owner of the land is a wrong which is complete from the moment of the dispossession. It is not a continuing trespass of the character contemplated by S. 23 of the Act. 182 I.C. 613=12 R.N. 18=1939 N.L.J. 153=1939 Nag. 145. *See also* 22 Pat.L.T. 1001. Dissolution of marriage—Suit for—Divorce—Cause of action. 8 O.L.J. 650=1920 O. 109. *See also* 41 P.L.R. 867=1939 Lah. 454 (Suit for dissolution of Mohamedan marriage on ground of impotency). Suit for restitution of conjugal rights against wife. 38 Bom.L.R. 502=164 I.C. 628=1936 B. 289. Every act of trespass gives a fresh starting point for limitation. 25 I.C. 185=12 A.L.J. 1150. The mere fact that a party has not availed himself of the earlier cause of action, will not prevent him from availing himself of a later one. 12 Pat.L.T. 755=1931 P. 285. Where damages are claimed for personal injury which is caused by throwing sulphuric acid on the face, there is no continuing wrong for purpose of limitation nor does time run only from the time any specific injury is caused. 25 Bom.L.R. 1333=84 I.C. 796. Section inapplicable to a suit to recover damages for wrongful attachment before judgment of defendant's goods. 1930 M. 625=31 L.W. 675. Also to a declaratory suit under S. 428, Specific Relief Act. 34 Bom.L.R. 1248. *See also* 1937 O.W.N. 207 (Order of Settlement Court recording defendant as under-proprietor. Suit to set aside). Where a Magistrate attached a disputed property under S. 146, Cr.P. Code, when plaintiff was in lawful possession and plaintiff sued for declaration of title for recovery of possession it was held that the case should be treated as one of continuing wrong within S. 23. 31 I.C. 242=20 C.W.N. 481. *See also* 12 P. 261=14 Pat.L.T. 113=1933 P. 224; 175 I.C. 256=1938 Pat. 212; (1941) 1 M.L.J. 322. Where plaintiff has right to use land on which some sheds have been erected, as a passage, and the sheds are obstructing the same, there is a continuing wrong, and a suit for declaration of plaintiff's right and for removal of the sheds is governed by this section. 156 I.C. 390=1935 C. 405. *See also* 1940 P.W.N. 394 (Erection of hut on occupancy holding—Suit for ejectment). Continuing wrong—Obstruction to waterflow—Right of way. 29 I.C. 385=21 C.L.J. 640; 69 M.L.J. 42. Right of access to highway from plaintiff's property. 1937 L. 94. *See also* 22 Pat.L.T. 46. Continuing wrong—Interference with right of worship—Recurring time-limit. 60 I.A. 313=12 P.681=65 M.L.J. 163=1933 P.C. 193 (P.C.). Suit for compensation for a continuing obstruction—Plaintiff prevented from removing obstruction by threat of violence—Limitation runs from the last day to which wrong continued. 1925 N. 189. So also in suit for injunction against plaintiff's right to unobstructed use of light and air. 162 I.C. 303=1936 L. 334. Where the property in dispute has throughout been in possession of the temple, each denial of title of the temple to the property in dispute is a fresh invasion of its

Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field. *B* owns the sub-soil. *B* digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by *A* against *B* runs from the time of the subsidence:

NOTES.

right and affords a fresh cause of action to establish its title to the property in dispute (8 L. 22, Foll.). 146 I.C. 136=1933 L. 920. Causing nuisance is a continuous wrong independent of contract and therefore a fresh period of limitation begins at every moment during which the wrong continues. 60 I.C. 529. Erecting *chhappars* on land belonging to another is not a continuing injury within S. 23. 3 Lah.L.J. 128=60 I.C. 20. *See also* 1941 Pat. 181. So also the exclusive occupation of a building meant for common purposes as distinct from a building meant for religious purposes is not a continuing wrong. 135 I.C. 681=33 P.L.R. 180=1932 L. 220. *See also* 40 P.L.R. 319=1938 Lah. 369 (adverse-possession of mosque by Sikhs—Refusal to allow mussalman to pray is no continuing wrong). Continuing wrong—If includes discharging rain water on the plaintiff's roof. 56 I.C. 1003=2 Lah.L.J. 463. In a suit for compensation under Land Acquisition (Mines) Act, the cause of action is the refusal of the public authority to follow the prescribed procedure for ascertaining such compensation if awarded, and it is not a continuing cause of action. 15 P. 510=1936 P. 513. *See also* 19 N.L.J. 101 (Application for reduction of rent on ground of deterioration of land due to construction of canal). The obstruction of a stream, whether having continuous flow or not, is a continuing wrong under S. 23 and a suit for its removal is not governed by S. 26. 43 I.C. 235=3 P.L.J. 51. The right of proprietors of a village to irrigate from a *kuhl* is a recurring right to which S. 23 applies. 13 Lah.L.T. 22. *See also* 46 L.W. 862. An omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board is a breach of a duty which continues as long as the decision is deferred and the starting point of limitation is governed by the third part of the time clauses in Art. 115. 1933 S. 103=143 I.C. 713. Vendee undertaking to clear prior mortgage—Non-performance on date of sale is breach of covenant—Breach is not continuous one. 87 I.C. 804 (2)=1925 A. 448; 9 A.L.J. 534. The building of a house on his holding by a tenant contrary to the terms of his tenancy is a continuing wrong. Limitation, therefore, does not run against the landlord from the moment the first operation of the building is commenced, but commences definitely when it is finally erected. 1939 Pat. 149. Surety for judgment-debtor undertaking to produce him on each date of hearing—Failure to produce him on certain date—Execution proceedings terminating after several subsequent hearings — Execution against surety. *Held,* that S. 23 had no application as it was not a case of continuous breach of the surety bond and that the right to apply for execution against the surety accrued when the surety failed to produce the judgment-debtor on a certain date and that counting the period from that date, the application was clearly time barred. 37 P.L.R. 72=1935 L. 174 (2). *See also* 171 I.C. 509=1937 Lah. 94 (lessee from municipality erecting building on public street and presenting plaintiff's access to highway is continuing wrong); 1940 Rang. 276; wrongful seizure in execution of stranger's property).

Secs. 23 and 28.—A *distinction has to be made between the continuance of a legal injury and the continuance of its injurious effects.* There is no perpetual right of suit under S. 23, on the ground that an encroachment is a continuing wrong, when the trespass itself gives rise to rights extinguishing any right of suit inder S. 28 of the Limitation Act. When the wrong amounts to dispossession of the plaintiff, then, even though it may be a continuing wrong, the plaintiff cannot recover possession after the expiry of 12 years, because under S. 28 of the Limitation Act the plaintiff himself would have got no right left which he can enforce by suit. 22 P.L.T. 1001. In considering whether the particular act complained of constitutes a continuing wrong within the meaning of S. 23 for which the cause of action arises *de die in diem,* it is necessary to keep in mind the distinction between an 'injury' and the "effects of that injury." Where the injury complained of is complete on a certain date there is no "continuing wrong" even though the damage caused by that injury might continue. In such case the cause of action to the person injured arises once and for all, at the time when the injury is inflicted and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions intermittently or even continuously does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by S. 23. 191 I.C. 42=1940 Lah. 359 (F.B.).

Sec. 24.—S. 24 does not give, as the date

Computation of time mentioned in instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(*a*) *A* Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after date computed according to the Gregorian calendar.

(*b*) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easements.

26. (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right without interruption, and for twenty years, and

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NOTES.

from which the time begins to run, the date on which the plaintiff becomes aware of the loss, but mentions the date on which the loss actually resulted. 164 I.C. 410=1936 R. 310. The word 'Act' in S. 24 will include omission. 24 A.L.J. 550. "Injury" in S. 24 includes legal injury. 54 B. 226=32 Bom.L.R. 232. There is no reason for holding that S. 24 is only applicable to suits based on tort. 24 A.L.J. 550. S. 24 of the Limitation Act applies only to suits based on tort and does not apply to a case of negligence which constitutes a breach of contract. 1938 Rang.L.R. 457=1938 Rang. 258 (F.B.). Suit for damages for breach of contract—Mere breach of covenant by omission to pay—Suit will come within the language of S. 24. 24 A.L.J. 550. Bodily injury—First suit for damages—Second suit for further injury consequential on the first injury. 58 I.C. 749=5 P.L.J. 359. The effect of S. 24 is not to extend or restrict any period of limitation but to modify the date or time from which the cause of action arises. In a suit for compensation for any misfeasance or malfeasance independent of contract and not otherwise provided for, the limitation will be 2 years not from the date of malfeasance or misfeasance but from the time when the injury results. 8 P. 776=1929 P. 245.

Sec. 25: SCOPE OF.—S. 25 is absolute and there is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties. 1927 M. 917=53 M.L.J. 447. *See also* 8 O.W.N. 834. Instalment bond—Date in Hindi. 29 I.C. 980=13 A.L.J. 486. Calculation of time must be according to Gregorian calendar. 47 A. 66=22 A.L.J. 902. Computation should be according to the Gregorian calendar unless specially otherwise mentioned. 102 I.C. 588=1927 N. 259. A promissory note bore both the English date, 16th November, 1934 and the Malayalam date, Thulam 30, 1110, corresponding to 15th November, 1934. In a suit on the promissory note filed on 16th November, 1937. *Held,* that S. 25 of the Limitation Act creates no presumption as to the date of a document but merely provides that periods of limitation shall be worked out according to the Gregorian Calendar. The question as to the date of the promissory note is one of fact to be decided by evidence and probabilities according to S. 96 of the Evidence Act. 53 L.W. 449 (1)=1941 Mad. 587=(1941) 1 M.L.J. 502.

Secs. 26 and 27: [*See also* Easements Act, Ss. 15 and 16:] SCOPE AND OBJECT OF SECTION.—To make easy the establishment of rights of easement, it is remedial and not prohibitory or exhaustive as to the modes of acquiring easements. 91 I.C. 712=1926 C. 507. S. 26 is concerned only with the acquisition of the easement and not with the extent of the right or with the remedy (in Bengal). 12 I.C. 60=39 C. 59. *See also* 35 C.W.N. 963. Ss. 26 and 27 do not apply to cases where easements are acquired under the Easements Act. 31 I.C. 528=29 M.L.J. 685. It is only when a person claims an easement under the provisions of S. 26 that he must show that the period of 20 years' enjoyment of the right extended up to a time within two years of the suit. An easement by prescription or long user can, however, be acquired otherwise than by the aid of that section, for instance, a person can show that he has enjoyed a right of easement from time immemorial in such a way as to lead to the presumption of a grant of such right. In such a case, it would not be necessary for him to show that he enjoyed the right till within two years of the suit. 45 C.W.N. 486. The question, even as regards an easement right classed under the statutory prescription is not one of limitation but whether the enjoyment, necessary to acquire the prescriptive right has been peaceable and as an easement without interruption for 20 years, within 2 years before suit. (*Ibid.*) Unless a suit falls under

NOTES.

S. 26 or 28, there is no bar of limitation to a defence. 59 I.C. 118=22 Bom.L.R. 1082. *See also* 1926 N. 99. S. 26 does not govern a claim to take water from a tank where that claim is based on lost grant. It applies only to cases of easements claimed by prescription. 1926 C. 291 (2). In cases of easements acquired by prescription, the English Law presumed a grant and its accidental loss due to lapse of time. In India, such a presumption is not necessary as the right depends on positive enactments, *e.g.*, S. 26. 1931 L. 395. A customary right of way is not an easement in the legal sense of that term, and even if it were an easement, it is not necessary for the party claiming it to rely on S. 26 if the existence of the right could be otherwise established. 36 C.L.J. 280=1923 C. 200. A right based on custom is established by proof of the custom and it is not necessary that there should be evidence from which a lost grant may be presumed. 36 C.L.J. 280=1923 C. 200. Suit for declaration of right of way—Affirmative proof 'actual user'—'Enjoyment'—'Actual exercise.' 26 C.W.N. 121. A customary right of way for all the villagers is not a case of acquisition by prescription and is not governed by S. 26. 65 I.C. 509. A person may be said to be in 'enjoyment' of a right of way during a period of time, though he does not actually "use" the way every moment. Cessation of user for a time is not an invariable indication of abeyance of enjoyment of a right. 51 I.C. 372 =29 C.L.J. 421. Obstruction to ancient lights when amounts to actionable nuisance. 31 C.W.N. 419=1927 C. 345. Obstruction to easement—Lower Court ordering injunction and restoration *status quo*—Interference. 35 C.W.N. 963. The permission to take water through another person's property is an easement within the meaning of S. 26. 100 I.C. 498=1927 L. 216. In the case of joint property, every co-sharer has a right to use it, consistently with the rights of the other co-sharers until partition. Where therefore one of the owners of a joint wall erects a wall on the top of the joint wall and keeps ventilators in the wall so erected, he does so consistently with the rights of the co-owner and hence cannot acquire a right of easement in respect of the ventilators against the co-owner. 41 P.L.R. 267=1939 Lah. 28.

MEANING OF WORDS.—"Interruption," "Peaceable" in S. 26. 1931 L. 395.

AS OF RIGHT.—The term "as of right" is not synonymous with "rightfully" but signifies enjoyment by a person in the assertion of a right. It is enjoyment had, not secretly or by stealth or tacit sufferance or by leave or favour or by permission asked from time to time on each occasion or even on many occasions of using it, but an enjoyment had openly, notoriously without particular leave at any time by a person claiming to use it without danger of being treated as a trespasser as a matter of right. 1931 L. 395; 1936 S. 61. 1936 Pat. 61; 1938 Pat. 423; 167 I.C. 490=38 P.L.R. 1146=1936 Lah. 905. Where the grant is in the nature of a license and not of an easement, right of user by prescription cannot be acquired. 152 I.C. 141=1934 Pesh. 96; 1926 L. 905. The words "as of right" in S. 26 mean *nec vi, nec clam, nec precario*. Twenty years' enjoyment of a right to light and air after a partition, which however did not reserve such a right, is enjoyment "as of right." 37 C.W.N. 963. *See also* 1936 Sind 61. When a right of way has been used peaceably and openly without interruption for twenty years, its user as of right may be legally inferred. 29 Punj.L.R. 567=111 I.C. 196. When S. 26 talks of the enjoyment of a right by a person, what it really means is that there must be an exercise of that right by that person. Where for a period of over twenty years the sweepers employed by the Municipal Committee have passed in exercise of statutory duty over the sites of a person in order to reach a latrine standing on another person's site, and to remove the nightsoil therefrom the owner of latrine cannot claim a right of way by way of easement in respect of this user by the sweepers of the Municipality because the activities of the sweepers are directed wholly by the Municipality and over them the owner of the latrine himself has no control. In these circumstances, such user cannot be accounted an enjoyment by the owner of the latrine of the right he claims, as an easement and as of right. 1939 Rang. 34. Where in a suit for establishing an easement to surface water on Government land there was interruption of the user more than two years prior to the suit, the right is defeated by S. 26. 7 R. 487=1929 R. 300. In a suit for easement to carry water in a channel across the defendant's land for irrigation, the mere failure to exercise the right for 2 years prior to suit does not extinguish the right. 118 I.C. 521. Nor does the mere fact the plaintiffs irrigated one of their fields from another well affect their easement right. 118 I.C. 521=1929 A. 497. Para. 1 of sub-S. (1) is controlled by para. 2. A title to easement is not complete merely upon the effluxion of the period mentioned. Until the right is brought in question in some suit the right is inchoate only. And in order to establish the right when brought into question, the enjoyment relied on must be for 20 years up to within 2 years of the institution of the suit. 56 C. 927=1929 C. 542. Whether the user has been peaceable and open and whether the enjoyment has been as of right are pure questions of fact. (*Ibid.*) A mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in S. 2 (5) of the Limitation Act and may be acquired by 20 years' uninterrupted enjoyment under S. 26. 148 I.C. 431=1934 P. 420. The right of fishing on another's water either where any way or water-course, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

the right to such access and use of light or air, way, water-course, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section (1) belongs to [1][the Crown] that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

LEG. REF.

[2] Substituted for "Government" by A.O., 1937.

NOTES.

by himself or by hired men on payment of a fee per head of men employed is not such a right as can be acquired by prescription. 37 C.W.N. 18. It is a little difficult to see how a *changing and fluctuating population of a locality* can be considered to occupy the status of a dominant tenement. It is true that certain classes of rights have been held to have been acquired by prescription, such as a right of way, or the right to bury dead bodies, and in all such cases a presumption has been made that the custom in question had a lawful origin in a dedication. Where however a well which has been used by the people of a mohalla was constructed in living memory and property in it has been changing hands by sale, it cannot be said that *qua* the user of the well an ancient custom has been established for which it was necessary to trace the legal origin to a dedication and hence no right by prescription, as contemplated by S. 26 can be said to have been acquired. 41 P.L.R. 536=1939 Lah. 191 (1939 Lah. 12 is not good law).

REQUIREMENTS.—Where an easement is enjoyed peaceably and uninterruptedly for 20 years, the requirements of S. 26 are fulfilled and the right becomes absolute. 26 I.C. 781; 37 I.C. 788=4 P.R. 1917. Open and uninterrupted enjoyment without dominant owner's permission is enough. 41 C.L.J. 379=1925 C. 788. *See also* 85 I.C. 81=1925 N. 270; 56 I.C. 728=1 L. 206. User as of right implies user against the will of the owner. 37 I.C. 788=4 P.R. 1917. There is a distinction between the enjoyment of a right and actual user. S. 26 contemplates enjoyment of the right claimed as easement for twenty years to be carried to a period within two years of the suit. The section does not speak of actual user. 40 C.W.N. 222. An easement of the supply of water from a natural stream may be acquired by twenty years user under the provisions of S. 26. 57 P.R. 1918=46 I.C. 441. A person who has throughout claimed ownership of soil cannot set up easement of way. 1939 Rang. 34. A lessee of land, who owns a building thereon, can acquire by prescription a right to light and air against another lessee under the same landlord in respect of the adjacent plot. In such cases there is no question of unity of ownership as regards the two tenements and the principle that the possession of the tenant is really the possession of the landlord cannot really affect the situation. 43 C.W.N. 636. Right of way—Non-user for two years prior to suit. 26 I.C. 485. Obstruction—Filling up channel—When amounts to. 25 I.C. 386. Easement—Discharge of surplus water—Right to compel. 22 I.C. 514=19 C.L.J. 45.

ACQUISITION OF EASEMENT AGAINST TRANSFEREE FROM CROWN—PERIOD REQUISITE.—An easement against a transferee of the servient tenement from the Crown can be acquired by an enjoyment as of right without interruption for a period of 20 years, and to make up this period the period during which the land had been in the hands of the Government can be tacked on. The word 'belongs' in S. 26 (2) should be given its plain meaning and should not be interpreted by a forced construction as equivalent to "has belonged." 44 P.L.R. 116.

ONUS.—Under S. 26 the onus is on the plaintiff to prove that the user was as of right. 9 I.C. 66 (8 C.W.N. 359, Foll.). *See also* 18 I.C. 211. No presumption as to continuous enjoyment for 20 years from the fact of mere prior possession fr a long period. 155 I.C. 966=16 Pat.L.T. 192=1935 P. 188. A right of fishing is an easement under S. 26. 12 I.C. 305=14 C.L.J. 572; 39 C. 53=11 I.C. 180; 15 C.W.N. 972. *See also* 37 C.W.N. 18. A right of fishery is an interest in land and falls under Art. 144 of the Act. It is not necessary for the plaintiff to prove user for 20 years under S. 26. 3 Pat.L.T. 53=1922 P. 9. A ferry is not an easement within S. 26. 9 I.C. 846. Ferry—Right to maintain—Easement—Right of easement. 5 P.L.J. 500=57 I.C. 516. Right of way—User by public—Presumption. 108 P.R. 1916=35 I.C. 458; 1922 U.B.R. 23. Easement—Discharge of surplus water—Right to. 35 I.C. 394=10 Bur.L.T. 38; 12 I.C. 27=4 Bur.L.T. 223. The plea that the defendants had been using particular Kul from

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a*) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January, 1890, to 1st January, 1910. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in favour of reversioner of servient tenement.

27. Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B's* land. *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that during ten of these years *C*, a Hindu widow, had a life interest in the land, that on *C's* death *B* became entitled to the land, and that within two years after *C's* death he contested *A's* claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Extinguishment of right to property.

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

NOTES.

time immemorial does not amount to setting up a plea of easement. 1923 L. 605. User of intermittent nature—Absence of assertion of rights—Acquisition of right. 1922 L. 59. S. 26 allows an easement irrespective of the capacity or incapacity of the servient owner to make a grant. The period of two years within which under the section a suit must be brought, if the section is to be availed of, should not, however, be confused with the period of one year mentioned in the explanation to the section. The explanation only defines the interruption contemplated by the section. 19 Pat.L.T. 511=1938 Pat. 423. *See also* 40 C.W.N. 222 (Discontinuous easement—Right to go on another's land to repair one's own wall). User for 19 years, 6 months—Effect. 46 I.C. 17=48 P.R. 1918.

Sec. 27.—S. 27 does not apply to a donee or transferee from a Hindu widow in virtue of her powers as representing the estate. 41 I.C. 47.

Sec. 28: SCOPE OF SECTION.—This section only extinguishes a right, if the remedy by suit is barred. It does not say that even a defence will be barred. 89 I.C. 752. The rule of limitation is a rule of procedure, and does not either create or existinguish rights, except in the case of acquisition of title to immovable property by prescription under S. 28. S, 28, however, extinguishes only the right to immovable property if the claim is not enforced within the period of limitation, but it does not affect the right to movable property. I.L.R. (1939) Bom. 685 =41 Bom.L.R. 1002=1939 Bom. 494. *See also* 44 Bom.L.R. 288. Twelve years' adverse possession of land by a wrongdoer not only bars the remedy of the real owner and extinguishes his title, but confers a title on the person in possession. That goes to the length that the title of the real owner who had been dispossessed cannot even revive if, at a later date, he reacquires possession. S. 28, Limitation Act, not only deprives the real owner of his right in the property but transfers it to the person who has successfully set up his adverse possession under the statute. Where a person remains in uninterrupted and unexplained possession and there is no indication of the capacity in which he was in possession then *prima facie* his possession must be presumed to be possession with an intention to claim the full rights of a proprietor. 1941 A.W.R. (Rev.) 1072=1941 O.A. (Supp.) 870=1941 A.L.J. 676. S. 28 presupposes that a person has, by force

NOTES.

of limitation, lost his remedy by a suit for possession, and it is only in regard to such person that the section declares that his right to the property is extinguished. It cannot apply to persons who are in possession. 37 Bom.L.R. 471. *See also* 40 P.L.R. 319 =1938 Lah. 369. The institution of a suit for possession within 12 years of dispossession is sufficient to bar the operation of S. 28 although possession is actually obtained under the decree passed in the suit after that period. 46 C.W.N. 551. Once a right to property has been extinguished under S. 28, there can be no question of that right being revived or perfected by any action on the part of the person who lost that right. So where a person has allowed his right of pre-emption to become barred by time, anything subsequently done by him, an agreement with the vendee or reference to arbitration or even a decree obtained on the basis of the award, is of no avail and he cannot set up his time-barred right as a bar to another seeking to pre-empt the property. 9 Luck. 475=1934 O. 303. *See also* 155 I.C. 1094 =16 P.L.T. 183=1935 P. 164. S. 28 does not apply to a suit for setting aside an order rejecting a claim; and the claimant's right to the property is not extinguished by his failure to get the order set aside within one year of the date of the order by a regular suit. When the execution proceedings including the attachment come to an end subsequent to the claim order, the claimant is not precluded from suing for a declaration of his title to the property after the lapse of a year from the date of the adverse claim order. 165 I.C. 84=40 C.W.N. 146. Suit for damages for malicious prosecution —Revision preferred against order of acquittal—Dismissal of revision—Limitation for suit runs from date of acquittal and not from date of dismissal of revision. 1935 O.W.N. 619=1935 O. 392. A person who obtains possession of property over which he has a charge should have that charge satisfied before he is made to part with possession irrespective of the fact that his remedy to enforce the charge may be barred by limitation. 144 I.C. 716=1933 N. 190. Limitation Act should be construed strictly. Limitation is not extinction and the bar created by limitation does not discharge a debt save in the particular circumstances mentioned in S. 28. 40 I.C. 358=5 L.W. 593. S. 28 is limited to suits for possession and does not apply in respect of suits for debts. In respect of debts the Act simply bars the remedy but does not extinguish the debts. 44 C. 425=21 C.W.N. 177; 1930 A. 416. Neither Sch. I nor S. 28 applies to defences. 1 P.R. 1916=32 I.C. 485. S. 28 applies to the right in a tenancy in the Central Provinces. 1927 N. 352. *See also* I.L.R. (1940) Nag. 348=1940 N.L.J. 121=1940 Nag. 49 (F.B.); 109 I.C. 403=1928 N. 281; 30 N.L.R. 208=148 I.C. 733=1934 N. 61. A right of property which is vested in one person is not transferred by the mere lapse of time to the person actually in possession. 45 A. 419=50 I.A. 202=45 M.L.J. 623 (P.C.). Where a person pleads title by prescription he must prove possession for the full statutory period. Possession for a shorter period does not shift the onus on to the original owner to show that possession became adverse within the statutory period. 39 M. 617=43 I.A. 192=31 M.L.J. 324 (P.C.). Right to cut wood from trees—Adverse possession. 40 A. 461=44 I.C. 980=16 A.L.J. 345. It is open to a tenant encroaching upon the adjoining land of his landlord which is not included in his lease to indicate that he intends to hold the encroached land for his own exclusive benefit and not to hold it as he held the land given to him on his lease. 1939 Pat. 587. A title acquired under S. 28 through adverse possession by a widow, who claims and holds a widow's estate, enures to the estate or her deceased husband and it descends upon her death accordingly. Where a Hindu widow became a convert to Mahomedanism, married a Mahomedan and continued to hold the properties of her former Hindu husband, *held,* that the effect of the remarriage was to cause a forfeiture of her rights in the estate of her first husband, that her possession thereafter was unlawful, but that the remarriage could not enlarge her estate into an absolute one. The effect of continued possession for over twelve years was only to perfect her title to a widow's estate which enured to the estate of her Hindu husband and devolved on his next heirs. 7 Luck. 320. Applicability of section to suit for restitution of conjugal rights. 34 A. 412=9 A.L.J. 784. Right to maintenance—Extinction. 1924 C. 364. There is no extinction of ownership where no one is in possession. 45 B. 1020=62 I.C. 101 =23 Bom.L.R. 416. *See also* 1929 O. 402. When a verandah is standing on part of a public street for more than thirty years, the Municipality cannot issue notice for its removal as the owner of verandah gets title to the site under it by virtue of S. 28. 58 I.C. 326=22 Bom.L.R. 951. *See also* 24 C.W.N. 1011=47 C. 1108; 30 I.C. 13. When section does not operate to extinguish right, *see* 1924 C. 364. A prescriptive title is not based on original right or morality but solely on expediency. 46 I.C. 964. *See also* 36 I.C. 11=25 C.L.J. 537. Title by prescription—Guardian of minor—Alienee from guardian, right of. 41 M. 102 =33 M.L.J. 309. *See also* 12 I.C. 695= 21 M.L.J. 1041. Service inam can be acquired by adverse possession. 34 I.C. 898=3 L.W. 590. Where a transferee of trust property has not acted in good faith but has paid valuable considerations he acquires good title after the lapse of the period necessary for extinguishing under S. 28 the right of the beneficiary to follow the property in his hands. 38 M. 1064. *See also* 26 M.L.J. 537=24 I.C. 369. A person acquiring indefeasible title to any property by adverse possession is entitled to institute

PART V.

SAVINGS AND REPEALS.

Savings.

29. [1][(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872.

LEG. REF.

[1] Substituted by Act X of 1922, S. 3.

NOTES.

a suit to recover possession of the same if lost afterwards. 58 I.C. 380; 46 I.C. 569. Although a right to assessment on land may for certain purposes be regarded as immovable property, it is impossible to hold that a suit to recover assessment is a suit for possession of property within the meaning of S. 28. A right to recover assessment is a mere right in action, and cannot be lost by failure to bring a suit for possession of such property for 12 years. 44 Bom.L.R. 288. *See also* 41 Bom.L.R. 1002. On this section, *see also* 30 Bom.L.R. 1095. The expression "the right to such property" in S. 28 includes the right to joint possession also. A person whose right to recover joint possession is extinguished under Art. 47, cannot therefore elude the operation of Art. 47 by framing his suit as one for damages of his share of the produce, as the right to claim damages is not separate from the right to claim possession or joint possession. 26 N.L.R. 160=1930 N. 142. Order under S. 145 (6), C.P. Code—*Successful* party deprived of possession by *stranger* after 3 years—Subsequent suits by *unsuccessful* party not maintainable. 16 Pat.L.T. 183=1935 P. 164; but it would be otherwise if it was *before* 3 years. 1935 Pat. 164. A case of exclusive right to fishing would seem to fall within the definition of interest in immovable property under Art. 144 and adverse possession of such a right for more than twelve years would, by operation of S. 28, extinguish the right of the lawful owner to that extent. 35 C.W.N. 1256. Fishery rights in navigable river in Bengal—Adverse possession against Government for over 60 years—Right of Government extinguished under this section—Evidence of adverse possession. 61 I.A. 78=61 C. 262=38 C.W.N. 285=66 M.L.J. 134 (P.C.). A mortgagee of melwaram interest in certain land leased back that interest to the mortgagors under a lease for terms of years. The tenancy terminated, but the mortgagee as landlord did not sue within twelve years for recovery of possession, but after 12 years, he brought a suit for his mortgage money and for profits for 3 years prior to suit. It was found that the mortgagor lessee had not been paying any rent to the mortgagee. *Held,* that by the operation of S. 28 read with Art. 139 all the rights of the mortgagee as landlord had become extinguished and that the suit was barred. 41 L.W. 398=1935 M. 377. Art. 131 could not be applied to the case. 1935 Mad. 377. *See also* 42 C.W.N. 758. S. 28 is confined to suits for possession and does not apply to a suit by a mortgagee for recovery of money due to him by sale of the mortgaged property. In cases to which that section does not apply the remedy by a suit may be barred but the right is not extinguished. 1930 A. 416=122 I.C. 411. *See also* 1935 O.W.N. 40=1935 O. 139. Mortgage decree—Mortgagee purchasing property in another sale—Mortgage decree barred by limitation—Security not extinguished—Suit for possession by purchaser from mortgagor—Right of mortgagee of use mortgage as shield. 144 I.C. 736=1933 N. 241. Usufructuary mortgage — Adverse possession of trespasser for more than 12 years—Right of mortgagor if lost. 1935 A.L.J. 496=1935 A. 542. S. 28 does not apply to persons who, being in actual possession which has never been disturbed, have had no occasion to sue for recovery of it, as a party in possession cannot be prejudicially affected by the law of limitation. 1930 A.L.J. 1416=1930 A. 858; 1931 L. 668=32 P.L.R. 479. A suit for possession of the office of mutawalli is an action of a personal character and is not "a suit for possession of any property". Where the action for possession of the office is statute barred, right to a particular wakf property is not necessarily extingushed under S. 28, which is limited to suit for "possession of property". 1930 A. 866=129 I.C. 375. In proceedings under S. 145, Cr.P. Code, there was a dispute about crops and possession of the crops was delivered to one of the parties, but not possession over the fields on which the crops were. The parties to a suit, instituted after three years from the date of the order in those proceedings, were not all of them parties to the said proceedings. It was also not proved that the area of the fields in dispute in the suit was the subject-matter of the prior dispute. *Held,* the suit was not barred under Art. 47 and S. 28. 152 I.C. 180=11 O.W.N. 1165=1934 O. 449. *See also* 1937 A.L.J. 225=1937 A. 300. Punjab Limitation Act, 1920, S. 2 (*b*)—Invalid sale—Vendee's possession—Suit to recover possession by heirs of vendors—Bar. 1931 L. 439.

Sec. 28 and Art. 44.—Art. 44 must be read with S. 28 and if an ex-minor fails to sue within the period prescribed by Art. 44 to set aside an alienation made by his guardian and obtain possession of the property alienated, then by the operation of S. 28, his right to that property becomes extinguished. 43 Mys.H.C.R. 194=16 Mys.L.J. 427.

Sec. 29: SCOPE OF SECTION.—The amendment of S. 29 by Act X of 1922 does not restrict the scope of the section but extends it. 91 I.C. 563=1926 N. 236. The enactment of S. 29 of the present Limitation Act

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by

NOTES.

in its present form was rendered necessary not because tht word "prescribed" in Part III of the Act did not mean prescribed by any law for the time being in force but because certain Courts had held that the application of the general provisions of the Limitation Act laid down in Part III to special and local Acts did "affect or alter" the periods of limitation prescribed by those Acts and the Legislature disapproved of those decisions. I.L.R. (1939) All. 647=1939 A.L.J. 522=1939 All. 403 (F.B.). *See also* 1941 All. 207. As to effect of amendment, *see* 36 C.W.N. 833. The amendment to S. 29 in 1922 has extended and not restricted the scope of the section. Under the new S. 29 some of the provisions of the Limitation Act are made applicable without being expressly included unless they are expressly excluded by the special or local law. The rest of the provisions remain as before applicable only when they are expressly included. The expression 'the remaining provisions of the Act shall not apply' in the amended S. 29 simply means that they are not to apply *proprio vigore* that is merely by virtue of the Limitation Act itself and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. I.L.R. (1941) All. 356=1941 A.L.J. 267=1941 All. 207. *See also* 1939 All. 403.

LOCAL LAW.—(as) Bombay Regulation V of 1827. *See* 37 B. 231=19 I.C. 387=15 Bom.L.R. 178. Order passed under S. 169, C.P. Land Revenue Act. 6 N.L.J. 205=1923 N. 356. U.P. Land Revenue Act, S. 111. 43 I.C. 473=4 O.L.J. 503. S. 18 of the Limitation Act does not apply to a proceeding under S. 174 of the Bengal Tenancy Act. 18 C.L.J. 533=18 C.W.N. 31.

SPECIAL LAW.—The statutory rules framed by the High Court under Cl. 27 of the Letters Patent under the authority delegated to it by His Majesty who, in turn, was acting under the powers conferred on him by Act of Parliament are a "special law" within the meaning of S. 29. I.L.R. (1941) Lah. 191=43 P.L.R. 297=1941 Lah. 257 (F.B.). *See also* 1934 Pat. 353. Provincial Insolvency Act, Ss. 46 and 47—Appeals under—Applicability. 41 M. 169=33 M.L.J. 566. *See also* 30 M. 539; 34 A. 496; 89 P.R. 1918=46 I.C. 588. By reason of the express terms of S. 29 (2) (*a*) of the Act. S. 4 of that Act applies to an application under S. 68 of the Provincial Insolvency Act: so that if the last day of limitation for that application happens to be a Sunday, it may be presented on the next day. (5 R. 384, Diss.; 34 A. 503, Rel.) 9 R. 150=1931 R. 209. *See also* 1933 M.W.N. 1049. S. 5 of the Limitation Act is inapplicable to appeals from special Magistrates under S. 39 of Ordinance II of 1932. The provision as to limitation contained in S. 39 (2) of the Ordinance is a specific provision the consequences of which are provided for as a matter of limitation by S. 29 of the Limitation Act. 60 C. 571=1933 C. 124=37 C.W.N. 195. Registration Act, S. 77—Suit to compel registration—Time expired, when Court closed. *See* 23 I.C. 23=26 M.L.J. 397. *See also* 24 C.W.N. 4=53 I.C. 705 (F.B.); 54 I.C. 228=24 C.W.N. 29. S. 29 is applicable to proceedings under Income-tax Act. 117 I.C. 881=1929 L. 170; but not to applications under S. 23 of Oudh Rent Act. 15 R.D. 6. S. 29 does not, apply to an application under S. 18 of the Land Acquisition Act. Time cannot be extended on account of an earlier infructuous application for copy. (9 L. 244, Rel. on.) 54 A. 282=1932 A. 598; 44 Bom. L.R. 138 (Dekkan Agri. Rel. Act—Special or Local Law). *See also* 14 Rang. 728 (conflict between Art. 159 and Rr. 100 and 101, Rangoon Small Cause Court Rules). *See also* 1941 Lah. 257. An express exclusion means an exclusion by express words, that is, by express reference to the section and not exclusion as a result of a logical process of reasoning. 122 I.C. 390=1930 S. 93. There is no conflict between S. 29 (2) (*b*), Limitation Act and S. 185 (2), Bengal Tenancy Act. There is an express reference in S. 29 (2) to S. 3, which itself refers to Ss. 4 to 25 and consequently Ss. 4, 9 to 18 and 22 are specifically made applicable so far as not expressly excluded; and the only reasonable way in which Cl. (*b*) can be read is that the remaining provisions of the Act if they are to apply are to be specially applied. They will not be applied by force of the Limitation Act itself. 1930 P. 301. The rules made by High Court under its Letters Patent or by virtue of the Civil Procedure Code will not amount to a special or local law. High Court rules approximate closely to bye-laws which can be altered at will. They are subordinate and domestic enactments; they must be *intra vires* of the power from which they are derived and any other power *pari materia*. 1930 R. 228 (F.B.). Rules of the Patna High Court, Ch. 7, R. 2—Letters Patent Appeal—Time obtained for copy of judgment or decree cannot be deducted. 15 Pat.L.T. 301=1934 P. 353. Code of Civil Procedure should not be taken to be a special law. 8 O.W.N. 642; 11 O.W.N. 1103=1934 O. 465. S. 29 applies even to the Crown. Therefore a suit by the Secretary of State against the Municipality for damages for injury caused to a police sowar's horse which put its foot into a manhole belonging to the Municipality which had been left open in breach of a statutory duty cannot be instituted without giving notice as contemplated by S. 167, Bombay District Municipal Act and the suit must be brought within six months from the date of the injury caused to the horse. 131 I.C. 181=1931 S. 55. The Limitation Act does not purport to revive claims which are declared as extinthe first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(*b*) the remaining provisions of this Act shall not apply.]

[1][(3)] Nothing in this Act shall apply to suits under the Indian Divorce Act.

[1][(4)] Sections 26 and 27 and the definition of "easement" in S. 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, may for the time being extend.

30 and 31. [*Provision for suits for which the period prescribed is shorter than that prescribed by the Indian Limitation Act,* 1877. *Provision for suits by certain mortgagees in territories mentioned in the second schedule.*] *Rep. by the Repealing and Amending Act,* (*XIII of* 1930), *S.* 3 *and Sch. II.*

32. [*Repeals.*] *Rep. by the Second Repealing and Amending Act* (*XVII of* 1914), *S.* 3 *and Sch. II.*

THE FIRST SCHEDULE,

(*See* section 3.)

FIRST DIVISION: SUITS.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part I.—Thirty days.	
1. To contest an award of the Board of Revenue under the Waste Lands (Claims) Act 1863.	Thirty days ...	When notice of the award is delivered to the plaintiff.
	Part. II—Ninety days.	
2. For compensation for doing or for omitting to do an act alleged to	Ninety days ...	When the act or omission takes place.

LEG. REF.

[1] The original sub-Ss. (2) and (3) were re-numbered (3) and (4) by Act X of 1922, S. 3.

NOTES.

guished by lapse of time. It also does not purport to effect the period of limitation provided by an English statute nor does an English statute come within the meaning of a local or special law referred to in S. 29. 25 S.L.R. 222=1931 S. 124.

Sch. I : SCOPE.—The first schedule provides periods of limitation for the institution of suits and not for putting in defences. 1 P.R. 1916=32 I.C. 485. Periods of limitation provided in this schedule are to be computed subject to the provisions contained in the body of the Act. 2 C. 336. The articles are to be so construed as to make them harmonious and consistent. 31 C. 681 (F.B.) ; 26 M. 780. If there be two articles which may cover the case the more particular and specific of the two ought to be regarded as one governing the case. 26 B. 430 ; 26 C. 564 (F.B.) ; 40 L.W. 760 ; 26 A. 482 ; 127 I.C. 889=1930 N. 300 ; 130 I.C. 157=1931 N. 47 ; 41 Bom.L.R. 1223=1940 B. 20. If two articles are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, apart from the other equitable considerations, be preferred. 127 I.C. 889=1930 N. 300. The nature of the cause of action rather than the form of the suit determines the applicability of the particular article. 20 N.L.R. 80=80 I.C. 769. *See also* 1934 L. 725 ; 27 B. 363 and 35 C. 298 on the point. The plaintiff can so frame his suit as to make a certain article favourable to him applicable, though the same suit, if framed, otherwise, would have come under a less favourable article. 1932 A.L.J. 317=1932 A. 358. The language of the third column of Sch. I should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. 62 C. 66=1935 C. 333. The law of limitation applicable to a suit is the law in force at the time of the institution of the suit. But this general rule is subject to the proviso that neither the right to the property in question has been extinguished nor the right to sue in respect of it barred before the later law came into force. Once a right to property has been extinguished, or right of suit barred, it cannot be revived by subsequent Limitation Acts in the absence of express words so providing. I.L.R. (1941) Bom. 260=43 Bom. L.R. 194=1941 B. 178.

Art. 2 : ESSENTIALS FOR APPLICABILITY.—

Description of suit.	Period of limitation.	Time from which period begins to run.
be in pursuance of any enactment in force for the time being in British India.		
	Part III—Six months.	
3. Under the Specific Relief Act, 1877, section 9, to recover possession of immovable property.	Six months	When the dispossession occurs.
4. [1][* * * *	* *	* * *]

LEG. REF.

[1] Repealed by Act XX of 1937.

NOTES.

Art. 2 has no application to suits for recovery of *statutory compensation*, but is confined to suits for *compensation in the sense of damages for acts which* (are not legalised wrongs but) *are and remain torts.* A suit for statutory compensation arising out of (or rather implied in) restrictions authorised by the Mines Acquisition Act is governed not by Art. 2 but by Art. 120. 15 P. 510=1936 P. 513. The expression "in pursuance of any enactment" in Art. 2 must be interpreted as meaning acting *bona fide* in conformity with an enactment, and not merely pretending to act or acting under colour of such an enactment. Art. 2 should not be applied as if it were proved against the averment of the plaintiff, and there should be an enquiry as to whether the defendant had, in fact, acted in good faith or not. 1935 A.L.J. 459=1935 A. 538 (F.B.). *See also* 4 L. 428=1924 L. 169; 8 B. 421; 22 B. 289; 15 C. 259; 36 A. 555; 3 R. 268; 1931 A.L.J. 858. The words "alleged to be in pursuance of any enactment" in Art. 2 must be reasonably construed and the person who seeks to take advantage of the shorter period of limitation must show that he had reasonable grounds for justifying his action under the particular enactment which he then relied upon, and not simply that he arbitrarily asserted or thought so. He must, in short, have assumed to act in the honest exercise of a supposed statutory power. 39 P.L.R. 915=1937 L. 748. Where police officers exceeded their lawful authority and caused needless hurt when acting *bona fide* in exercise of what they understood to be their duty under Criminal Procedure Code. *Held*, that Art. 2 governed the case and the suit for compensation brought more than 90 days after injury was barred. 1936 C. 653. Where in a suit for compensation the defendant pleads bar of limitation under Art. 2, there must be an inquiry as regards good faith before a decision can be come to as to whether Art. 2 applies or not, and if in the inquiry the defendant fails to prove good faith, he is not entitled to protection under Art. 2. The case is even stronger if it becomes evident that the defendant knowingly acted contrary to the provisions of the enactment of which he seeks to take advantage and Art. 2 has no application to such a case. 32 S.L.R. 106=1937 Sind 281. A suit for damages by a civil servant for wrongful dismissal is not governed by Art. 2. It cannot be possibly said that his dismissal is "an act done in pursuance of any enactment in force." The suit is one in reality for breach of contract. 159 I.C. 1107=1937 L. 226. Suit for malicious prosecution against Municipality—Art. 2 does not apply to improper manner of doing an act out of malice and carelessness. 21 I.C. 426=16 O.C. 211; 39 Bom.L.R. 881. It does not apply to suit for damages for libel against Police Inspector for libellous statements contained in his report made under S. 202, Cr. P. Code. 1937 A.L.J. 20=1937 A. 90. A suit for damages against the officer of the Court for selling property when decretal amount was tendered falls under Art. 2. 44 A. 219=48 I.C. 815. A suit for the refund of money legally collected by a Municipality but wrongfully refused to be refunded is governed by Art. 120 and not by Art. 2. 36 A. 555=12 A.L.J. 952. *See also* 1939 L. 583; 152 I.C. 680=1935 L. 47 (1). What amounts to continuing cause of action. 92 I.C. 679=1927 N. 85. Suit to recover damage from a Municipal Committee on the ground that it had been negligent in the repairing of a drain outside his house and had thereby caused the fall of a wall and of the roof, is governed by Art. 2 and Art. 31 has no application. 31 Punj.L.R. 159=122 I.C. 111. A sale of goods by the railway company without the formality provided by S. 55 of the Railways Act is wrongful and a suit for damages for such wrongful sale is one for conversion and is governed by Art. 48 and not by Art. 2. 151 I.C. 995=1934 P. 507. Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged, it was held that Art. 2 was not applicable. 1927 P.C. 72=31 C.W.N. 838 (P. C.) [Reversing 4 L. 432=1924 L. 192].

Arts. 2 and 36.—Suit for compensation for act done in pursuance of Cattle Trespass Act —Art. 2 and not Art. 36 applies. 39 P.L.R. 915=1937 L. 748. No doubt Art. 2 of the Limitation Act makes no reference whatsoever to *bona fides* and *mala fides*. But the protection of the Article cannot be claimed by a defendant where it is shown and found that the act complained of was a wilful and malicious act which the defendant could not have committed in the honest belief that he was justified in doing it under any enactment—and a suit in respect of such an act may be filed within the time limited by Art. 36. 1942 A.L.W. 63. *See also* 1937 Sind 281.

Art. 3.—*See* 13 I.C. 641.

Description of suit.	Period of limitation.	Time from which period begins to run.
	[1][*Part IV.—One year.*]	
5. Under the summary procedure referred to in section 128 (2) (*f*) of the Code of Civil Procedure, 1908, [1][where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under Order XXXVII of the said Code].	[2][One year] ...	When the debt or liquidated demand becomes payable or when the property becomes recoverable.
	[3][* * *]	
6. Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture.	One year ...	When the penalty or forfeiture is incurred.
7. For the wages of a household servant, artisan or labourer. [5][* * * * *]	[4][One year] ...	When the wages accrue due.
8. For the price of food or drink sold by the keeper of a hotel, tavern or lodging house.	[4][One year] ...	When the food or drink is delivered.
9. For the price of lodging.	[4][One year] ...	When the price becomes payable.

LEG. REF.

[1] Inserted by Act XXX of 1925.

[2] Substituted by *ibid* for "six months."

[3] The heading "*Part IV—One year*" was omitted by *ibid*.

[4] Substituted by Act XI of 1923, S. 2 and Sch. I for "Ditto"

[5] The words "not provided for by this Schedule, article 4" have been omitted by Act XXXIV of 1939.

NOTES.

Art. 5.—*See* 41 Bom.L.R. 518=1941 B. 342. Art. 5 does not apply to suits on promissory notes filed under O. 37, C. P. Code. 52 C. 954 =29 C.W.N. 589 ; 98 I.C. 78.

Art. 7.—Art. 7 is applicable only to domestic servants. 27 L.W. 30=106 I.C. 229. The term 'household servant' as used in Art. 7 must be read *ejusdem generis* with the words 'artisan or labourer' which follow it. It cannot apply to a person who is employed for the purpose of collecting rents of houses and as a male companion in his employer's journey abroad. 8 Luck. 119=1933 O. 393. A *bisardhar* in Oudh is not such a servant. 26 O.C. 327=10 O.L.J. 348; nor a weighman in a shop. 48 A. 164=90 I.C. 120=23 A.L.J. 1059=1926 A. 172; nor a salesman in a shop. 1935 R. 235 ; nor a fencing teacher. 8 M.H.C.R. 87 ; nor one who has to clean a temple. 7 M. 99; nor a village barber. 1941 N.L.J. 102=1941 N. 132; nor a contractor. 7 M. 100 ; 10 B. 196 ; nor a wet nurse. 17 I.C. 658=10 A.L.J. 395 ; nor a cook employed in a hotel. 1937 M. 340=(1937) 1 M.L.J. 329. But *see* 28 I.C. 956 (Mad.) ; nor a motor car driver. 62 C.L.J. 562=1936 C. 808. As to a motor driver who is provided with boarding and lodging by the employer, *see* 38 P.L.R. 296 =1936 L. 661. Art. 7 does not apply to a suit by a *shahna* for the amount of wages due to him in respect of watching the crops attached in execution of a decree, as he is not a labourer within the meaning of that article. Such a suit is governed by Art. 102. 1935 A.L.J. 78= 1935 A. 102. Art. 7 applies to a case where a household servant, artisan or labourer is hired on wages per day, per week or per month and does not apply to the remuneration of a skilled person like a goldsmith. But by a goldsmith for recovering the price of his labour in making ornaments falls under Art. 56 and not under Art. 7. I.L.R. (1938) N. 592=1938 N. 286. It is open to a master instead of paying the salary then and there to give credit in his account books and treat him as his creditor. Then Art. 7 does not apply and the ordinary rule of limitation applies. 1928 M. 27=27 L.W. 30. The word 'artisan' in Art. 7 means a mechanic or workman who has acquired some manual skill and does not mean person undertaking higher class of work. 50 I.C. 37=12 S.L.R. 140. So a suit by a mechanical engineer would be governed by Art. 102 and not by Art. 7. 50 I.C. 37. A village carpenter is an 'artisan' and a suit for wages by him is governed by Art. 7 and not by Art. 102 or Art. 56. 152 I.C. 885=1934 N. 260; but not a village barber. 1941 N. 132. A motor car driver is an artisan within the meaning of Art. 7. 5 R. 477=1927 R. 279 ; 62 C.L.J. 562=1936 C. 808 ; 1936 L. 661.

Arts. 8 and 9.—If Arts. 8 and 9 apply to a claim for boarding charges. 91 I.C. 839= 1926 C. 530. Consumable commodities sold in a restaurant would certainly come under Art. 8, but the mere fact that a proprietor of a store has a restaurant department does not make all articles of food which he may have sold in a different department lose their character of "goods" and with it the benefit of the Art. 52 of the Act. Food and drink the price of which would come under Art. 8 must be meals or articles of food which are either consumed on the premises or are sent out or taken away by the customer which are intended for, or capable of, immediate consumption in the state in which they are sent out, that is to say, without cooking. If from the restaurant is sent out, for instance,

Description of suit.	Period of limitation.	Time from which period begins to run.
10. To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	[1][One year] ...	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.
11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order: (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree; (2) Order under section 28 of the Presidency Small Cause Courts Act, 1882.	[1][One year] ...	The date of the order.
11-A. By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon	[1][One year] ...	[1]Ditto

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I for "Ditto"

NOTES.

a case of beer, that would scarcely be drink in that sense of the word. It would be goods; and the same applies to article in tins which do not require immediate consumption. 1939 Rang. L.R. 626=1940 R. 17.

Art. 10: APPLICABILITY.—A suit for pre-emption in respect of a pure and simple lease is governed by Art. 120 and not by Art. 10. 19 A.L.J. 442=62 I.C. 884. *See also* 15 C. 184. So also in regard to a subsequent transferee from original vendee. 31 P.R. 1913=18 I.C. 70 (F.B.), overruling 25 P.R. 1903 and 106 P.R. 1907. *See also* 17 P.R. 1915=28 I.C. 695. So also where physical possession is not with the vendor but with the plaintiff who had executed a sale to the former with a covenant to pre-empt. 40 M.L.J. 443=62 I.C. 27. So also in the case of tenant becoming owner under a foreclosure decree. 1927 O. 212=102 I.C. 22 (2). Where the document was executed as a deed of gift but it appeared that the parties really effected a sale and the person who sued for pre-emption *was shown to have been aware of the passing of consideration*, *held*, that he should sue within the time prescribed by Art. 10 and that S. 18 did not save limitation. 128 I.C. 257=5 Luck. 492 (P.C.). *See also* 1928 N. 89 (1). But if *the fraud was not known* to the plaintiff, limitation will commence under S. 18, only from the time when that fraud first become known to him. 36 P.L.R. 114=1934 L. 878; 1937 L. 97. *See also* 44 P.L.R. 99.

STARTING POINT—PHYSICAL POSSESSION.—Limitation against the pre-emptor begins from the date of the physical possession of the purchaser and not from the date of symbolical possession. 1 Pat.L.T. 578=4 P.L.J. 277; 1927 L. 784. A fractional share of zamindari situated in several Rathas is not capable of being physically taken possession of. 50 I.C. 80=17 A.L.J. 269. *See also* 109 I.C. 382=1928 L. 705; 5 O.W.N. 674; nor property in the possession of tenant. 73 I. C. 903; 1924 L. 302. *See also* 148 P.W.R. 1913=20 I.C. 475 (portion only in the possession of tenants); nor share in joint undivided property. 1923 L. 75; 1930 A. 255 (1); nor share in undivided zamindari *mahal*. 4 A. 24 (F.B.); 24 A. 17 (P.C.). [As to property in a divided *mahal*, *see* 9 I.C. 309]; nor a share in the *shamilat*, 68 P.R. 1918=47 I.C. 359; nor property in possession of mortgagee or lessee. 52 I.C. 940=16 N.L.R. 37 (F.B.); 32 P.L.R. 743. *See also* 15 I.C. 890=8 N.L.R. 68; 28 I.C. 208=2 O.L.J. 109; nor an equity of redemption in respect of usufructuarily mortgaged property. 45 M.L.J. 389=1924 M. 57. Physical possession is always possible in cases of houses and shops. 89 I.C. 444=23 A.L.J. 885=1926 A. 70. Whether the property admits of physical possession or not must be determined with reference to the date of the sale. 26 Punj.L.R. 780; 1924 L. 302. In cases of sale of properties situated within the jurisdiction of two registration offices, time begins to run from the date of first registration and not from the date of the entry regarding registration made in the other office sometime later. 23 A.L.J. 104=1925 A. 324. Where in case of a mortgage by conditional sale maturing into a decree absolute, there is delivery of possession after 5 years, time runs from the date of the original transfer, *i.e.*, the date of the mortgage and not the date of the delivery of possession. 39 A. 544=40 I.C. 461. But *see* 3 A. 175; 1 A. 311 (F. B.). In case of sale required to be sanctioned by the Deputy Commissioner under the Land Alienation Act, time begins to run from the date of sale and not from the date of such sanction. 79 P.R. 1913=19 I. C. 239. Where by private arrangement, possession is taken by vendee before sale, time

Description of suit.	Period of limitation.	Time from which period begins to run.
an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the		

NOTES.

begins to run only from the date of sale. 80 P.R. 1918=48 I.C. 102. In a suit for possession by a purchaser of a share in land, the defendant cannot plead by way of defence his right of pre-emption which has become barred by limitation under Art. 10. The right of pre-emption, is an inchoate right and in order to be completed it must be exercised. If that right is not still enforceable, it cannot be a ground of a valid defence. 42 C.W.N. 1028. Where a purchaser under a sale deed in respect of which the cause of action for the suit for pre-emption has arisen subsequently transfers the property to another, the original cause of action for pre-emption is not thereby affected, for the subsequent transferee must take the transfer only subject to the right of pre-emption. Though such a transferee is impleaded in the suit more than a year after the date of the transfer to him, the suit filed within a year of the original sale, is not barred by limitation. I.L.R. (1939) All. 220=1939 A.L.J. 35=1939 A. 158.

Arts. 11 and 11-A: SCOPE AND APPLICATION.—*See* as to the scope of the articles, 18 B. 260; 40 M. 733; 22 B. 875; 40 C.W.N. 146; 19 N.L.J. 308. Articles apply to suits under C. P. Code, O. 21, R. 63 and R. 103. *See* 69 M.L.J. 120; 36 I.C. 211; 2 P. 372=59 I.C. 772; 11 L. 369=31 P.L.R. 752; 130 I.C. 200 =1930 A.L.J. 1322; 42 C.W.N. 1051=68 C.L.J. 261=1938 C. 577; 1941 M. 77=(1940) 2 M.L.J. 402. Claim orders in cases of attachment before judgment are not covered by Art. 11. 44 M. 902=41 M.L.J. 252 (F.B.). Suit though not barred by Art. 11 may be barred by some other provision of the Act. 50 I.C. 6 (Punj.); 23 C. 302. The objector himself must sue to set aside the order under O. 21, R. 63. 6 L.W. 281=41 I.C. 684. A suit for declaration that the property is liable to attachment and for setting aside an order allowing objection is governed by Art. 11. 18 I.C. 519; 50 I.C. 6 (Punj.); 1930 A.L.J. 1322; 138 I.C. 412=1932 L. 516; 1935 N. 171. Art. 11 is not applicable to suits by strangers to the proceedings in which order is passed. 57 I.C. 52; 53 I.C. 260; 36 I.C. 3. *See also* 1940 L. 497; 138 I.C. 412=1932 L. 516 (Article not applicable to suit by creditors other than the decree-holder, who had not attached the property). Order for symbolical delivery need not be set aside within one year by strangers in actual possession of the land. 24 I.C. 771=1 L.W. 31 (*see* on appeal 30 M.L.J. 404=31 I.C. 615). Symbolical possession in prior suit—Khas possession denied by tenant—Suit for khas possession filed one year after is barred by Art. 11-A. 106 I.C. 371=1927 C. 916. The words 'a person against whom' in Art. 11-A include a decree-holder. 15 C. 521; 19 A.L.J. 53. Where therefore a decree-holder brings a suit for declaration of his title against a third person in whose favour an order under O. 21, Rr. 98, 99 or 101, has been made, his suit is governed by Art. 11-A. 44 A. 607= 20 A.L.J. 578; 66 C.L.J. 537=I.L.R. (1938) 1 Cal. 685=1938 C. 384; 31 Bom.L.R. 765; 1929 A. 610. *See also* 130 I.C. 200=1930 A.L.J. 1322 (a similar suit under O. 21, r. 63 governed by Art. 11); 52 L.W. 354=(1940) 2 M.L.J. 402; 40 C.W.N. 146. So also suit by auction-purchaser to establish his right to possession, after dismissal of his application to be placed in actual possession under O. 21, r. 99. 24 C.W.N. 1001 =58 I.C. 21 (P.C.); 1930 M.W.N. 1051; *See also* 60 I.C. 905=16 A.L.J. 53. But where such application was dismissed on the ground that the sons of the judgment-debtor were in possession in their own right, the suit is not governed by Art. 11-A. 40 A. 693=22 A.L.J. 626. Article applicable to claim to property attached before judgment. *See* 41 M.L.J. 252 =70 I.C. 439 (F.B.); 79 I.C. 917=1925 M. 49; 1929 N. 128. But *see* 152 I.C. 297=1934 P. 580. House attached in execution—Mortgage proclaimed to be a burden on mortgagee's objection—Suit by decree-holder to declare mortgage null and void comes within Art. 11. 100 I.C. 763=1927 A. 420. The articles apply to adverse orders against minors, only where they are properly represented. 26 B. 730; 40 A. 325; 43 I.C. 395 at 396 (Nag.). *See also* 32 B. 404=10 Bom.L.R. 550; 27 C. 242; 80 I.C. 992 (Mad.) Where there is no application, the articles do not apply. 132 I.C. 844= 1931 L. 686. Where a claim under O. 21, R. 58 is rejected by the Court, which declines jurisdiction on the ground that the claimant has no *locus standi*, the order of the Court is one under the C. P. Code within the meaning of Art. 11, and a suit based on such rejection would be barred after one year. But when the matter is one to which O. 21, r. 58, does not apply, it is not within the mischief of Art. 11, although the applicant by mistake purports to apply under O. 21, R. 58. 150 I.C. 40. Applicability of article to suit under S. 73, C. P. Code. 1937 M.W.N. 480.

WHETHER INVESTIGATION IS NECESSARY TO MAKE THE ARTICLES APPLICABLE.—The article is more comprehensive than that of the preceding articles and applies to orders passed without investigation. 45 C. 785=23 C.W.N. 375; 38 I.C. 937=31 M.L.J. 247; 41 M. 985=35 M.L.J. 335 (F.B.); 57 Bom. 213; 19 N.L.R. 34=1923 N. 187; 1923 N. 69; 58 I.C. 37=

Description of suit.	Period of limitation.	Time from which period begins to run.
decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.		

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5 P.L.J. 652 (41 I.C. 468 *contra*). But see *contra* 40 A. 325=44 I.C. 1005; 50 I.C. 649; 3 L. 7=1922 L. 108; 16 P.R. 1918=44 I.C. 528. In the following cases, Art. 11-A has been held to apply only where the order is made on investigation. 35 C.L.J. 537=26 C.W.N. 853; 31 I.C. 444; 41 I.C. 640. Where a claim is neither investigated *nor dismissed*, on account of delay, Art. 11 does not apply to suits by claimant. 45 M. 827=43 M.L.J. 467. An order dismissing an application for default is not an order passed upon investigation. 26 C.W.N. 853=1922 C. 229; 26 I.C. 943=18 C.W.N. 77. *See also* 3 A. 504; 1937 N. 170; 31 M. 5; 1922 C. 164, *contra.* Claim—Withdrawal stating that suit will be filed—Dismissal—Suit—If to be filed within one year. *See* 41 L.W. 500=1935 M. 328. *See also* 41 L.W. 578=156 I.C. 880. Dismissal of an application for want of prosecution on the ground that objector did not produce evidence is dismissal on the merits to which article is applicable. 20 I.C. 369; 19 A. 253 (F.B.); 40 A. 325. Where an objection is dismissed under O. 21, R. 58 as being made after unnecessary delay, the order rejecting the claim is an order made against the claimant under O. 21, R. 63, and a suit to establish the applicant's claim falls under Art. 11. 57 B. 213=35 Bom.L.R. 147=1933 B. 190; 39 C.W.N. 457=61 C.L.J. 5. An order simply directing a sale after notifying the claim is one against the claimant to which Art. 11 applies. 4 M. 985=33 M.L.J. 335 (F.B.). Where the order was "Petition not pressed as the decree-holder has to file a separate suit for the purpose," *held*, that the petition was not disposed of, and that plaintiff was not limited to the period of one year prescribed by Art. 11-A. 1933 M.W.N. 924.

SUITS NOT GOVERNED BY ARTICLE.—ART. 11 does not apply as against a person who was not a party to the proceedings in which the order sought to be set aside was made. 42 P.L.R. 601=1940 L. 497. Suit to recover property released from attachment before judgment under O. 38, R. 8 is not governed by Art. 11 or 13. 41 M. 23=39 I.C. 863. Arts. 11 and 13 do not apply to orders on claims by Official Receiver to property attached. 45 M. 70=41 M.L.J. 334. Proclamation of sale under certificate under Public Demands Recovery Act—Objections to—Rejection—Suit by objector for declaration of title and possession—Limitation is governed by Art. 11. 17 P. 446=1939 P. 109. Art. 11 (1) does not apply unless there has been an attachment in the manner prescribed by the C. P. Code. In cases where the property has been or is sought to be sold under a mortgage decree, there can be no attachment within the meaning of O. 21, R. 58 and a suit to contest an order passed on an objection to such a sale need not be filed within one year. 33 P.L.R. 1033=1933 L. 75. The executing Court will have no jurisdiction to investigate claim or objection under O. 21, R. 58, when once the sale takes place. So, dismissal for default of such claim after the sale being without jurisdiction will not be governed by this Act. 65 C.L.J. 353=41 C.W.N. 845=1937 C. 390. Where an attachment effected in execution of a decree was held as irregular and the property was released, and the claimant's objection on the basis of a gift deed in his favour was formally accepted, a suit filed more than one year after that, to declare the gift deed as fraudulent is in time being governed by Art. 120. 1933 L. 449=34 P.L.R. 443. An application under O. 21, R. 100 dismissed for want of cause of action, on the ground that the applicant continues to be in possession of the disputed plots of land —Art. 11-A does not constrain the applicant to bring a suit within one year. 38 C.L.J. 150 =1924 C. 97. Nor does article apply to a suit by such applicant on subsequent dispossession. 1924 C. 97; 50 C. 311=84 I.C. 876. Where after dismissal of a claim to attached property, the execution proceedings were dismissed for default of the decree-holder and the attachment ceased under O. 21, R. 57, the claimant need not thereafter sue within a year after the adverse order under Art. 11. 51 C. 548=39 C.L.J. 418. *See also* 41 B. 64=36 I.C. 627. But *see* 56 I.C. 481=38 M.L.J. 397; 1937 N. 170; 19 N.L.J. 308. Adjudication between decree-holder and claimant—Subsequent suit by claimant against judgment-debtor—Judgment-debtor could set up his title in defence and this article is inapplicable. 1929 P. 604. The mere attachment in the case of execution of a mortgage decree gives no cause of action for a suit by reversioners and the article is inapplicable. 10 L. 543=1929 L. 90 (2). Certain ancestral land was attached in execution of a money decree against the father. The sons objected to the attachment under O. 21, R. 58, and the objection was dismissed in January, 1922, and their suit for a declaration under O. 21, R. 63 was also dismissed. A fresh suit was filed by them in 1924 after their father's death for possession of the attached land which was sold in execution of the decree and purchased by the decree-holder. *Held*, that the suit was not barred by limitation, as the cause of action for the suit being the alienation effected in execution proceedings after the sons' objection had been dismissed, and a suit for possession not being competent in the lifetime of the father. 139 I.C. 522=33 P.L.R. 882=1932 L. 460. An application by an auction-purchaser under O. 21, r. 97 was allowed as to one item of property as being unopposed and dismissed as to another item, because the auction-purchaser adduced no evidence. *Held*, that the order was not one made in default but one made on investigation and a suit to set aside such an order was governed

Description of suit.	Period of limitation.	Time from which period begins to run.
12. To set aside any of the following sales:—	[1][One year] ..	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I. for "Ditto."

NOTES.

by Art. 11-A. 155 I.C. 702=39 C.W.N. 164=1935 C. 267. *See also* I,L.R. (1938) 1 Cal. 685 =1938 Cal. 384. Where in execution of a mortgage decree the auction-purchaser obtained a decree and an order for symbolical delivery against the 1st defendant and he subsequently brought a suit against the 2nd defendant for actual possession, the previous order in execution not having been a final order cannot be considered to be passed under r. 103 of O. 21. There is, therefore, no obligation upon him to bring a suit for possession within one year from the date of that order and a suit brought later cannot therefore be deemed to be barred by R. 103. 1930 M.W.N. 1051. Art. 11-A does not apply where what is sought to be set aside is the original decree and not the order in execution proceedings. 51 B. 158=101 I.C. 40=1927 B. 184. Terms of Art. 11-A go to show that it applies only to cases where a person who has been actually dispossessed of the property and who made an application under O. 21, R. 100, and whose application was dismissed, then brings a suit. Where the plaintiff was actually dispossessed long after the date of the order dismissing his application under O. 21, R. 100, limitation for a suit to establish his title and recover possession is that provided under Art. 142 and not Art. 11-A. 1929 P. 553=117 I.C. 634. Art. 11-A is co-related to and must be read with O. 21, R. 103 of the Code, and the article applies only when the suit as brought is one by a decree-holder or auction purchaser as such, and cannot apply if the plaintiff falls back on his original title as owner of the property in suit treating the defendant as holding permissively. 114 I.C. 725=1929 A. 610. Art. 11-A does not bar suits for recovery of possession of immovable property after proceedings under Chapter VII of the Presidency Small Causes Courts Act have failed. 1929 M. 69=29 L.W. 537.

STARTING POINT OF LIMITATION.—Time runs from the date of the order and not the date of attachment and sale of property. 40 M. 733 =31 M.L.J. 394. Time runs only from the date of the appellate order in case of a Letters Patent appeal. 39 M. 1196=28 I.C. 367. But time taken in an unsuccessful revision petition to the High Court cannot be deducted. 8 Bur.L.J. 93=27 I.C. 829.

Art. 11-A.—[*See also* under Art. 11, *supra.*] Art. 11-A does not contemplate computation of the period of limitation from the date of any order passed in revision. There is a clear distinction between an appeal and an application for revision. Whereas the right of appeal is a substantive right created by statute, interference by the High Court by way of revision is entirely discretionary and when the High Court rejects a petition for revision, it is not as if the order of dismissal is the only subsisting order in the case. It only amounts to the High Court abstaining from exercising its jurisdiction and allowing the order of the Subordinate Court to stand. 1931 N. 17=130 I.C. 145.

Before Art. 11-A applies, there must have been an act of dispossession by the decree-holder or auction-purchaser. An order for delivery of possession of land in the actual possession of tenants made in favour of the decree-holder purchaser under O. 21, R. 96, C. P. Code, does not amount to dispossession within the meaning of that article. 44 C.W.N. 251=70 C.L.J. 111 =1940 C. 16. Art. 11-A applies only to suits by a person who has been dispossessed of property in the delivery of possession in execution of a decree. Where a person had not been dispossessed of the property when the order under O. 21, R. 99, C. P. Code, was passed against him and the application which was presented by him under O. 21, R. 99, C. P. Code, was held to be incompetent, the suit is not covered by the terms of Art. 11-A. 1940 L. 349.

Art. 12 : SCOPE AND APPLICATION.—Article applicable to suits to set aside a sale voidable on any ground. 49 I.A. 312=1922 P.C. 336 (P.C.) ; 14 I.C. 780=14 Bom.L.R. 254 ; 32 M.L.J. 525=32 I.C. 611 ; 1941 P. 490. Article does not apply where the sale is void *ab initio* and is a nullity . 35 I.C. 404 (C.) ; 42 C.L.J. 69=1925 C. 1148 ; 12 M. 168 (F.B.). *See also* 29 C. 73 (F.B.) ; 44 C. 241 ; 26 A.L.J. 716. Article inapplicable to suits for declaration that a sale was fraudulent and cannot affect the right of plaintiff. 24 I.C. 695. *See also* 14 P.L.J. 441 ; 11 B. 119 ; 9 M. 457 ; 6 A. 406 ; I.L.R. (1941) 1 Cal. 339=45 C.W.N. 277=1941 Cal. 333 ; 34 C. 241 ; 23 P.L.T. 364 ; 14 P.L.T. 441=1933 P. 473. The suit need not be expressly to set aside the sale. It is enough if the relief sought cannot be had without setting aside the sale. 25 C. 179 (P.C.) ; 10 B. 214 ; 27 B. 577 ; 9 P.L.J. 627. Art. 12 does not apply to void sales. It applies only to cases where the plaintiff was a party to the proceedings in which the sale was held. 1941 O.W.N. 1328=1941 O.A. 1013. The language of Art. 12 (*a*) is wide and there is no reason to restrict the application of the expression "in execution of a decree" to cases of simple money decrees. The article applies to the case of sales on the basis of mortgage decrees also. 196 I.C. 457= 1941 O.W.N. 1077=1942 Oudh 33. Thus a suit for possession of property sold in execution of a decree is governed by Art. 12. 1 L. 27=55 I.C. 833. *See also* 24 Bom.L.R. 423=1923 B. 162. Art. 12 is not applicable to a suit, by an unsuccessful claimant in execution proceedings, for a declaration of his lien on the property arising out of a hypothecation in his favour by the judgment-debtor. The suit is not one for setting aside the sale nor is it necessary for the

Description of suit.	Period of limitation.	Time from which period begins to run.
(*a*) sale in execution of a decree of a Civil Court; (*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue; (*c*) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (*d*) sale of a patni taluq sold for current arrears of rent. *Explanation.*—In this article "patni" includes any intermediate tenure saleable for current arrears of rent.		
13. To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	[1][One year] ...	The date of the final decisiou or order in the case by a Court competent to determine it finally.
14. To set aside any act or order	[1][One year] ..	The date of the act or order.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, fon "Ditto."

NOTES.

plaintiff so to do as he was not a party to it. 34 P.L.R. 468=1933 L. 10; 45 C.W.N. 277 =1941 C. 333. Sale in execution of mortgage decree against father of Hindu joint family—Sons cannot claim to redeem without setting aside the sale within one year. 1 P.L.J. 180 =34 I.C. 288. *See also* 1929 P. 323. Article applicable to suit by minor to set aside sale. 30 P.W.R. 1918=43 I.C. 712. The rule is not affected by the fact that after decree, the plaintiff became *sui juris* at the time of execution proceedings, notice of which was served not on him but on the guardian *ad litem*. 39 M. 1031= 32 I.C. 391. A minor not represented by a proper guardian is not a party to the proceeding and Art. 12 is inapplicable. 1922 L. 447; 38 M. 1076=28 M.L.J. 525; 12 B. 18; 8 C. 656; 11 O.C. 346. The Article applicable in such cases is Art. 144. 48 I.C. 399=113 P.R. 1918. Article is inapplicable to strangers to suit or proceedings. 71 I.C. 822; 67 I.C. 894; 15 P.R. 1912=11 I.C. 26; 11 B. 130; 9 C.L.R. 18; 5 A. 614. Suit to set aside sale in execution of a decree against third party is not governed by this Act. 36 I.C. 3=10 Bur.L.T. 225. Also suit to set aside a sale of property not belonging to the judgment-debtor, but to a stranger. 26 A. 346. Also a suit to recover property which is sold subject to plaintiff's rights. 7 W.R. 252. Also a suit for land taken in excess of that included in the decree. 19 A. 308. A sale under S. 118 of Madras Estates Land Act is not held in pursuance of an order or a decree of the Collector or other officer of Revenue. Therefore Art. 12 cannot apply to such a case. 1927 M.W.N. 174. A suit to set aside a sale under the Bengal Public Demands Recovery Act is governed by Art. 12. 31 C.W.N. 299= 1927 C. 315. *See also* 1939 M.W.N. 918 (Execution sale under decree on void mortgage by Hindu father—Suit by sons for possession impeaching mortgage decree and sale).

STARTING POINT.—In the case of a sale that requires confirmation, time begins to run from the date of the confirmation, and in other cases from the date on which the sale becomes otherwise final. 10 I.C. 87=13 C.L.J. 339. *See also* 23 C. 775 (P.C.); 32 I.C. 391 (M.); 12 C. 49; 17 C. 347 (P.C.).

Art. 12 (b).—A suit to set aside a revenue sale under the Madras Estates Land Act more than one year after the expiry of 30 days after the sale does not lie as it is barred by Art. 12 (*b*). 45 M.L.J. 840=1924 M. 278; 76 I.C. 840= 19 L.W. 81. *See* 1927 M.W.N. 174; 52 M.L.J. 390. *See also* on the point 61 M.L.J. 203=134 I.C. 184=1931 M. 724.

Cl. (c).—Sale for Government revenue. *See* 23 I.C. 240=38 M. 356=25 M.L.J. 393. *See also* 8 C. 329; 34 C. 241; 6 M. 148; 40 C.W.N. 1359 (Suit under Assam Land and Revenue Regulation).

Cl. (d).—Applicability to sale under Bengal Patni Regulation, 1819. 46 C.L.J. 51. A suit to recover property released from attachment under O. 38, R. 8 is not governed by this article, as the existence of the order releasing the attachment before judgment does not bar the suit. 41 M. 23=39 I.C. 86. *See also* 3 A. 40. On this article, *see also* 6 P.L.J. 85=60 I.C. 849.

Art. 13.—In a subsequent suit against an order in proceedings under Chap. VII of the Presidency Small Cause Courts Act, there is no necessity to alter or set aside any such decision or order and Art. 13 has no application. 1929 M. 69. So also in a suit for declaration of title to certain property after an order of the Insolvency Court under sub-S. (3) of S. 14 of the Provincial Insolveney Act for sale of the interest of the insolvent in it, leaving the question of title to be decided by a competent Civil Court. 36 C.W.N. 621. *See also* on the article. 41 M. 23; 45 M. 70, cited under Arts. 11 and 11-A.

Art. 14: APPLICABILITY.—If it is necessary for a plaintiff to get rid of an order which stands in his way before he can obtain a certain relief, although he may sue merely for a declaratory decree, still the suit should be deemed to be one to set aside an order falling within the ambit of Art. 14. 15 L. 389=1934 L. 384 (F.B.). "Official capacity"—Meaning of. 39 Bom.

Description of suit.	Period of limitation.	Time from which period begins to run.
of an officer of Government in his official capacity, not herein otherwise expressly provided for.		

NOTES.

L.R. 288. The article would apply if the suit involves the setting aside of an order, though there is no direct prayer to that effect. 23 B. 337 (P.C.); 24 A. 767. Art. 14 applies only to orders and proceedings to which by law a particular effect is given. An order to come under Art. 14 must be an order of at least a *quasi*-judicial character and not a mere executive order. 104 I.C. 781. *See also* 165 I. C. 739 =1936 L. 692. Under Art. 14, the question is not merely one of form but of substance. 30 Bom.L.R. 431=1928 B. 180; 1939 C. 749. An order made without jurisdiction is a nullity and need not be set aside, and Art. 14 has no application to an order of such kind. 39 C.L.J. 454=83 I.C. 446=1924 C. 913. *See also* 29 B. 480; 30 M. 280; 1924 N. 142; 20 P.L.T. 136=1938 P.W.N. 631=1938 P. 524. Thus the article does not apply where relief is asked for on the ground that order is *ultra vires*. 48 B. 61=1924 B. 273; 36 B. 225=15 I.C. 517; 39 B. 494=29 I.C. 490; 36 C. 726; 17 I.C. 881=17 C.W.N. 55; 30 M. 280; 37 M.L.J. 71=51 I.C. 366; 98 I.C. 22=1927 N. 101; 1927 N. 159=100 I.C. 4=22 N.L.R. 147. The words "act" or "order" in Art. 14 do not mean an act or order which is a nullity. An order made by an officer of Government in his official capacity, purporting to act under the law, which is of a *quasi*-judicial character and within his power would fall under Art. 14. A suit to set aside an order of the Assistant Collector of Customs imposing penalty under S. 167 (17) of the Sea Customs Act is governed by Art. 14. 42 Bom.L.R. 532=1940 Bom. 294. *See also* 57 M. 501=66 M.L.J. 715. (Resumption of certain villages by Government treated as a nullity); 5 P.L.J. 321=56 I.C. 507; 24 I.C. 813=7 S.L.R. 169; nor where the officer was not acting in his official capacity, 45 B. 920=61 I.C. 347. *See also* 40 Bom.L.R. 1288. (Suit under S. 36 Proviso (3) of Bombay Hereditary Officers Act). As to whether the article applies to suit for declaring illegality of resumption of service inam on the ground of non-performance of service, *see* 27 L.W. 101. *See also* 41 Bom.L.R. 939.

SUITS GOVERNED BY ARTICLE.—A suit under S. 12, Redemption of Mortgages Act (XI of 1913), instituted by a person aggrieved by an order passed by the Collector under Ss. 6 to 10 or 11 of the Act to establish his right in respect of the mortgage is governed by Art. 14; it makes no difference that the suit is one for a mere declaration and no relief to set aside the order of the Collector has been expressly asked in the plaint. (4 L. 346=1928 L. 648, Overr. and 1925 L. 385, Appr.) 15 L. 389=1934 L. 384 (F.B.). *See also* 165 I.C. 739=1936 L. 692; 40 P.L.R. 245=1938 L. 512. Suit to set aside order of Collector forfeiting land for failure to pay arrears of Government revenue. 44 B. 451 =57 I.C. 587; 15 B. 424. A claim for relief inconsistent with an order of enfranchisement of inam is governed by Art. 14 if the order of enfranchisement is *intra vires, i.e.,* the inam was granted or continued by Government, and in any case in which it is shown that the inam was not granted or continued by Government, Art. 142 or 144 would apply. 123 I.C. 341; 39 Bom.L.R. 288=I.L.R. (1937) Bom. 464=1937 Bom. 307. A suit by a Zemindar against the Government for a declaration that an enfranchisement of the Government of a service inam in his Zemindari is not valid and binding on him, is generally governed by Art. 120, but if the Zemindar was a consenting party to such enfranchisement proceedings and did not object to the same, Art. 14 might apply. 58 M. 141 =68 M.L.J. 409. Where, however, the Zemindar has not appeared before the Inam Commissioner or taken any part in the proceedings, and sues on the footing that the proceedings are *ultra vires*, it is not necessary to set aside the proceedings and Art. 14 will not apply. 58 M. 141=68 M.L.J. 409; 165 I.C. 739=1936 L. 692. In such a case Art. 120 applies and the cause of action arises only when he is injuriously affected by the enfranchisement, *i.e.*, when inamdar definitely refuses to perform the services for which the inam was originally granted. 58 M. 141; 31 I.C. 267=1915 M.W.N. 915 (in 37 M.L.J. 71 resumption treated as a nullity which need not be set aside.) Suit for amendment or cancellation of settlement entries. 1922 N. 76; 57 I.C. 319. But *see* 14 I.C. 50, *contra*. Suit for cancellation or modification of rent fixed by a Settlement Officer. 28 C. 676; 29 C. 367. Suit under S. 11 of Punjab Act (II of 1913) which is a suit to set aside the summary order of the Collector. 6 L. 206= 88 I.C. 945=1925 L. 85. Order of Collector regulating supply of water to lands is not within the Article. 104 I.C. 781=1927 M. 1167. Order of commissioner under S. 178 of Bombay District Municipal Act is governed by Art. 14. 51 B. 105=28 Bom.L.R. 1465. *See also* 1940 B. 188=42 Bom.L.R. 223 (Order of Bench of Magistrates under Bombay Municipal Boroughs Act). Also an order of a manager under the Sind Encumbered Estates Act, S. 7 (2) (*c*) in his official capacity. 1930 S. 150.

SUITS NOT GOVERNED BY THIS ARTICLE.—Art. 14 does not apply to an order of enhanced assessment, which is a nullity or in excess of authority; in such a case it is not incumbent on the plaintiff to file a suit to have the order set aside. Consequently, a suit to recover payments made under protest filed more than one year after the order to recover such assessment was made is not barred by limitation. 36 Bom. L.R. 761=1934 B. 434. *See also* 39 Bom.L.R. 288. Suit in ejectment by a proprietor to whom Bakasht lands were allotted in collectorate partition not governed by Art. 14. 5 P. 735= 1926 P.C. 60 (P.C.). *See also* 183 I.C. 853= 1939 L. 135 (Suit to set aside mutation order and for possession). Where the suit for declaration of title was brought in the Civil Court

Description of suit.	Period of limitation.	Time from which period begins to run.
15. Against Government to set aside any attachment, lease or transfer of immovable property by the revenue-authorities for arrears of Government revenue.	[1][One year] ...	When the attacnment, lease or transfer is made.
16. Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	[1][One year] ...	When the payment is made.
17. Against Government for compensation for land acquired for public purposes.	[1][One year] ...	The date of determining the amount of the compensation.
18. Like suit for compensation when the acquisition is not completed.	[1][One year] ...	The date of the refusal to complete.
19. For compensation for false imprisonment.	[1][One year] ...	When the imprisonment ends.
20. By executors, administrators or representatives under the Legal Representatives' Suits Act, 1855.	[1][One year] ...	The date of the death of the person wronged.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

more than one year after the order of the Deputy Collector, which was one passed apparently under S. 57 of the Estates Partition Act, *held*, that the suit not being to set aside the order of the Collector was not barred by Art. 14. 1931 C. 29=52 C.L.J. 247. *See also* 171 I.C. 267=1937 Pesh. 94. A suit denying a right of way as affirmed by an order of a Mamlatdar under Mamlatdar's Courts Act, is a suit respecting possession of immovable property and as between Arts. 14 and 47, Art. 47 applies to such suit. 33 Bom.L.R. 517=1931 B. 256. Where the suit was for declaration, against the Secretary of State that the order by the Collector disposing of the suit lands in favour of the second defendant was null and void, and for possession as against the grantee, *held*, the relief regarding possession could not be awarded in this suit ; that it was really a suit for declaration and injunction and governed by Art. 120, and not by Art. 144 or 14. 1931 B. 369=55 B. 447=33 Bom.L.R. 772. Certain allowance was payable by Government to defendants. In December, 1917, the Commissioner had directed payment of that allowance to the 1st defendant. A suit to recover the plaintiff's share of that allowance brought more than one year from the date of that order was held to be not barred by Art. 14, as the plaintiff's claim was entirely independent of the order of Government. 33 Bom.R.L. 783 =1931 B. 473.

Art. 16.—Art. 16 requires for its application that the demand, if not for arrears of revenue, should be "recoverable as such arrears." Rent "settled" by the Settlement Officer under S. 104 of the Bengal Tenancy Act are not arrears of revenue and unless it can be shown that by some enactment they have been made to come under that description or have been made recoverable as arrears of revenue. Art. 16 cannot be applied to them. The fact that the claim to such rents comes within the Bengal Public Demands Recovery Act would not assist to bring that article into operation. 64 I.A. 281=I.L.R. (1937) 2 Cal. 769=1937 P.C. 244=(1937) 2 M.L.J. 834 (P.C.). Suit for recovery of water-cess alleged to have been illegally levied and paid under protest is governed by Art. 16. 46 M. 488=45 M.L.J. 12 ; 70 I.C. 884 (M.); 44 M.L.J. 645 ; 1923 M. 665. *See also* 18 I.C. 699=1913 M.W.N. 75 (it would be different if proceedings are taken under the Revenue Recovery Act). The article is also applicable to a suit for the recovery of penal assessment illegally levied for an alleged wrongful taking of water. 1925 M. 474. A suit to recover the amounts paid as village service cess by the plaintiff under protest is governed by Art. 16. 61 M.L.J. 754=1931 M. 525.

Art. 17.—Where there is no determination of the amount of compensation, as where the Collector refuses to award any compensation, the article has no application. 34 C. 470 =22 B. 802 ; 27 M. 535. Land acquisition—Money paid to person apparently entitled—Suit by person having interest in land for money so paid, governed by Art. 120 and not by this Article or Art. 62. 1935 P. 42.

Art. 19.—Suit for damages for false imprisonment or malicious prosecution is governed by one year rule under Arts. 19 and 23. 40 C. 898 =23 I.C. 25=18 C.W.N. 185. *See also* 30 C. 872 (P.C.).

Description of suit.	Period of limitation.	Time from which period begins to run.
21. By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.	[1][One year] ...	The date of the death of the person killed.
22. For compensation for any other injury to the person.	[1][One year] ...	When the injury is committed.
23. For compensation for a malicious prosecution.	[1][One year] ...	When the plaintiff is acquitted, or the prosecution is otherwise terminated.
24. For compensation for libel ...	[1][One year] ...	When the libel is published.
25. For compensation for slander ...	[1][One year] ...	When the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results.
26. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	[1][One year] ...	When the loss occurs.
27. For compensation for inducing a person to break a contract with the plaintiff.	[1][One year] ...	The date of the breach.
28. For compensation for an illegal, irregular or excessive distress.	[1][One year] ...	The date of the distress.

LEG. REF.

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NOTES.

Art. 22.—*See* 22 Bom.L.R. 1333=1924 B. 290. Art. 22 does not apply to claims by workmen under the Workmen's Compensation Act. 58 B. 128=35 Bom.L.R. 1142=1934 B. 28. 'Injury' in Art. 22 has a wider connotation than physical hurt. Assault even though it causes no hurt is an offence to the human body and wrongful obstruction to a person from entering a temple is an injury to her person and a claim for damages regarding the same is governed by Art. 22. 138 I.C. 84=1932 M. 432. The proper article applicable to a *suit for damages for enticing away the plaintiff's wife* is Art. 120 and not Art. 22. Injuries to person in Art. 22 mean physical injuries to the plaintiff and this is not a case of injury to the person of the plaintiff. 1936 A.L.J. 574=1936 A. 454.

Art. 23.—*See* 40 C. 893=18 C.W.N. 185. Proceedings under the Bengal Disorderly Houses Act not a prosecution but only a libel. 20 I.C. 768=18 C.L.J. 352. Art. 2 applies only where the defendant did an act honestly believing that he was empowered to do it by some enactment. Otherwise the suit for compensation for wrongful act will fall under Art. 23. 3 R. 268=1925 R. 311. Time runs from the time the plaintiff is acquitted, or prosecution is otherwise terminated. 17 M.L.J. 60. Time runs from date of discharge. Revision petition does not suspend period. 24 Bom.L.R. 507=1922 B. 209; 23 M. 24. It is doubtful if the same rule will apply in case of appeal preferred by Government against acquittal. 20 C. 41. In the case of an acquittal on appeal, or on revision, the date of the order of the appellate Court is the starting point for limitation. 7 A. 205 (F.B.); 57 I.C. 635 (M). *See also* I.L.R. (1938) All. 89=1937 A.L.J. 1281=1938 All. 49; (1938) 1 M.L.J. 344=1938 M. 349=I.L.R. (1938) Mad. 675 (F.B.). Prosecution terminates by order of discharge by Magistrate—But if matter is taken up in revision by higher authority, prosecution terminates when proceedings in revision come to an end. 1930 A. 326. *See also* 39 Bom.L.R. 881.

Art. 24.—Each publication of a libel gives a fresh cause of action for suit. Where the President of a Union Bench sends a report to a Magistrate in connection with an application for transfer of a case pending before the Bench, a suit for damages for libellous matter contained in that report may be brought within one year of the publication of the report to the Magistrate. 40 C.W.N. 500. A suit for damages against the defendant for making a false accusation against the plaintiff to the police, when no prosecution was instituted, is a suit for compensation for libel or slander, and the limitation applicable to such a suit is that prescribed by Art. 24 or Art. 25 and not by Art. 36. 1937 Lah. 709.

Art. 27.—Suit for compensation for inducing breach of contract is governed by Art. 27 of Limitation Act. 1926 P.C. 88=31 C.W.N. 174 (P.C.).

Art. 28.—*See* 26 A. 482. Art. 28 is a specific article dealing precisely with a claim to compensation for illegal distress or distraint. Distress has the same meaning as distraint. The illegal distress contemplated by the article might be the result of various causes. The seizure of the property might be illegal either because the party from whose possession it was seized was not liable or because the property on account

Description of suit.	Period of limitatiIn.	Time from which period begins to run.
29. For compensation for wrongful seizure of movable property under legal process.	[1][One year] ...	The date of the seizure.

LEG. REF.

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NOTES.

of its character was itself exempt from seizure. Again the person effecting seizure or the officer under whose authority the distraint is effected might have no power or jurisdiction to effect the seizure, or the distraint itself might not be in conformity with the provisions of the statute under which the Act was purported to be done. It cannot be said that seizure due to want of jurisdiction is not contemplated by Art. 28. Such a seizure is an illegal distraint covered by Art. 28, and there is no ground for applying Art. 36, which is a very wide and general article. Art. 28, being an express and specific article, must prevail over the general provisions. I.L.R. (1939) Bom. 721=41 Bom. L.R. 1223=1940 B. 20.

Art. 29: SCOPE AND APPLICATION OF THE ARTICLE.—39 P.L.R. 948; 1937 Rang. 523. Distinction between Arts. 11 and 29. *See* 9 I.C. 773. The crux of Art. 29 is in the words "wrongful seizure." If the seizure is not wrongful, there can be no cause of action. The seizure may be wrongful either because the property does not belong to the judgment-debtor or the Court has no jurisdiction to attach the property. It is because the process is illegal that the seizure becomes wrongful so as to give a cause of action for the suit. The sale of the property after the wrongful seizure does not give a new cause of action. 30 I.C. 157=1931 N. 47. *See also* 1940 Rang. 276 (F.B.). Where in the execution of a decree against the judgment-debtor, the decree-holder wrongfully attaches property belonging to a stranger, the suit by that stranger for compensation for wrongful seizure is governed by Art. 29. 1940 Rang. 276 (F.B.). This article applies only where attachment is illegal *ab initio*. 22 A.L.J. 977=81 I.C. 1038=1925 A. 131. Where a seizure is under a writ of Court, it is not wrongful unless it is shown that the Court issuing it had no jurisdiction or the writ was executed against a person not a party to the decree. 64 I.C. 513=35 C.L.J. 480. *See also* 28 I.C. 463 =42 C. 85 (arrest of ship). There should be wrongful seizure of movable property under legal process. *See* 23 M.L.J. 519; 23 M. 621. Where the plaintiff's claim is for recovery of the amount, of money he has voluntarily paid to the Official Liquidator to save his property which had been wrongfully attached by the latter and for damages Art. 62 and not Art. 26 applied. 11 O.W.N. 398=1934 O. 158. There can be wrongful seizure only where the property is in possession of the person. No doubt, constructive possession also will do, but when there is no right to possession, there cannot be wrongful seizure and Art. 29 has no application. 123 I.C. 362 (1)=1930 M. 349 (1). Attachment of debt effected by prohibitory order does not come within this article as there is no actual seizure. 38 M. 972=26 M.L.J. 168 (F.B.); and as debt is not movable property. 23 M.L.J. 519=16 I.C. 914. A suit to recover money wrongly paid under an order of Court is not governed by the article. 39 A. 676; 35 I.C. 86; 11 M. 345; nor a suit to recover money rateably distributed in execution of a decree subsequently reversed. 39 A. 676= 35 I.C. 86. *See also* 13 M. 437; 21 C. 142 (P.C.); 26 M.L.J. 166. (There is no wrongful seizure in such cases). Wrongful attachment of movables by prohibitory order—Suit for compensation, *see* 31 M.L.J. 257=35 I.C. 98. Standing crops are not movable property within Art. 29. 25 M.L.J. 447=21 I.C. 213; 31 I.C. 796 (M.); 17 C.W.N. 308=18 I.C. 253; 18 N.L.R. 96= 1922 N. 212. Suit for value of crops wrongfully attached, cut and removed is not governed by Art. 29. 105 I.C. 763=1928 C. 106. On this point, *see also* 31 M. 431; 23 M.L.J. 620=17 I.C. 185; 32 C. 459; 36 C. 141. What constitutes seizure under legal process, *see* 11 M. 345; 38 M. 972; 21 C. 142. Where a certain amount deposited in Court by the receiver appointed under O. 40, R. 1, C. P. Code, is attached and paid to a person a suit to recover back such amount is not governed by Art. 29, as the attachment is neither seizure within the meaning of Art. 29, nor wrongful. 1938 L. 493. Suit to recover damages for wrongful attachment before judgment of goods falls under Art. 29 and not Art. 36 or 49 and the starting point of limitation is the date of the seizure of the goods. Suit filed by third party aggrieved—No difference. 1930 M. 635. In a suit for damages for the unlawful attachment and seizure of certain properties, the date from which time begins to run is not the date of the attachment, but the date of the seizure, and hence it is immaterial whether the attachment is or is not a continuing wrong. 1934 R. 329. A cause of action is not suspended while the plaintiff is seeking to prove in other proceedings the facts upon which his cause of action depends. In a suit for damages for wrongful attachment, the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted. 1934 R. 329. Suit for damages on account of sale of goods attached before judgment, at a low price and for injury to trade and reputation caused by such attachment is governed by Article. 38 M.L.J. 324=55 I.C. 786. Art. 29 governs also a suit for value of property wrongfully attached and sold in execution. 9 I.C. 773=4 Bur.L.T. 45; 9 I.C. 774; 14 I.C. 182 (M.); 23 M. 621; 4 M.L.J. 271.

Arts. 29 and 83.—Art. 29 applies only to seizure and not to any suit arising out of what happens later at the time of the sale. Where the suit is brought on an undertaking given by the defendants in a suit under O. 21, R. 63 that they would indemnify the plaintiff if he succeeds

Description of suit.	Period of limitation.	Time from which period begins to run.
30. Against a carrier for compensation for losing or injuring goods.	[1][One year] ..	When the loss or injury occurs.
31. Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	[1][One year] ...	When the goods ought to be delivered.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

in the suit, it is Art. 83 that applies to such suit. 1938 L. 196.

Art. 30: LOSS OR INJURY TO GOODS.—Loss of goods may arise from non-delivery as well as misdelivery. 2 P. 422=1 P.L.R. 169 (2 L. 103; 41 M. 871; 43 M. 617; 43 B. 386, Ref. to). But *see* 19 I.C. 477=122 P.W.R. 1913 (there must be actual losing of goods by the carrier himself). Short delivery is loss of the portion not delivered. 4 P.L.T. 331. Suit by consignor against a Railway Company for compensation for loss of goods owing to the loss caused by negligence or theft of company's servants, is governed by this article. 38 I.C. 502=20 C.W.N. 696. Carrier includes carrier by sea. 26 B. 562. Port Trust Board not a carrier within this article. 10 I.C. 972=4 S.L.R. 236. A suit for compensation for non-delivery of goods by a Railway is governed by Art. 31 and not by Art 30. 1927 P. 335=8 P.L.T. 767; 5 P. 106.

STARTING POINT OF LIMITATION.—In a suit against carrier for compensation for injuring goods, time does not run from the date of the plaintiff's knowledge. Time begins to run from the date when the injury was actually caused and the burden of proving when the injury was caused rests upon the carrier. 1941 C. 304. The article refers to losing or injuring goods by the carrier and not by the consignee and time begins to run from the time when the carrier lost or injured the goods and not from the time when the consignee has suffered loss. 19 I.C. 47; 45 A. 43=20 A.L.J. 792. *See also* 13 P.L.T. 695; 1935 A.L.J. 398=1935 A. 407=157 I.C. 46; 1937 R. 523. Mere non-delivery is not proof of such loss. 7 B. 478; 12 C. 477. Where a railway company has not proved that the goods were lost more than one year before the suit, a suit brought within one year from the date of refusal to deliver is not barred either by Art. 30 or 31. 17 I.C. 419=23 M.L.J. 511. The onus is on the railway company, in a suit for short delivery, to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date. Where the company had on the other hand throughout taken up the position that no loss had in fact occurred, Art. 30 is out of the question. 13 P.L.T. 695. Where portion of goods was missing and plaintiff's offer to take delivery of the remainder was refused, a suit for damages filed within one year of the date when the plaintiff sought to obtain delivery is within time. 47 A. 549=23 A.L.J. 398.

Arts. 30 and 115.—The law relating to common carriers in India is contained in the Carriers Act and the definition of "common carrier" in S. 2 of that Act excludes the Government from that category. Art. 30 which applies to "carriers" does not, therefore, apply to a suit against the Government relating to carriage by railway. Art. 115 is the appropriate article. I.L.R. (1941) 2 Cal. 160. *See also* 1938 C. 298.

Art. 31.—*See also* under Art. 30.

APPLICATION OF THE ARTICLE.—Article applies to suits against State Railways also as the word used is "carrier" and not "common carrier" which does not include Government for the purpose of the Carriers Act, 1865. 1933 A. 348=144 I.C. 1029. *See also* 1933 A. 466=1933 A.L.J. 796. A suit against a carrier for compensation for non-delivery of goods is governed by Art. 31 whether the suit is laid in contract or tort and Art. 48 would not apply even if an allegation of conversion of goods is made. 6 L. 301=88 I.C. 974; 5 P. 106=1927 P. 335=8 P.L.T. 767; 1928 C. 371; 3 Luck. 102. *See also* as to the applicability of the article in preference to Arts. 48, 49 and 115, 4 P. 482=89 I.C. 672; 90 I.C. 135; 6 P.L.T. 565=90 I.C. 374; 87 I.C. 763=1925 A. 785; 33 A. 544=10 I.C. 122; 39 M. 1=29 M.L.J. 342; 31 I.C. 474=11 N.L.R. 174; 51 I.C. 570=13 S.L.R. 1; 24 I.C. 676 (Art. 49 would apply where there is proof that the goods are still in the possession and custody of the carrier). Suit for price of goods lost by capsizing of boat falls under this article. 1928 C. 806. Suit by consignee for damages for the loss of goods in transit—Art. 31 held applicable. 46 M.L.J. 302=1924 M. 567. Article is not limited to suits by consignees. Suit by consignor also is governed by Art. 31. 52 C. 372=29 C.W.N. 277; 27 C.W.N. 806=1924 C. 173; 44 C. 16, *contra*. Misdelivery is not non-delivery within Art. 31 and is covered by the residuary art. 115. 122 P.W.R. 1913=19 I.C. 477. Suit for wrongful conversion of goods, is not governed by this article but by Art. 48. 1935 A.L.J. 61=1935 A. 156. Goods not lost but in possession of company—Sale by public auction—Suit for damages governed by Art. 48 and not by this article. 1935 A. 601=1935 A.L.J. 793. As to suit to recover the surplus proceeds of sale held by the Railway Company under S. 56 of Railways Act, *see* 44 M. 823=41 M.L.J. 205 cited under Art. 62. Delay in taking delivery—Carrier not converted into bailee for purpose of limitation. 1933 A. 466.

STARTING POINT OF LIMITATION.—Art. 31 fixes one year from the date when the goods ought to have been delivered. 1927 O. 478 (2). Where no time is fixed, the suit may be instituted within a year after the expiry of a reasonable time for the delivery of the goods. 45 A. 43=20 A.L.J. 792. On this point, *see also* 44 C. 16=34 I.C. 130; 13 P.L.T. 695. The question as to when plaintiff's chances of recovery from the defendant became hopeless is immaterial. 6 L. 301=1925

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part V.—Two Years.	
32. Against one who, having a right to use property for specific purposes, perverts it to other purposes.	[1][Two years] ...	When the perversion first becomes known to the person injured thereby.
33. Under the Legal Representatives' Suits Act, 1855, against an executor.	[1][Two years] ...	When the wrong complained of is done.
34. Under the same Act against an administrator.	[1][Two years] ...	Ditto.
35. Under the same Act against any other representative.	[1][Two years] ...	Ditto.
36. For compensation for any mal-	[1][Two years] ...	When the malfeasance, mis-

LEG. REF.

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NOTES.

L. 478; 46 M.L.J. 302=1924 M. 567. But where the defendant failed to send a definite reply for a long time and was responsible for the delay in the institution of the suit, it was not open to him to plead that the suit had been brought too late. 13 P.L.T. 695. Major portion of consignment delivered on a certain date—Presumption is that the rest also ought to have been delivered on the same day. 103 I.C. 383 =1927 P. 335.

Arts. 31 and 48.—The correct article of limitation applicable to a suit against a Railway Company for damages for misdelivery of goods consigned is Art. 31 and not Art. 48. 1937 A.L.J. 794=1937 A. 632.

Arts. 31 and 49.—A suit against a Railway Company for compensation for non-delivery of goods is governed by Art. 31 and not by Art. 49 and must, therefore, be brought within one year of the non-delivery, no matter what the circumstances are which occasion the non-delivery. The company does not cease to be carriers for the purposes of the Limitation Act, because they detain the goods of the plaintiff in respect of a claim for their charges before making delivery. The company's claim arises out of the rights as carriers to claim wharfage, and the plaintiff cannot plead that the company's position as carriers was at an end and that the refusal to deliver the goods was unconnected with their position as carriers when their very claim to detain the goods arose out of that position. 1936 N. 21=31 N.L.R. (Supp.) 79.

Art. 32: APPLICABILITY.—Art. 32 can properly be applied only where the person proceeded against had, before the perversion in respect of which he is being sued took place, a right to " use the property for specific purposes." Art. 32 is not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public, to pass over it. 1928 L. 794; 1929 L. 816. Nor to one who has a *mere license* to use the property. 1934 A. 836. Nor to cases where in substance the plaintiff seeks a greater relief. Where a tenant without the landlord's consent builds upon the *abadi* land which is no part of his tenancy lands, he, by such act, takes exclusive possession of such land to the ouster of the landlord, and a suit by the landlord for the demolition of the building is not suit falling under Art. 32. 1937 A.L.J. 515=1937 A. 472. *See also* 1937 A.L.J. 1231=1938 A. 20. Placing heavier beams on plaintiff's wall and replacing thatched roof by masonry roof, is no perversion of the purpose for which the wall is to be used and a suit for removal of the beams does not come under this article. 46 A. 68=78 I.C. 193. *See also* 1938 A. 20=1937 A.L.J. 1231. But *see contra* 1922 A. 320. Suit for possession under B. T. Act, S. 155, on the ground of tenant's misuse of land is governed by this article. 33 I.C. 923=20 C.W.N. 661. *See also* 8 A. 446; 20 P.L.T. 109=1940 P. 106; 64 C.L.J. 71; 24 C. 160 and 20 A. 519 (suits for removal of trees planted by tenant). Suit for injunction restraining defendant from cultivating land reserved for communal purposes governed by article. 89 I.C. 405=1925 L. 653. Suit for removal of structure erected by tenant or mortgagee and injunction. *See* 1924 A. 814; 12 I.C. 108=8 A.L.J. 914. Also suit to eject the persons who have built upon a common burning ground after appropriating it to their own use. 1929 L. 186. A co-owner of a *shamilat* reserved for specific purposes perverted it by using it for building purpose. A suit by another co-owner for permanent injunction falls within this article. 1929 L. 535=118 I.C. 447. *See also* 115 I.C. 73 (Suit by one of the proprietors of the village against the rest in respect of *shamilat* land). *See also* 14 L. 267=145 I.C. 553 (F.B.); 35 P.L.R. 472=1934 L. 701. The notion that Art. 32 applied only to cases *ex contractu* cannot be regarded as correct. When one proprietor in a village sued another for an injunction to compel the removal of various constructions on a part of the village land, *held*, that the case was governed by Art. 32 and not Art. 120. 121 I.C. 186=1930 L. 283. *See also* 1937 A.L.R. 1093. As to the applicability of the article, *see* 10 A. 634; 26 C. 546 (F.B.); 29 Punj.L.R. 308.

Art. 36: SUITS GOVERNED BY ARTICLE.—Suit for damages in respect of seizure of standing crops. 17 C.W.N. 308=18 I.C. 253. *See also* 41 Bom.

Description of suit.	Period of limitation.	Time from which period begins to run.
feasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	.	feasance or non-feasance takes place.

NOTES.

L.R. 1223 (Illegal distress without jurisdiction —Suit for compensation). If a suit arises out of tort, or if it arises both from tort and contract and there is no waiver of the tort, it has to be brought within the two years allowed by Art. 36. I.L.R. (1938) A. 454=1938 A. 305. *See also* 1939 Lah. 118. Where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The action is one for misfeasance independent of contract and Art. 36 applies to such action. I.L.R. (1938) Nag. 348 =1938 N. 84. Suit to recover damages resulting from conspiracy. 13 I.C. 721=16 C.W.N. 145. Suit for damages for wrongful excommunication from caste is governed by this article. 37 Bom. L.R. 417. Suit for compensation for loss caused by irregular sale in execution of decree. *See* 1924 L. 136. Suit for damages on account o injury to stock caused by attachment before judgment. 38 M.L.J. 324=55 I.C. 786. Suit for damages for wrongful use of water by tenant. 1936 M. 250=70 M.L.J. 255. Suit for compensation for wrongful attachment of movables by the issue of a prohibitory order. 35 I.C. 98 =31 M.L.J. 257. Suit for compensation for deterioration of goods caused by wrongful detention by Police. 90 I.C. 509=42 C.L.J. 203. Suit for damages for institution of wrongful civil proceeding and for slander of goods. 46 C.L.J. 455=1928 C. 1. *See also* 1938 N. 84. Suit for damages for loss of ship caused by collision at sea owing to the negligence of defendant's workmen. 11 B. 133. *See also* 22 M. 342; 32 C. 459; 36 C. 141 (F.B.). Where an attachment by a plaintiff was stayed by a rival claimant pending his suit for establishment of claim and the claimant having misappropriated the goods attached, the attaching decree-holder sued him for compensation, *held*, that Art. 36 and not Art. 48 or 49 applied to the case. 54 A. 467. Where certain movables were attached before judgment, but the suit was dismissed on appeal, a suit for compensation for loss of profits and reputation caused by wrongful detention of goods is governed by Art. 36 read with S. 23. 22 A.L.J. 977=81 I.C. 1038. Loss of goods due to capsizing of boat—Suit for price of goods is governed by Art. 36. 107 I.C. 723=1928 C. 306. Also a suit for damage to house by bursting of Municipal fittings by the negligence of the Municipality. 1929 L. 730. Application under S. 235 of the Companies Act to recover compensation from an ex-director for misfeasance is governed by Art. 36. 8 L. 167=1927 L. 433; 54 B. 226=32 Bom.L.R. 232; 1930 M.W.N. 966=32 L.W. 555. *See* 169 I.C. 640=1937 L. 709 (Suit for damages for making false accusation to Police).

SUITS NOT GOVERNED BY ARTICLE—Art. 36 does not include wrongs committed by trustees in respect of trusts. Art. 120 and not Art. 36 is the proper article applicable to a suit filed against a trustee or ex-trustee, by a co-trustee or a succeeding trustee of a trust, to make good the loss sustained by the trust by reason of the defendant's omission to collect moneys due to the trust. I.L.R. (1938) M. 586=47 L.W. 344 =1938 M. 353=(1938) 1 M.L.J. 334 (F.B.). A suit for compensation for breach of a term in a compromise is governed by Art. 115 and not by Art. 36 or Art. 120; and the fact that such compromise is merged in a decree none the less makes it a contract within the meaning of Art. 115. 1934 P. 7. The defendant borrowed from the plaintiff his car for private use and while it was in his use it met with an accident which resulted in considerable damage to the car. The plaintiff sued to recover the repair charges and interest by way of damages. *Held*, that the case was one of bailment and that the claim for damages was governed by Art. 115 and not Art. 36. 1933 O. 518. Suit for damages against a Sub-Inspector of Police for malicious arrest is governed by Art. 2 and not by Art. 36 if it is found that he had a *bona fide* belief as to his statutory powers, though malice is proved. 1931 A.L.J. 858. Suit to recover money paid under rateable distribution, not governed by article as there is no non-feasance or misfeasance, or malfeasance in respect of the money. 39 A. 322=39 I.C. 532. Also a suit for recovery by assignee of debt attached and received by attaching creditor, subsequent to assignment. 38 M. 972=26 M.L.J. 166 (F.B.). Also suit for damages against a person untruly representing himself to be agent of another and inducing plaintiff to have dealings with him. 38 M. 275 =25 M.L.J. 256. Also suit against director for losses arising through negligence. 5 L. 27. Article inapplicable to claim by the liquidator of a Company under S. 235 of the Companies Act as it is not independent of contract. 47 A. 699=1925 A. 519; 1933 S. 103=143 I.C. 713. Hereditary temple *archaka*—Suit against trustee for emoluments—Limitation—Art. 102 applies and not this Article. 68 M.L.J. 132.

STARTING POINT.—Time runs from the date of the tort and not from the time when it is known to the plaintiff. 33 M. 71. A right to sue for misfeasance of directors of companies arises from the date of misfeasance and is governed either by Art. 120 or Art. 36. 54 M. 153=60 M.L.J. 280=1931 M. 58. *See also* I.L.R. (1938) M. 586=1938 M. 353=(1938) 1 M.L.J. 334 (F.B.) (Suit by succeeding trustee against old trustee to recover loss due to failure to collect trust funds); 1941 P.C. 1. Where each act of depositing silt on plaintiffs' grounds afforded the plaintiffs a separate cause of action, their relief in respect of silt deposited more than two years before suit is barred under Art. 36. 27 S.L.R. 41=1933 S. 176=144 I.C. 452.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years.	
37. For compensation for obstructing a way or a watercourse.	[1][Three years] ...	The date of the obstruction.
38. For compensation for diverting a watercourse.	[1][Three years] ...	The date of the diversion.
39. For compensation for trespass upon immovable property.	[1][Three years] ...	The date of the trespass.
40. For compensation for infringing copyright or any other exclusive privilege.	[1][Three years] ...	The date of the infringement.
41. To restrain waste	[1][Three years] ...	When the waste begins.
42. For compensation for injury caused by an injunction wrongfully obtained.	[1][Three years] ...	When the injunction ceases.
43. Under the [2][Indian Succession Act 1925, section 360 or section 361,] to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	[1][Three years] ...	The date of the payment or distribution.
44. By a ward who has attained majority, to set aside a transfer of property by his guardian.	[1][Three years] ...	When the ward attains majority.

LEG. REF.

[1]Substituted by Act XI of 1923 S. 2 and Sch. I, for "Ditto".

[2] Substituted for the words and figures " Indian Succession Act, 1865, S. 320 or S. 321, or under the Probate and Administration Act, 1881, S. 139 or S. 140 " by Act VIII of 1930, S. 2 and Sch. I.

NOTES.

Arts. 36 and 39.—Where the claim is for damages in respect of removal of clay, it is not a mere claim for compensation founded on trespass so as to attract Art. 39, but it is a claim in respect of a tortious act which comes within the scope of Art. 36. 1941 O. 172.

Arts. 37 and 38.—*See* 82 I.C. 482=1925 N. 189.

Art. 39.—Standing crops are immovable property and the attachment thereof if illegally made constitutes a trespass within this article. 25 M.L.J. 447=21 I.C. 913. *See also* cases cited under Art. 29 on the point. Trespass includes the mischief committed by the trespasser after entering on the land. 23 M.L.J. 618=17 I.C. 605. Thus suits for compensation for injury to crops, (1925) N. 189; 23 M.L.J. 618=17 I.C. 605); or for loss caused by the cutting of gum trees by defendant (20 N.L.R. 80=80 I.C. 769=1924 N. 125); and suit for damages for cutting and carrying away crops [25 C. 692 (F.B.)] would fall under the article. *See also* 1941 O. 172 (Suit for damages for removal of clay).

Art. 40.—Suit for damages for infringement of trade marks is governed by this article. 45 P.R. 1919=51 I.C. 434. As to the applicability of the article *see also* 3 C. 17. Under the copyright Act an infringement takes place not only when a book is re-printed but also when a book in respect of which a copyright exists is old. There is a fresh cause of action on the sale of every book. 1934 A. 922.

Art. 41.—Time begins to run when the waste begins though it is a continuing wrong. *See* 25 B. 644 (F.B.).

Art. 42.—As to the applicability to temporary injunction granted by the lower Court but dissolved on appeal, *see* 16 I.C. 443=16 C.L.J. 34. *See also* 42 C. 550=26 I.C. 296, holding that no suit lies in respect of a permanent injunction obtained maliciously which is subsequently dissolved in appeal.

Art. 44 : APPLICABILITY.—One condition precedent for the application of Art. 44 is that the property should be property belonging to the ward. 1930 O. 82 ; and it must have actually passed out of the hands of the minor. 1930 A.L.J. 1416=1930 A. 858. The Limitation Act draws a distinction between void transactions and voidable transactions, and while a longer period is allowed for remedies arising out of void transactions, a shorter period has been prescribed for all actions seeking to set aside voidable transactions ; and it makes no difference that there is also a prayer for possession. It is also a well-established principle that, whenever there is a specific article applicable to a suit, a general article like Art. 144 will be excluded. 68 M.L.J. 87=40 L.W. 760. Article does not apply where the transaction impeached is void *ab initio* which need not be set aside. 9 I.C. 377=13 C.L.J. 277. *See also* 1936 M. 884=71 M.L.J. 366 ; 30 M. 393 ; 39 M. 456 ; 107 I.C. 897=1928 N. 262 ; 32 L.W. 680=1930 M.W.N. 1067 ; 41 Bom.L.R. 867=1939 B. 427. Sale of minor's land by minor jointly with *de facto* guardian—Latter not described as guardian—Recital that land belongs to both and that consideration was for purposes of both—Sale void and need not to be set aside. Therefore suits to recover property transferred under such alienation will be governed by Art. 144. 43 M.

496=56 I.C. 519=38 M.L.J. 327 ; 12 C. 69. *See also* 33 I.C. 436 (M.). Also a suit to set aside a permanent lease by the mortgagor which is held to be void as being a clog on the equity of redemption. 53 B. 360=1929 B. 186 ; 1938 P. 337 (suit to set aside release by guardian of sub-soil rights of minor mortgagee). So also, where the property has been alienated by the guardian *as if it were his own*, and the mortgagee treats it as the personal property of the guardian and has it sold as such, Art. 44 cannot apply. 1935 A. 417=157 I.C. 118. If a sale is held to be void owing to fraudulent registration, there will be no need to set it aside and a suit to recover possession of the properties covered by the sale deed will not be barred, though brought by the ward about eleven years after the date of the sale. On the other hand, if it is not void, then such a suit has to be regarded as one for setting aside the sale-deed. As possession cannot be obtained unless the document is set aside, such a suit should be brought within three years from the date of the sale. 54 M. 352=1931 M. 45=60 M.L.J. 701. A sale is not void for mere inadequacy of consideration. 28 I.C. 704=2 L.W. 365. Article applicable to cases of mortgage, 31 I.C. 811 ; 1938 M.W.N. 802 ; of exchange, 17 Bom.L.R. 1137 ; and of sale of equity of redemption, 44 B. 742 (suit for redemption cannot be brought without first setting aside sale). A suit by ward's purchaser in combination with ward is within article. 49 B. 309=86 I.C. 879. *See also* 28 A. 30 ; 44 B. 742 ; 1929 M. 313. The article applies to improper alienations made by testamentary guardian appointed by a Hindu father. 38 B. 94=15 Bom.L.R. 882 ; 59 M. 549=1936 M. 346=70 M.L.J. 352. The article applies to a fraudulent sale by guardian, which is only voidable. 34 I.C. 188. It applies to alienations which are unauthorised. 44 B. 742. (*see also* 1929 M. 313) as well as to those which are improper (40 M.L.J. 475), and which are in excess of authority of the guardian [6 L. 447 ; 9 I.C. 377 (C.)] ; 103 I.C. 365 (1). Article does not apply to alienations by unauthorised guardians which are void and need not be set aside. 38 M. 1125=27 M.L.J. 285 ; 34 A. 213 (P.C.) ; 26 I.C. 813=10 N.L.R. 133 ; 83 I.C. 1040=1924 C. 1008 ; 87 I.C. 1018 ; 84 I.C. 923=1925 L. 239 ; 1929 A. 879 ; 1936 Lah. 996 ; 43 Mys.H.C.R. 197. Art. 44 applies to alienations by *de jure* guardians and not to those by *de facto* guardians. 1931 M. 597=1931 M.W.N. 417. The natural father of an adopted minor is not a guardian *de jure* and a suit to set aside an alienation by him can be brought within twelve years. 1931 M. 597. So also a suit to set aside an alienation by the *de facto* guardian of an Indian Christian minor. 60 M.L.J. 695=1931 M. 529. *See also* 71 M.L.J. 366=1936 M. 884 (Suit to declare void alienation by sister of minor when mother is alive). Alienation by minor's elder brother acting as his *de facto* guardian is void. 108 I.C. 529=1928 M. 226 (2) ; 34 A. 213=39 I.A. 49=28 M.L.J. 6 (P.C.). *See also* 27 Bom.L.R. 495=87 I.C. 721 ; 99 I.C. 1050=1927 N. 145. A step-mother of Hindu minor is such unauthorised guardian. 51 I.C. 943=15 N.L.R. 55. Mahomedan mother alienating immovable property of her children is an unauthorised person. 25 C.W.N. 258=62 I.C. 428 ; 45 C. 878 (P.C.) ; 47 C. 713 ; 34 I.C. 85=1 P.L.J. 188. But a Hindu mother is natural guardian whose alienations are covered by this article. 38 M. 118=25 M.L.J. 405 ; 30 M. 303 ; 22 M.L.J. 404=15 I.C. 365 ; 44 B. 742=22 Bom.L.R. 680 ; 53 L.W. 650=(1941) 1 M.L.J. 800 (F.B.) ; 42 B. 626=46 I.C. 22 ; 24 I.C. 110 ; 88 I.C. 278=1925 N. 385 ; 6 L. 44=1925 L. 619 ; 40 L.W. 760=68 M.L.J. 87. But *see* 35 I.C. 551=10 S.L.R. 381, *contra.* An alienation by a Christian mother acting as the natural guardian of her minor child is voidable and not void and a suit by the minor avoiding the transfer should be instituted within the three years prescribed by Art. 44. 57 M. 1062=67 M.L.J. 322. A suit to set aside alienations by the father as guardian of property collaterally inherited by minor is governed by this article. 34 M.L.J. 229=42 I.C. 939. The words of the article are very general and the article is not confined to transfer by certified guardians. 1929 A. 879. A permission obtained by a certified guardian by a fraudulent misrepresentation is a nullity, but a transfer made in pursuance thereof is only voidable. Where the minor sues after attaining majority to set aside the transfer, the suit is governed by Art. 44 and not Art. 144. 1931 A.L.J. 997. Article contemplates " transfer of property " and is inapplicable to cases where the minor is in possession as in the cases of mortgage or sale without parting with possession. 1930 A. 858=52 A. 979.

ALIENATION OF JOINT FAMILY PROPERTY.—Article does not apply to suit to set aside alienation of minor's share by the managing member of a joint Hindu family. Such an undivided share is not property which can be dealt with by guardian. 84 P.R. 1915=29 I.C. 199. *See also* 49 I.C. 118=25 C.L.J. 496 ; 86 I.C. 234=1925 M. 793. Thus, suit to set aside alienation by Hindu father during son's minority is not governed by this article. 33 I.C. 441=17 Bom.L.R. 1137 (Note) ; 32 I.C. 242=12 N.L.R. 12. (It is so even if the manager purports to act as minor's guardian). The fact that the Hindu father executed the sale-deed as guardian of his son will not make the article applicable. 1918 M.W.N. 892=44 I.C. 605. *See also* 38 A. 126 ; 40 C. 966 (P.C.). Article not applicable to suit to set aside alienation of joint family property, by undivided uncle. 35 P.L.R. 722=1934 L. 601 ; by undivided brother, 151 I.C. 1043=36 Bom. L.R. 474=1934 B. 234. A sale deed by a manager of joint Hindu family for other than necessary purposes is void from its inception, and suit to set it aside is not governed by this article. 1929 O. 284.

SUITS FOR POSSESSION.—Suit for the recovery of property transferred during the minority of plaintiff is governed by article as the alienation should first be set aside under this article. 24 C.W.N. 1016=59 I.C. 589 ; 61 I.C. 384 ; 6 L. 447=1925 L. 619 ; 28 I.C. 704=2 L.W. 365 ; 23 I.C. 406=17 O.C. 52. *See also* 1936 L. 996 ; 44 B. 742 ; 25 B. 337 (P.C.) ; 28 M. 423 ; 23 M. 271 (P.C.) ; 1929 M. 313 ; 116 I.C. 893. To a suit by a ward on attaining majority, for possession of property transferred by his guardian, a pardanashin lady, under a transfer void *ab*

Description of suit.	Period of limitation.	Time from which period begins to run.
45. To contest an award under any of the following Regulations of the Bengal Code:— The Bengal Land-revenue Settlement Regulation, 1822. The Bengal Land-revenue Settlement Regulation, 1825. The Bengal Land-revenue (Settlement and Deputy Collectors) Regulation, 1833.	[1][Three years] ..	The date of the final award or order in the case.
46. By a party bound by such award to recover any propepty comprised therein.	[1][Three years] ...	The date of the final award or order in the case.
47. By any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by any one claiming under such person, to recover the property comprised in such order.	[1][Three years] ..	The date of the final order in the case.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

initio, Art. 44 has no application. To such a suit Art. 142 applies. 1940 O.W.N. 131=1941 O. 172. Sale of minor's property by certificated guardian without sanction—Possession not delivered—Suit by minor more than three years after attaining majority to set aside sale and partition—Article not applicable. 52 A. 979=1930 A. 858.

DEFENCE NOT BARRED.—Though remedy is barred under Art. 44, plea of invalidity of sale can be set up in defence to a suit by vendee for possession. 42 M. 36=35 M.L.J. 652. But *see* 41 M. 102=33 M.L.J. 309; I.L.R. (1940) All. 580=1940 All. 416. On the point whether ward's right to property is extinguished by article, *see* 30 M. 393; 41 M. 102.

TRANSFEREE—LEGAL REPRESENTATIVE.—The transferee from the ward stands in the same position as the ward himself and if the latter's suit is barred, the transferee is in no better position and Art. 44 applies. In such a suit the onus is on the plaintiff to prove when his vendor attained majority. 1929 M. 313=56 M.L.J. 332. *See also* 1939 O.W.N. 241=1939 O. 122; 34 Bom.L.R. 1512. If the ward dies during his minority, Art. 44 will not apply to a suit by his legal representative for recovering the property alienated by the guardian, whereas if the ward dies after the attainment of majority, Art. 44 will apply. 56 M.L.J. 332. Suit for possession by ward against alienee from purchaser from guardian—Art. 44 and not Art. 144 applies. 1938 M.W.N. 403=1938 M. 677.

Art. 45.—Order of Collector directing entry of defendant's name in settlement record as occupancy tenant is award within this article. 63 I.C. 161=33 C.L.J. 317. Article is applicable only to a suit to set aside an award made by Revenue authorities and not to one to recover possession. 33 C.L.J. 497=1922 C. 345. The award contemplated by Art. 45 presupposes a contest between the parties and a decision after proper investigation into the points at issue; when there is no contest or decision on investigation, Art. 45 does not apply. 55 C. 201=1927 C. 902 (49 C. 37, Rel.).

Art. 46.—A decision by Collector of the title between two raiyats is not an award within Art. 46. 17 I.C. 881=17 C.W.N. 55. Suit for possession of lands comprised in an award filed in Court but not executed, is governed by this Article. 52 C. 314=52 I.A. 79=48 M.L.J. 20 (P.C.).

Art. 47: APPLICABILITY.—Art. 47 does not apply to a case where at the time of the passing of the Magistrate's order there was no existing legal right in the plaintiff to sue for possession, and such a right accrued to him only subsequent to that date. 1927 M. 586=52 M.L.J. 482. *See also* 111 I.C. 152=1929 M. 38 (2); 1941 Pesh. 65. Art. 47 applies only to those cases in which the Magistrate has declared one of the parties to be entitled to possession until evicted therefrom in due course of law or has restored possession to a party found to have been forcibly and wrongfully dispossessed within two months of his initial order. The essential requirement, therefore, for the application of the article is the order of the Magistrate in respect of possession of the property. Where, therefore, in a boundary dispute, the Magistrate orders demarcation of the boundary in accordance with an order passed previously by a settlement officer, and the parties accept that position and compromise the proceedings under S. 145, Cr. P. Code, which are consigned, it cannot be regarded as an order of the Magistrate respecting possession made under the Criminal Procedure Code within the meaning of the article, and it has accordingly no application. 164 I.C. 118=1936 O. 387. Order under S. 145, Cr. P. Code—Suit for possession of

Description of suit.	Period of limitation.	Time from which period begins to run.
48. For specific movable property	[1][Three years] ...	When the person having the

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

property comprised in order. *See* 45 A. 306=21 A.L.J. 102. *See also* 45 B. 1135=62 I. C. 224; 84 P.R. 1912=14 I.C. 566; 38 M. 432=21 I.C. 564; 28 C. 86=5 C.W.N. 160. Art. 47 does not apply to a suit brought by a plaintiff in whose favour an order under S. 145, Cr. P. Code, has been passed. 99 I.C. 532=1927 M. 304. *See also* 1941 Pesh. 65. It does not matter if the order is made on withdrawal of a party and without taking evidence. 42 I.C. 768=22 C. W.N. 342. But, at the time of suit, there must be an existing right to sue for possession. 19 C. 646. Article not confined to orders under Ch. XII of the Cr. P. Code. Order restoring possession under S. 522, Cr. P. Code, is within the article. 1925 M. 799=48 M.L.J. 372. Article is inapplicable to a suit for declaration of rights. 35 C. 851; 20 B. 270; or for partition of property. 15 B. 299; 51 C.L.J. 461. But plaintiffs cannot escape the bar by framing the suit as one for declaration after taking forcible possession. 45 A. 306=21 A.L.J. 102 or by framing the suit as one for partition. *See* 3 Bom. L.R. 594. If the Court merely attaches the property and puts it in the hand of the receiver, it cannot be called an order respecting possession of the property. 20 A. 120. *See also* 26 M. 410. Article applies to suits based on title. 38 M. 432=21 I.C. 564. But *see* 28 B. 601 (F.B.) (previous decision by Mamlatdar). A suit denying a right of way as affirmed by an order of a Mamlatdar under Mamlatdars' Courts Act, is a suit respecting possession of immovable property and as between Arts. 14 and 47, Art. 47 applies to such suit. 33 Bom.L.R. 517=1931 B. 256.

ORDER WITHOUT JURISDICTION.—Where the order is found to be without jurisdiction, the case would be governed by Art. 142. 60 I.C. 860 (C.). *See also* 1912 P.R. 84; 9 M.L.T. 91. But for this effect to arise, a vice must clearly be established which infects the whole proceedings. 82 I.C. 691=1925 O. 190. Mere irregularities will not render the article inapplicable 42 I.C. 768=22 C.W.N. 342.

PERSONS BOUND BY ORDER, ETC.—Article does not bar a person who was no party to the criminal proceedings in which the order was passed. 17 I.C. 589=23 M.L.J. 348; 23 C. 731 (F.B.); 28 B. 215; 15 P. 481=17 P.L.T. 726=1936 P. 629. Proceedings under S. 145, Cr. P. Code, about crops—Order as to possession of crops alone—Subsequent suit after 3 years—Parties and area in dispute not same—Suit, if barred. 1934 O. 449=11 O.W.N. 1165. The successor in interest must claim title under a title derived subsequent to the order. Otherwise article would not apply. 23 C. 731 (F.B.); 6 Bom.L.R. 305. *See also* 18 B. 348; 15 P. 481=17 P.L.T. 726=1936 P. 629. Members of joint family getting by survivorship do not claim under the person against whom the adverse order might have been made. 66 I.C. 678=8 O.L.J. 410. *See also* 1937 A.W.R. 235=1937 A. 300. Order against the manager of a joint Hindu family as such binds other members of the family. 52 M. 787=57 M.L.J. 228. Also persons not parties to the order but having notice of it are bound by it and a suit by them falls within this article. 57 M.L.J. 228=52 M. 787. But *see* 1935 L. 115 (2), where he was only a witness.

TRUST PROPERTY.—S. 145, Cr. P. Code, relates to the question of possession of immovable property and its application does not depend upon whether the claim is made by a private owner or on behalf of a trust. If there is a *bona fide* dispute between a trust and a third person and the other conditions of the section are satisfied, it falls within the cognisance of the Magistrate under S. 145, and to an order passed by a Magistrate in such a case, Art. 47 applies. There is no justification for holding that it is only the particular trustee who was a party to a proceeding under S. 145 that must be held bound by that order or by the limitation prescribed in Art. 47. If the trustee purported to act on behalf of the trust, the proper interpretation of the order will be that the trust itself was a party and must be held bound by that order. 1936 M. 188=70 M.L.J. 441. *See also* 1935 P. 164. Suit against widow of late high priest of temple by present high priest—Claim to recover war bonds belonging to deity or their substitutes or their value—Limitation—High priest—If "trustee." *See* 19 P.L.T. 367.

STARTING POINT.—Time runs from date of Magistrate's order and not the date of the High Court's refusal to exercise its revisional powers. 43 I.C. 955. There is no reason why an order passed by the High Court in the exercise of its power of revision under S. 439, Cr. P. Code, should not be regarded as a final order within the meaning of Art. 47, whether the High Court ultimately interferes in revision or not, its order is none the less a final order. Where in proceedings under S. 145, Cr. P. Code, a Magistrate passes an order against which an application in revision is filed under S. 435, Cr. P. Code, before the Sessions Judge, who makes a reference to the High Court under S. 438, Cr. P. Code, with a recommendation that the Magistrate's order should be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order passed by the High Court under S. 439, Cr. P. Code, is the final order in the case for purposes of Art. 47, and limitation for a suit in the Civil Court runs from that date and not from the date of the order of the Magistrate although the High Court discharges the reference. The final order in Col. 3 of Art. 47 must be understood to refer to the order contemplated by Col. 1 of the same article. 20 Pat. 735=22 P.L.T. 202=1941 Pat. 372. On this point, *see also* 6 C. 709; 28 I.C. 367 (M.); 12 C.W.N. 840. Order under S. 145 (6), Cr. P. Code—No suit by unsuccessful party—Subsequent eviction of successful party by *stranger*—Suit by *unsuccessful* party later on against successful party and stranger—Bar. *See* 16 P.L.T. 183=1935 P. 164.

Arts. 48 and 49: SCOPE AND APPLICABILITY.—

Description of suit.	Period of limitation.	Time from which period begins to run.
lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.		right to the possession of the property first learns in whose possession it is.
[1][48-A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	[2][Three years] ...	When the sale becomes known to the plaintiff.]

LEG. REF.

[1] Inserted by Act I of 1929 S. 3.

[2] Substituted by Act XI of 1923 S. 2 and Sch. I, for "Ditto".

NOTES.

Arts. 48 and 49 must be read together, and so read, Art. 49 would apply to a suit for recovery of specific movable property which is other than the specific movable property described in Art. 48; and if the property falls within the description of Art. 48, it would be excluded from the operation of Art. 49, which is a residuary article. 165 I.C. 184=38 Bom.L.R. 712=1936 B. 322. Arts. 48 and 49 are intended to apply to suits for recovery of specific movable property or for compensation for the same. Art. 48 is more special, whereas Art. 49 is general. The plaintiff's remedy is one for the recovery of the specific movable property, or in the alternative for compensation for wrongfully taking, injuring or wrongfully detaining. In such a case the period begins to run from the time when the property was wrongfully taken, injured or the defendant's possession became unlawful. Distinction between scope of Arts. 48 and 49 pointed out. 54 A. 467=1932 A. 256. By delaying taking delivery of goods, the liability of the carrier as a carrier cannot be continued for an indefinite period, and for the period following the arrival of the goods, if there be no delivery, the carrier's liability is that of a bailee and not that of a carrier, but the carrier does not become the bailee for the purpose of limitation and Art. 48 or Art. 49 does not apply, but Art. 31 applies. 1933 A. 466=1933 A.L.J. 796. Arts. 48 and 49 apply, whether the remedy sought is the recovery of property or compensation or both. 23 M. 621 ; 7 I.C. 447 (B.). *See also* 20 M. 449. Art. 48 applicable only when the movable property lost is still in the possession of the defendants and not when the property cannot be traced. 133 I.C. 453=1931 P. 436. A suit to recover movables deposited with the defendant is not governed by Art. 49 but by Art. 146. 33 M. 56. *See also* 6 R. 547. Injury to property in Art. 49 refers to injury to it while in custody of some person other than owner. 11 B. 133. Suit by mortgagee for compensation for injury to specific movable property mortgaged is governed by Art. 49. 17 I.C. 906 ; 28 M. 208. Art. 49 does not apply to a suit for damages for institution of wrongful civil proceedings and for slander of goods. 46 C.L.J. 455. Suit for value of crops wrongfully attached, cut and removed is governed by Art. 48 or 49. 105 I.C. 763=1928 C. 106. A suit to recover articles bailed is governed by Art. 115 and not by Art. 49. 126 I.C. 682=1930 O. 395. Misdelivery of goods by Railway Company—Suit for damages. 1937 A.W.R. 613.

SPECIFIC MOVABLE PROPERTY—MONEY IS.—*See* 37 M. 381 ; 5 A. 341 ; 29 A. 579 ; 14 I.C. 254 (M.) ; 1930 A. 397. Government securities are. *See* 32 C. 799. Standing crops are movable property as soon as severed. 22 C. 877 ; 25 C. 692 (F.B.). *See also* 36 C. 141. As to suits to recover title-deeds, *see* 12 Bom.L.R. 513 ; 15 M. 157 ; 35 M. 636 (Such cases generally fall under Art. 49 and time runs from the date of demand and refusal). Art. 49 applies only to a suit for "specific movable property," which means property of which one can demand the delivery *in specie*. It is not applicable to a suit for the recovery of a share in certain movable property on declaration of title thereto. 36 C.W.N. 758 =55 C.L.J. 420. Art. 48 applies only to suits for such articles as have been acquired by theft, dishonest misappropriation or conversion. 12 B.L.R. 513. Thus, a suit for value of coal wrongfully extracted and carried away is governed by Art. 48. 55 I.C. 113=1 P.L.T. 84. *See also* 52 I.C. 361 ; 8 P. 516=1929 P.C. 69 (P.C.). Also a suit to recover stolen property or its value. 148 P.W.R. 1911=11 I.C. 446. A suit, however, against a carrier on ground of unlawful conversion of goods is not governed by Art. 49 but by Art. 31. 6 L. 301=88 I.C. 979. *See also* 39 M. 1=30 I.C. 840=29 M.L.J. 342 (F.B.). But *see* 1935 A.L.J. 61=1935 A. 156. Where Art. 48 was held to apply. *See also* 1935 A. 601 (Suit for compensation for non-delivery framed in tort not governed by Art. 49). The word "conversion" as meaning dishonest conversion —Possession with some person contemplated by the article. 101 I.C. 62=1927 C. 117. An action of trover claiming damages for the conversion by the defendants of specific movable property, *viz.*, coal wrongfully gotten from the plaintiffs' mines and sold or otherwise disposed of by the defendants to their own use, is governed by Art. 48. Art. 48 alone refers to conversion and conversion cannot be split into two classes, one dishonest and the other not dishonest. "Or" preceding conversion is equivalent to "or by." 56 I.A. 93=8 P. 516=1929 P.C. 69=56 M.L.J. 517 (P.C.). *See also* 133 I.C. 453=1931 P. 436. Art. 48 applies to all conversions, whether dishonest or not. Where the trespass is due to inadvertence and want of reasonable care, both these views of the conversion fall within the terms of Art. 48, under which the limitation period of three years begins to run when the

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]48-B. To set aside sale of movable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration,	Three years. ...	When the sale becomes known to the plaintiff.
49. For other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	[2][Three years]. ..	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.

LEG. REF.

[1] Inserted by Act I of 1929. (*See* notes under S. 10, *supra.*)

[2] Substituted by Act XI of 1923, for "Ditto."

NOTES.

person having the right to possession of the property first learns in whose possession it is. (1927 C. 117, reversed and 1929 P.C. 69, Rel. on.) 34 C.W.N. 483=1930 P.C. 113=58 M.L.J. 536 (P.C.). A sale of goods by the railway company without the formality provided by S. 55 of the Railways Act is wrongful, and a suit for damages for such wrongful sale is one for conversion and is governed by Art. 48 and the starting date of limitation is the date when the plaintiff, *i.e.*, the person who has the right to possession, first learns of the act of conversion. 151 I.C. 955=1934 P. 507. *See also* 1936 N. 21 (Suit against railway company for non-delivery of goods—Goods detained by company for non-payment of wharfage).

STARTING OF LIMITATION.—Limitation begins to run under Art. 48 from the time it is known to the plaintiff in whose wrongful possession it is while it runs under Art. 49 from the time when possession becomes unlawful. 1914 M.W.N. 319. *See also* 11 B. 133; 161 I.C. 855=1936 P. 179. Under Art. 49, the starting point of limitation is when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. Detention, so as to amount to conversion affording a cause of action, must become adverse to the owner or other person entitled to possession, *i.e.*, the defendant, must have an intention to keep the property in fraud of the plaintiff. The usual method of proving that a detention is adverse is to show that the plaintiff demanded delivery of the property and that the defendant refused or neglected to comply with the demand. 38 Bom.L.R. 712=1936 B. 322. *See also* 1937 Rang. 523. According to the plain meaning of Art. 48, time begins to run against the owner of the property lost, etc., from the time when he first discovers that it is in the possession of the defendant, and there is no question as to whether the owner of the property mentioned in the article was or was not reasonably diligent to discover in whose possession the property he is seeking to recover is. There is no warrant for reading into the article words which are not there. The words "whose possession" in column 3 mean the possession of some definite person who can be identified and against whom effective relief for restoration of the property in question can be obtained. 38 Bom.L.R. 712=1936 B. 322. As to suit for recovery of property or in the alternative for compensation, *see* 1932 A.L.J. 241=1932 A. 256, cited *supra*.

PLEA OF LIMITATION—ONUS OF PROOF.—In a suit governed by Art. 48, the onus is on the plaintiff to prove that he first learnt within three years of the suit that the property which he seeks to recover was in the possession of the defendant, *i.e.*, that he obtained knowledge of the defendant's possession of the property within three years of the suit and that is all. If he proves this, the defendant. in order to succeed in his plea of limitation, has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to suit. 38 Bom.L.R. 712=1936 B. 322.

Art. 49.—Art. 49 contemplates a case of a cause of action arising *ex delicto* whether or not the wrongful taking or wrongful detention was preceded by a contract. The material date is the date when detention becomes wrongful. Even if possession was at its inception under a contract, that would not preclude the application of Art. 49, for it comes into operation only when possession becomes wrongful. In cases where the original possession of the defendant is lawful but becomes unlawful by reason of certain facts, Art. 49 is the ordinary article to apply. I.L.R. (1939) N. 498=1939 N. 177. Possession, which to start with is permissive, cannot become unlawful until he asserts a title in himself or until he refuses to return possession. A mere demand by the plaintiff would not be enough. A suit by an owner of certain empty oil drums or their value from the defendant who had taken them on loan undertaking to return them whenever required, is in time, and not barred by Art. 49, if filed within three years of the refusal by the defendant to return them, though beyond three years of the date of demand by plaintiff. 55 L.W. 56=(1942) 1 M.L.J. 187.

POSSESSION ORIGINALLY PERMISSIVE SUBSEQUENTLY BECOMING UNLAWFUL.—Mere detention beyond period does not render possession originally permissive unlawful. There should be demand and refusal to make it unlawful, and time begins to run from the date of such demand and refusal under Art. 49. 42 A. 45=52 I.C. 382. *See also* 27 I.C. 637=13 A.L.J. 81; 33 M. 56=20 M.L.J. 41. It is so even if there is assertion of ownership on the part of the defendant. 2 R. 555=85 I.C. 10=1925 R. 146. *See also* 54 I.C. 159. Possession of title-deeds by mortgagee after satisfaction of debt secured thereby becomes

Description of suit.	Period of limitation.	Time from which period begins to run.
50. For the hire of animals, vehicles, boats or household furniture.	[1][Three years] ...	When the hire becomes payable.
51. For the balance of money advanced in payment of goods to be delivered.	[1][Three years] ..	When the goods ought to be delivered.
[2]52. For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	[1][Three years] ...	The date of the delivery of goods.

LEG. REF.

[1] Substituted by Act XI of 1923, for "Ditto"i

[2] For the period of limitation for these and certain other suits in the province of the Punjab, *see* the Punjab Loans Limitation Act (Punj. Act I of 1904) and S. 29 (1) (*b*) of this Act.

NOTES.

wrongful from the time there is demand and refusal. 15 M. 157. *See also* 31 C. 519; 12 C.W.N. 1010. But a suit for movable property originally obtained lawfully but subsequently converted or retained unlawfully is governed by Art. 48 and not by Art. 49. Time runs from the time when plaintiff has knowledge of the conversion. 38 M. 783=23 I.C. 174. Thus, a suit for jewel or its value, which was pledged with the defendant by the commission agent, to whom it had been given for sale, is governed by Art. 48. 40 M. 678=30 M.L.J. 587. But *see* 12 C.W.N. 1010. Non-payment of rent of article sold on hire-purchase system does not amount to wrongful detention. 27 I.C. 637=13 A.L.J. 81. Sale on approval—Suit for the price is governed by Art. 49 and limitation begins to run when the defendant after receipt of a notice from the plaintiff failed to return them. 1928 O. 87 (1)=105 I.C. 224. Suit to recover ornaments—Stridhan of mother—Art. 49 applies. 32 C.W.N. 133=106 I.C. 885. Pronotes left with another either as security or for safe custody—Suit in respect of. Art. 145 and not 49 applies. 1938 A.W.R. 59 =1938 P.C. 110=47 L. W. 649 (P.C.).

Arts. 49, 115 and 145.—Applicability—Gold bought from and left with, defendant for making ornaments—Delivery of one ornament and non-delivery of other—Suit for ornament not delivered or for value of same—Limitation—Starting point. *See* 20 N.L.J. 198.

Art. 51.—'When goods ought to be delivered'—Meaning of. *See* 31 I.C. 474=11 N.L.R. 174.

Art. 52 : SCOPE.—*See* 63 I.C. 435=19 A.L.J. 555=1922 P. 30; 130 I.C. 574=1931 L. 309. In a suit by a tradesman for the price of goods sold and delivered from time to time, the customer having from time to time made payments without specifying any particular item for which the payments were made, the limitation is governed by Art. 52 in respect of each item as delivered. 155 I.C. 44=1935 A.L.J. 33=1933 A. 53. The plaintiff in a case like this is entitled to appropriate the payments to the earlier times in the account but not to credit them to the entire balance due up to date in the sense of saving limitation for each and every item. Art. 85 is not applicable to such a case. 1933A. 53. *See also* 24 Bom.L.R. 998=1923 B. 113=77 I.C. 943; I.L.R. (1939) Nag. 137=1938 N.L.J. 157 =1938 N. 266. Goods sold and delivered and moneys received on account on various dates—Suit for balance—Cause of action—Limitation—Starting point. 42 Bom.L.R. 227=1940 B. 158. Article inapplicable where contract is to return the goods in kind. 4 L.L.J. 268=1922 L. 271; also to suit based on contract of commission agency. 1941 C. 245. Suit to recover arrears of subscription to newspaper is governed by article. 7 Bom.L.R. 190. *See also* 27 M. 243 (F.B.). So also a suit for recovery of the price of medicines supplied. 133 I.C. 537=1931 A.L.J. 949=1931 A. 752. Where goods were sold and delivered to one and were wrongly debited against another person and the mistake being subsequently discovered, the vendor sued the right person for the price, *held*, the suit was governed by Art. 52 and not Art. 96. 142 I.C. 470=1933 Sind 32=27 S.L.R. 81. *See also* 40 P.L.R. 143. Sale of goods—Payments made by purchaser on account—Suit by seller for balance—Art. 52 applies. 42 P.L.R. 272=1939 L. 307. Suit to recover money due under a contract for supply of materials and construction of flooring is governed by Art. 115 and not by this article. 2 L. 376=1922 L. 108. On the point, *see also* 103 P.R. 1913=22 I.C. 576. A suit against the Cantonment Board for the price of goods supplied is governed by Art. 52. 1934 A.L.J. 805=1934 A. 436. Date of delivery of a railway receipt is the date of delivery of goods for the purposes of Art. 52. 108 I.C. 801 (2)= 1928 N. 181; 38 M. 664. In a simple transaction of sale of goods, the liability to pay the full price accrues on the date of the sale. The fact that the purchaser, not having all the money in his hands, agrees to pay the balance with interest at a certain rate does not prevent the accruing of the vendor's right to recover the whole price and time begins to run from the date of the sale. 1931 A.L.J. 363=1931 A. 229. Where the goods sold remain in the custody of the vendor as security for the unpaid price of the goods and the vendor sues the vendee for a personal decree against him and not for enforcement of any charge on the security, the suit is not governed by Art. 120, but by the three years' rule of limitation. (*Ibid.*) On this article, *see also* 130 I.C. 574=1931 L. 309.

Arts. 52 and 8.—Sale of articles of food by shopkeeper—Latter also running restaurant—

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]53. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	[2][Three years] ...	When the period of credit expires.
54. For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	[2][Three years] ...	When the period of the proposed bill elapses.
55. For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	[2][Three years] ...	The date of the sale.
56. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	[2][Three years] ..	When the work is done.
[1]57. For money payable fot money lent.	[2][Three years] ...	When the loan is made.

LEG. REF.

[1] *See* Foot-note (2) on page 3482, *supra.*

[2] Substituted by Act XI of 1923 for "Ditto",

NOTES.

Suit for their price—Limitation. *See* 1939 Rang. L.R. 626 cited under S. 8, *supra.*

Art. 53.—When the price is not claimable as of right, on the date the goods are delivered, it is sale on credit within Art. 53. 7 A. 284. The word " thavanai " entered on a bill of sale implies credit and a suit for money due in respect of the transaction is governed by this Article. 47 M.L.J. 844=48 M. 275.

Art. 54: APPLICABILITY—CONDITIONS.—For Art. 54 to apply, it must be alleged that the hundis were not executed as promised. If the defendants wish to make this allegation, it is for them to make it in their written statement or their pleadings clearly and without any attempt to mislead the plaintiffs. 162 I.C. 302=1936 L. 328.

Art. 56—*See* 2 L. 276=1922 L. 198; 103 P.R. 1913=22 I.C. 570 cited under Art. 52. *See also* 24 B. 260 at 274 (F.B.). A suit for printing work done is governed by this article. 30 C. 687. *See also* 5 O.W.N. 350; 1938 Nag. 286 (Suit for remuneration by goldsmith for work done). A village carpenter is an artisan within the meaning of Art. 7 and a suit for wages by him is governed by Art. 7 and not by Art. 102 or Art. 56. 152 I.C. 885=1934 N. 260. A suit by an Advocate for his fees when there is no contract, is governed by Art. 56. 75 C.L.J. 7.

Art. 57.—When money is lent from time to time, limitation runs as regards each loan from the respective dates of the advances. 33 C. 1047 (P.C.). A suit for recovery of money on a *bahi* account, where the dealings between the parties were simple money loans as between creditor and debtor and the account was not mutual in any sense of the term, is governed by Art. 57 and not by Art. 85. 12 L. 420=1931 L. 241. Neither selling the goods by the pawnee nor the recovery of the debt out of the sale proceeds bars the pawnee from suing for the debt under the contract of loan. 104 I.C. 641=1927 N. 346. *See* 30 B. 218 and 24 A. 251. The plaintiff was a dealer in timber and the defendant did the business of sawing wood. The plaintiff stated that, between certain dates, a certain sum of money was advanced to the defendant and the plaintiff sued to recover the money lent, less the value of the work done by the defendant. *Held*, that the suit was governed by Art. 57 and not by Art. 115. 147 I.C. 295=1934 A. 126. A suit for recovery of money secured by a pledge is really a suit for money lent and advanced, and a suit to recover the balance due after the sale of the pledged property is none the less a suit for money lent, and the period of limitation is three years under Art. 57. The fact that movable property has been pledged does not change the nature of the suit. 37 Bom.L.R. 165. *See also* 1929 P. 605; 160 I.C. 986=1936 Pesh. 43 (Suit on personal covenant contained in mortgage deed). Where money is lent under a special contract fixing date of repayment, that date fixes the period of limitation under Art. 115. 10 C. 1033; 15 M. 380; 37 M. 175; 52 I.C. 456 (M.). Where no date is fixed for repayment, the loan is payable at once and time runs from the date of the loan even against the surety. 132 I.C. 590=1931 L. 691. As to applicability to suit on balance struck and for recovery of a further advance in cash, *see* 4 L.L.J. 69=1922 L. 204; 148 P.W.R. 1916=35 I.C. 577; to suit on " thavanai " account, *see* 13 Bur.L.T. 31=57 I.C. 908; 36 I.C. 497. Where the transaction between the parties was conducted as between a debtor and a creditor, and on a certain date the balance was struck and it was agreed that the debtor should pay interest from that date on the amount found due by him and the creditor sued to enforce his rights, *held*, that the suit was on an account stated and that it was governed by Art. 64 or perhaps Art. 57 and not by Art. 85. 131 I.C. 292=1931 L. 233. Where on hundis being held inadmissible in evidence for want of proper stamp, suit is brought on original con-

Description of suit.	Period of limitation.	Time from which period begins to run.
58. Like suit when the lender has given a cheque for the money.	[1][Three years] ..	When the cheque is paid.
[2]59. For money lent under an agreement that it shall be payable on demand.	[1][Three years] ..	When the loan is made.

LEG. REF.

[1] Substituted by Act XI of 1923, for "Ditto".

[2] *See* foot-note (2) on page 3482, *supra*.

NOTES.

sideration over three years after the date of payment, it is barred under this article. 51 I.C. 945=29 C.L.J. 508. Suit to recover money on account of advance in kind and cash is not governed by article. 37 I.C. 300. Where the transaction between parties starts as a deposit and subsequently there are several items of deposits and withdrawals in the handwriting of the depositee, the transaction is one between customer and banker and to such a case Art. 60 applies and Art. 57 does not apply. 15 L. 242 =1934 L. 42. In case of doubt whether a transaction amounts to a loan or a deposit, the presumption is that it is a deposit and not a loan. 107 I.C. 290=1928 M. 499. *See also* 1937 Rang.L.R. 254=1937 R. 340.

Arts. 57 and 96.—Where a customer of a bank draws cheques on it knowing that the funds to his credit are not sufficient to them but expecting the bank nevertheless to honour them, he impliedly applies to the bank for an overdraft or a loan. A suit for recovery of the amounts due by the customer in such a case is governed by Art. 57 and must be instituted within three years from the date on which the earliest of the various sums paid to the customer or to his orders in respect of the cheques so drawn. The mere fact that some clerk or officer of the bank has been careless in honouring cheques drawn by the customer when presented for payment would not make the moneys paid under a mistake so as to mark Art. 96 applicable to the suit for recovery of such sums, when there is no evidence to show that the manager was or could have been under any misapprehension that the amounts were covered by security, especially when the customer had been a customer for a very considerable time and was a man in a large way of business. Art. 96 would only apply to a case where money is paid to another under the influence of a mistake, that is, upon a supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue. But where the money was not in fact paid under any such mistake, Art. 96 cannot apply. 197 I.C. 449=1941 P.W.N. 638.

Arts. 57 and 58-60.—Art. 58 applies to a case in which the lender draws his own cheque and gives it to the borrower. It does not govern a suit in which he transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. Such a suit comes within the ambit of Art. 57 only. 65 I.A. 132=I.L.R. (1938) A. 326=1938 P.C. 66=(1938) 1 M.L.J. 785 (P.C.). Deposit being a species of loan, if Art. 60 does not apply then either Art. 57 or Art. 59 will apply. 1939 A.M.L.J. 6. Suit on personal covenant—Fictitious property included in mortgage to give jurisdiction — Registration invalid—Suit for money. *See* 41 C.W.N. 783=1937 C. 347.

Art. 58.—The period of limitation under this article commences to run from the date the cheque is paid and not when the cheque is handed over. 28 A. 54. *See also* 38 B. 293=23 I.C. 779. A cheque is paid under Art. 58 when it is cashed by the lender's bankers, for it is only then that the lender's money passes into the hands of the borrower and the loan is made by the former to the latter. The mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period prescribed by Art. 58 begin to run against the lender when the cheque received by the borrower is given by him to his own bank and the amount is credited to him by the bank. 65 I.A. 132= I.L.R. (1938) A. 326=40 Bom.L.R. 752=1938 P.C. 66=(1938) 1 M.L.J. 785 (P.C.).

Arts. 59 and 60 : SCOPE AND APPLICABILITY.—In the case of a registered bond, the article which is applicable, is not Art. 59 but Art. 116. 151 I.C. 426=1934 R. 227. Arts. 59 and 60 deal with transactions of two different natures; while the former applies to loans, the latter applies to deposits. That a transaction is a deposit, has to be proved, undoubtedly by the person alleging it to be so. The test to determine whether a particular transaction is one of loan 'or one of deposit' is to ascertain whether the money paid or deposited was in the nature of an advance of loan so as to create the relationship of creditor and debtor between the parties or was merely a deposit without bringing into existence such relationship. 184 I.C. 559=1939 All. 378. Where money is deposited by a customer with a banker, the death of the banker does not change the character of the sum. It cannot be said that the liability of the heirs of the banker is in any way different from that which existed between the original banker and the depositor. The money does not become a loan in the hands of the banker's heirs, so as to make Art. 59 applicable. Art. 60 would still apply both to the principal and the interest. The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and when the claim is a single claim for principal and interest, there cannot be two periods of limitation applicable. 185 I.C. 339=1940 P. 129. The word "deposit" used in Art. 60 covers all payments of the customer's moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands. 29 Bom.L.R. 423=1927 B. 362; 17 L. 481=165 I.C. 699=1936 L. 718; 15 P. 709=165 I.C. 593=1936 P. 539. *See*

NOTES.

102 I.C. 145=1927 B. 433. Suit for recovery of money—Loan or deposit—Distinction. *See* 25 Bom.L.R. 503=1924 B. 28; 37 A. 292=28 I.C. 949. *See* 44 C.W.N. 1041 (P.C.); *also* 20 B. 8; 19 B. 775; 22 I.C. 936 (M.); 102 I.C. 145=1927 B. 433; 140 I.C. 96=1932 A.L.J. 261. Doubt arising whether a transaction amounts to a loan or deposit, the presumption is that it is a deposit, and not a loan. 107 I.C. 290=1928 M. 499 (1). For the period of limitation prescribed in Art. 60, the *terminus a quo* is not the date of the last balance but the date "when the demand is made." 15 L. 242=151 I.C. 712=1934 L. 42. Art. 60 is not limited to suits against bankers only. Where money is deposited for safe custody, with liberty to depositee to lend the money to others and pay a certain rate of interest to the depositors, Art. 60 applies and a demand is necessary before time begins to run. 66 I.C. 752=23 C.W.N. 981. *See also* 52 I.C. 25; 4 P.R. 1919=47 I.C. 592; 39 M. 1081=30 M.L.J. 245; 98 I.C. 554=1927 P. 91. The investment of the *stridhanam* moneys in a firm of Nattukottai Chetties amounts to deposit and a suit brought within three years from the date of notice demanding payment is in time under Art. 60. The demand under Art. 60 should be an unqualified demand for the whole sum due. 63 M.L.J. 232=1932 M. 685. Under Art. 60, the making of demand is entirely dependent upon the volition of the plaintiff, and the period of limitation may be indefinitely prolonged, and a suit may be instituted without even a demand being made, in which case no question of limitation arises. 1933 P. 701. A suit to recover a deposit with a Nattukottai Chetty on "thavanai" terms, is governed by Art. 60, both as regards principal and interest. 43 M. 629=38 M.L.J. 437. *See also* 1935 M.W.N. 559=41 L.W. 536. The fact that money is deposited on the understanding that it was to be paid on demand after a certain time does not take the case out of the article. 47 I.C. 948=1918 M.W.N. 564. *See also* 20 P.L.T. 84=1939 P. 261. But if the money is to be paid at the end of the "thavanai" period, the case is governed by Art. 115. 43 I.C. 972=1918 M.W.N. 242. *See also* 42 I.C. 573=1917 M.W.N. 858; 52 I.C. 456=10 L.W. 67. For similar cases, *see* 20 B. 8; 19 B. 352. Where, after the expiry of the "thavanai" contract, no fresh contract is entered into, the money is held as a deposit and Art. 60 applies. 57 I.C. 908. But *see* 36 I.C. 497. As to application of article, *see also* 15 L. 242=1934 L. 42. (noted under Art. 57, *supra*). Where money is paid to defendant for purchase of goods, on the understanding that the balance remaining after paying for the purchase should be given back on demand, there is deposit within Art. 60. 28 C. 393. Art. 60 governs suit for gold mohurs deposited, delivery of which is refused on demand. 47 A. 643=17 A.L.J. 888. Deposit must be by agreement payable on demand. 1928 M. 509. It is not necessary that the agreement to pay the amount due on demand must be "express." This Art. 60 applies even if the agreement is to be "implied" from the course of dealings between the parties or the other circumstances of the case. 15 L. 242=1934 L. 42; 164 I.C. 50=1936 L. 587. *See also* 35 P.L.R. 91=1934 L. 179. The suit itself may be taken to constitute a demand for the purpose of this Art. 60. 15 L. 242. The demand contemplated in Art. 60 must be a legal demand. It must be made by a person capable of giving a valid discharge in the event of payment being made. If the deposit is payable to more persons than one it equally follows that the demand must be made by them all or at least by one of them duly authorized by the others and in a position to give a legal discharge on behalf of himself and the others. In the same way the demand referred to in Art. 60 must be a demand made directly on the party with whom the deposit lies in his capacity as depositee. The demand must be an unqualified demand for the whole sum due. A claim to deposit not addressed to depositees but put forward in a written statement in a suit in which both the claimant and the depositee were co-defendants is not a demand of the nature contemplated in Art. 60. I.L.R. (1939) Kar. 602=1939 Sind 173. Where a banker with whom deposit is made on current account is adjudicated insolvent, tender of proof of debt and claim made in insolvency by the creditor is not a demand within the meaning of Art. 60. 1938 Rang.L.R. 468=1938 Rang. 335. The demand contemplated by Art. 60 is a demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment. 1938 Rang.L.R. 468=1938 Rang. 335. Where there is no evidence that the dissolution of partnership is notified to customers of the firm, then on the customer's demanding payment from either of the partners his cause of action has arisen against them all. 15 Pat. 709=1936 P. 539. Time under Art. 60 can only run from the date of demand, if that demand is part of the cause of action. Where as a result of a demand some payment is made, a later demand would give a fresh cause of action, only if full payment had been made on the first demand and the second demand was for a sum not due when the first demand was made. 1939 A.M.L.J. 66. In the case of money deposited with a banker, there must ordinarily be a demand or something that can be deemed equivalent to a demand or take the place of a demand as part of the action for a suit to recover it under Art. 60 of the Limitation Act. The necessity for a demand may, however, be got rid of by special contract or waiver. A repudiation by the banker of the customer's right to be paid any particular sum would be a waiver of any demand in respect of such sum. The defendant banker cannot simultaneously repudiate liability to pay the amount and insist that a demand previous to suit is essential to its maintainability. 185 I.C. 339=1940 Com.C. 61=1940 P. 129. Suit to recover money invested in Bank in fixed deposit is not within this article. 1930 A.L.J. 1157. When the deposit for the recovery of which the action is brought, is subsequently held to be invalid and insufficient, limitation runs not from the date of deposit but from the date of its appropriation. 9 O.W.N. 414=1932 O. 222.

LOAN AND DEPOSIT—DISTINCTION.—*See* 1936 L. 718; 1936 P 539; 1932 A.L.J. 261; 13 Luck. 323=1937 O.W.N 831=1937 O. 394 (Claim against co-sharer

Description of suit.	Period of limitation.	Time from which period begins to run.
60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	[1][Three years] ..	When the demand is made,
61. For money payable to the plaintiff for money paid for the defendant.	[1][Three years] ..	When the money is paid.

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto".

NOTES.

in respect of improvement made to joint property—Art. 120 applies). The distinction between a loan and a deposit is that, in the case of a loan, it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement. In the case of a deposit it is the duty of the depositor to go for the money to the banker or the depositee and to make a demand for it. Where a certain sum is deposited with stipulations that money will not be withdrawn for three years, and after that period, depositors to withdraw it jointly, and in the meantime interest to be paid periodically, such a transaction is not a loan, but amounts to a deposit with the person deposited, on the stipulation that it shall carry interest at a specified rate and shall be payable to the depositors on demand and with a further stipulation that such a demand shall not be made within three years. To such a transaction, Art. 60 applies. (1936 L. 587, Affirm.) 39 P.L.R. 377=1937 L. 81. In order to determine whether a bailment of a certain sum of money is a deposit for safe custody or a loan, the test to be applied is whether the bailee is to keep the moneys till the bailor asks for it or whether there is an obligation on his part to seek out the bailor and repay him. Where the appellant who received moneys from the respondent put them in his Bank account and credited them to the respondent and whenever the appellant paid any of these moneys to the respondent it was because the respondent had asked for them, and further there was no security, no receipt in writing, no promissory note and no agreement as to rate of interest. *Held*, that the moneys were simply held by the appellant for safe custody and that he was really acting as a Banker for the respondent and that, therefore, a suit by the respondent for the recovery of the moneys was governed by Art. 60. 189 I.C. 444=42 Bom.L.R. 971=44 C.W.N. 1041=1940 P.C. 132 (P.C.). The character of a deposit with a banker is not altered by the fact that the person in whose name the money is deposited agrees in writing with another person that a part of it should belong to that other from the date of the agreement. The money still remains as a deposit, and suit to recover it by the respective parties is governed by Art. 60. The right to sue does not accrue until there is a demand and refusal. Art. 115 cannot apply to such a case, as the claim can in no sense be one for compensation for breach of a contract. 47 L.W. 118=1938 M. 236=(1938) 1 M.L.J. 56.

Art. 60.—Where there is no evidence that the dissolution of partnership is notified to customers of the firm, then on the customer's demanding payment from either of the partners, his cause of action has arisen against them all. 15 P. 799=165 I.C. 593=1936 P. 539. The agreement that the money shall be payable on demand within Art. 60 need not be an express agreement. It can be an implied agreement, and often is implied from the circumstances of the deposit. 180 I.C. 300=1939 R. 42; 1939 A.M.L.J. 6. Deposit on current account—Insolvency of bank—Proof of claim—Annulment of adjudication—Receiver acting under S. 37 (1) of Provincial Insolvency Act—Suit for deposit—Limitation—Starting point. 1938 R. 335=1938 Rang.L.R. 468.

Art. 61 : APPLICABILITY.—The article applies to cases where the plaintiff has paid money for the defendant. The payment must have been at the defendant's request express or implied. *See* 34 M. 167; 29 A. 627; 5 Bom.L.R. 725. Payments made on behalf of another need not be accepted or adopted by the person on whose behalf they are made. 1931 L. 344. When one person places money with another person to secure a regular monthly payment to a third person, the transaction amounts to one of deposit and the person with whom the money is deposited becomes, as regards that particular transaction, the banker of the depositor. Art. 60 of Limitation Act applies to such a case. 1939 A.M.L.J. 49. Article does not apply where a charge is created by statute for the claim. 35 C.W.N. 678=1931 C. 493. Where plaintiff borrows money for defendant's benefit and is compelled to pay the amount himself, suit for recovery of the amount paid by him is governed by Art. 61 or 83, and time runs when the plaintiff paid the amount. 29 A. 627; 5 Bom.L.R. 725. *See* however 38 M. 381. As to suit for reimbursement where plaintiff assumes responsibility for the defendant's debts which he is subsequently compelled to pay to the creditors, *see* 26 M. 322; 46 I.C. 161 (O.) *See also* 70 M.L.J. 537. Where in a compromise one party agrees to pay off certain creditor and on the failure of fulfilment of the term the other party pays off the creditor, then limitation runs from the date of the payment by the other party to creditor. 1935 L. 307. A suit for recovery of money paid to save property of another from execution sale falls under this article. 78 I.C. 738=1925 O. 322. *See also* 7 A.L.J. 585. Also suit by puisne mortgagee against mortgagor for reimbursement of money which he had paid to discharge a prior mortgage decree. 19 A.L.J. 840=63 I.C. 604. *See also* 1929 A. 943 (discharge of prior mortgage). But *see* 1935 O. 245=1935 O.W.N. 272 (case of co-mortgagee redeeming). Also suit to recover money paid to defendant's

Description of suit.	Period of limitation.	Time from which period begins to run.
62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	[1][Three years] ..	When the money is received.

LEG. REF.

[1] Substituted by Act XI of 1923, for "Ditto."

NOTES.

guardian for purposes of minor's necessity. 35 C. 320. *See also* 41 Bom.L.R. 585=1939 B. 394; 1939 M.W.N. 798. Also suit by plaintiff for recovery of revenue paid by him in respect of property of which he has been dispossessed. 42 A. 61=52 I.C. 632. Also claim by a divorced Mahomedan wife to recover arrear of maintenance for the child. 51 I.C. 968=21 Bom.L.R. 713. Where the mortgagee has failed to pay a creditor of the mortgagor according to the terms of the mortgage and the mortgagor himself had to pay the same, suit for recovery of the amount is governed by this article. 53 I.C. 87; 1922 A. 409. But *see contra* 1931 A.L.J. 533=1931 A. 549, holding that such a suit was governed by Art. 120. *See also* as to suit by vendor against vendee for a payment which ought to have been made by the vendee according to the terms of the sale-deed, 14 L. 380=1933 L. 109 (time runs from the date when the vendor is actually indemnified). Where an agent borrows moneys wtihout principal's authority and pays the same to principal's creditors, suit to recover the amount paid is governed by this article. 52 I.C. 414=10 L.W. 33. *See also* 34 M. 167=20 M.L.J. 989. But *see* 34 Bom.L.R. 1268=1932 B. 593; 31 P.L.R. 666 (suit by agent against principal held to fall under Art. 83). Where the defendant purchased goods and wrongfully got the transaction entered in the name of the plaintiff and a decree was obtained against the plaintiff for the price, a suit by plaintiff before paying the decree amount was held to be premature as plaintiff had not paid the amount and that the cause of action would arise only on actual payment. 1933 L. 404. Sale in execution of mortgage decree—Deposit by purchaser of equity of redemption under O. 21, R. 89—Suit to recover the amount from mortgagor is not covered by Art. 61. 51 A. 626=1929 A. 309. Suit by landlord to recover from tenant a moiety of the road cess paid by him under the Madras Local Boards Act whether governed by Art. 61. *See* 33 M.L.J. 369=42 I.C. 502. On appeal, *see* 52 I.C. 468=1919 M.W.N. 365, holding such suit is governed by Art. 120. *See also* 20 N.L.J. 73 (lessee and sub-lessee). As to suit for contribution by a partner of a firm who has paid whole or more than his share of the amount due from all the partners, *see* 5 L.L.J. 310=1924 L. 112. *See also* 52 I.C. 243=1919 M.W.N. 429; 38 L.W. 858=65 M.L.J. 789. Limitation runs from the date of payment by plaintiff and any later payment by defendant towards the joint liability does not save limitation. *See also* 26 M. 886; 48 I.C. 336 (O.); 19 C.W.N. 193 (P.C.). As to suit for contribution by co-sharer from whom money in excess of his share has been realised by coercive process by the creditor, *see* 26 C.W.N. 340; 19 A. 244; 25 C. 844 (P.C.); 44 L. W. 135=1936 M. 782. Suit by *de facto* guardian to recover expenses incurred on behalf of minor is governed by this article, and time runs from the date of expenditure and not from time when ward attains majority. 37 P.L.R. 246=1935 L. 437. A suit to get back money deposited as security is governed either by Art. 61 or by Art. 115. 108 I.C. 49 (1). A suit for reimbursement by a purchaser, whose purchase has been set aside as a sham transaction, of the sum of money he had paid for the redemption of an undisclosed mortgage on the property is governed by Art. 61. 32 Bom.L.R. 1376=1931 B. 39. Also a suit against *A* and *B* by a receiver put in charge of the property pending determination of rights between *A* and *B* to recover the decree amounts paid by him to the watchmen for guarding the property. 6 Luck. 102=1930 O. 420. Suit by trustee of emple to recover money from former trustee, is not governed by this article, nor by S. 10; but Art. 120 applies to it. 40 L.W. 275=1934 M. 542. When a receiver or manager is appointed by the Court, he is appointed on behalf of all persons interested in the property. Hence the expenses incurred by the receiver of an estate in instituting a suit to recover money due to the estate are incurred by him on behalf of and for the person who owns the estate, and they are "money payable to the plaintiff for money paid for the defendant" within the meaning of Art. 61. Therefore, a suit by the quondam receiver to recover the amount spent by him in instituting a suit on behalf of the estate is governed by Art. 61 and not by Art. 83 or 120. The circumstance that the receiver was also benefited by the suit does not make the suit any the less a suit on behalf of the owner of the estate or take it out of the purview of Art. 61. 1935 M. 594=69 M.L.J. 539.

Arts. 61, 96 and 120.—Applicability—*R* and *N* borrowing money on pronote from *J* and *M*—*J* alone realizing amount by draft on *R* and *N*—Suit by *M* against *R* and *N* decreed for half the amount on ground that *J* had no authority to receive payment on behalf of *M*—Decree confirmed in appeal—*M* recovering the amount in execution—Suit by *R* and *N* against *J*—Limitation—Starting point. *See* 1936 L. 747; 40 P.L.R. 300=1938 L. 99. Sale certificate—Stamps purchased and paid for by one of two joint purchasers—Suit for contribution—Limitation runs not from date of purchase but only from date on which stamps were actually used. 52 L.W. 508=(1940) 2 M.L.J. 494.

Art. 62: SCOPE AND APPLICATION.—Article is applicable where the defendant has received money which, in justice and equity, belongs to

NOTES.

the plaintiff under such circumstances as in law render the receipt of it a receipt by the defendant to plaintiff's use. 49 C. 886=36 C.L.J. 295. *See also* 32 C. 527 ; 37 A. 233 ; 25 M.L.J. 531 ; 19 C. 128 ; 31 M. 230 ; 40 I.C. 173 ; 19 I.C. 3 =1913 M.W.N. 218 ; 101 I.C. 322=1927 A. 437 ; 1928 N. 256. As to the nature of such action, *see* 41 M. 923=35 M.L.J. 581. The test of what is "receiving for use of" is not the intention of the defendant to receive it as such. If money to which another is entitled is received without valuable consideration, that is receiving for use of that other. 39 M. 62=27 M.L.J. 640=26 I.C. 219 ; 52 I.C. 580=85 P.R. 1919. *See also* 36 P.R. 1913=17 I.C. 311. Art. 62 governs cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff, and is not applicable to cases where the defendant is asked to account for properties and moneys when the person managing or collecting them is entitled to just allowance. 182 I.C. 426=1938 L. 139. Art. 62 of the Limitation Act is applicable to cases where the defendant has received money which in justice and equity belongs to the plaintiff but in circumstances where the receipt by the defendant would be regarded in law as a receipt to the plaintiff's use. Where the receipt by the defendant, is on his own account and is not or cannot be regarded as one on behalf of the plaintiff, Art. 62 can have no application. 55 L.W. 90=(1942) 1 M.L.J. 274. Art. 62 applies to suits falling under the category well-known in English Law as "suits for moneys had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff. 7 R. 540. Although privity of contract is not necessary for the purposes of Art. 62, there must be some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money, or some mistake or ignorance of facts on the part of the man who paid the money, or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and defendant. 118 I.C. 444=1929 L. 290 ; 41 M. 923. *See also* 1941 M. 767=(1941) 2 M.L.J. 222 ; 1941 M. 742. Article does not apply to an equitable claim against a trustee for an account and ascertainment of what may be due. 8 R. 645=58 I.A. 1=130 I.C. 609=1931 P.C. 9=60 M.L.J. 1 (P.C.) ; 6 C. 120. Art. 62 contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. 1930 R. 197 ; 143 I.C. 496=1933 M. 524=37 L.W. 631 ; 64 M.L.J. 574. Subscription collected for a particular purpose—Suit for recovery from person making collections —Limitation—Starting point. (*Ibid.*) Where a mortgagee receives a certain sum from Insurance Company, the property mortgaged being destroyed by fire, a suit for accounts by mortgagor is governed by Art. 120 and not by Art. 62, inasmuch as the mortgagee has a lien on the moneys he received and is entitled to retain those moneys until his mortgage is satisfied. 1930 R. 197. Relinquishment of rights—Money paid in consideration—Failure of deed to take effect—Claim for refund of money paid—Limitation is under Art 62 or Art. 97. 1930 A.L.J. 1112. Limitation for a suit to recover money retained with defendant as stake-holder to be paid to successful party in a suit, is three years from the date of decision in the suit. 1935 A.W.R. 500.

MONEY HAD AND RECEIVED.—Assets realized and debts paid by a person appointed by deceased —Suit by sister of the deceased to recover her share of inheritance is suit for money had and received by the defendant for her use and is governed by this article. 37 A. 40=27 I.C. 533 =12 A.L.J. 1256. *See also* 1939 A. 442. But where the amount of maintenance granted under a will is to come out of income of particular property and the defendants are in possession of the property under the will, the proper article to apply to the suit for arrears of such maintenance against the defendant is Art. 123 and not Art. 62. 35 C.W.N. 307=1931 C. 670. A sum due for rent by mortgagee to the mortgagor is not money had and received. 41 M. 488=34 M.L.J. 193. Surplus proceeds of sale held by Railway Company under S. 56 of the Railways Act are received for plaintiff's use within this article. 44 M. 823=41 M.L.J. 205. *See also* 18 C. 234 (sale for arrears of Government revenue). Money deposited in Court in *usum jusha bentis* and withdrawn by a person having no right to it may be held to be received for the use of the plaintiff. 33 A. 450=10 I.C. 730. Article applies to a suit to recover money alleged to have been collected *benami* for the plaintiff. 28 I.C. 495=1915 M.W.N. 215. *See also* (1941) 2 M.L.J. 222=1941 M. 767. A claim for arrears of revenue is governed by Art. 62 and not Art. 131 which applies only to a suit to establish a periodically recurring right. 55 B. 193=33 Bom.L.R. 120=1931 B. 189. A suit to recover money paid to a defendant under S. 73, C. P. Code, is a suit for money paid to him for plaintiff's use. 39 M. 62=27 M.L.J. 640. A payment of money made to a person with a view to its reaching the party entitled to it, is a payment for the use of the latter. 20 C.W.N. 983 ; 1 P.L.J. 374 ; 104 I.C. 704. *See also* 16 P. 184=18 P.L.T. 162. Where a person has lost money by theft he can sue the thief for the recovery of the money, quite apart from the crime, but if he does, the suit must be framed as one for money had and received, and the suit then falls under Art. 62. I.L.R. (1941) M. 414=1941 M. 391=(1941) 1 M.L.J. 27.

OTHER ILLUSTRATIVE CASES.—Suit to recover money from mutawalli received by him on behalf of a deity is governed by Art. 62. 50 A. 265=25 A.L.J. 1047=1928 A. 134. Suit for accounts against shebaits—Defendants collecting rents and profits for benefit of idol—Money received belonging to idol and payable to him—Art. 62 applies. 27 A.L.J. 229=114 I.C. 734. But *see* 8 R. 645 (P.C.), cited *supra*. Art. 62 does not apply to an equitable claim against a trustee liable to account for an account and ascertainment of what may be due. 58 I.A. 1=8 R. 645 =60 M.L.J. 1 (P.C.). Nor to suits for accounts between principals and agents. 1933 A.L.J. 1009=1933 A. 642. *See also* 41 Bom.L.R. 215. Nor to suit for recovery of money under S. 68, T. P. Act. 161 I.C. 461=1936 R. 80. Agreement of partnership—Undertaking to finance litigation of third party—Realisation of money

NOTES.

by defendant—Suit by plaintiff for accounts after notice—Article is not applicable. 36 Bom. L.R. 1068=1934 B. 491. Nor to suit by principal for moneys misappropriated by agent. 60 C. 1347=149 I.C. 996=38 C.W.N. 211=1934 C. 238. This is governed by Art. 89. 60 C. 1347=1934 C. 238. Suit for profits received by agent after termination of agency is governed by this article. 41 A. 635=52 I.C. 373; 29 I.C. 986=13 A.L.J. 494; 1925 M.W.N. 23=27 I.C. 807. *See also* 39 M. 62. Also suit for money received by the pleader of the plaintiffs for their use. 35 C.L.J. 330=1922 C. 499. Suit by an heir of the deceased person to recover his share of the debt due to the deceased, which had been realised by another heir holding succession certificate is governed by Art. 62. 37 A. 434=29 I.C. 347. *See also* 37 A. 233=27 I.C. 712; 50 C. 610=27 C.W.N. 941; 69 I.C. 274=41 M.L.J. 274 (one member of joint Hindu family collecting debts due to family); 25 M.L.J. 531=21 I.C. 394. So also suit for recovery of share of compensation money for the house acquired by Government. 2 L.L.J. 353. Also suit by the other members to recover their shares in outstandings left undivided at partition and subsequently realised by one member. 32 M. 191; 24 C. 309. Where however various debts owned in common had been collected and rents and profits received,a suit for money had and received under Art. 62 does not lie in respect of such moneys, the appropriate remedy being a suit for account. 45 M. 648=42 M.L.J. 507 (F.B.). *See also* 12 I.C. 586=13 Bom.L.R. 1041; I.L.R. (1940) 1 C. 110; 1939 A. 442; 1937 Pesh. 28; 40 M. 291=30 M.L.J. 341 (one co-sharer appointed by Government as manager to collect rent). Tenants-in-common—Suit *inter se* to recover share of profits—Art. 120 and not Art. 62 is applicable. 1929 O. 83=4 Luck. 265. *See also* 1937 Pesh. 28. In a suit for mense profits 7 years after a decree for partition, there having been no actual partition in spite of the decree, it was held the rents and profits received by one co-owner in respect of undivided lands could not be considered to be money payable by him to others as money received for their use within Art. 62 and that Art. 120 applied to the case. 131 I.C. 511=1931 R. 150. *See also* 16 P. 184=18 P.L.T. 162; 1937 Pesh. 28. Also a suit by members of an unregistered company for refund of their subscriptions falls under Art. 120. 7 R. 540. Suit by karnavan of a Malabar tarwad against a junior member for money realised by the latter is governed by this article. 37 M. 381=14 I.C. 254; 1928 L. 688. Suit for compensation by purchaser where patni sale set aside by suit—Article applicable. *See* 46 C. 620=36 M.L.J. 557=50 I.C. 444 (P.C.). *See also* 3 A. 354; 38 A. 676. Money advanced by plaintiff for a mortgage or sale which is void *ab initio*, is money received by the defendant for plaintiff's use under Art. 62. 39 B. 358=28 I.C. 442; 40 B. 614=36 I.C. 564; 55 B. 565=33 Bom.L.R. 1092; 44 P.R. 1918=46 I.C. 26; 81 I.C. 878=1925 N. 130. *See also* 118 I.C. 203. In a suit to recover money paid under a void agreement the *terminus a quo* for purposes of limitation is the date of the agreement, that being the time at which (in the absence of special circumstances) the agreement was discovered to be void within the meaning of S. 65 of the Contract Act. [50 C. 929 (P.C.), Rel. on.] 60 I.A. 13=54 A. 1067=64 M.L.J. 403 (P.C.). Where a plaintiff, who had advanced money on a mortgage, repudiates it himself and files a suit for the money paid, such a suit is not a suit for compensation for breach of contract and is governed either by Art. 62 or by Art. 97, according as to whether the contract is void or voidable and not Art. 116. 145 I.C. 186=1933 L. 581=34 P.L.R. 96. Decree setting aside execution sale in suit by stranger—Absence of saleable interest in judgment-debtor—Suit by purchaser for refund of purchase-money—Limitation. *Held*, that the suit was governed by Art. 62 and not by Art. 120, as the suit was in substance one for money had and received. 41 L.W. 305=1935 M. 354=68 M.L.J. 630. Where the purchaser is put in possession but is subsequently dispossessed by a person with paramount title, suit for refund of money paid is governed by Art. 97 and not Art. 62 as such money has been paid under an existing consideration which afterwards fails. 37 B. 538=20 I.C. 254=15 Bom.L.R. 559; 55 B. 565=134 I.C. 1157=33 Bom.L.R. 1092; 38 M. 887=23 I.C. 570; 1925 R. 113 (2). *See also* 44 I.C. 719; 55 I.C. 93; 47 I.C. 886; 118 I.C. 203; 133 I.C. 76=1931 S. 141 (Art. 116 held applicable); 32 P.L.R. 457=1931 L. 448 (mortgagor who paid money for redemption to one person as representing the mortgagee and was subsequently compelled to pay it once over to another, suing the former). Suit for damages for breach of a covenant for indemnity contained in a registered deed is governed by Art. 116 and not Art. 62 or 97. 1932 A.L.J. 317=1932 A. 358; 1933 M. 126=64 M.L.J. 336. Suit on original liability on failure of consideration in a contract affecting it, is governed by Art. 97 and not Art. 61. 13 L. 188=137 I.C. 828=1932 L. 382. Where the plaintiff failed to enforce specific performance of a contract to sell land, a suit for the recovery of advance paid by him is governed by Art. 97 and not by Art. 62. 40 I.C. 893=1917 M.W.N. 447. Suit to recover arrears of jagir income, wrongfully received and appropriated by defendants, is governed by this article. 46 P.W.R. 1914=23 I.C. 445. Also suit for recovery of money advanced under a void agreement. 47 I.C. 214=5 O.L.J. 277. But *see* 48 M.L.J. 598=88 I.C. 557 (Art. 96 applied). Assignment of mortgage bond which had been repaid—Suit against assignor by assignee—Art. 120 and not this article applies. 1935 P. 159. Land acquisition—Money paid to person apparently entitled—Suit by person having interest in land for money so paid. Art. 120 and not this article applies. 1935 P. 42. Also suit for money paid as patni rent without consideration. 60 I.C. 698=33 C.L.J. 366. Also a suit for refund of money illegally collected as profession-tax. 1932 M.W.N. 1089. Art. 62 and not Art. 96 applies to a suit to recover money paid to a Municipality as tax on the ground that the tax was illegally levied by the Municipality. 189. I.C. 678=42 Bom.L.R. 491=1940Bom. 252. Also a claim for the refund of premium paid by the tenant. 33 Bom.L.R. 1563=1932 B. 86. Also suit for enhanced amount of rent paid under protest is governed by this article. 27 Bom.L.R

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]63. For money payable for interest upon money due from the defendant to the plaintiff.	[2][Three years] ..	When the interest becomes due.
[2]64. For money payable to the plaintiff for money found to be due from	[2][Three years] ..	When the accounts are stated in writing signed by the defendant or

LEG. REF.

[1] For the period of limitation for these and certain other suits in the Punjab, *see* Punj. Act I of 1904 and S. 29 (1) (*h*) of this Act.

[2] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

645=89 I.C. 65. Also suit by Official Receiver for money of judgment-debtor attached before insolvency but paid to the decree-holder after insolvency. 41 M.L.J. 334=45 M. 70. *See also* 47 L.W. 557=1938 M. 532=(1938) 1 M.L.J. 682. [Art. 96 is to be preferred to Art. 62 in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount due. 4 P. 448=1925 P. 765.] Money paid by mortgagors after preliminary decree but before final decree—Mortgagee not certifying payment nor crediting it as directed by mortgagor holds it to the use of the mortgagor. 1927 A. 710=50 A. 111. The income of joint family property which accrues during period between preliminary and final decrees in a partition suit, constitutes joint family property; and if that is not divided by final decree, a suit to enforce a share in such income is governed by Art. 127 and not by this article. 1935 N. 137. Same agent for two principals—Money belonging to one lent by the agent to the other—Liability of the other to re-pay the loan arises on the date of actual payment and Art. 62 applies. 49 A. 520=1927 A. 161. Where a suit for recovery of certain sums from the sons of a deceased *karpardar* or agent, it is found that the *karpardar* was under no liability to pay over the sums received by him to the principal directly on receipt, and that there was a running account, the arrangement being that he should keep in his hands sufficient funds out of the collections for costs of litigation on behalf of his principal, the proper article applicable to the suit is not Art. 62 and limitation will not run from the date of each receipt by the deceased agent: Art. 89 or 120 will apply to the case. 7 Cut.L.T. 87.

Arts. 62, 97 and 120.—Where a suit is for profits of property entrusted to the defendant by the plaintiffs for safe custody and management neither Art. 62 nor 109 apply to the case. It is Art. 120 that applies. Art. 62 cannot apply to a case in which profits and not money is sought to be recovered. It only applies when the defendant has received money as distinct from profits into his hands. Nor could Art. 109 apply because the receipt of profits was not wrongful. The defendant was in rightful possession and received the profits rightfully but it is his retention that was wrongful. 1941 N.L.J. 184=1941 N. 181. Where before a decree for specific performance could be passed in respect of an agreement to assign a particular decree, the defendant withdraws the money deposited in respect of the said decree and the plaintiff files a suit to recover it, it is a suit to enforce an equitable claim to follow the money withdrawn by the defendant contrary to agreement and as such it does not fall under Art. 62 but comes under Art. 120 of the Act, the starting point being the date of the conveyance to him of the decree. 1941 N.L.J. 665. Art. 62 applies to cases in which there is a failure of consideration from the very beginning, or, in other words, where the transaction is void *ab initio* and the defendant is deemed to have received the money for the plaintiff's use. On the other hand, Art. 97 applies to cases where the consideration fails afterwards by reason of some subsequent event, as in the case of voidable transactions. Where, therefore, an auction-purchaser, who under a decree obtained by a third party loses a part of the property purchased by him, brings a suit against the decree-holder for refund of the purchase-money, the suit is governed by Art. 62 or 97 and not by Art. 120. 166 I.C. 705=1937 O. 286=1937 O.W.N. 83. Consideration in a contract of sale is not money paid for the use of the payer, so as to attract the operation of Art. 62 of the Limitation Act, except perhaps when the contract is of such a nature that it is void in law *ab initio*. A test for the applicability of Art. 62 is whether when the money was paid it was recoverable immediately by the plaintiff. Art. 97 and not Art. 62 would govern a suit for recovery of part purchase price paid on sale which afterwards goes off by reason of the failure of the buyer to complete payment. Art. 120 also cannot be applied to such a case. I.L.R. (1941) Kar. 495. *See also* 1941 M. 767=(1941) 2 M.L.J. 222 (Claim against fraudulent transferee from benamidar—Relationship between benamidar and real owner is one in the nature of trust).

Arts. 62 and 116.—Where a registered perpetual lease by one of the joint tenants contains a covenant to refund the nazarana in case of dispossession and the lessee knowing of the defective title of the lessor does not take any action but obtains possession and is dispossessed after ten years and sues for the refund of the nazarana, it is Art. 116 and not Art. 62 that applies to the suit and the starting point is the date of dispossession. 1941 O.W.N. 1182=1942 O. 82.

Art. 63.—Art. 63 is applicable to suit for recovery of interest on "thavanai" deposits. *See* 43 M. 629=38 M.L.J. 437=58 I.C. 639. On this article, *see also* 40 I.C. 229=20 O.C. 152; 3 A. 328.

Art. 64: WHAT IS AN ACCOUNT STATED.—An account stated is one where several cross items are set-off one against the other and the balance is struck in favour of one of the parties, the law implying a new promise by the other party to pay the balance. 5 P.L.J. 34=1 P.L.T.

Description of suit.	Period of limitation.	Time from which period begins to run.
the defendant to the plaintiff on accounts stated between them.		his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

NOTES.

190. *See also* 9 B. 516 ; 23 A. 502 ; 54 A. 506 =1932 A. 461 ; 22 B. 513 ; 86 I.C. 942=1925 M. 1147 ; 106 I.C. 53 ; 108 I.C. 600=1928 L. 459 ; 138 I.C. 542=1932 L. 273. There must be items on both sides of accounts. I.L.R. (1940) N. 441=1938 N. 180 ; 1941 C. 595. Where the account upon which the suit is based includes a certain sum, which was brought forward from the previous year's account, it is clearly for the defendant to prove that the dues brought forward from the previous year's account were time-barred, and in any case the mere fact that some of the items are statute-barred can be of no avail to him where the suit has been brought on account stated. [56 A. 376 (P.C.), Rel. on.] 167 I.C. 652=1937 P. 348. Where the book of account contained entries of account of only one of the parties and there was nothing to show that there was an account stated between the parties, Art. 64 had no application. 1930 A. 467 ; 54 A. 506. *See also* 1929 L. 263 (balance struck and signed and accepted was novation of contract). Mere striking of the balance due on a certain date in the unsigned account books will not furnish a cause of action on account stated under Art. 64. 38 I.C. 227=32 M.L.J. 536. *See also* 10 M. 199 ; 5 P.L.J. 34=1 P.L.T. 190 ; I.L.R. (1938) A. 741=1938 A.L.J. 773=1938 A. 504 ; 27 S.L.R. 300=1933 S. 324. The expression "account stated" has a technical meaning. Where the accounts were gone into, a balance was struck and the defendant signed the same but there was nothing before the Court to show that the several items for which credit had been given to the defendant were due to him from the plaintiff. *Held*, that it was not a case of account stated and that Art. 64 was inapplicable. There can be account stated, although the balance of indebtedness is throughout in favour of one side. It is irrelevant whether the debt in favour of the final creditor is created at the outset by one large payment or consists of several sums of principal and several sums of interest. Nor is it material whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings. In any event items must be ascertained and agreed on each side before the balance can be struck and settled. (English case-law discussed). (54 A. 506, Reversed). 61 I.A. 273=56 A. 376 =67 M.L.J. 110 (P.C.). The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side, *pro tanto* go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debts as true and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action. The account stated is accordingly binding, save that it may be reopened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement. 67 M.L.J. 110 (P.C.) ; 1938 C. 861 ; 189 I.C. 802 (Some items time barred, effect of). The acknowledgment which forms the basis of an account stated must be an acknowledgment within time. An account stated may contain some time-barred items and yet the account stated may form the basis of a suit. But if the whole account is time-barred, then the ban imposed by S. 25 (3) of the Contract Act would apply. 1942 N.L.J. 248 ; 131 I.C. 867=1931 A. 375. Where the account is not open and current at the time of the suit and the account closed and balance struck, Art. 64 is applicable. 1922 L. 182. *See also* 130 I.C. 570. Where the transaction between the parties were conducted as between a debtor and creditor, and on a certain date the balance was struck and it was agreed that the debtor should pay interest from that date on the amount found due by him and the creditor sued to enforce his rights. *Held*, that the suit was on an account stated and that it was governed by Art. 64 or perhaps Art. 57 and not by Art. 85. *Held, further*, that the mere fact that subsequent to the date of the striking of the balance, there were four items on each side of the account did not have the effect of converting it into a mutual, open and current account. 32 P.L.R. 65=1931 L. 233. Suit on balance of account treated as one on account stated. *See* 3 L. 326=1922 L. 425. As to suit for money on accounts, based on decree, *see* 22 L.W. 195=1925 M. 1260. For the article to apply, there need not be reciprocity of demands. 1923 C. 578 ; 1923 L. 645=37 P.L.R. 126. But *see contra* 54 A. 506 =1932 A.L.J. 279=1932 A. 461. An entry of balance not containing a promise to pay cannot be relied upon to recover a time-barred debt. 25 I.C. 89=9 C.L.J. 263. An 'account stated' does not extinguish the original debts on which the account is based. 63 I.C. 280. *See also* 189 I.C. 802 (Account stated and acknowledgment—Distinction between). *See also* 14 Luck. 478=1939 O. 120). Where in a suit brought by a commission agent for commission, the accounts were stated and balance was struck, the proper article applicable to the suit is Art. 64.

Description of suit.	Period of limitation.	Time from which period begins to run.
65. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	[1][Three years] ..	When the time specified arrives or the contingency happens.
[2] 66. On a single bond, where a day is specified for payment.	[2][Three years] ..	The day so specified.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I for "Witto".

[2] *See* footnote 1, p. 3490.

NOTES.

100 I.C. 874. *See also* 140 I.C. 187 (L.); 33 Bom.L.R. 1200; 162 I.C. 178=1936 P. 444 (Suit against surety). Plaintiff had been employed under the defendant from 1913 to 1928. In the books of the defendant's business, there were accounts of drawings by plaintiff from time to time, there was no account on the other side as the plaintiff's salary was never fixed. In 1928, an account was drawn up by the defendant's manager, showing credits for salary and debits for drawings and ending in a balance in favour of the plaintiff. *Held*, that it was an account stated and involved a promise to pay the balance for good consideration. 38 C.W.N. 813=1934 P.C. 144=67 M.L.J. 103 (P.C.). An account stated may only take the form of a mere acknowledgment of a debt and though, if those circumstances amount to a promise, and the existence of a debt may be inferred, that can be rebutted by showing that there is no real debt at all. On the other hand, there is another form of account stated, a "real account stated," which contains entries on both sides and in which the parties have agreed that the items on one side should be set against those on the other, and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by those on the larger side, and there is a promise for good consideration to pay the balance. It is not necessary, to make out a real account stated, that there should be debts *in praesenti*, or that they should be legal debts. 67 M.L.J 103 (P.C.). *See also* 1936 C. 470=64 C.L.J. 75; 1937 C. 535. Suit on alleged settlement of account—Heading of account and entries in handwriting of defendant not a statement of account "signed" by the defendant sufficient for purposes of Art. 64. 1940 M. 887=(1940) 2 M.L.J. 334.

Arts. 64 and 85: PRINCIPAL AND AGENT—ACCOUNTS—NATURE—MUTUAL, OPEN AND CURRENT ACCOUNTS—ACCOUNT STATED—SUIT ON.—Cases of transactions between a creditor and his debtor must be distinguished from those of a principal and agent. Where the whole basis of the relation between the parties is that of principal and agent, the accounts between them are mutual, running and current accounts. The essentials of a mutual, open and current account are the reciprocity of dealing and the right to mutual demand. Where these are the relations between the parties, an account, to be a settled account, need not be signed provided that it is submitted to the party sought to be made liable on it, and he has, by words or by conduct, acquiesced in its correctness. Until an account is stated between the parties, the right of either of them is to bring a suit for account and to have accounts taken. 1940 P.W.N. 28=21 P.L.T. 41=1940 P. 71.

Art. 65: SCOPE.—*See* 31 I.C. 479=9 S.L.R. 90. Art. 65 does not apply unless there is an agreement between the parties to pay the loss immediately on its being ascertained, and in the absence of any specified time or specified contingency. So, a suit by a commission agent to recover loss on the transactions entertained on behalf of his constituents is governed by Art. 83 and not by Art. 65. 33 Bom.L.R. 1200. Suit for recovery of a debt in kind payable in kind or for cash value is governed by this article. 4 L.L.J. 64=1922 L. 122 (2); 1922 L. 271; 49 I.C. 231=41 P.R. 1918. Registered lease discovered to be void—Suit to recover premium paid is governed not by Art. 65 or Art. 97, but by Art. 116. 164 I.C. 277=1936 P. 462. Breach of promise—Suit for compensation. *See* 1923 N. 47; 1 M.H.C.R. 162. Suit for damages—Parties agreeing as to amount of damages before the date fixed for delivery—Limitation—Starting point. 99 I.C. 591=1927 L. 122. As to limitation for an application for enforcing a bond executed by a surety to produce the movables attached, *see* 1933 M. 219=37 L.W. 127.

Art. 66: SCOPE.—*See* 4 A. 3; 31 I.C. 479 (Sind). As to applicability, *see* 37 M. 175. A bond merely for the payment of a certain sum of money, without any condition in it is called a simple or single bond. 1923 O. 19=26 O.C. 121. *See also* 22 I.C. 60 (Mad.). Art. 66 is not barred in its application to a suit for the enforcement of a bond against the executant himself. A suit on a bond executed by a Hindu after his death to enforce the same against his sons is governed by Art. 66. The article makes no reference to the persons against whom the suit is brought. 1937 A.L.J. 403=168 I.C. 359=1937 A. 559. Where money is deposited with a person for certain expenses and the balance is repayable with interest at a fixed date, the case is governed by Art. 66 and not by Art. 115. 37 M. 175=24 I.C. 852; 164 I.C. 459=1936 R. 338. As to suit for recovery of money deposited with another and repayable on the happening of a future event, *see also* 22 I.C. 60=1914 M.W.N. 264. Article is inapplicable where repayment is to be made within a period, but the amount might be repaid earlier. 3 A. 276. Where a simple bond sets out firstly that the money is payable on demand and further on it sets out that the whole sum with interest should be paid within one year, it is not open to the debtor to make a payment before the end of the period of one year fixed, as the bond is not payable within that period, unless the creditor makes a demand. Art. 66 applies to a suit on a such bond, and the period of limitation runs not from the date of execution but from the

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]67. On a single bond, where no such day is specified.	[2][Three years] ..	The date of executing the bond
[1]68. On a bond subject to a condition.	[2][Three years] ..	When the condition is broken.

LEG. REF.

[1] See footnote 1, p. 3490.

[2] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

expiry of the period of one year specified in the bond. 154 I.C. 521=1935 A.L.J. 381=1935 A. 413. Mere condition that, in default of payment of interest at the stipulated intervals, the creditor is to have the option to enforce payment earlier, does not take the case out of Art. 66. 39 I.C. 574=15 A.L.J. 313; 1 C. 163 (P.C.). But *see* 2 A. 322; 27 O.C. 318=85 I.C. 280. Suit to recover money due on a registered bond is not governed by this article. 16 Bom.L.R. 20 =38 B. 177; 6 B. 75. Where a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage debt out of the mortgaged properties, the claim is governed by Art. 66. 1927 O. 569. But *see contra* 1926 M. 1124 =55 M.L.J. 506 which holds that Art. 116 governs such a case. *See also* 1929 O. 30; 51 A. 473; 52 M. 105=1929 M. 53 (F.B.); 35 C.W.N. 1030=1931 C. 801. In a *rehan* bond, there was personal covenant to repay on a certain date, and in addition, there was a clause which gave the mortgagee the right to realise from the mortgaged property, from the person of the mortgagor and from his other properties if he was dispossessed from the *rehan* property. The mortgagee sued basing his cause of action on dispossession and after sale of the mortgaged property in execution of his decree applied for a personal decree for the balance. *Held*, that Art. 116 applied and not Art. 66 or 67; and that the starting point for limitation was the date of dispossession. 13 P. 228=1934 P. 578. *See also* 162 I.C. 459=1936 O. 279. Where a second mortgage-deed provided that the mortgagor would redeem the mortgage at the same time when he would redeem the first mortgage, *held*, that the condition regarding the time for redemption did not amount to specifying a day for payment within the meaning of Art. 66 and as no date was specified, the period of twelve years to enforce the second mortgage commenced from the date of the mortgage. 1933 L. 84=34 P.L.R. 37. Where the parties to a mortgage deed get it registered by practising fraud on the Registering Officer and including a fictitious item of the property, the registration is invalid for all purposes. The deed must be treated as unregistered even for the purpose of the peronal covenant to pay. A suit for recovery of the money on the personal covenant is governed by Art. 66 or Art. 57 and not by Art. 116, and there is no breach of a contract in writing registered within the meaning of Art. 116. 41 C.W.N. 783= 1937 C. 347. *See also* 1937 R. 484.

Arts. 66, 68, 75 and 80.—Where an ordinary unregistered money bond provides for repayment of the principal with interest after a specified period and further provides that interest is payable annually and in default, the creditor was entitled to sue for the entire amount due without waiting for the expiry of the period specified in the bond, the bond is a single bond, notwithstanding the default clause. The period of limitation for instituting a suit on such a bond, runs from the date specified for payment as prescribed by Art. 66. Time does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80. It is doubtful if Art. 68 would apply to such a case. Though the bond contains a condition, it is not one which relates to the whole sum due on the bond. Art. 68 applies rather to bonds of the nature of security bonds. The bond in question could not be called instalment bonds and it is only in the case of an instalment bond to which Art. 75 applies that time begins to run from the date when the default is made. 16 Luck. 464=1941 O. 210 (F.B.).

Art. 67.—When payment is to be made on the happening of certain future event, time begins to run from that date. Neither Art. 66 nor 67 applies. 32 I.C. 575. A bond payable on demand is identical with one in which no day for payment is specified. 3 A. 600 (F.B.); 3 A. 340. Book entries of balance struck by the defendants which were attested by witnesses, are held to be bonds within this article. 5 L. 406 =1925 L. 75. Mortgage of house under attachment—Suit to enforce personal liability—Art. 67 applies. 1927 L. 101=27 P.L.R. 801.

Art. 68.—*See* 1941 O.W.N. 361=1941 O. 210; 40 I.C. 235=5 L.W. 706. Surety bond under the Guardians and Wards Act—Suit on it is governed by this article except where immovable property is charged. 42 M. 802=36 M.L.J. 114=49 I.C. 587. So also an administration bond. 1 R. 463=1924 R. 680; 27 I.C. 849. A suit by an assignee of an administration bond under the provisions of S. 292, Succession Act, for its enforcement, is a suit upon a bond subject to a condition to which Art. 68 applies. Where the administrator dies, the condition must be deemed to have been broken at the latest on that date and limitation would begin to run from that date. S. 292 of the Succession Act has not the effect of conferring a new cause of action on the assignee and hence cannot provide a fresh starting point for the purposes of limitation. 67 I.A. 416=I.L.R. (1941) B. 202=45 C.W. N. 429=1941 P.C. 6=(1941) 1 M.L.J. 88 (P.C.). *See also* I.L.R. (1938) N. 399=1938 N. 13 (Suit on a bond not being a single bond). 38 Bom.L.R. 632=165 I.C. 672=1936 B. 363 (Suit by assignee of administration bond is governed not by Art. 68 but by Art. 120). If a bond provides that if the monthly interest is not paid, or if the principal money lent is not

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]69. On a bill of exchange or promissory note payable at a fixed time after date.	[2][Three years] ..	When the bill or note falls due.
[1]70. On a bill of exchange payable at a sight or after sight, but not at a fixed time.	[2][Three years] ..	When the bill is presented.
[1]71, On a bill of exchange accepted payable at a particular place.	[2][Three years] ..	When the bill is presented at that place.
[1]72. On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	[2][Three years] ..	When the fixed time expires.
[1]73. On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	[2][Three years] ..	The date of the bill or note.
[1]74. On a promissory note or bond payable by instalments.	[2][Three years] ..	The expiration of the first term of payment as to the part then payable; and for the other parts the expiration of the respective terms of payment.

LEG. REF.

[1] See footnote 1, p. 3490.

[2] Substituted by Act XI of 1932, S. 2 and Sch. I, for "Ditto."

NOTES.

paid at the end of the year, in either case, the creditor may sue, and the monthly interest is not paid, there is no doubt that there is a breach of the condition for payment of interest, but still that is a matter over which the creditor has a right of waiver and limitation under Art. 68 will only begin to run from the expiry of the period of one year stipulated in the bond for payment. 1935 A.L.J. 341=1935 A. 405. The breach of each condition gives rise to a separate cause of action and time begins to run from the date of the particular breach giving rise to the suit. 1 R. 463=1924 R. 68. *See also* 56 I.C. 968 ; 26 I.C. 505. Where a debtor who makes a part payment of the amount due under the bond makes an endorsement on it that he would pay the balance within a certain period, the limitation for a suit for that balance will only begin to run from the expiry of the period mentioned in the endorsement. 41 P.L.R. 352 =1939 L. 236.

Art. 69.—*See* 33 M.L.J. 70=56 I.C. 384 (six months' time fixed for payment in a promissory note).

Art. 73.—A promissory note payable at sight is payable on demand and a suit on it is governed by Art. 73. 40 C.L.J. 84=1924 C. 1065. *See also* 47 C. 861 ; 25 C.L.J. 238. Promissory note—Endorsement —Suit against endorser—Limitation—Starting point. 1940 M. 85=50 L.W. 649=(1939) 2 M.L.J. 760 ; 1939 S. 28. A suit against a Hindu son, on a promissory note executed by his father is governed by Art. 73, and limitation runs from the date of the note. 33 Bom.L.R. 1234=1931 B. 542. Limitation will be extended if the pronote sued on was accompanied by a security bond of the same date hypothecating certain properties. 140 I.C. 460 =1932 O. 286.

Art. 74.—When a debt is payable in instalments, limitation runs as regards each payment on the date it is payable. Plaintiff can recover only in respect of instalments falling due within three years before suit. 1923 M.W.N. 699= 1924 M. 310 ; 38 M. 374. Where in a bond it is stipulated that it will be paid back within a fixed period, and the principal amount of the bond is divided into annual instalments, provisions being also made for the payment of interest, and there are no express words in the bond which affirmatively give the creditor a right to sue for the entire amount after the date fixed for the last instalment and there is nothing which precludes the creditor from suing for a defaulted instalment, the bond is one payable by instalments and the proper article applicable to such a bond is Art. 74. (4 Luck. 480, Appl.) 42 C.W.N. 545. Bond stipulating payment of principal within fixed period, entire principal divided into instalments payable annually with interest—Bond is one payable by instalments and the proper article applicable is Art. 74. 100 I.C. 655 (1)=4 O.W.N. 207 (1 O.W.N. 617, Foll.; 48 A. 457, Ref.) ; 7 O.W.N. 230=4 Luck. 480. The suit bond was executed on the 1st December, 1926. According to the terms of the bond, interest was to be paid monthly and the principal amount was to be paid in certain instalments after the lapse of the first three years. The bond further provided that, in default of payment of interest month by month, the whole amount should become payable at once. The defendant paid interest only for the first six months. The suit for the recovery of the entire amount was instituted on the 22nd November, 1930. *Held*, that the suit was barred under Art. 80 and that Arts. 74

Description of application.	Period of limitation	Time from which period beings to run.
[1]75. On a promissory note or bond payable by instalments, which provides that if default be made in payment of one or more instalments, the whole shall be due.	[2][Three years.] ..	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.

LEG. REF.

[1]See foot-note 1, p. 3490.

[2]Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

and 75 had no application. 142 I.C. 851 (2) =1933 L. 548. If a decree does not make the entire decretal amount payable at once after default about the first instalment, the decree should be executed for recovery of the instalments that are within time. 13 Luck. 340=1937 O. 379. Construction of instalment bond—Default in payment of principal *and* interest—Default in payment of principal *or* interest—Limitation. 37 P.L.R. 242.

Arts. 74 and 75.—There is a well-defined distinction between Arts. 74 and 75. The former applies to an instalment bond which does not contain any default clause, and in such a case, therefore, the plaintiff is entitled by the very terms of the bond to sue only for such instalment as remains unpaid. No question of waiver or default can ever arise in such a case. But where the document provides that in the case of default the obligee has the right to sue for the whole of the sum then remaining due, Art. 75 applies. 18 P. 459=1939 P.W.N. 367=20 P.L.T. 443=1939 P. 433 (F.B.); 1937 L. 1. When a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default and the plaintiff can recover in respect of instalments falling due within three years before suit, *vide* Art. 74, Limitation Act. But if there is a default provision, Art. 74 cannot be relied upon and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time barred, that is he cannot recover even those instalments which fell due within three years of suit. But the chief Court of Oudh is in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier defaults. The principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults. 194 I.C. 744=1941 O. 485. An instalment bond gave the creditor the option to demand payments of three instalments, if default was made together with interest thereon from time to time, and also gave the creditor an option to bring a suit for the whole amount due under the bond, if the creditor chose to exercise his right in the whole amount. *Held*, that in view of the wording of the bond, Art. 74 and not Art. 75, applied, and hence it was open to the creditor to sue at any time for all those instalments which had become payable, within three years of the institution of the suit. (38 P.L.R. 357, Rev.) 39 P.L.R. 110=1937 L. 1.

Art. 75.—As to applicability, *see* 6 L. 168= 89 I.C. 294; 11 O.L.J. 513=79 I.C. 848; 75 I.C. 98=1924 P. 439; 31 I.C. 479=9 S.L.R. 90; 58 I.C. 615; 130 I.C. 571=52 C.L.J. 591 =1931 C. 157. *See also* 1933 L. 548=142 I.C. 851=34 P.L.R. 145; 1934 A.L.J. 1056=1934 A. 1039=4 A.W.R. 966; 1941 O.W.N. 361= 1941 O. 210 (F.B.). It is immaterial whether whole amount becomes payable from a single default or from more than one default. 3 L.L.J. 522; 38 I.C. 302 (M.). Where the instalment bond provides that, in case of default, the whole shall be payable on defand. Art. 74 governs the case. 1923 M.W.N. 699=1924 M. 310. Creditor given option to recover whole in default or to wait till the expiry of term fixed for last instalment—Suit within three years of fresh default not barred. 89 I.C. 383=23 A.L.J. 896. *See also* 19 I.C. 738=16 O.C. 45; 1928 M. 705; 1929 C. 399; 1930 L. 124; 11 P.L.T. 866= 132 I.C. 112; 167 I.C. 293=1937 O.W.N. 336; 164 I.C. 431=1936 O.W.N. 665 =1936 O. 384; 1936 L. 570=38 P.L.R. 357. Where an instalment bond provided that, if default be made in payment of one or more instalments, the whole shall be due and the creditor elected to enforce the default clause. *Held*, that the suit was governed by Art. 75; and that the creditor could not by merely saying that he chose to give up a part of the claim fall back on Art. 74. 1934 A.L.J. 1035=1934 A. 661 (F.B.). Where there is a covenant in a bond, entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years, it is for the benefit of the creditor, and it is open to him to waive that option, and to wait for the full period of four years before putting the bond into suit, and that the time for recovery of the debt did not begin to run from the date of the first default. 55 A. 283 =1932 A.L.J. 550=1933 A. 235. *See also* 1937 L. 863. Where the plaintiffs waive the benefit of the provision as to the recovery of the whole amount, they will not be able to sue in future for the whole amount at once, but they are entitled to sue for instalments as they fall due under Art. 75, the cause of action accruing on each default. 1929 A. 812; 187 I.C. 221.

WAIVER, EFFECT OF.—In absence of waiver, time runs from date of default for a suit for recovery of over due instalments. 15 I.C. 856; 11 I.C. 526=14 O.C. 129; 1925 N. 298; 164 I.C. 431=1936 O. 384; 167 I.C. 293=1937 O.W.N. 336; 1937 L. 863. Where there is no waiver, plaintiff cannot make his suit within time by claiming only the instalments not barred. 47 A. 552=1925 A. 499=87 I.C. 162; 14 N.L.J.

Description of suit.	Period of limitation.	Time from which period begings to run.
[1]76. On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	[2][Three years] ...	The date of the delivery to the payee.
[1]77. On a dishonoured foreign bill where protest has been made and notice given.	[2][Three years] ...	When the notice is given.

LEG. REF.

[1] *See* footnote 1, p. 3490.

[2] Substituted by Act XI of 1923, S. 2 and Sch. I for "Ditto".

NOTES.

141 (F.B.), following 53 C. 277. *See* 31 C. 297; 7 M. 577; 36 C. 304=9 C.L.J. 226; 37 A. 400 (F.B.); 20 B. 109; 47 I.C. 943 (C.); 33 I.C. 606. *See also* 1935 M. 303=68 M.L.J. 244 (case of instalment bond in connection with a *chit fund* and containing a default clause). But *see* 41 A. 104=47 I.C. 926=16 A.L.J. 929 (Plaintiff presumed to have exercised option to waive). *See also* 23 I.C. 830; 133 I.C. 223=1932 O. 176. When there is no waiver, time runs from the date when the right accrues. 1929 C. 292. Where the bond gave the plaintiff the option of taking advantage of the forfeiture clause, and his right to realize the amount by instalments as originally agreed upon could not be lost by his failure to exercise his option. 1933 L. 849 (1). *See also* 1930 L. 124. If the plaintiff does not receive the offered payment, there is no default and consequently no waiver. 38 M. 374=25 M.L.J. 264.

WHAT CONSTITUTES WAIVER.—" Waives the benefit ", meaning of. 1934 A. 1039=1934 A.L.J. 1056=153 I.C. 205. Where the obligee under an instalment bond is given the right to sue for the whole amount on the occurrence of default in payment of any instalment, it is open to him to waive the benefit of that provision on the occurrence of default in payment of an instalment, and yet to avail himself of that provision when a similar default takes place in the payment of subsequent instalment. What amounts to waiver must depend upon the circumstances of each case. It cannot be laid down as a general rule that, wherever a person omits to claim a particular amount, it must be held to constitute a waiver. It is not necessary for a creditor to adduce affirmative evidence in support of waiver. In fact generally it is to be inferred from all the surrounding circumstances. 164 I.C. 431=1936 O.W.N. 665=1936 O. 384. *See also* 151 I.C. 852=11 O.W.N. 1191=1934 O. 455; 1941 O. 74=16 Luck. 280. Waiver must be something more than negligence. 1938 A.M.L.J. 50. It must be considered first whether the plaintiff had an option to waive his right to bring a suit at once on the happening of the default and whether as a matter of fact he did exercise the right of waiver. 1922 A. 113; 99 I.C. 871=1927 S. 158. Waiver must depend on some definite act or forbearance. 1929 C. 292. Where whole amount and not merely the amount due on unpaid instalments, is claimed, there is no waiver. 1929 C. 292; 35 A. 456=20 I.C. 933=11 A.L.J. 664; 149 I.C. 972 (1)=1934 L. 283 (1). Consent not to sue if waiver. *See* 31 I.C. 672=19 C.W.N. 1172. *See also* 164 I.C. 59=1936 L. 570. Acceptance of an overdue instalment is waiver. 2 L.L.J. 314; 59 I.C. 607 (S.); 1929 A. 881; 58 C. 615=1931 C. 157. But *see* 1933 N. 70=144 I.C. 211; 1933 S. 365. Payment and acceptance of amounts equivalent to overdue instalments are not sufficient to prove waiver, when such payments are not appropriated to any particular instalments. 18 N.L.J. 104. Acceptance of portion only of such instalment is not waiver. 20 I.C. 156; 33 I.C. 606. *See also* 19 N.L.R. 170=1924 N. 61; 36 C. 394; 19 M. 162; 18 P. 459=1939 P. 433 (F.B.); 16 A. 371; 27 B. 1 (F.B.); 29 A. 431; 12 M. 192 on the point. As to proof of waiver, *see* 1937 O.W.N. 1073=1938 O. 42; 1937 L. 863. An instalment bond provided that the creditor will be entitled on default of any one instalment to realize the full amount with interest in a lump sum or by miscellaneous amounts. There was default but the debtor made voluntarily miscellaneous payments which the creditor accepted and subsequently sued for the balance on the ground that he was entitled to sue for the whole amount. It was contended for the debtor that the creditor had waived such a right and that he was entitled only to the balance with interest from date of last default. *Held*, that he was entitled only to the balance with interest from date of the last default. 1934 A.L.J. 697. A creditor waiving default if and when entitled to take advantage of subsequent default. *See* 163 I.C. 165=38 P.L.R. 286; 1936 L. 570. The question whether there is waiver or not depends on the attendant circumstances of the act claimed as a waiver in each particular case. Where there is no evidence either that the debtors requested the creditors to excuse the default or that the payment of an overdue instalment was accepted as a consequence of waiver, the suit filed more than three years from the date of the first default cannot be saved from the bar of limitation by a plea of waiver. 1933 N. 70. Mere abstention from enforcing rights in case of default does not amount to waiver. 47 A. 552=23 A.L.J. 424. *See also* 1924 B. 301; 25 I.C. 938=8 S.L.R. 63; 47 I.C. 943 (C.); 1929 C. 292. But it is very strong evidence of waiver. 36 M. 66=12 I.C. 57. It is not necessary for waiver that there must be acceptance of an overdue instalment. 36 M. 66. *See also* 1929 C. 309. Recovery of overdue instalments by suit amounts to waiver of right to sue for the whole as soon as default occurred. 19 N.L.R. 170=1924 N. 61; 1930 A.L.J. 495. If the promisee had the option to sue for the entire amount on the first default, but he did not base his claim on that option but instead sued specifically for the last three instalments, basing his cause of action on each of the said defaults, that is sufficiently indicative of his having waived his option. 137 I.C. 223=1932 O. 176. As to bond with default provision in respect of interest

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]78. By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	[2][Three years] ...	The date of the refusal to accept.
[1]79. By the acceptor of an accommodation bill against the drawer.	[2][Three years] ...	When the acceptor pays the amount of the bill.
[1]80. Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	[2][Three years] ...	When the bill, note or bond becomes payable.
81. By a surety against the principal debtor.	[2][Three years] ...	When the surety pays the creditor.
82. By a surety against a co-surety.	[2][Three years] ...	When the surety pays anything in excess of his own share.
83. Upon any other contract to indemnify.	[Three years] ...	When the plaintiff is actually damnified.

LEG. REF.

[1] *See* foot note 1, page 3492.

[2] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

payable at stated intervals, *see* 1919 M.W.N. 82 =51 I.C. 724; 41 I.C. 423; 31 I.C. 479=9 S.L.R. 90; 142 I.C. 851 (L.). As to principle of this article applied to suits on mortgage bonds, *see* under Art. 132. *See also* 11 P.L.T. 609; 30 N.L.R. 314=1934 N. 180, for a case of instalment decree. Where a mortgage deed provides for payment by instalments with a default clause that on default in payment of an instalment the whole of the balance becomes payable, the mortgagee does not forfeit his right to recover the balance after the expiry of the term of the mortgage, though he might not have taken advantage of the default clause. A suit to enforce a personal remedy under such a bond is governed by Art. 75 read with Art. 116 and would be within time if filed within 6 years from the date fixed for the payment of the last instalment. 1941 N.L.J. 649.

Art. 78.—Where the cheque or hundi sent by debtor to his creditor is dishonoured, article is inapplicable to an action on the original cause of action. 46 C. 168=45 I.C. 241=27 C.L.J. 392.

Art. 80.—Where a promissory note payable on demand was accompanied by a writing fixing a period of payment, a suit by the payee is governed by Art. 80. 39 M. 129=30 M.L.J. 51 (F.B.). *See also* 11 M. 853; 162 I.C. 459 =1936 O.W.N. 518=1936 O. 279. So also where period of payment is postponed on the request of the executant of the promissory note. 42 A. 55=52 I.C. 235. Where pronote is payable on demand made by the payee after coming of age, time runs when the payee after majority makes demand. 3 M.L.J. 199. Where the claim was for recovery of the amount due on a war bond, which in form was a promissory note payable at a specified period after date thereof and at a special place. *Held*, that the suit was governed by Art. 80 and time commenced to run from the date on which it should have been presented for payment at the specified place. 1933 M. 376=64 M.L.J. 172. Suit on mortgage bond redeemable in 12 years but providing for annual payment of interest, and giving power to the mortgagee in case of default either to add interest due to the principal and charge compound interest or to sue for the principal at once, falls under Art. 80 read with Art. 116, and time begins to run from the date of first default in payment of interest. 45 A. 27=1923 A. 1 (F.B.). But *see* 148 I.C. 951=1934 A. 317 (F.B.). As to instalment bond providing for payment of interest monthly, *see also* 1933 L. 548=34 P.L.R. 145; 1934 A.L.J. 261=1934 A. 397 (F.B.); 1938 N. 13 (suit on bond not being a single bond); 1941 O.W.N. 361=1941 O. 210.

Art. 81.—*See* 67 I.C. 365=55 P.L.R. 1922. Surety's right to sue the principal debtor is not barred, though creditor's action against the principal debtor is barred. 5 B. 647. *See also* 59 M. 288. 'Payment' does not include incurring of a fresh obligation by executing a pronote, bond, etc. 50 I.C. 611=15 N.L.R. 78. *See also* 60 I.C. 23. So time runs when the surety actually pays the creditor. *See* 26 M. 322; 39 M. 288. Where date of payment by surety is uncertain, discretion should be exercised in favour of the surety. 1925 A. 64.

Art. 82.—*See* 26 M. 686; 39 M. 288.

Art. 83.—Contract to indemnify need not be express. It may be inferred from circumstances. 29 A. 627; 5 C. 811. *See also* 34 M. 157. It may be imposed by statute or implied or inferred in virtue of the jural relations of the parties. 33 Bom.L.R. 1200. Article does not apply to a suit to enforce a charge against the person who purchased it in execution subject to the charge. 1933 M.W.N. 486=66 M.L.J. 4. Suit to recover compensation for the breach of a contract to indemnify the vendee against the claims of the mortgagee is governed by this article. 2 L. 316 =64 I.C. 431. *See also* 57 I.C. 982=38 M.L.J. 470; 13 I.C. 979=15 O.C. 25: 7 M.L.J. 46 (Notes of recent cases); 1935 A.L.J. 255=1935 A. 463. Where a vendee under a registered sale deed undertakes to pay off a mortgage debt of the vendor out of the amount left in his hands for that purpose, it amounts to a contract of indemnity. A contract of indemnity may be express or implied. Where such a vendee fails to make the payment and such non-payment has resulted in the property of the vendor being sold, the

Description of suit.	Period of limitation.	Time from which period begins to run.
84. By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	[1][Three years] ...	The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business the date of such discontinuance.
85. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	[1][Three years] ...	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for 'Ditto".

NOTES.

vendor has a cause of action to sue for damages for the breach of the contract of indemnity and such a suit would be governed by Art. 83 read with Art. 116. I.L.R. (1938) A. 500=1938 A. 297 (F.B.). *See also* 19 P.L.T. 198; 17 P. 751=1939 P.W.N. 361=1939 P. 194; 1940 L. 321; 1936 A. 870. Co-mortgagor redeeming mortgage—Suit for contribution not governed by this article. 1935 O.W.N. 278=1935 O. 245. In a suit for refund of consideration for a sale on the ground that the plaintiffs were dispossessed by a third party, the cause of action to recover damages on account of the covenant for indemnity in the sale-deed arose only when the plaintiffs are dispossessed, and not when the third party files a suit or gets a decree, and the suit is governed by Art. 83 read with Art. 116. (31 M. 452, foll.; 26 B. 750, dist.) 55 B. 565=33 Bom.L.R. 1092. *See also* 42 Bom.L.R. 175; 1938 L. 196; I.L.R. (1941) L. 353=43 P.L.R. 548; 44 L.W. 458=1936 M. 655. A suit for value of goods supplied by commission agent is governed by this article. 139 P.W.R. 1918=46 I.C. 541. Also suit for indemnity in respect of losses sustained during agency. 23 P.R. 1915=26 I.C. 415. Time begins to run when the plaintiff is actually damnified. 33 Bom.L.R. 1200. Purchase of goods by commission agent for principal—Resale by agent at a loss—Suit by agent to recover loss is governed by Art. 83. 1927 L. 826. Limitation in such case operates from the date of payment made on behalf of the principal and not from the date of sale. 106 I.C. 40=1927 L. 826. Suit by agent to recover money due from principal. 115 I.C. 767. A suit by an agent to recover the amount due from his client must be brought within the period of limitation prescribed by Art. 83. Limitation in such a case operates from the date of payment. 1928 L. 424. *See also* 31 P.L.R. 666 (suit by agent against principal). Plaintiff is damnified when he has to pay the amount on account of the defendant's default. *See* 2 L. 316=64 I.C. 431. *See also* 1925 M. 594; 12 P.L.J. 211; 5 C. 811; 26 M. 322; 39 M. 288. Person undertaking payment to third person—No time specified—Limitation commences from date of loss to the person to whom guarantee is given as to payment. 49 A. 603=101 I.C. 691 (2)=1927 A. 435. *See also* 1936 M. 334=163 I.C. 177=70 M.L.J. 537. Breach of compromise—Term of payment to creditor—On breach, payment by other party—Limitation—Starting point. 1935 L. 307. Where a vendee required to pay off vendor's incumbrances defaults in paying and the vendor sustains loss thereby, a suit by the vendor for a relief against the vendee is governed by Art. 116 read with Art. 83 or Art. 61; and the starting point for limitation is the date when the vendor is actually damnified. 1933 L. 109=14 L. 380 (34 A. 429 Not Foll.); 1936 A.W.R. 1197=1936 A. 170. *See also* 14 L. 646; 1933 L. 793=34 P.L.R. 734; 10 P. 451=1931 P. 271 (following 49 A. 603); 1933 A. 386=1933 A.L.J. 787=55 A. 490.

Art. 84.—The word 'cost' is not confined to out of pocket expenses of the practitioner. Suit for remuneration is also governed by this article. 29 I.C. 763 (M.). Application made under the rules of the Court, by attorney for realisation of costs, where it involves enquiry, is a suit governed by Art. 84. 46 C. 249=51 I.C. 941=23 C.W.N. 473. But *see* 1 B. 253; 32 B. 1; 24 C. 70. Art. 84 does not apply in the case of a decree which provides that the costs shall be said to the solicitor (named) of one of the parties to the suit. It is governed by Art. 120. 34 Bom.L.R. 670=1932 B. 378. Termination of suit. *See* 7 M. 1; 22 C. 943. Proceeding does not terminate by compromise not certified by Court. 1 B. 505. Where, a petition for which the attorney was engaged, resulted in an order in favour of the client in 1924. and nothing was done further till 1930, when the client instructed his attorney to have his bill of costs taxed, it cannot be said, where the continuance of the solicitor's lien is in question, that the business terminated in 1924 and that the lien has become barred in 1930. 131 I.C. 158=1931 M. 183=60 M.L.J. 133. In many proceedings of which administration suits are examples, the so-called final decree is very far from being the termination of the suit. 52 C.L.J. 197=1930 C. 651 (F.B.).

Art. 85: APPLICABILITY.—Art. 85 applies to a suit on a mutual, open and current account. 1930 B. 5=53 B. 652. As to what is mutual, open and current account, *see* 102 I.C. 225=1927 B. 225=29 Bom.L.R. 375; 56 C. 575=1929 C. 641; 112 I.C. 715 (A.); 1930 L. 711. The conditions for the applicability of Art. 85 are that there should be cross-claims arising out of a course of dealings which evidences or is referable to an intention of set-off. The phrase "reciprocal demands" does not import that either party has made an actual demand in fact. 58 C. 649=34 C.W.N. 1175=1931 C. 359. Where a depositor borrows money from a bank by means of overdrafts, and occasionally deposits money, which is applied to the overdrafts, the

NOTES.

transaction is not a mutual account, and the statute of limitation runs from the date of each loan, notwithstanding the transaction opens with a credit to the depositor. 197 I.C. 449. The phrase 'reciprocal demands' in Art. 85 does not import that either party has made an actual demand in fact. But the dealings must be of such a nature that they might lead to reciprocal demands. 1939 N. 113=184 I.C. 139. *See also* 1936 R. 495; 1938 R. 224; 1938 R 270; 1936 O. 382. It refers to cases where the course of business between the parties has been of such a nature as to give rise to reciprocal demands between them, that is, the dealings between the parties must have been of such a nature that the balance might sometimes be in favour of one party and sometimes in favour of the other. 1936 R. 495.

MUTUAL, OPEN AND CURRENT ACCOUNT.—The term 'mutual' in relation to accounts is found in at least four different collocations and hence it is desirable to bear in mind that all cases concerned with 'mutual dealings' or 'mutual accounts' are not necessarily safe guides when considering what constitutes 'mutual. open and current account' under Art. 85. 184 I.C. 139=1939 N. 113. Where there is dual contractual relationship between the parties (*i*) that of borrower and creditor and (*ii*) that of principal and agent, and in these dealings, the plaintiff as creditor has demands against the defendant, while the defendant as the principal has independent demands against the plaintiff as his agent, and the items relating to all the dealings are entered in one account, such an account is clearly a mutual, current and open account and a suit for recovery of the amount due on it is governed by Art. 85. The absence of a shifting balance is not a decisive factor in case of mutual, open and current accounts. 185 I.C. 805=1939 L. 356. *See also* 1941 P.W.N. 638. An 'open account', what is. *See* 100 I.C. 815=28 Punj.L.R. 146. Dealings should be entered in an account consisting of mutual items of debit and credit. 63 I.C. 950=23 Bom.L.R. 540. There must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. 44 M.L.J. 184=1923 M. 278; 1936 C. 382. *See also* 1923 L. 656; 1923 L. 347; 1922 L. 338; 1922 L. 316; 12 L. 420=1931 L. 241; 3 P.L.T. 492; (1911) 2 M.W.N. 440; 1927 M. 819=103 I.C. 48; 1930 O. 287; 15 N.L.J. 105; 1930 L. 711; 1936 A.M.L.J. 68; 130 I.C. 574=1931 L. 309; 1933 A.L.J. 1283; 1937 R. 340; 58 C. 649=34 C.W.N. 1175. In other words, the dealings must be such that there may be balance in favour of either party and not always in favour of one party in the very nature of the transactions. 44 M.L.J. 184; 47 B. 128=1923 B. 82; 4 P.L.T. 571; 1927 B. 225=29 Bom.L.R. 375; 35 Bom. L.R. 929=1933 B. 450. But *see also* 106 I.C. 53. But actual shifting balance is not necessary. 50 I.C. 669; 47 B. 128; 1923 N. 108; 1924 P. 102; 29 Bom.L.R. 575=1927 B. 225; nor does it afford a real test of mutuality. 17 I.C. 48=23 M.L.J. 516; 142 I.C. 123=1933 N. 50; 15 N.L.J. 105=29 N.L.R. 20. The question whether an account is mutual, open and current so as to attract the operation of Art. 85 is one of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual, there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But that test is not conclusive or decisive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account, that is, an account which is continued and not stopped or closed. If the account is running, that is to say, if it is unclosed, then it is open and current. Mere cessation of dealings between the parties, however, does not mean that the account is closed. The real question in each case would be what is the intention of the parties. 35 Bom.L.R. 929=1933 B. 450. Where there is no open account on the date of suit, the plaintiff cannot sue on a mutual account and claim the benefit of Art. 85. 1933 B. 450=35 Bom.L.R. 929. Each party must have a demand against the other, *i.e.*, each party should be able to say against the other "I have an account against you." 5 C. 759; 6 C.L.J. 158; 3 L.L.J. 362; 8 Bur.L.T. 116=27 I.C. 879. *See also* 17 P.W.R. 1920=54 I.C. 453; 47 B. 128; 24 I.C. 128 (M.); 17 I.C. 48=23 M.L.J. 516; 22 M.L.J. 14=12 I.C. 673; 6 B. 134; 10 M. 259; 32 A. 11; 17 M. 293; 22 B. 606; 39 A. 33; 132 I.C. 420 (A.); 1939 N.L.J. 109=1939 N. 113; 1940 A. 209; 1936 A.M.L.J. 68; 1938 L. 264. In order to bring a case within the article, it is necessary that the dealings on either side must be so independent of each other that neither party giving credit to the other relied on the debt which he had against him. 140 I.C. 187 (L.). The account must be continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions, from which the balance due to one of them is or can be easily ascertained. 1923 L. 347; 3 P.L.T. 492. *See also* 6 M.H.C.R. 142; 100 I.C. 815=28 P.L.R. 146. Where independent obligations are created between the parties and the accounts are never closed even though annual balances are struck, the fact that the balance has been in favour of same party during the last few years does not take the transaction out of the category of Art. 85. I.L.R. (1938) A. 741=1938 A.L.J. 773=1938 A. 504. A mutual, open and current account continuous as such, so long as the account remains open and current. It would not become a non-mutual, open and current account, merely by reason of the fact that after a certain date the account was one-sided. The mutuality results from the reciprocal claims which can spring out of the transactions which once made the account mutual. Where an acknowledgment closes the old account, then the old account ceases to be a mutual, open and current account. It could cease to be open and it could cease to be current, but it could never lose the quality of mutuality. With the end of either of the first-mentioned characteristics would end the applicability of Art. 85. 1939 N.L.J. 109=1939 N. 113. Plain-

Description of suit.	Period of limitation.	Time from which period begins to run.
86. On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	[1][Three years] ...	[1][The date of the death of the deceased.]
87. By the assured to recover premia paid under a policy voidable at the election of the insurers.	[1][Three years] ...	When the insurers elect to avoid the policy.
88. Against a factor for an account.	[1][Three years] ...	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
89. By a principal against his agent for movable property received by the latter and not accounted for.	[1][Three years] ..	Ditto.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

[2] Substituted by Act IV of 1938, S. 122.

NOTES.

tiff sending moneys to defendant as loans—Defendant making purchases for plaintiff and advancing moneys for him—All these accounts debited and credited in the defendant's account, by the plaintiff—Account, is a mutual, open and current. 27 A.L.J. 73=112 I.C. 715. The phraseology of Art. 85 is wide and comprehensive and does not exclude from its purview the case of a principal and agent between whom a mutual open and current account has existed. 1930 L. 712.

ILLUSTRATIVE CASES.—The following are covered by the article:—Agency business in selling goods on commission, on behalf of the defendant involving mutual accounts. 1922 L. 338; 27 I.C. 773; 34 Bom.L.R. 1410; 34 Bom.L.R. 1268=1932 B. 593; 15 I.C. 356; 62 I.C. 898; 29 I.C. 462=1915 M.W.N. 419; 58 C. 649=34 C.W.N. 1175. Suit for money due on a *bhahi* account. 54 I.C. 453. But *see* 12 L. 420=1931 L. 241. Agent for both the parties lending money to each other as the agent of the other and keeping a current account. 1 Bur.L.J. 240=1923 R. 18. Defendant in the employment of plaintiff taking advance from time to time as against salary—Suit to recover excess. 87 I.C. 832=1925 N. 295. The defendant firm was depositing money with the plaintiff Bank from time to time and the plaintiff Bank was allowing them to draw money in excess of the deposits with the result that the balance was frequently shifting in favour of one or the other party. *Held*, that the account was a mutual, open and current one. 15 L. 652=1934 L. 358. Article inapplicable where plaintiff is alone the banker advancing and receiving part-payments, with balance always in his favour. 37 I.C. 300; 12 L. 420=1931 L. 241; or a tradesman supplying goods on credit. 88 I.C. 747=1925 P. 806; 1930 O. 287. Goods sold and delivered from time to time—Payment by customer from time to time without specifying item. 1935 A.L.J. 33=1935 A. 131. Suit for accounts after the agency dealings had stopped is not governed by this article. 37 I.C. 875=5 L.W. 375. Servant debited with sum advanced—Salary credited when due—Account is not mutual. 1927 M. 819=103 I.C. 48; 7 P. 238=107 I.C. 533; 108 I.C. 694. Where the contract is for outright sale and there is no stipulation that the accounts should be settled after the goods had been resold in the market by the purchaser time for instituting a suit for the price runs from the date of the initial purchase and the period is that provided in Art. 52, and not Art. 85. 1931 A.L.J. 363=1931 A. 229. In a suit on settlement of accounts on striking balance it was held that the account was not a mutual open and current account within the meaning of Art. 85 but an account stated within that of Art. 64 and that therefore the suit was within time. 130 I.C. 570. The mere fact that subsequent to the date of the striking of the balance, there were four items on each side of the account could not have the effect of converting it into a mutual, open and current account. 131 I.C. 292=1931 L. 233. As to when time begins to run, *see* 5 C. 211; 5 C. 759 at 764; 1 L. 12=55 I.C. 872.

Art. 86.—Time runs from the date that proof of loss is given. 6 B.H.C.R. (A.C.J.) 34. The policy of insurance contained a clause that "the Company should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage, unless the claim was the subject of pending action or arbitration." Where the suit was filed more than twelve months after the fire, and there had been no reference to arbitration and all the time had been spent in the investigation of the claim and delay by the insured. *Held*, that (i) the words "pending action" referred only to a pending suit and not to steps which the company might take in the investigation of the claim; (*ii*) that the clause only provided that the company shall not be liable if the claim was made more than twelve months from the date of the loss and not that the insured should not have the right to sue after twelve months; so it was not against public policy and it did not contravene the provisions of S. 28 of the Contract Act, or Art. 86. 11 R. 475=1934 R. 15.

Art. 89: SCOPE AND APPLICABILITY.—As to

NOTES.

applicability, *see* 39 M. 376=28 M.L.J. 140; 109 I.C. 332=1928 M. 906; 1930 M.W.N. 1199; 1937 A.L.J. 264=1937 A. 363. Art. 89 would apply if the defendant acted as plaintiff's agent implied or express. If there is no agency, Art. 120 would apply. 45 M. 648=42 M.L.J. 507. Art. 89 and not Art. 115 applies even where the relation of principal and agent is created by a written agreement. 4 P. 289=89 I.C. 275. But when the contract is registered, Art. 116 applies. 12 C. 357. A legal practitioner, who happens to be the agent of a party, does not cease to be such agent merely because he gets a vakalatnama from his principal and sues on the strength of it for realising the amount due to his principal. 1935 L. 49. Termination of agency—Burden of proof. 1935 L. 49. Co-sharer managing property on behalf of another co-sharer is an agent of the latter. 40 C. 108 =18 I.C. 735=17 C.L.J. 103. *See also* 26 Bom. L.R. 1165=1925 B. 148. But *see* 7 A. 25. Where joint property is in possession of one member of the family, he holds the same as agent for the others, and a suit by the latter for an account of such property and for recovery of their shares is governed by this article. 45 B. 313 =59 I.C. 357. *See also* 27 C.W.N. 725=1923 P.C. 31; 30 Bom.L.R. 912=1928 B. 365; 1928 N. 256. When after partition one brother is recovering outstandings originally due to the joint family, there must be an implied contract of agency between one brother and the other, and a suit by the other brother for rendition of accounts and recovery of his share of the joint outstandings is governed not by Art. 62 or Art. 120, but by Art. 89. 116 I.C. 327=1929 L. 407. Also suit by coparcener against manager for recovery of outstandings collected and misappropriated. 121 I.C. 205=1930 P.C. 18 (P.C.). (1925 M. 922, reversed). When by an oral agreement one tenant-in-common is left in possession as the agent of the other tenants-in-common, if one of them sues him for an account, the suit is governed by Art. 89. 54 M. 654= 62 M.L.J. 45=33 L.W. 1=1931 M. 185 (2). Director of limited company whether agent within article. *See* 5 L. 27=79 I.C. 740=1924 L. 435. Loan raised on security of shares—Creditor selling shares—Subsequent suit by debtor for surplus and account—Limitation—Relation of principal and agent—If exists. *See* 55 L.W. 90=(1942) 1 M L J. 274. Suit by Municipality against Secretary and Executive Officer for recovery of moneys embezzled on account of his negligence is governed by this article 46 A 175=22 A L.J. 26. Chairman of Municipality is not agent of the Council. 22 M. 342 Money is movable property within this article. 21 C.W.N. 591=40 I.C. 359; 39 M. 376=26 I.C. 740=28 M.L.J. 140; 49 C. 250 =26 C.W.N. 61; 32 C. 719; 35 C. 298. A suit for accounts against a rent collector is governed by article. 49 C. 250=26 C.W.N. 61 =1922 C. 355. Art. 89 applies to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account. The starting point of limitation is (1) when the account is demanded and refused, or (2) when the agency terminates. 35 Bom.L.R. 929=1933 B. 450; 1933 A. 642= 1933 A.L.J. 1009. A suit by the principal against the agent for recovery of certain sums misappropriated by him is governed by Art. 89 and not Art. 62. Art. 89 is not confined to suits for accounts only. 60 C. 1347=38 C.W.N. 211= 1934 C. 238. Where accounts of an agent have already been adjusted, suit for money found due is not governed by this article. 25 C.L.J. 33= 21 C.W.N. 591. Article inapplicable to suit against heirs of agent. 17 C.W.N. 5=16 I.C. 742; 16 C.W.N. 1042=16 I.C. 414; 1 P.R. 1912=13 I.C. 930=1923 P. 259. But *see contra* 47 M.L.J. 483=1924 M. 840. The proper article applicable to a *suit by the legal representative of the principal against the agent* for accounts is Art. 89. The article is not restricted to a suit by the principal against the agent or *vice versa*. It also applies to a suit by or against the legal representatives of the principal or of the agent. The omission of any mention of legal representatives in the words under "Description of suit" in Art. 89 does not mean that the article does not apply to a suit by or against the legal representatives. 40 C.W.N. 245=62 C.L.J. 464; 44 C. 1=31 M.L.J. 836 (P.C.); 85 I.C. 704= 1925 A. 682. Time runs from the termination of the agency (*i.e.*) the death of the principal (*see* 26 C.W.N. 320=1922 C. 53; 43 C. 248) whether the principal has demanded an account or not. 44 C. 1 (P.C.). Pleader engaged for several suits—Death of pleader—Suit for moneys advanced against legal representatives is barred in respect of suits disposed of more than three years prior to the suit. 50 M. 249=99 I.C. 456 =1927 M. 157. After a dissolution of partnership an agreement was entered into by the partners to the effect that the two partners, as mentioned in the agreement, were to collect the outstandings of the partnership as trustees and to deposit the amount in a bank after paying off the partnership liabilities and to share it equally. Then a suit had been instituted for rendition of accounts of the moneys realized as per agreement. *Held*, that under the above-mentioned circumstances the suit was governed by Art. 89 and not by Art. 106 of the Act, because by virtue of the said agreement the trustee partners were the agents of the partnership for recovering the assets and therefore the suit was essentially between the principal and an agent and for accounts. 134 I.C. 527=1931 L. 300. A suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an express agreement between the partners to render accounts and to distribute the profits annually is governed by Art. 120 and not Art. 89 or Art 100 or Art. 116. 1933 N. 127 =29 N.L.R. 34.

STARTING OF LIMITATION.—Whether failure to render accounts amounts to refusal under this article, *see* 53 I.C. 675=30 C.L.J. 90. If there is demand and there is no response, there is an implied refusal. 43 C. 248=19 C.W.N. 1070= 30 I.C. 697. But *see* 1 P.R. 1912=13 I.C. 930; 43 I.C. 570 (putting off not refusal); 3 P. 546 =80 I.C. 956. There must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission on his part to render accounts might be construed as a refusal. 56 C.L.J. 172. Non-compliance or evasion or procrastination on the part of the agent amounts to a refusal. 123 I.C. 228=1930 S. 142. Where there is no

Description of suit.	Period of limitation.	Time from which period begins to run.
90. Other suits by principals against agents for neglect or misconduct.	[1][Three years] ...	When the neglect or misconduct becomes known to the plaintiff.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

demand and refusal, time runs only from the termination of the agency. 20 C.W.N. 366=29 I.C. 848. *See also* 1937 A.L.J. 264=1937 A. 363; 35 C. 298; 32 C. 719; 11 W.R. 76. Agency terminates when agency business is complete. Question of termination depends on circumstances of each case. 21 S.L.R. 336; 110 I.C. 575=1928 L. 833. *See also* 40 L.W. 538=1934 M. 691. The question when an agency terminates is a question of fact. 41 M. 1=45 I.C. 430. *See also* 37 I.C. 875=5 L.W. 375; 31 M.L.J. 685=36 I.C. 804. In a suit by heirs of the principal for accounts, time runs from the death of the principal which terminates the agency. 44 C. 1 (P.C.); 26 C.W.N. 320; 43 C. 248. Where an agent is appointed by a certain person and thereafter that person dies, and the agent continues to hold service under the son of the deceased principal, the agency created by the deceased terminates on his death, and the subsequent service of the agent under his son should be regarded as a new agency held under the son of the decceased principal. The two periods should be separately considered, and if a suit for accounts in respect of the anterior period is instituted more than three years after the death of the former principal, that suit must be regarded as barred. 40 C.W.N. 245=62 C.L.J. 464. Where an agency does not terminate with the death of the principal but terminates with the completion of a transaction which has occurred in the lifetime of the principal, the *terminus a quo* for limitation under Art. 89 begins from the completion of the transaction. 1929 L. 883; 1939 M. 114; 1939 L. 738 (suit to recover money collected by agent—Agency revoked by letter—Starting point). Subsequent resumption of work after termination of agency cannot prevent running of time as regards the first agency. 30 I.C. 691 (M.); 26 I.C. 740=28 M.L.J. 140. *See also* 40 C.W.N. 245=62 C.L.J. 464. As to suit by co-sharer for his share of profits, *see* 1936 A.W.R. 700. *See also* 1939 M. 671; 1939 A.L.J. 428. On this article, *see also* 1936 M. 170. In the case of co-principals demand by one only does not start limitation. 2 P. 585=1923 P. 464. Joint and several principals—Death of one—If terminates agency as regards survivor—Suit by latter—Limitation. 1936 C. 650. The plea of limitation must be specifically raised supported by necessary facts. 3 P. 546=80 I.C. 956. On this article, *see also* 21 M.L.J. 453=9 I.C. 54.

Arts. 89 and 90.—Art. 90 and not Art. 89 is the article applicable to a suit in which the claim is based on the misconduct or neglect of an agent. A suit by a sabha against an ex-secretary claiming a sum of money on the ground that he had wrongfully retained money due the sabha by not entering them in the accounts and had shown certain sums of money falsely as having been spent on behalf of the sabha when as a matter of fact they were not at all spent, is therefore governed by Art. 90, as there is an allegation of misconduct, and the suit filed within three years of the discovery of the misconduct would be in time. 48 L.W. 775=1939 M. 114. *See also* 1938 M. 38.

Arts. 89 and 120.—In a case where a hundi is vested in the defendant for payment of debts of third person, the defendant's obligation to account is equitable. If the defendant is to be regarded as an agent of such third person for the purpose of paying off his creditors, the suit for accounts will fall under Art. 89, if not under Art. 120. But, in both cases, time will run from the date at which the defendant had denied such third person's claim, or in any other manner infringed or threatened to infringe his right. 1936 M. 876; 49 L.W. 608=1939 M. 671 (Joint creditors—Pronote by debtor in favour of one—Arrangement that the latter should collect and pay the other his share—Relationship is one of trust, not agency—Art. 120 applies).

Art. 90.—This is a residuary article with regard to actions between principal and agent and would apply only if no other article applies. 109 I.C. 332=1928 M. 906. "Neglect or misconduct"—Meaning of. (*Ibid.*) Per *Page, C.J.*—Art. 90 is not happily worded, for the law knows nothing of negligence or misconduct in the abstract, and no cause of action can exist and no suit will lie that is founded on negligence or misconduct as such. A suit for negligence means a suit in respect of some negligence, act or omission (and the words in the third column mean) "from the time when the negligent act or omission becomes known to the plaintiff." 9 R. 575. Limitation applicable to a suit brought against an advocate for neglect or misconduct in his professional duties is that prescribed by Art. 90 and not by S. 24, as such suit arises on negligence arising out of contract between principal and agent and not out of tort. 1938 Rang.L.R. 457=176 I.C. 608=1938 R. 258 (F.B.). A suit in which a client claims damages for negligence of his advocate is governed by Art. 90. Limitation runs from the date when the negligent act becomes known to the plaintiff and not from the date when the plaintiff discovers the act to be negligent. 9 R. 575. Where conduct of the directors of a bank is such as to render them liable to the amount lost by the bank owing to wilful breach of their obligation as directors, Art. 90 and not Art. 36 applies. 160 I.C. 759 =1936 L. 271. Where director of a bank acted in a transaction as an agent of the bank, the suit by the bank against him is a suit by a principal against an agent to which Art. 90 applies. (5 L. 27, Foll.) 17 L. 262=38 P. L. R. 526=1936 L. 268. Suit for recovery of unauthorized payments made by agent on account of principal is governed by this article. 36 I.C. 418=9 Bur.L.T. 130. *See also* 1938 M. 38. In a suit against agent for

Description of appeal.	Period of limitation.	Time from which period begins to run.
91. To cancel or set aside an instrument not otherwise provided for.	[1][Three years] ...	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

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misconduct, limitation runs from the time when the account books are got from the agent, when only the plaintiff will come to know of the misconduct. 25 I.C. 136=7 Bur.L.T. 199. Money entrusted to person with direction to dispose them off in particular manner —Person wrongfully retaining it in his hands—Suit for recovery of such money—Limitation runs from the date the matter comes to the knowledge of the principal. 1930 A. 397. Suit by principal against agent for recovering secret profit made by latter. Time would run only from the date on which the plaintiffs came to know that the defendant had made a secret profit. 25 A.L.J. 448=1927 A. 436. Before Art. 90 can be invoked it must be ascertained at which time or on what date the fact of the defendant's withholding of the money from the plaintiff became known to him. 58 C. 923 1931 C. 738. The starting point of limitation is the knowledge that something has been omitted or done. This knowledge must be the knowledge of all the facts; if the plaintiff is lulled into a sense of security by being led to believe that something was done which was not in fact done, or that something was not done which was in fact done, clearly time cannot run against him. But once he knows the true facts, it is for him to judge of their legal consequences, and he cannot afterwards say that he did not know what those legal consequences might be. Where a suit is brought against an advocate for neglect or misconduct in and about his duties as professional adviser in failing to join certain party in appeal, the fact that the plaintiff was aware of the neglect at the institution of the appeal but knew it to be actionable as such only when the appeal was lost does not extend time. 1938 Rang.L.R. 457=176 I.C. 608=1938 R. 258 (F.B.). Art. 90 does not say that time begins to run when the cause of action for neglect or misconduct became known to the plaintiff, but when the neglect or misconduct became known. In a suit against an Advocate for neglect or misconduct in respect of his duty, it cannot be said that when once the plaintiff is acquainted with what has happened, he can sit still and say that time does not run against him until he chooses to take the view that the omission of which he is aware is actionable neglect or that the act of which he is aware amounts to actionable misconduct. 1935 Rang.L.R. 457=1938 R. 258 (F.B.).

Art. 91.—Art. 91 applies to suits of the kind mentioned in S. 39, Specific Relief Act. 16 A. 73. Where plaintiff merely disputes the legal effect of an instrument, it is not a suit to cancel or set aside. *See* 23 A. 383 (P.C.). Article applies only where plaintiff or his predecessor in title was a party to instrument. 32 C. 473; 13 C.W.N. 815; 16 A. 73; 52 P.R. 1895; 24 I.C. 246 (M.); 22 A. 90; 24 M.L.J. 592; 38 M. 321; 64 I.C. 775=17 N.L.R. 169; 9 Luck. 365 =11 O.W.N. 193=1934 O. 55; 1923 R. 82; 1929 L. 816. An award is an instrument within the meaning of Art. 91. 1927 L. 172=100 I.C. 596. Article applies to suit to set aside an award which is not void but is only voidable. 15 I.C. 819=5 S.L.R. 240. *See also* 1939 A.L.J. 642=1939 A. 348; 1938 L. 869; 1938 N. 335. The instrument to be cancelled or set aside which is referred to in Art. 91 is that instrument which the plaintiff himself has actually asked to have cancelled or set aside and not one which he ought to have set aside. 1940 Rang.L.R. 35=1939 R. 278. A party cannot impeach the decree incorporating the award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. 100 I.C. 596=1927 L. 172. Where decree is binding, suit must be brought to set it aside within time. 4 P. 510=6 P.L.T. 634. Article is inapplicable to reversioner suing to enforce his rights after the death of the widow who has alienated family porperty. 40 B. 51=30 I.C. 909; 19 B. 809; 33 B. 88; 1929 L. 816. But *see* 32 Bom.L.R. 1013 (void sale). Where the alienation was by a Hindu widow of an unrecognized portion of a *bhag* and the reversioner sued to have the same set aside after the lifetime of the widow. *Held*, that the alienation being void *ab initio*, limitation commenced from the date of the sale-deed and the suit was barred whether Art. 91 or Art. 120 applied to the case. 32 Bom.L.R. 1013. An adopted son suing to set aside an alienation made by the deceased widow before adoption is in the position of reversioner. 48 B. 654=1925 B. 9. Art. 91 inapplicable to an alienation by an unauthorised person attacked by the successor in office of a mahant of religious institution. 1929 L. 816. Also to a suit for declaration and injunction by plaintiff alleging that the settlement deed under which the defendant claimed was sham and fictitious. 1929 M. 478. *See also* 1939 A.L.J. 389=1939 A.W.R. (H.C.) 400; 41 P.L.R. 657; 140 I.C. 709=9 O.W.N. 958 (suit for possession on the ground that a deed of mortgage in respect of suit properties was a fictitious and sham transaction). If a person executes an instrument without authority to do so, plaintiff need not sue to set it aside, but may treat it as of no effect. 24 C. 77; 14 M. 26; 32 A. 392=7 A.L.J. 387; 16 A. 73. Article inapplicable to suit to set aside alienation by a coparcener. 13 I.C. 547. Suit by junior members of Malabar tarwad to recover possession of property improperly alienated by Karnavan is not governed by this article. 46 M.L.J. 340=1934 M. 607. *See also* 27 M.L.J. 60=4 I.C. 246 (alienation by *ejaman* of an Aliasanthana family).

NOTES.

Alienation by an unauthorised guardian is void and need not be set aside. 83 P.R. 1916=33 I.C. 643; 38 M. 1125=27 M.L.J. 285; 26 I.C. 813 =10 N.L.R. 133. Art. 91 does not apply to a suit to set aside the sale of property belonging to a minor by his *de facto* guardian. *See also* 34 C.W.N. 642 (suit to avoid lease). 99 I.C. 1050 =1927 N. 145. Suit to set aside a wrongful lease by agent of the principal's property is governed by Art. 144 and not by this article. 130 I.C. 119=1931 O. 34. Suit denying the genuineness or the validity of the will is not governed by this article. 12 I.C. 49=114 P.W.R. 1911. Suit for declaration that a mortgage deed executed by plaintiff was without consideration and ineffectual to confer any right on defendant is governed by this article. 37 A. 640=29 I.C. 968=13 A.L.J. 913. So also suit to set aside sale on ground of undue influence. 41 M.L.J. 474=68 I.C. 352; 39 Bom.L.R. 1233; 43 I.C. 164=1917 M.W.N. 906; 38 M. 321=24 M.L.J. 592; 1938 R. 264; 1940 P. 201 (misrepresentation as to the real nature of the deed); 1938 A.L.J. 502=1938 A. 451. The period of three years permitted by Art. 91 begins to run from the discovery of the plaintiff of the true nature of the deed which he had signed, and not from the date when he escaped from the influence by which according to the plaintiff, he was dominated. [15 C. 58 (P.C.), Ref.] 61 I.A. 224=9 Luck. 178=67 M.L.J. 7 (P.C.). Suit to set aside gift executed under undue influence——Limitation is three years from the date when the true facts became known to the plaintiff. 7 O.W.N. 1129=1931 O. 34; 1931 A.L.J. 909; 106 I.C. 903=1927 O. 629. The burden of proof is on the defendant to show that the plaintiff had clear and definite knowledge of the true facts. 182 I.C. 801 (2)=1939 A.L.J. 642=1939 A. 348. Suit for cancellation of document and suit for declaring document to be null and void distinguished—Latter class of suits is governed by Art. 120 and not by Art. 91. *See* 109 I.C. 54=1928 A. 267. Article is inapplicable to void documents, the cancellation of which need not be claimed, and is not specifically claimed. 42 B. 638=47 I.C. 581 (F.B.); 33 I.C. 441=17 Bom.L.R. 1137 (N.); 26 C.W.N. 570=69 I.C. 426; 26 C.W.N. 479; 23 C.W.N. 93=49 I.C. 76; 65 I.C. 224; 39 M. 456=28 M.L.J. 571=29 I.C. 1. Suit by vendee for declaration that the sale-deed is either void or voidable at his instance and for return of purchase money is under this article and time runs when he comes to know of the alleged defects in vendor's title. 1930 S. 66. Article has been held to apply to a suit for declaration of invalidity of a registered adoption deed. 45 A. 169=20 A.L.J. 945. If a lease is not binding on the plaintiff, he can recover the property without setting aside the lease. 1915 M.W.N. 962=31 I.C. 590. Where there exists a document, which, if valid and binding on a party, would defeat his right in recovering possession of any property, he must sue under Art. 91 for its cancellation. 38 B. 449 =22 I.C. 195. Art. 91 can have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But it does apply to a case in which it is not possible to the plaintiff to get any relief until the instrument is set aside. In other words, if the instrument is binding upon the plaintiff, then, even though the plaint may have been made to look as much like a suit for recovery of lands as possible, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate have a declaration of its invalidity as against him. 37 C.W.N. 1141=1933 C. 812; *see also* 1934 A.L.J. 817=1934 A. 507. In a suit for recovery of possession of land to which the plaintiff claimed to by entitled to inheritance and which had been transferred to the defendant by the deceased owner by means of fictitious sale-deed, *held*, that the property having been found to be non-ancestral and to be the self-acquired property of the last owner, it was necessary for the plaintiff to obtain a cancellation of the sale-deed in favour of the defendant and that Art. 91 applied to the suit, even though the main prayer in the suit was a decree for possession of the land. 34 P.L.R. 412=1933 L. 399. Where a guardian sells immovable property belonging to a minor without the sanction of the Court and subsequently executes a second sale with the permission of the Court, the latter transferee can sue for possession outright and need not expressly sue to have the first sale set aside. To such a case Art. 120 and not Art. 91 will apply. 34 C.W.N. 948. *See also* 1936 L. 996. A suit by a creditor to declare the invalidity as against him of a fraudulent transfer executed by his debtor is not governed by Art. 91, but is governed by Art. 120. 8 O.W.N. 593=1931 O. 333.

Arts. 91 and 142.—There is a wide difference between an instrument which is voidable and one which is void from the beginning. In the former the right under the contract continues until it is avoided and therefore restoration of property handed over in pursuance of it cannot be claimed until the instrument is avoided either by the act of parties or through the Court. In the latter no legal contract ever came into being and so the rights of the parties are determined independently of the deed. There is no need to avoid or cancel that which never existed in the eye of the law and so the substantial relief claimed would not be governed by Art. 91, nor can the mere addition of an ancillary relief for cancellation which need never have been claimed make any difference. These observations apply equally whether the transaction is embodied in one instrument or two. If the legal parts can be separated from the illegal, then the relief of restitution in respect of the bad is not governed by Art. 91. If they cannot, even then Art. 91 would not apply, for the only difference is that the whole would be bad and so void *ab initio* instead of only a part, nor can the fact that the other side can elect in such a case to make restitution in respect of the bad and keep the good without altering the consideration make any difference. It is Art. 142 that applies to such a case. I.L.R.(1939) N. 1=1938 N. 335 (F.B.). *See also* 20 P.L.T. 957=1940 P. 201; 19 P.L.T. 362=1938 P. 69. In a suit where there is not only a prayer for cancellation of a document, as for example, a hibanama, sought to be avoided but also for confirmation of possession of the properties covered by the deed, the position must be recognised that if the defendant is put in possession by virtue of an instrument which is not void on the face of it, a suit for possession even

Description of suit.	Period of limitation.	Time from which period begins to run.
92. To declare the forgery of an instrument issued or registered.	[1][Three years] ...	When the issue or registration becomes known to the plaintiff.
93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	[1][Three years] ...	The date of the attempt.
94. For property which the plaintiff has conveyed while insane.	[1][Three years] ...	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
95. To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	[1][Three years] ...	When the fraud becomes known to the party wronged.

LEG. REF.

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NOTES.

without a prayer for cancellation of the document would not take it out of the operation of Art. 91. In such a case, the *prima facie* title remains with the defendant, and until that title is defeated or displaced, the possession of the defendant cannot be disturbed. Art. 142 is inapplicable to such a case. 65 C.L.J. 34=1937 C. 500.

Art. 92.—Art. 92 applies to a suit for a declaration that an alleged deed of relinquishment is a forgery. 102 I.C. 287. Will—Suit to declare not genuine and invalid on the ground of testator's minority and absence of sound disposing state of mind—Limitation applicable. *See* 52 L.W. 440=A.I.R. 1941 M. 179.

Art. 93 : ATTEMPT TO ENFORCE includes the institution of proceedings in which the genuineness of the instrument is directly put in issue and to which the person against whom it is sought to be enforced is a necessary party. 40 M.L.J. 348 =62 I.C. 531 ; 32 I.C. 99 (M.). An attempt to register a document is not an attempt to enforce it. 17 Bom.L.R. 635 ; 32 I.C. 99 (M.) Attempt to have a lease recorded under the Record-of-rights Act is not an attempt to enforce the lease, but an attempt to recover rent under the lease is. 40 B. 22=30 I.C. 399. Mere mention of will in written statement in a previous suit is not an attempt within this article. 62 I.C. 531=40 M.L.J. 348 ; nor mention in the petition for succession certificate by a widow. 32 I.C. 99 (M.). A party challenging a document as forgery is not bound to set it aside by suit. (1916) 2 M.W.N. 325=37 I.C. 642.

Art. 95.—The article has no application when, on the face of the plaint, no equitable relief is claimed on the ground of fraud. 37 B. 158= 19 I.C. 406. *See also* 25 C. 49 ; 6 A. 406. Art. 95 applies and must apply to a case where the plaintiff has sustained loss or damage on account of the fraud of the defendant. It has no application to a suit for return of bonds lost or acquired by theft, or dishonest misappropriation or conversion. 38 Bom.L.R. 712=1936 B. 322. The object of the provision is to extend time in favour of the plaintiff where there is fraud. 5 A. 294 ; 16 B. 1 ; 30 M. 402. A decree obtained against a person treating him as a minor while in reality he is a major, is not a nullity. A suit by the defendant to declare that the decree obtained against him wrongly impleading him as a minor, is governed by Art. 95 and must be brought within three years of the date of the decree. A suit after three years is clearly barred when the decree challenged is not a nullity. 189 I.C. 535=21 P.L.T. 269. The heirs of the person against whom the fraudulent decree has been obtained, must also sue within the period prescribed by the article. 4 P. 510=1925 P. 625. In a suit under Art. 95 to set aside an *ex parte* decree on the ground of fraud, it is not enough if the plaintiff proves merely that there was no service of summons on him. He must show that the decree was obtained by fraud ; he must show that the summons was fraudulently suppressed and by fraud of the plaintiff (in the former suit) he was kept in ignorance of the decree. 60 C.L.J. 120. Where a suit is filed to set aside a consent decree in a partition suit on the ground of fraud, Art. 95 applies and limitation runs from the date of the discovery of the fraud. 145 I.C. 777=1933 S. 53. Sale in execution of a fraudulent decree cannot be set aside without setting aside the decree which is not a nullity. 20 C.W.N. 659=33 I.C. 767. Art. 95 governs such a suit. 23 M.L.J. 187= 16 I.C. 843 ; 26 C. 326. *See also* 49 I.C. 953 ; 30 C.W.N. 59. Although there may be allegations of fraud, still where they are unnecessary and the suit is really one for possession by the auction purchaser, Art. 138 and not this article applies. 167 I.C. 481=1937 P. 331. If a sale is sought to be set aside on the ground of fraud, Art. 95 and not Art. 12 applies. 14 P. L.T. 441 =1933 P. 473. Suit to set aside execution sale on account of the fraud of the decree-holder in concealing encumbrances is also governed by this article. 16 I.C. 215 (M.). So also where the vendor has no title in the property sold, suit to set aside sale on the ground of fraud, 19 I.C. 5. Also suit to recover possession of property as shebaits against defendants who were in possession under a certificate of sale under the Public Demands Recovery Act to which the plaintiffs were not parties. 34 C.W.N. 801. So also suit to recover together with interest money advanced on a fraudulent mortgage. 37 I.C. 351. 'Other relief' includes compensation for damages caused by fraud. 27 M. 343. Knowledge of fraud implies definite knowledge and not mere suspicion 6 A. 406 ; 17 B. 341 (P.C.). The onus of proving such knowledge before period of limitation is on the defendant. 17 B. 341 (347). *See also* 31 M. 230 ; 27 A. 540. Where a Mahomedan son, who is not the authorised agent of his father, by mortgaging his father's land holds himself out to be an agent, the limitation for a suit for compensation starts from the date

Description of suit.	Period of limitation.	Time from which period begins to run.
96. For relief on the ground of mistake.	[1][Three years] ...	When the mistake becomes known to the plaintiff.
97. For money paid upon an existing consideration which afterwards fails.	[1][Three years] ..	The date of the failure.

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NOTES.

on which the father obtains a decree in a suit for possession of the mortgaged property and not from the date of institution of suit. Though the plaintiff knew that the father repudiated the agency directly he instituted his suit, he was in possession of the land and it was not until a decree was obtained that he suffered any loss. 151 I.C. 58=1934 Pesh. 49. Whether Art. 95 or 115 applies to a suit for compensation against a pretended agent under S. 235 of the Contract Act, the period of limitation is three years. The date from which limitation starts is the date on which the plaintiff has notice that the implied agency did not exist, but it must be an effective notice. (*Ibid.*)

Art. 96 : SCOPE OF.—*See* 1924 L. 324 ; 20 B. 511. Article applicable only to cases of mistake. 101 I.C. 62=1927 C. 117. *See also* 18 L. 623 ; 1936 L. 747 ; 40 C.W.N. 914=1936 C. 400 (suit to rectify petition for adjustment of decree). Suit for recovery of excess of cess paid by mistake is governed by this article. 4 P. 448=1925 P. 765. *See also* 1936 L. 747 ; 42 Bom.L.R. 491 (suit to recover illegal tax levied by Municipality); 1938 L. 338 (wrong bills sent by mistake for electric current supplied by plaintiff—Suit for balance of current supplied not charged) ; 1941 M. 742. Money paid by mistake—Nature of claim—Banker and customer—Cheques drawn on bank by customer without funds—Suit for money paid on such cheques—Limitation. *See* 1941 P.W.N. 638. Execution sale—Subsequent decree in claim suit holding that judgment-debtor had no interest in property sold—Suit by purchaser for purchase-money from decree-holder—Limitation. *See* 1941 M.W.N. 484. This article governs suit for refund of excess price paid on account of short delivery. 48 M. 925=49 M.L.J. 228. Mistake in partition. 45 B. 582=61 I.C. 34 ; 54 M. 883=1931 M. 707=61 M.L.J. 430. (plaintiff allotted properties belonging to third party suing to reopen the partition and to re-adjust the shares). But *see* 55 I.C. 422. *See also* 130 I.C. 552=1931 S. 27 (Art. 142 held to apply). Where Art. 141 was applied, mistake in lease, 48 I.C. 972 ; mistake in decree not covered by this article. 11 I.C. 537. It is open to the plaintiff or the defendant in a suit to adduce oral evidence in regard to the correct description of the property in a conveyance executed between them and relief in regard thereto may be granted even though a suit for rectification has not been filed and even though a suit is barred by limitation under Art. 96. 47 L.W. 661=1938 M. 589=(1938) 1 M.L.J. 806. Limitation runs only on actual discovery of mistake. 25 A. 527 (P.C.). *See also* 6 M. 344. Mistake of law—If and when a ground for relief under article—Pure mistake of law—Mistake bearing upon private or special right of party seeking redress—Distinction. 56 M.L.J. 269. Goods sold and delivered to one of two brothes trading independently—Other brother debited by mistake—Mistake subsequently discovered—Claim against right person—Held Art. 52 and not Art. 96 applied. 27 S.L. R. 81=1933 S. 32.

Arts. 96 and 138.—*See* 1937 P. 331.

Art. 97 : APPLICABILITY.—*See* 33 M.L.J. 577 =42 I.C. 519. As to distinction between applicability of this article and of articles 115 and 116, *see* 13 P. 192=1934 P. 145. This article is applicable to the following suits : Suit for recovery of purchase money where the sale is inoperative and unenforceable, being only of reversionary interest. 45 A. 179=50 I.A. 69= 44 M.L.J. 489 (P.C.). [But *see* 1933 S. 379 ; 25 B. 593 (sale-deed void *ab initio*—Article inapplicable).] Where the vendee is dispossessed by the true owner owing to the defective title of the vendor. 39 M.L.J. 449=60 I.C. 235 ; 46 M. 40=43 M.L.J. 721. *See also* 50 I.C. 815 (M) ; 32 I.C. 176=19 M.L.T. 163 ; 55 I.C. 93 ; 37 B. 538 ; 48 M.L.J. 217=1925 M. 749. A purchaser's suit for refund of purchase-money owing to vendor failing to make out clear title. 50 A. 95=25 A.L.J. 841. *See also* 28 Punj.L.R. 74. Registered sale deed—Vendee put in possession —Lease by him—Lessee dispossessed by vendor—Suit by vendee for declaration of title against vendor and his brother—Sale found binding only as to vendor's share—Subsequent suit by vendee for refund of excess purchase-money over half price of goods—Cause of action held started when previous suit was decided. 30 N.L.R. 138= 1934 N. 16. *See also* 18 P. 654=1940 P. 81. Art. 97 applies in the case of a suit for refund of advance of moneys on mortgages subsequently declared void. 5 R. 283=54 I.A. 145=52 M.L.J. 579 (P.C.). Where the plaintiff, who has advanced money on a mortgage, repudiates in himself and files a suit for the money paid, such a suit is not a suit for compensation for breach of contract and is governed either by Art. 62 or by Art. 97, according as to whether the contract is void or voidable and not Art. 116. 1933 L. 581. Article applicable to a suit by a mortgagee who could not obtain possession of the mortgaged property by reason of a defect in the mortgagor's title. 55 I.C. 413. *See also* 13 L. 188 =1932 L. 382 ; or by a lessee evicted by a third party, for return of premium. 10 I.C. 486. Also to suit by the auction-purchaser for recovery of the purchase-money where execution sale is declared a nullity for want of any saleable interest in the judgment-debtor. 1922 M.W.N. 561=1923 M. 23. *See also* 1937 O.W.N. 83 ; 30 C.W.N. 79. [But in 46 C. 670=36 M.L.J. 557 (P.C.), it has been held that a suit for recovery of purchase money by the purchaser at a *patni* sale subsequently set aside in a suit, falls under Art. 62.] A suit for recovery of earnest money on the dismissal of a suit for specific performance

NOTES.

of contract of sale is governed by the article. 45 A. 378=21 A.L.J. 265. *See also* 18 Bom.L.R. 806=41 B. 31 ; 1937 A.L.J. 812=1937 A. 689. But *see* 4 Bur.L.J. 160=1925 R. 373. A suit for reimbursement by the purchaser of certain property of the amount paid for the redemption of an undisclosed mortgage, after the purchase in his favour was found to be sham and nominal, is not governed by Art. 97. It cannot be said to be "for money paid upon an existing consideration which afterwards fails" because *ex hypothesi* no consideration was ever intended for the transaction. (15 I.A. 211 ; 28 A. 466 and 28 A. 618, Dist.) 32 Bom.L.R. 1376=1931 B. 39. *See also* 197 I.C. 498. Relinquishment of rights—Money paid in consideration—Failure of deed to take effect—Claim for refund of money paid—Limitation Act, Arts. 62 or 97 appliable and not Art. 116. 1930 A. 1112. Where the representative of the mortgagor paid the mortgage amount to the representative of the mortgagee and was subsequently compelled to pay it once over to a donee from the mortgagee, a suit by him to recover the money paid by him to the former with interest and expenses of prior litigation would be governed by Art. 97 and not Art. 62. The suit for compensation would even fall under Art. 116 as there was a stipulation for reimbursement in the redemption deed executed by the representative of the mortgagee, in case any difficulty was experienced in obtaining possession. 32 P.L.R. 457=1931 L. 448. *See also* 1941 Pesh. 41 ; 1941 Pesh. 57. Plaintiff wrongly paying defendants to redeem mortgage —Third person obtaining foreclosure decree—Plaintiff paying him also to redeem mortgage—Suit to recover money wrongfully paid to defendants—*Held*, governed by this article and time began to run from date of foreclosure decree. 1935 O.W.N. 549=1935 O. 378. A suit for refund of the purchase money paid under a registered instrument on the ground that the vendor had no title and there was no consideration is governed by Art. 116 and time begins to run only from the date of knowledge of vendor's want of title or the purchaser is dispossessed of the property in consequence thereof. It is not governed by Art. 62 or Art. 97 (45 B. 955 ; 8 P. 432 ; 118 I.C. 203, Foll.). 133 I.C. 76=1931 S. 141. Where it was declared that certain property could not be sold in execution of a decree obtained by the plaintiff on foot of his mortgage deed and the decree became thereby infructuous and a suit for a simple money decree having been barred on that date, the plaintiff sued for damages for breach of a covenant for indemnity contained in the mortgage deed. *Held*, that the suit was governed by Art. 116 and not by Art. 62 or 97. *Held*, further that the suit was in time whether it was reckoned from the date of the objection to the plaintiff's execution or the date of the decree nullifying the decree in favour of the plaintiff. 1932 A.L.J. 317=1932 A. 358. On 24th February, 1926, the plaintiff paid the receiver certain amount as part of the purchase money of the estate of the insolvent. The Insolvency Court having refused to sanction the transfer, the purchaser applied in October, 1929, for a refund of the amount paid by him, and the Court dismissed his application, and he thereupon instituted a suit in May, 1931, for recovery of the amount. Meanwhile the property had been sold in auction in September, 1927. *Held*, that the suit was governed by Art. 97 and time commenced to run from the date of failure of consideration, namely, the date on which the property was sold to another person. 1934 A.L.J. 864=1934 A. 547. *A* and *B* were mortgagees of a share each. Both sub-mortgaged the entire share to *C*. *A* paid to *C* his share, of the sub-mortgaged debt, but *B* defaulted. *C* obtained a joint decree against *A* and *B* and had both their mortgagee rights sold in execution, on 21-10-1927 and got possession of the same on 19-1-1928. *A* then filed suit against *B* on 9-1-1931 for the recovery of his share of the mortgage amount with interest, and the suit was framed as one for contribution. *Held*, the suit was barred by time, that Art. 120 did not apply, that even if Art. 99 applied, limitation ran from date of sale and not date of dispossession and that S. 69, Contract Act, had no application as payment was held not to have been made. 10 O.W.N. 919=1933 O. 478.

Starting of Limitation.—As to what is date of failure of consideration, *see* 31 A. 68 ; 24 M. 27 ; 38 M. 887 ; 11 B. 475 ; 25 A. 618 ; 19 C. 123. Where lender was put in possession of land of the debtor for appropriation of the usufruct towards interest and there was no execution of a mortgage, the suit for money on dispossession of the land commences only from the date of dispossession. 1937 R. 148 (37 B. 938 ; 25 M. 396 ; 1927 P.C. 99, Rel. on) ; 1937 A. 689. Where there was a suit on an existing consideration, time runs from failure of that suit. 103 I.C. 385= 1927 A. 756 [19 C. 123 (P.C.), Foll.] Where vendee is dispossessed under a decree of Court starting point of limitation is not the date of the decree but the date of the actual dispossession. 46 M. 40=43 M.L.J. 721 ; 1927 L. 570. *See also* 10 I.C. 486 (lessee evicted by suit. 22 B. 783 ; 26 A. 519. But *see* 30 C.W.N. 79). Where a decree-holder omitted to give credit in his execution application to certain amounts received from the judgment-debtor, the payment of which he had certified to the Court and had the house of the judgment-debtor sold in execution and realised amount for more than the amounts due to him. *Held*, that a suit by the judgment-debtor to recover the excess realised was governed by Art. 115 or 120 and not by Art. 97 and that the starting point of limitation was the date of sale. 140 I.C. 472=1933 L. 112. Where an execution sale is declared a nullity, the starting point is the date of the decree of the first Court declaring the sale to be invalid and not of the appellate Court confirming the decree. 70 I.C. 45=1923 M. 23. *See also* 39 M.L.J. 449=60 I.C. 235 ; 1928 N. 134. The plaintiff purchased a decree. A suit to have that decree set aside on ground of fraud was decreed by the first Court but was reversed on appeal. The High Court, however, on second appeal restored the decree of the first Court. The plaintiff having sued for refund of the price on the ground of failure of consideration. *Held*, that time began to run from the date of the High Court's decree. 133 I.C. 415 (1)=1931 A. 651. Where a decree is confirmed in appeal, time under Art. 97 runs from the date of the adverse judgment of the first Court. The running of time is not postponed by reason of the filing of

Description of suit.	Period of limitation.	Time from which period begins to run.
98. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	[1][Three years] ...	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

the appeal. 39 L.W. 147=1934 M. 224. As to limitation in a suit for refund of purchase-money where plaintiff is entitled to sue for specific performance, *see* 1923 R. 87. *See also* 58 C.L.J. 235. Where a sale is void *ab initio* and possession is not given to the purhcaser, a suit to recover the purchase-money would be governed by Art. 62. Where, however, the title is imperfect and possession is not handed over and it is subsequently discovered that the contract of sale became void, Art. 97 would apply to a suit to recover the purchase money on an existing consideration which afterwards failed, and limitation would start from the time when the purchaser endeavoured to obtain possession of the property and being opposed found himself unable to obtain possession. But where possession has been handed over by the vendor to the vendee the cause of action would not arise till the vendee is dispossessed. 33 Bom.L,R. 1092=55 B. 565. *See also* 118 I.C. 203; 14 M.L.J. 125 (F.B.). In a suit for refund of purchase-money limitation will ordinarily run from the date of the agreement. But there may be special circumstances in which it would not. When there is a misapprehension as to the private rights of the vendor in the property which he purported to sell, the limitation begins when the true nature of those rights is discovered. 144 I.C. 724=1933 N. 244. Once the plaintiff establishes that there was a misrepresentation and that he was kept from a knowledge of the defect in title by it, then the burden shifts to the other side. If the question of title has been bound up with a complicated family history, the plaintiff cannot know of the defect in the title with reasonable definiteness, until the Court has finally decided the matter and then the starting point is the date of decision in the appellate Court. 1933 N. 144. Certain occupancy tenants effected a mortgage in favour of one of their landlords. It was, however, set aside as having been brought about without the consent of the other landlords and the mortgagors were formally put in possession. Nevertheless, the mortgagee continued in possession for some time afterwards, and, on the ground that he was on some subsequent date dispossessed, the mortgagee brought a suit for money lent as on a failure of consideration. *Held*, that time began to run from the date when the mortgage was held to be invalid and the mortgagors were put in possession, and not from the date when they were actually dispossessed. 34 P.L.R. 104=1933 L. 83. The plaintiff entered into a contract for the purchase of lands in 1916 but was unable to get possession of some of them. His suit for possession was dismissed in 1921. Within six years thereafter, the plaintiff brought the present suit for damages against his vendor for breach of the implied covenant of title. His subsequent suit for damages against vendor is governed by Art. 116 and not Art. 97. 64 M.L.J. 336=1933 M. 126. In a suit for recovery of damages due to breach of covenant as to title, Art. 97 applies and the date at which the party had notice of the defect as to title was the starting point of limitation. 31 Bom. L.R. 658=1929 B. 361. *See also* 137 I.C. 61=1932 N. 3 (Art. 116 applied). Contract of sale—Due diligence to be used by vendor in applying to the Court and obtain an order for sale—Failure by vendor—Subsequent mortgage to another who had it sold in satisfaction thereof—Suit by the original vendee for the return of the deposit money is under this article. Time begins to run from the date, when the contract became impossible of performance or was rescinded or abandoned. 56 C. 455=1929 C. 216. Contract to execute lease—Consideration paid in two instalments on different dates—Breach of contract —Suit for recovery of amounts paid—*Held*, the suit was governed by this article or Art. 115, and that limitation began to run only from breach of agreement which could only be after the second payment by the plaintiff. 155 I.C. 1092=1935 A. 759. Where a lessee failing to get possession of the leased property sued for the return of the advance paid by him, *held*, the breach of the covenant to lease occurred from the commencement of the lease which was the starting point of limitation whether Art. 97 or Art. 116 applied. 138 I.C. 119=1932 M. 255.

Arts. 97 and 62.—A suit for the return of the consideration by vendee of mortgagee rights against his vendor on the dismissal of a suit on the mortgage which was found to be without consideration and not binding on the heirs of the executants, is governed by Art. 97 and not by Art. 62 and the starting point is date of dismissal of suit. 1942 A.L.W. 50. *See also* I.L.R. (1941) Kar. 498.

Art. 98.—Joint family property not the "general estate" within this article. 33 M. 308. Art. 98 does no more than carry a deceased trustee's liability for breach on to his estate after his death. It does not contemplate any different cause of action. I.L.R. (1940) Nag. 94=1938 N. 30. A suit was brought against a daughter in respect of a breach of trust committed by her father. She herself was not a trustee, and she had not committed any wrong Act: also the defalcated money was not in her possession; nor was there anything else in her hands which could be said to represent it. *Held*, that the suit against her was clearly one to make good the loss occasioned by her father's breach of trust out of his general estate. To such a suit Art. 98 would apply. I.L.R. (1940) N. 94=1938 N. 30.

Description of suit.	Period of limitation.	Time from which period begins to run.
99. For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	[1][Three years] ...	The date of the payment in excess of the plaintiff's own share.
100. By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	[1][Three years] ...	When the right to contribution accrues.
101. For a seaman's wages.	[1][Three years] ...	The end of the voyage during which the wages are earned.
102. For wages not otherwise expressly provided for by this schedule.	[1][Three years] ...	When the wages accrue due.
103. By a Muhammadan for exigible dower (*mu'wajjal*).	[1][Three years] ...	When the dower is demanded and refused or (where, during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.

LEG. REF.

[1] Substituted by Act XI of 1923, S.2 and Sch. I, for "Ditto".

NOTES.

Art. 99.—Suit for reimbursement of money realized by coercive process is governed by this article. 26 C.W.N. 340. *See also* 22 A.L.J. 737 =1924 A. 843 (money payable by mortgagee under deed, realised from mortgagor). Article applies also to voluntary payments. 57 I.C. 484. One co-sharer paying revenue on behalf of another—No charge is created—Suit for contribution—Suit is governed by Art. 99 and not by Art. 132. 7 P. 613=111 I.C. 84. *See also* 44 L.W. 135. Art. 99 applies only to a suit for a personal decree under a charge created by S. 82 of the T. P. Act, but not to a suit to enforce the charge itself. 33 A. 708=8 A.L.J. 854. *See also* 35 C.W.N. 678=1931 C. 493 (Article inapplicable to a suit to enforce a statutory charge under S. 171, B. T. Act). Co-mortgagor redeeming a mortgage becomes assignee of the original security and therefore limitation for his suit for contribution is the same as that for a suit on the mortgage. 57 I.C. 868=25 C.W.N. 283. *See also* 44 L.W. 135. "The date of payment" is the date of acceptance of deposit of the money by the Court to the credit of the decree-holder. 1928 C. 361. *See also* 1940 P. 151. Where one member of a joint Hindu family pays a certain decree debt after separation and sues the others for contribution, Art. 99 applies and time runs only from the date of payment, and not the date when the debt was incurred. 1931 A.L.J. 651=1931 A. 652.

Art. 102 : ' WAGES '—MEANING OF.—*See* 39 A. 81=36 I.C. 871. Suit for commission by broker is not suit for wage. 36 I.C. 871. Suit by a *bisardar* for wages is governed by this article. 26 O.C. 327. Suit for wages of cook employed in hotel, *see* (1937) 1 M.L.J. 329. As to suit for wages by weighman in a shop, *see* 90 I.C. 120 ; also suit for wages by person employed as salesman 1935 R. 235. Art. 102 applies only to suits for wages as such brought by the person entitled to the wages. A suit brought by person not entitled to the wages cannot therefore be regarded as a suit within the meaning of the article. 7 O.W.N. 760=1930 O. 420. A village carpenter is an artisan within the meaning of Art. 7 and a suit for wages by him is governed by Art. 7 and not by Art. 102 or Art. 56. 152 I.C. 885=1934 N. 260. Applicability—*Shahna* employed to watch crops attached in execution—Suit for wages—Limitation. 1935 A.L.J. 78=1935 A. 102. In the case of monthly wages, the wages accrue and become due in law on the final day of the month, and the period of limitation for recovery of arrears of monthly wages runs under Art. 102 from that date and not from the date of termination of service. 154 I.C. 713=1935 A.L.J. 379.

CLAIM BY ARCHAKA AGAINST TRUSTEE FOR 'TASTIK' ALLOWANCE.—The relationship of master and servant subsists between the trustee of a temple and the hereditary archaka attached to that temple and the trustees have a right to dismiss the archaka for misconduct. A suit by an archaka against the trustee for the emoluments of his office is a suit for wages coming under Art. 102. The allowance called ' tastik ' paid by the trustee to his archaka, although paid out of Government revenue, is yet paid only in lieu of wages for the services rendered to the temple. So, a claim by an archaka to " tastik " allowance is governed by Art. 102. 1936 M. 149=70 M.L.J. 220; 41 M. 528=1935 M. 124=68 M.L.J. 132.

SUIT FOR MONEY DUE FROM DISMISSED EMPLOYEE. —Defendant claiming set-off of arrears of pay—Plaint filed within three years of dismissal admitting arrears—Defendant's claim for arrears not barred. 1936 C. 277=167 I.C. 265.

Art. 103.—Suit for prompt dower. *See* 78 I.C. 106=1925 O. 267. Under Art. 103, time begins to run not from the date of demand of the dower but from the date of the refusal. I.R.L. 1937 A. 153=1937 A. 39. *See also*

Description of suit.	Period of limitation.	Time from which period begins to run.
104. By a Muhammadan for deferred dower (*mu'wajjal*).	[1][Three years] ...	When the marriage is dissolved by death or divorce.
105. By a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee.	[1][Three years] ...	When the mortgagor re-enters on the mortgaged property.
106. For an account and a share of the profits of a dissolved partnership.	[1][Three years] ...	The date of dissolution.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

1937 L. 270. Article applicable to suits for dower on the basis of registered instrument. *See* 50 C. 253=36 C.L.J. 379. Art. 103 is not applicable to a suit on a bond executed for the amount of dower. 99 I.C. 553=1927 A. 268. Demand must be express and unambiguous. 2 Beng.L.R. 306 ; 24 W.R. 163 (P. C.) ; 142 I.C. 833=1933 Pesh. 31.

Arts. 103 and 104.—Under Mahomedan Law a divorce by means of a written deed is valid if communicated to the wife. Hence, time under Arts. 103 and 104, for a suit for dower runs from the date of communication of divorce to the wife. The onus about the date of communication however in such a suit is on the plaintiff. 1941 L. 166.

Art. 104.—It is a part of the Mahomedan Law that, so far as a claim for dower is concerned, the marriage is dissolved only when it comes to the wife's notice, and there is nothing in Art. 104 against that rule. So a suit brought by a Mahomedan wife for deferred dower is in time, if within three years from the date when the talak pronounced in her absence by her husband was communicated to her, though it may be more than three years from the date of the pronouncement. 133 I.C. 375=1931 M. 647. Where a Mahomedan widow in possession in lieu of dower is dispossessed forcibly, limitation for her suit for the balance of her dower debt runs from such dispossession and not from the death of the husband. 33 A. 569=8 A.L.J. 578. Divorce by husband—Talaknama offering to pay deferred dower in instalments—Suit by wife after three years—If barred—Decree for instalments not barred—Power of Court to grant. 1936 C. 627.

Art. 105.—As to applicability, *see* 38 I.C. 610 =20 O.C. 25 ; 32 I.C. 729=2 O.L.J. 620. (recovery of mesne profits and interest). Article has no application where the mortgagor recovers property by a redemption suit. 30 A. 225. *See also* 10 I.C. 402 ; 26 C.W.N. 123=1922 C. 189.

Art. 106.—*See* 36 Bom.L.R. 1065. Art. 106 contemplates suits between partners *inter se* and does not apply to an action by partner against the sub-partner. Such an action is governed by Art. 120. 38 L.W. 858=65 M.L.J. 789. A suit for a declaration that certain property attached in execution of a decree against one of the partners as belonging solely to him, is not solely owned by him, and that plaintiff has got a share in it, is not a suit for account or for share of profits of a dissolved partnership and is not governed by Art. 106. 1933 A. 926. Art. 106 only applies in the case of a partnership that has been already dissolved. 6 R. 198=1928 R. 160 ; 138 I.C. 375=1932 L. 519. Where a firm is not dissolved, Art. 106 does not apply but only Art. 120. 66 I.C. 811=25 C.W.N. 847. *See also* 37 L.W. 288=144 I.C. 573=1933 M. 353 ; 48 I.C. 89 (M.) ; 37 M.L.J. 353 ; 6 R. 198=1928 R. 160. There is no scope for the application of Art. 106 where admittedly a memorandum has been drawn up on the dissolution of a partnership, embodying the settlement between the parties as to their respective rights on settlement of the accounts of the partnership. 1938 M. 133= (1937) 2 M.L.J. 511. Where a partnership is dissolved on the death of a partner, and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, a suit for recovery of the debts is governed by Art. 106, and must be instituted within three years of the death of the partner. 1936 L. 514 ; 167 I.C. 759. A suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an express agreement between the partners to render accounts and to distribute the profits annually is governed by Art. 120 and not Art. 89 or Art. 106 or Art. 116. 29 N.L.R. 34=15 N.L.J. 10=141 I.C. 277 (2) =1933 N. 127. After a dissolution of partnership, an agreement was entered into by the partners to the effect that the two partners, as mentioned in the agreement, were to collect the outstandings of the partnership as trustees and to deposit the amount in a bank after paying off the partnership liabilities and to share it equally. A suit instituted for rendition of accounts of the moneys realized as per agreement was held to be governed by Art. 89 and not by Art. 106 of the Act. 134 I.C. 527=1931 L. 300. Art. 106 does not apply to a suit by a legal representative of a deceased partner for accounts of the partnership business which was carried on by the surviving partners after the death of the partner. The right of the legal representative is not a right to a share of the profits of a dissolved partnership within the meaning of that article, but is a right accruing to him by the subsequent dealing with the assets belonging to the deceased partner. 45 C.W.N. 1065. The business of a partnership formed for running a chit fund, with the partnership as the stake-holder, does not cease or terminate with the expiry of the chit period of earlier if the auction of chits every month comes to an end earlier for other reasons. Accordingly for a

Description of suit.	Period of limitation.	Time from which period begins to run.
107. By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	[1][Three years] ..	The date of the payment.
108. By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	[1][Three years] ..	When the trees are cut down.
109. For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	[1][Three years] ...	When the profits are received.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

suit for dissolution and account of such a partnership time will not begin to run until all the assets of the partnership are realised and the liabilities paid, when alone the business can be said to come to an end. 54 L.W. 355=(1941) 2 M.L.J. 490. Cessation of annual accounts and rendering of final account showing division of capital and revenue if constitutes dissolution of partnership. *See* 36 M. 185=25 M.L.J. 128 (P.C.). As to time of dissolution, *see also* 42 I.C. 459=62 P.W.R. 1917; 32 I.C. 853=49 P.W.R. 1916. Even after business of the partnership is stopped, partnership can continue for purpose of realisation of assets, and limitation for a suit for accounts begins from the date of the final dissolution. 143 I.C. 903=1933 S. 121. Death of a partner effects dissolution. 7 N.L.J. 195=1924 N. 263. *See also* 57 M. 378=151 I.C. 81=66 M.L.J. 625. Death of partner—Continuance of business by survivors and son of deceased partner in old firm name—Use of old premises and old accounts books—Suit for accounts—Limitation. 153 I.C. 969=1935 L. 209. As to the effect of contract to continue partnership on death of a partner, *see* 1922 L. 343; 101 P.R. 1914=27 I.C. 69; 46 M.L.J. 503=80 I.C. 378. Where one of the divided members of a Hindu family running a business in partnership after partition, puts an end to the partnership, there is a dissolution and a suit by such member is governed by this article. 63 I.C. 548=19 A.L.J. 525. *See also* 1939 A. 217. So also where a partnership is already dissolved and a suit is for its winding up. 25 M. 149. Also suit for plaintiff's share of partnership property purchased out of the partnership funds. 30 A. 279=5 A.L.J. 278. Also a suit by the heirs of one of two brothers who carried on joint business for an account and a share of the profits. 38 M. 1099=32 I.C. 1002. Also suit for declaration that the plaintiff retired from partnership on a certain date, that the partnership was dissolved so far as he is concerned and for accounts and share of profits due to him. 22 C.W.N. 104 =43 I.C. 893. Also suit for price of article delivered to a partner during the course of partnership. 10 I.C. 250. But if the plaintiff alleges such receipt after dissolution, suit to recover share within three years of such receipt is not barred, though a suit for account might be barred. *See* 6 B. 628; 20 B. 15; 28 M. 344; 12 B.H.C. 97. But *see* 97 P.R. 1910; 34 B. 515 =11 Bom.L.R. 1354, disapproving 6 B. 628. A suit by an expelled partner for accounts or for dissolution and a share in the profits is governed by Art. 120 and not by Art. 106. 120 I.C. 613 =1930 L. 378. Suit for accounts of partnership —Decree—Amount found due to *ex parte* defendant—Suit by latter to recover—Limitation. *Held*, that the claim was not analogous to one arising out of an adjustment of partnership accounts; that the suit did not involve or require the kind of accounts taking usually directed in a case of the ordinary accounting kind; and that the suit was therefore not governed by Art. 106. 40 L.W. 792=1934 M. 665=67 M.L.J. 413. Joint family business—Partition of part of properties of family—Business still carried on in common for sometime—Outstandings collected by branches and retained—Suit for partition of undivided properties and for accounts of the collections—Art. 120 and not this article applies. 45 L.W. 749=1937 M. 599.

Art. 107.—Time runs from the date on which the manager expends the money for family purposes. 20 C. 18. A suit for contribution by a member of a joint family who pays a decree debt after separation is governed by Art. 99 and not this article. *See* 134 I.C. 452=1931 A.L.J. 651=1931 A. 652 cited under Art. 99.

Art. 108.—Applicability. *See* 25 I.C. 704.

Art. 109.—The words "wrongfully received" include receipts under a claim or title that cannot be legally susbtantiated. 2 L.W. 169=28 I.C. 85; 26 C.W.N. 386=1922 C. 235. As to the meaning of the words "wrongfully received," *see* 162 I.C. 771=43 L.W. 706=1936 M. 654. *Ses aiso* 1939 R. 365. They do not import bad faith on the part of the defendant. 10 W.R. 486. Reciept of rents and profits by one of several tenants-in-common on behalf of all cannot be said to be wrongful. 45 M. 648 (F.B.); 131 I.C. 511=1931 R. 150. *See also* 1933 L. 951; 1938 R. 416. Advance collection of rent, if wrongful receipt. *See* 16 P. 184=18 P.L.T. 162. Suit for share of profits—Suit by members of joint family against purchaser of another member's interest in property—Inapplicability. 41 L.W. 138=68 M.L.J. 487. *See also* 1941 N.L.J. 184 (suit for profits against person entrusted with property for safe custody).

ILLUSTRATIVE CASES.—A suit for recovery of profits by a person who was dispossessed under a decree, and who was subsequently restored to possession, the decree being reversed in appeal is governed by this article. 28 I.C. 85=2 L.W. 169. *See also* 55 L.W. 264=(1942) 2 M.L.J. 472; 22 C.W.N. 263=43 I.C. 781 (possession obtained

Description of suit.	Period of limitation.	Time from which period begins to run.
110. For arrears of rent.	[1][Three years] ..	When the arrears become due.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

by defendant under a patni sale which was subsequently set aside). Also suit by purchaser at a mortgage sale for recovery of profits received by a transferee *pendente lite*. 26 C.W.N. 386=1922 C. 235. [In such cases proceedings to set aside the sale by the judgment-debtor does not operate to suspend limitation. 89 I.C. 1000=29 C.W.N. 973]. *See also* 1937 A.W.R. 539=1937 A. 481= 1937 A.L.J. 979. Also suit for mesne profits by usufructuary mortgagee against mortgagor. 39 A. 200=39 I.C. 663. Under the article mesne profits cannot be claimed for more than three years prior to suit. 26 I.C. 890=19 C.W.N. 1167; 22 C.W.N. 263=43 I.C. 781; 13 I.C. 791 (M.); 14 I.C. 801 (Bur.); 10 C. 785 (P.C.). Application by Official Assignee for mesne profits from mortgagee whose mortgage has been annulled. 71 M.L.J. 289. Claim for profits wrongfully received by receiver appointed by Court. *See* 50 L.W. 389=43 C.W.N. 897=1939 P.C. 178 (P.C.). Government lands under management of Railway Company—Agreement of license by company for cultivation of special crops for one year—Suit for mesne profits—Limitation. *See* 17 P.L.T. 206. *See also* 32 C. 118; 21 C. 157 (P.C.); 14 M. 328; 1925 A. 52. Starting point of limitation is the actual receipt of profits. 24 I.C. 866=10 N.L.R. 76; 35 C. 996; 161 I.C. 461=1936 R. 80; and not date of decision as to question of title of the plaintiff. 146 I.C. 939 =1933 L. 615. The terms of Art. 109 are perfectly plain and require that the suit must be brought within three years from the date when the profits were received. The starting point is the date when the profits were received and not the date when the cause of action for recover those profits arose. I.L.R. (1938) B. 107=40 Bom.L. R. 100=1938 B. 158. *See also* 1937 A. 481. Three years to be reckoned back from the date of the plaint and not date of application for acertainment of mesne profits. 68 I.C. 203=2 P.L.T. 648.

Arts. 109 and 116.—Where a mortgagor covenants to deliver possession to the mortgagee before a certain date and to pay rent at a certain rate till then and fails to do so and the mortgagee sues for possession and compensation. The suit is governed by Art. 116 and not by Art. 109, and it would be within time if brought within six years from the date fixed for delivering possession when the breach occurred. As it could not be said that the covenant to pay rent till possession was given on fixed date amounted to an implied agreement to continue to pay rent to the mortgagee, if possession was not given, there is no successive breach of contract every year. 190 I.C. 721=1940 O.W.N. 875=6 Luck. 203= 1941 O. 1.

Art. 110: APPLICABILITY.—Where the relationship between the parties is not that of landlord and tenant, the article has no application. 25 B. 556; 13 M.L.J. 248; 18 W.R. 132. Rent is payable within the meaning of this article only when it is ascertained. 36 M. 438. *See also* 12 I.C. 804=7 N.L.R. 169. Suit by assignee for arrears of rent comes within the article. 63 I.C. 424; 1 P.L.J. 506=38 I.C. 102. *See also* 45 C.W.N. 787=I.L.R. (1941) 1 Cal. 335=1942 C. 222. Also suit for *Kattubadi* cess. 161 I.C. 336=43 L.W. 522=1936 M. 147. Also suit for money settled by auction for date and palm trees. 15 P. 626=17 P.L.T. 363=1936 P. 403. *See also* 30 S.L.R. 146 (suit for license fee for use of municipal land); 1936 R. 338) suit for ground rent). Suit to recover arrears of royalty and commission is not one for rent within Art. 110. 19 I.C. 865=17 C.L.J. 372. Also suit for miras or customary dues payable to a chatram. 16 M. 305. Suit for rent on a registered lease is governed by Art. 116 and not by Art. 110. 44 C. 759=44 I.A. 65=32 M.L.J. 357 (P.C.); 37 B. 656=21 I.C. 315; 1942 P. 83; 133 I.C. 102=53 C.L.J. 522=1931 C. 790. A suit for arrears of rent based on an unregistered kabuliyat is governed by Art. 110 and not by Art. 115. I.L.R. (1942) 1 C. 335=1942 C. 222 =45 C.W.N. 787. [Decisions in 34 A. 464 and in 1 P.L.J. 504 to the contrary not good law.] Suit for recovery of jodi payable by inamdar to zamindar is governed by this article. 1923 M.W. N. 524=1924 M. 73. Under S. 46 of the Contract Act, where no time is fixed for the performance of a contract a reasonable time must be allowed for its performance. Where money has to be paid under a contract which does not specify when such money is payable, then the money must be paid within a reasonable time, and limitation for a suit to recover the money would commence to run only after the expiry of such reasonable time. Royalty payable in respect of a coal mine cannot be treated on the same footing as rent, because the amount cannot be possibly ascertained until the raisings of coal have been weighed and checked, etc. 21 P.L.T. 442=1940 P. 609. If a purchaser at a revenue sale annuls an under-tenure under S. 37 of Act XI of 1859, without having received any rent from the holder of it, he must be taken to have refused to recognise the under-tenure from the date of sale. He is only entitled to damages from him for use and occupation from the date of sale to the date of annulment and to mesne profits for the subsequent period. Obviously, to the claim for none of these periods, Art.110 would apply, as the claim would not be one "for arrears of rent" within the meaning of this article. The article applicable would be Art. 120. 43 C.W.N. 469=69 C.L.J. 220=1939 C. 468.

STARTING POINT OF LIMITATION.—Usually arrears of rent become due at the end of each fasli year. But a different time may in certain circumstance be the time from which time

Description of suit.	Period of limitation.	Time from which period begins to run.
111. By a vendor of immovable property for personal payment of unpaid purchase-monry.	¹[Three years] ..	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
112. For a call by a company registered under any Statute or Act.	¹[Three years] ...	When the call is payable.

LEG. REF.

¹Substituted by Act XI of 1923 for "Ditto".

NOTES.

begins to run. 46 M. 579=44 M.L.J. 318. *See also* 27 M. 143 (P.C.) and 29 M. 553 on this point. Thus, where right of landlord and that of tenant were vested in the same person, time begins to run only from the date when they vested in different persons. 46 M. 579=44 M.L.J. 318. Where a date is fixed when the rent would fall due, time runs from that date. 37 M. 540=16 I.C. 934. *See also* 22 M.L.J. 451 =15 I.C. 393; 1 P.L.J. 506=38 I.C. 102; 1931 A. 51.

Art. 111.—A suit to enforce the vendor's lien for the unpaid purchase-money is governed by Art. 132 and not by this article. 29 M. 305 (F. B.); overruling 21 M. 141 and 24 M. 233. *See also* 22 B. 846; 18 B. 48; 2 A. 454; 30 A. 172. Article is not applicable to a suit to recover amount due under compromise in a suit for partition. 1928 L. 662; nor to a suit by the vendor to recover unpaid purchase-money which the vendee had failed to pay to a creditor of the vendor in accordance with his undertaking. 1931 A.L.J. 985=1931 A. 419; 1937 A.L.J. 279 =1935 A. 411. *See also* 15 P. 753=1936 P. 44. Art. 111 governs suits for unpaid purchase money payable to or to the order of the vendor under the agreement to sell and is independent of rights arising by the deed of sale. When the agreement is embodied in the registered sale deed, a suit for compensation for breach of contract is governed by Art. 116. 56 M. 724=1933 M. 424=64 M.L.J. 526. *See also* 15 P. 753=166 I.C. 599= 1937 P. 44. Art. 111 does not apply to a case where no time was fixed for completing the sale and the purchase-money is not payable till some date after conveyance of the property. Where the purchase money or a substantial portion of it was not payable until one year after the conveyance of the property and no time was fixed for completing the sale. *Held*, Art. 116 did not apply. 1934 L. 296 (1). Vendor and purchaser —Amount kept with vendee to pay previous mortgage—Surplus to be paid to vendor—Claim for surplus. *Held*, that Art. 111 is not applicable to the case but Art. 116 is applicable and the period would commence from the date of the breach, *i.e.*, when for the first time in the suit instituted by the vendee for redemption, the Court of first instance would find that smaller sum than the amount left with the vendee was due. 11 O.W.N. 691=1934 O. 240. Registered sale—Portion of purchase-money retained by vendee—Contract of indemnity—Starting point of limitation. *Held*, that it was governed not by Art. 111 but by Art. 116; the *terminus a quo* is not the date of the execution of the sale-deed, but the date on which the contract is deemed to have been broken, this date being either when there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied. (2 L. 316; 55 B. 565; 8 P. 860, Foll.) 14 L. 646. *See also* I.L.R. (1938) N. 45=1937 N. 246. Sale by guardian—Money left with vendee to be paid to two minors on attaining majority—Suit by such guardian as reversioner for money—Limitation governed by Art. 120 and not by Art. 111. 1933 L. 860.

Arts. 111, 116 and 83.—Registered sale-deed —Consideration left with vendee for payment to vendor's creditor for debt due under mortgage and hand-note—Vendee committing default—Hand-note paid by vendor—Suit by vendor for unpaid consideration—Limitation Act, Art. 111 and 116 apply. 1941 P. 452.

Art. 112.—Inapplicable to suit by liquidator suing on behalf of the company in liquidation. 10 B. 483. The call payable to the company and the liability to contribution on a winding up are distinct and different; the fact that the company could not realise the calls by lapse of time is no answer to the liquidator's claim. 10 P. 249=130 I.C. 534=1931 P. 44. Where the articles of association of a company provide that a person shall continue to be liable for the unpaid balance of share money though his share is forfeited, the result is that the shareholder on forfeiture ceases to be a member of the company, and all that is left is the new liability to pay all monies which at the date of the forfeiture were payable by him to the company in respect of his shares. Hence the starting point of limitation for a suit to recover such unpaid balance of share money is the date of forfeiture and not the date of the allotment of shares. 1940 N. 235=I.L.R. (1942) Nag. 114. As to the applicability of the article in the case of call upon shareholder in a company, *see* 1927 L. 543=102 I.C. 705. When a suit to recover the call money has been barred by time the fact that simply because the name is kept in the register as a shareholder and the share is forfeited only subsequently does not revive the debt, and the company cannot claim that limitation should run from date of forfeiture. 10 O.W.N. 447=1933 O. 285. A shareholder was called un to pay a certain amount by 2nd March, 1925, but he failed to do so and thereupon the directors of the company forfeited his share on 22nd March, 1926. The liquidator who was appointed subsequently, sued to recover the amount on 16th March, 1929. *Held*, that the suit was in time, the cause of action having arisen when the share was forfeited. 54 A. 541= 1932 A. 342. A company issued certain shares which were partly not paid up. In 1920 they mortgaged the unpaid calls to the plaintiff. By a resolution of the company the unpaid calls were

Description of suit.	Period of limitation.	Time from which period begins to run.
113. For specific performance of a contract.	[1][Three years] ...	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

LEG. REF.

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NOTES.

made payable on the 31st August, 1931. The shareholders took no notice of the calls. In April, 1923, the plaintiff sued on his mortgage. In July, 1923, the company went into liquidation. The plaintiff bought the unpaid calls in 1924 at the sale in execution of his own decree and then sued the shareholders. *Held*, that the suit was barred by Art. 112, that time began to run from 31st August 1921, that the limitation was not interrupted in any way by the liquidation of the company. 137 I.C. 380=1932 C. 382. *See also* 1934 L. 1015.

ART. 113: APPLICABILITY.—*See* 10 I.C. 1061; 9 I.C. 243. Article applicable to suit for specific performance of—a contract for conveyance of immovable property. *See* 45 M. 645=49 I.A. 335 (P.C.). The fact that the defendant was, even prior to the contract, bound to hold the property for the benefit of the plaintiff does not affect limitation. 66 I.C. 622; of a contract to grant lease. 23 I.C. 360; 4 P.L.J. 447=52 I.C. 452; 24 I.C. 911; of a contract to resell. 29 I.C. 898. Where there is an agreement by the vendee to re-convey the property to the vendor and, on the vendor's demanding resale of the property, he (vendee) denies the agreement, his denial amounts to a refusal to perform the agreement within the meaning of Art. 113. 36 Bom. L.R. 290=1934 B. 171; to a suit to enforce a covenant to give the first offer to the vendor in case of subsequent sale by the vendee. 80 I.C. 962. Suit based on a covenant in an exchange deed, for re-exchange in the event of obstruction is governed not by this article but by Art. 143. 42 M. 690=51 I.C. 939 Suit for specific performance and possession how far governed by this article. *See* 6 A. 231; 25 W.R. 521; 33 C. 881. Suit by patnidar for settlement and possession of chaukidari chakran lands transferred to the zamindar is governed not by this article but by Art. 144. 46 C. 173=35 M.L.J. 528=45 I.A. 162 (P.C.). Also suit by heir for possession of his share under an agreement. 20 P.R. 1913 =19 I.C. 411. As to applicability of article to suit for accounts of partnership, *see* 36 Bom.L.R. 1068. The word "contract" does not apply to award. 51 I.C. 999. Suit to recover money under an award is not governed by this article. 34 A. 43=11 I.C. 705; 23 M. 593; 23 A. 285; 33 C. 831; 32 P.R. 1913=16 I.C. 804; 36 Bom.L.R. 174=1934 B. 140; nor a suit to enforce an award. 1929 S. 168. Suit for possession of "immovable property" on the basis of an award is governed by Art. 144 and not by the article. 42 I.C. 116=4 O.L.J. 487. *See also* 4 U.B.R. 124=1923 R. 108. To a suit for specific performance of a contract of the lease, no article other than Art. 113 applies, which expressly provides for such suits. Under that article the *terminus a quo* is the date fixed for the performance of the contract and if no such date is fixed, the date when the plaintiff has notice that performance is refused. 42 P.L.R. 194=1940 L. 225. *See also* 1932 L. 36; 1933 A. 410. This article applies to a suit for possession under a lease, where plaintiff was never put in possession. 1935 A.L.J. 662=1935 A. 569.

STARTING POINT OF LIMITATION.—The date fixed for the performance must be a date expressly fixed in the contract itself which is to be specifically enforced and not a date which the parties may have fixed by necessary implication without stating expressly what it was. If not expressly stated, the date of notice of refusal of performance is the starting point of limitation. 1933 A.L.J. 300=1933 A. 410. *See also* 139 I.C. 121=1932 L. 36; 32 P.L.R. 761; 1940 L. 225; 1938 L. 23 (Agreement to finance litigation). Where no time is fixed for performance, time runs from the time when performance is demanded and refused. 43 C. 790=20 C.W.N. 370=35 I.C. 305; 38 M.L.J. 29=55 I.C. 533; 41 M. 18=33 M.L.J. 35; 17 I.C. 399=1922 M.W.N. 1004; 1 Bur.L.J 171=1923 R. 44. On the point, *see also* 5 C. 175; 34 C. 564; 31 M. 51. Where a purchaser of a portion of property has agreed to release it of an existing mortgage, but he fails to do so the cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made or at least not later than the date when the vendor calls upon the purchaser to do so. Such a suit is governed by Art. 116, and if it is for specific performance, it is governed by Art. 113. 60 C. 761=146 I.C. 863=1933 C. 641. Document contemplating another document to be executed—No date fixed—Time runs from notice of refusal. 102 I.C. 305. Time runs from the date when the plaintiff comes to know of the refusal. 32 I.C. 573; 32 I.C. 536; 107 I.C. 905. *See also* 31 P.L.R. 636 (a suit to enforce an agreement to sell under Punjab Colonisation of Government Lands Act subject to some conditions.)

ARTS. 113 AND 116.—Where a mortgage decree for sale is assigned under a registered deed, which provides *inter alia* that part of the consideration money remaining unpaid should be paid by the assignee to the assignor on the assignee realizing the decree, a suit by the assignor for the amount due and interest thereon is suit for compensation for breach of a contract falling under Art. 116 and is governed by the six years' rule of limitation. It is not a suit for specific performance so as to make Art. 113 applicable to it; nor is it a suit for indemnity. 1939 P.W.N 769=1940 P. 155.

ARTS. 113 AND 144.—Where a lease is registered it effects an actual demise and the right to possession becomes vested in the lessee. The lessee acquires a right which he can enforce by a suit for possession over the leased property against the lessor and as against any third person who might happen to be in possession over it. Where there was a perpetual lease but the lessee was not

Description of suit.	Period of limitation.	Time from which period begins to run.
114. For the rescission of a contract.	[1][Three years] ..	When the facts entitling the plaintiff to have the contract rescinded first become known to him.
115. For the compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	[1][Three years] ..	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

LEG. REF.

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NOTES.

put in possession, it was held that the rights acquired by the lessee are real rights which might be enforced by a suit for possession and not by a suit for specific performance. Such a suit would be governed by Art. 144 and not by Art. 113. I.L.R. (1938) All. 664=1938 A.L.J. 561=1938 A. 429.

ART. 114.—Applies only to suits by parties to the contract. 3 A. 846. Article is inapplicable to a suit by a donor to recover possession of the gifted property on the ground that the donee failed to fulfil the conditions mentioned in the gift deed. I. R. 1932 L. 645.

ART. 115: APPLICABILITY.—Distinction between this article and Art. 97 pointed out. 13 P. 192=150 I.C. 975=1934 P. 148. Art. 115 applies to a case of express or implied contract and not a contract in writing registered. The article again applies to cases for compensation and not where the action is for a liquidated sum of money. 12 P. 792. Applies to all cases of breaches of contract not otherwise specially provided for. 14 C. 256; 31 I.C. 335 (M.); 3 A. 600 (F.B.); 107 I.C. 493=1928 L. 442; 1930 O. 395. The word "compensation" has the same meaning as it has in S. 73 of the Contract Act. 107 I.C. 493. Article applies also to a case of liability on a simple debt due and is not limited to cases of damages for breaches of contract. 39 I.C. 205=21 C.W.N. 479. *See also* 1928 L. 442; 6 B. 76. Thus, a suit upon a letter of guarantee would be governed by the article. 39 I.C. 205=21 C.W.N. 479. Also suit by mortgagee where the right to sue for the money arises from a contract. 20 I.C. 360. Suit for money due on a contract to supply marble for a flooring and also to construct the flooring is governed by this article, as neither Art. 52 nor Art. 56 would cover the claim as a whole. 2 L. 376=1922 L. 198. The word "registered" in Arts. 115 and 116 includes articles of association registered under the Indian Companies Act and is not confined to registration under the Indian Registration Act. 54 B. 226=32 Bom.L.R. 232. But *see* 1933 S. 103=143 I.C. 713 (*contra*). *See also* 1937 P. 293. Article 115 will not apply where part of the contract was in writing registered, *i.e.*, contained in the articles of association. Article 115 is not strictly applicable to misfeasance in the nature of a breach of trust, nor is Art. 116, as "breach of contract" is not the sole liability sued on, nor is it the usual nomenclature for a breach of trust whether specific or *quasi*. 54 B. 226=32 Bom.L.R. 232. But *see* 1933 S. 103=143 I.C. 713, holding that limitation for proceedings under S. 235, Companies Act, is governed by Art. 115. [49 M. 468 (F.B.), Foll.] *See also* 1937 P. 293. Where a suit was filed to recover articles bailed with the defendant, but it appeared that no time was fixed for return of the articles, *held*, that Art. 115 applied and that limitation commenced from the date when the bailee should return the articles. If the contract of bailment is silent, the Court may take it that there was an implied term that the articles should be returned after the lapse of a reasonable time. 126 I.C. 682=7 O.W.N. 769=1930 O. 395.

THE FOLLOWING SUITS ON EXPRESS CONTRACTS ARE GOVERNED BY THE ARTICLE.—The word "registered" in Art. 116 means registered under the Registration Act. Hence registration of a company under the Companies Act is not equivalent to a registration of the Articles of Association, within the meaning of Art. 116 and therefore limitation for proceedings under S. 235, Companies Act, is governed by Art. 115 and not by Art. 116. [49 M. 468 (F.B.), Foll.] 143 I.C. 713=1933 S. 103. But *see* 54 B. 226 (*contra*). A suit by a legal adviser for his remuneration for services rendered on the basis of an express agreement with the client is governed by Art. 115 and not by the residuary Art. 120. 43 P.L.R. 97. Suits by lessee for damages caused by the lessor's failure to deliver a portion of the demised land. 40 M. 910=30 M.L.J. 575. A suit claiming repair charges and damages from the defendant who had borrowed the plaintiff's car for private use, which was considerably damaged by an accident. 10 O.W.N. 1105=145 I. C. 1001=1933 O. 518. A suit to recover deposit money payable by lessees on execution of the lease. 25 I.C. 812=1 L.W. 858. Deposit for fixed term—Article applicable. *See* 1936 Rang. 338. Art. 115 is a general provision applying to all actions *ex contractu* not specifically provided for otherwise. Where *D* contracted with *N* to supply goods and render services to *N* for a fixed sum of money and after the contract was broken, *P* purchased the debts due to *D* from *N* on account of goods supplied and services rendered to *N* by *D*, and *P* sued *N* for the purchased debts. *Held*, that Art. 52 did not apply and Art. 115 applied to this suit. 1935 L. 222. Suit against a *del credere* agent for the value of goods sold by him. 16 W.R. 35 (P.C.). Where partnership is dissolved, and there is subsequently an adjustment of accounts, which however was not signed, a

NOTES.

suit for the recovery of the amount is not governed by Art. 64, but only by this article or Art. 120, and the starting point is the date of adjustment. 27 S.L.R. 308=1933 S. 324. Suit for money on the basis of an agreement to deliver half the produce of certain land or on default, a sum of money annually. 72 I.C. 480= 1924 L. 149. A suit for recovery of a sum of money as the value of work done by the plaintiff. 35 P.L.R. 529= 1934 L. 475. Suit for money due under the terms of an award would be governed by the article if the award is signed by the parties in token of their acceptance. 265 P.W.R. 1912= 16 I.C. 804. Also suit for royalty under a decree passed in pursuance of a compromise agreement between the lessor and lessee. 2 P. 749=1924 P. 231. A compromise decree has got both the characteristics of a compromise and a decree. A suit for compensation for non-compliance with such a decree, may either be based on the compromise or the decree, and it depends upon the circumstances of each case. Where the suit is based on the contract, it is governed by this article. 13 P. 792. As to the applicability of the article to *thavanai* contracts, *see* 42 I.C. 573 =6 L.W. 687; 8 L.B.R. 526=36 I.C. 497. Where the debtor wrote a letter to the following effect in respect of a time-barred debt: "In regard to my overdrawn floating account with your branch, I herewith send Rs. 100, through *B*, General Manager of your Bank, to be credited in my above overdrawn floating account and I promise to pay the balance as soon as I am able to arrange within a period of six months. This is to give you time in the matter of limitation . . . . ." *Held*, that on a breach of the contract embodied in the letter the creditor's remedy was a suit for compensation and that such a suit was covered by Art. 115. 13 L. 448= 1932 L. 212. A suit by a creditor against a surety upon a letter of guarantee, executed by the latter in respect of a debt payable forthwith is governed by Art. 115 and limitation begins to run from the date of the execution of the guarantee, notwithstanding a stipulation in the guarantee to the effect that the creditor may look for payment to the surety if the principal made default in payment. 132 I.C. 590=1931 L. 691. The fact that limitation against the principal is extended by a local Act such as the Punjab Loans Limitation Act does not have the effect of extending the period of limitation against the surety. 1931 L. 691. *See also* 38 P.L.R. 276=163 I. C. 928=1936 L. 668. Suit by judgment-debtor to recover excess realised by the decree holder by execution sale is governed by this article or Art. 120, and the starting point is the date of sale. 140 I. C. 472=33 P.L.R. 1084=1933 L. 112.

THE FOLLOWING ARE NOT GOVERNED BY THE ARTICLE.—Suit against Railway Company for compensation for non-delivery of goods is governed by Art. 31 and not by this article. 31 I.C. 474=11 N.L.R. 174 (26 B. 562; 13 C.W.N. 851; 33 A. 544, Foll.) But *see also* 44 C. 16=34 I.C. 130; 7 B. 478. The plaintiff was a dealer in timber and the defendant did the business of sawing wood. The plaint stated that, between certain dates, a certain sum of money was advanced to the defendant, and the plaintiff sued to recover the money lent less the value of the work done by the defendant. *Held*, that the suit was governed by Art. 57 and not by Art. 115. 147 I.C. 295=1934 A. 126. As to case of misdelivery, *see* 122 P.W.R. 1913= 19 I.C. 477. Parties trading independently and agreeing to equalise profits on taking accounts. Suits for such accounts is not for compensation within Art. 115. 1927 M. 775. Suit for accounts against an agent would fall under Art. 89 despite the fact that there were written agreements between the parties. 4 P. 289=1925 P. 494= 89 I.C. 275; 1930 M.W.N. 1199. Whether Art. 95 or 115 applies to a suit for compensation against a pretended agent under S. 235 of the Contract Act, the period of limitation is three years. The date from which limitation starts is the date on which the plaintiff has noticed that the implied agency did not exist, but it must be an effective notice. 151 I.C. 58=1934 Pesh. 49. Articles 115 and 116 have no application to a claim made by the liquidator of a company under S. 235, Companies Act. 47 A. 669=23 A.L.J. 473. As to suit for balance of price of article sold with claim to damages and interest added, *see* 130 I.C. 574=1931 L. 309.

"IMPLIED CONTRACT"—Meaning, *see* 38 M. 275=25 M.L.J. 256. *See also* 17 P. 277. When a person untruly represents himself to be an authorized agent and deals with the plaintiff a suit for damages against the agent is governed by this article. 38 M. 275. *See also* 14 M.I.A. 134; 31 M. 275. Suit upon an agreement which is not express but based merely on local custom falls under the article. 3 A. 385. A lambardar who collects rents and manages the estate on behalf of the proprietors is an agent, bound by an implied contract to render account. 51 I.C. 733=4 P.L.J. 304. But a suit by some co-sharers in a ferry against other co-sharers for profits is not governed by this article. 35 I.C. 430=1 P.L.J. 69. A suit by a medical practitioner for the recovery of fees due for medical attendance is governed by Art. 115. In such a case there is an implied contract to pay the fee on each day of the visit and there is a breach of contract whenever there is non-payment. If the practitioner demands the fee and the party promises to pay the same promptly and fails to do so, there is a breach of contract at least on the last date of the attendance or anyhow on the date of the death of the patient. 1931 A. L.J. 949= 1931 A. 752 (2). As to suit for recovery of purchase money and costs incurred in litigation in an unsuccessful attempt to take possession of the property sold, *see* 42 M. 507=36 M.L.J 157. Article applies to suit for damages against the decree-holder who has received payment out of Court but failed to certify the same and applies for execution. 36 M.L.J. 175=48 I.C. 810; 5 M. 397. *See also* 30 M. 545; 25 M. 50 (decree executed notwithstanding compromise); 140 I.C. 472=1933 L. 112 (excessive execution without giving credit to payments made). In a suit for compensation for the subsidence of a tank the action for misfeasance or malfeasance was based on implied covenant running with the land that surface land had the inherent right of support from the underground mines. 8 P. 776=1929 P. 245.

STARTING POINT OF LIMITATION.—Time runs from the breach. 20 B. 8; 31 I.C. 335. *See*

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VII.— *Six years.*	
116. For compensation for the breach of a contract in writing registered.	[Six years] ...	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

NOTES.

also 1936 R. 510 ; 1941 R. 129. The question when the breach has occurred turns upon the interpretation of the contract. 20 B. 8. As to cases when demand and refusal are necessary to start limitation, *see* 20 B. 8 ; 14 B. 498 ; 31 I.C. 335 (M.). In a case of alternative contract to sell land or pay compensation, the claim to recover compensation accrues only when the vendor elects to adopt one of the courses and the three years' period runs only from that date. 132 I.C. 489=1931 L. 657. Where the lessee sues for damages for non-delivery of a portion of the leased property, time runs either from the date of the lease or from the date when possession was demanded and denied. 40 M. 910=30 M.L.J. 575. Continuing breach—Limitation does not run until the breach ceases. 30 M.L.J. 575. *See also* 1938 Lah. 277. An omission by directors to come to any conclusion whatsoever on an important peace of business duly proposed for the decision of the Board is a breach of duty which continues as long as the decision is deferred. 1933 S. 103. An indemnity clause in a sale-deed is a continuing covenant and a suit for indemnification is within time, if brought within six years of the date on which it is held by a Court of law that neither the purchaser nor his vendor had the rights given to him by the sale deed. 35 M.L.J. 124=47 I.C. 924. *See also* 42 M. 507=36 M.L.J. 157. Covenant for quiet enjoyment in favour of tenant—Test as to whether breach thereof is a continuing one or not. *See* 40 M. 910=30 M.L.J. 575. Covenant for title does not admit of continuing breach and time runs for a claim based on such covenant. from the date of the sale. 21 I.C. 740=1 L.W. 110. Contract for toll—Default by contractor—Attempted re-sale by District Board—Second re-sale—Loss sustained by—Suit to recover—Limitation for—Starting point of. 145 I.C. 476=38 L.W. 533=1933 M. 704. *See also* 17 P. 277 (Suit to recover money due under lease of market tolls bymunicipality. *See also* 16 P. 302=18 P.L.T. 252=1937 P. 360; (1938) 1 M.L.J. 56 (Suit for money deposited in bank—Agreement between depositor and, another dividing amount between them) ; 20 N.L.J. 198 (Suit for gold left with defendant to make jewel for its value) ; 1938 S. 48 (Suit for terminal tax) Where a Municipal Committee continues to hold a cattle fair on another's land from year to year, an inference can be drawn that there was an implied contract between the Committee and the land-owner that the Committee should pay to the owner and that the owner should allow the Committee to hold the fair. A suit therefore for compensation not received will be governed by Art. 115 and not by Art. 39 or Art. 120. 178 I.C. 49=1938 L. 267.

SUCCESSIVE BREACHES.—*See* 34 A. 429. Where a party has recurring or successive causes of action, each cause of action will give a fresh start to the period of limitation and the mere fact that party has not availed himself of the earlier cause of action, will not prevent him from availing himself of a later one. 134 I.C. 609=1931 P. 285. In a claim for damages for non-payment of *malikhana*, plaintiff is entitled only to such arrears as have accrued for three years antecedent to suit. 15 I.C. 911=15 C.L.J. 684. (10 A. 85 ; 13 A.330 ; 19 C. 19 ; 24 C. 669, Rel.) *See also* 10 A. 85.

ARTS. 115, 116 AND 120.—The directors are in a limited manner trustees. Their liabilities are liabilities which depend upon their position as directors. Their position as directors is governed by the Articles of Association and generally by the written constitution of the company. The Articles are a part only of the contract. Thus the liability of the directors under S. 235, Companies Act, arises out of a contract which is partly in writing and partly not in writing. Therefore, an application by the liquidator for compensation under S. 235 for damages for misfeasance or breach of contract of the directors is not governed by Art. 115 or Art. 116, which deal with contracts exclusively in writing or not in writing. Hence the application is governed by Art. 120. *See also* 54 B. 226; 1937 P. 293. A suit to recover license fee assessed by the Municipal Committee under Municipal Act, in respect of a platform erected by the defendant in his holding, is governed by Art. 120 and not by Art. 115. The liability of the defendant does not arise out of any contracy between him and the Municipality but out of an obligation imposed by the statute on the licensees of platforms to pay the fees assessed by the Municipal Commissioners. The Municipality is authorized to recover such fees by distraint or suit. 175 I.C. 86=1938 P. 192. In a suit for assessment of a fair and equitable rent and compensation for use and occupation of land where the tenants are willing to pay a reasonable rent and dispute only the figure at which a reasonable rent should be fixed, it cannot be said that the tenants are guilty of any breach of implied contract to pay reasonable rent and therefore Art. 115 does not apply to the case and the suit could be governed by Art. 120. 190 I.C. 631=1940 C. 400.

ART. 116 : SCOPE AND APPLICABILITY.—*See* 1936 N. 180 ; 1936 R. 80. Distinction between this Article and Art. 97 pointed out. 13 P.192 =150 I.C. 975=1934 P. 148. Article applies to all registered contracts. 15 Bom.L.R. 836 ; 14 M. 465 ; 18 C. 506 ; 3 A. 600 (F.B.). The term 'registered' includes registration under special laws as the Companies Act or the Copy-

NOTES.

right Act as well as the Registration Act. Thus, a suit by a share-holder to recover dividends from a registered Company is governed by Art. 116. 42 M. 33=35 M.L.J. 256 ; I.L.R. (1940) Bom. 165=42 Bom.L.R. 57=1940 B. 97 (F.B.) ; 20 P.L.T. 285 ; 54 B. 226=32 Bom.L.R. 232. But *see* 1933 Sind 103=143 I.C. 713 ; 1937 P. 293. But a purchaser at a Court sale of shares in a Company cannot claim the benefit of this article. 46 M.L.J. 563=79 I.C. 94=1924 M. 721. The word ' contract ' does not include an award. 19 I.C. 376=6 S.L.R. 148. But *see* 16 I.C. 804 (Punj.). cited under Art. 115. The word ' contract ' in Art. 116 includes an implied ' contract ' also. 51 A. 651=119 I.C. 243=1929 A. 293. Where a personal covenant to pay is contained in registered mortgage, it being in writing registered, the relevant article is 116. 52 L.W. 777=1940 P.C. 204=67 I.A. 431 (P.C.). It cannot be said that Art. 116 applies only to cases where the document is signed by both the parties. Article does not contain the words " executed by both parties " and there is no reason to interpolate them. If there is a valid contract, evidence by a registered document which though signed by one party only is complete, because it has been accepted by the other and breach of that contract has been committed, Art. 116 will apply to such a case. 50 A. 651=1928 A. 313. If the vendees' promise to pay the purchase-money is set out in the registered conveyance which is accepted by him, the contract between the parties can be regarded as embodied in the conveyance, even though it is not actually executed by the vendee. The plaintiff's right to a personal decree on the failure of the defendant to pay the balance of consideration in such a case is governed by Art. 116. 9 R. 56=1931 R. 139. Where the liability of the vendee arises in virtue of the conveyance, *i.e.*, upon a contract in writing registered within the meaning of Art. 116, the six years' period allowed by that article applies. 60 I.A. 183=11 R. 186=1933 P.C. 143=64 M.L.J. 655 (P.C.). Art. 116 does not apply to a claim against the directors of a Company for misfeasance in the nature of a breach of trust because the whole of the contract governing the relationship of the Company and the directors is not in writing registered but part only, *viz.*, that which is contained in the articles of association. 54 B. 226=32 Bom.L.R. 232. *See also* 1937 P. 293. Relinquishment of rights—Money paid as consideration—Failure of deed to take effect—Claim for refund of money paid—Limitation—Art. 97 applies, but not Art. 116. 1930 A.L.J. 1112. A suit for taking the accounts of a dissolved partnership cannot be deemed to be a suit " for compensation for breach of contract " and is not therefore governed by Art. 116. 57 M. 378=1934 M. 162=66 M.L.J. 625. The word ' compensation ' need not be restricted to a claim for unliquidated damages and can include a claim for a sum certain. 49 B. 596=27 Bom.L.R. 637=1925 B. 440 ; 12 C.L.J. 423 ; 3 A. 600 (F.B.); 14 A.L.J. 873. The word ,compensation' has the same meaning as it has in S. 73 of the Contract Act and denotes a sum of money payable to a person on account of loss or damage caused to him by breach of the contract. 107 I.C. 493=1928 L. 442. Art. 116 applies not merely to a suit for compensation for breach of contract in the narrow sense of the word compensation, but also to a suit for money payable under the terms of the contract, and it is applicable in all cases in which the contract is in writing and registered, notwithstanding that there may be an article directly applicable to the class of contract in question. 9 R. 56=1931 R. 149. Thus, a suit for recovery of money due on a registered bond is governed by article. 17 C.W.N. 369=13 I.C. 440 ; 42 I.C. 609=6 L.W. 712. *See also* 1940 P. 74 ; 1939 P.W.N. 220 (suit for rent under registered lease deed) ; Also suit by heirs of a Muhammadan lady for dower debt on registered dower deed. 27 C.W.N. 210=1923 C. 507 ; 50 C. 253=26 C.W.N. 532 ; 44 C. 759 (P.C.). Suit for arrears of rent on a registered lease is governed by Art. 116 and not Art. 110. 44 C. 759=44 I.A. 65=32 M.L.J. 357 (P.C.) ; 196 I.C. 466 ; 133 I.C. 102=53 C.L.J. 522=1931 C. 790 ; 67 I.C. 939 ; 56 I.C. 241=11 L.W. 328 (kanom deed) ; 44 I.C. 153 (*Zuripeshgi* lease). 20 N.L.J. 73 (Sub-tenant). Suit for profits owing to non-delivery of possession under a registered instrument is in substance one for compensation governed by Art. 116. 31 I.C. 804 ; *see also* 25 M. 587=12 M.L.J. 249 ; 30 A. 400 ; 32 I.C. 245 ; 11 I.C. 337 ; 1928 A. 313=26 A.L.J. 426 ; 1927 L. 1. As to suit to recover unpaid purchase money or mortgage money under registered instruments, *see* 24 M. 233 ; 25 M. 55 ; 13 A. 200 ; 30 I.C. 410 (A.) ; 8 P. 860. A suit to recover the amount of unpaid purchase money from the vendee, which he had agreed to pay under a registered sale-deed to a third person, is governed by Art. 116. 33 Bom.L.R. 136=1931 B. 365. *See also* 8 P. 860 ; 15 P. 753=1937 P. 44 ; 131 I.C. 686=1931 A. 419. Suit on a mortgage executed for a loan not of money but of paddy is governed by Art. 116 or 120 and not by Art. 132. 44 I.C. 518 ; 37 I.C. 805=24 C.L.J. 348. *See also* 1940 O.W.N. 875 (Covenant in mortgage deed to deliver possession or pay rent till then). 41 C.W.N. 1001 (Lease for collection of rent) ; 1941 O.W.N. 1182 ; 1941 N.L.J. 184=1941 N. 169. (Suit for breach of covenant of title and quiet enjoyment in sale deed). A suit for accounts against an agent on the foot of a registered kabuliyat is governed by this article. 16 I.C. 852=17 C.L.J. 201. [But *see* 54 M. 654=1931 M. 185 (2), holding that suit for accounts between tenants in common or between a principal and agent, even if it be based on a registered agreement, is essentially different from a suit for compensation for breach of contract and is governed by article 89 and not by Art. 116]. So also suit against the heir of such an agent. 39 A. 355=39 I.C. 626. The words " express or implied " contained in Art. 115 are also intended to be read into Art. 116. 49 B. 591=89 I.C. 59. Article applies to a suit for a personal decree on the basis of a registered deed purporting to be a mortgage, but which is inoperative as a mortgage owing to defects in the registration. 29 C. 654=6 C.W.N. 856 ; 38 B. 177 ; 1938 R.L.R. 35=1937 R. 484 (Suit on personal covenant in registered mortgage deed) 1940 M. 233 ; 1939 P.W.N. 769. (Suit for balance of money due under sale of mortgage decree and left with vendee). *oee alslo* 41 Bom.L.R. 832 ; 1939 M.W.N. 437. As to suit for

NOTES.

recovery of mortgage money by a mortgagee who is deprived of his mortgage security, *see* 3 R. 60 =1925 R. 223. *See also* 7 O.W.N. 1045; 20 N.L.J. 42. A suit under S. 68 of the T. P. Act for a personal decree against the mortgagor, on the ground that the security was lost as the result of a litigation between the mortgagor and a third party, is governed by Art. 116 or 120 and the period commences (*i.e.*, the cause of action arises) at the time when the mortgagor loses the property and not when the mortgagee comes to know of such loss. 11 O.W.N. 1198=1934 O. 415. *See also* 1936 R. 80; 1936 S. 14; 43 C.W.N. 38= 1939 C. 26; 41 C.W.N. 783=1937 C. 347. Where the plaintiff himself repudiates a mortgage and sues for the amount advanced under it, Art. 116 cannot apply. 1933 L. 581. The period of limitaition applicable for the recovery of money due under a personal covenant contained in a registered deed of mortgage, where the mortgaged property has been sold and the claim is for deficiency, is six years under S. 116. 36 C.W.N. 117; and not three years under Art. 66 or 67; 52 M. 105=56 M.L.J. 10 (F.B.); 35 C.W.N. 1030=133 I.C. 101=1931 C. 801; 140 I.C. 387 =1932 L. 592. *See also* 68 C..L.J. 109=43 C.W. N. 38=1939 C. 26; 5 O.W.N. 1128=114 I.C. 813; 1928 M. 1124=55 M.L.J. 506; 5 O.W.N. 836=1928 O. 465; 6 O.W.N. 974; 1934 L. 765; 37 Bom.L.R. 170. Limitation for enforcing the relief starts from the date of the mortgage. 140 I.C. 387=1932 L. 592. *See also* 50 L.W. 889=1940 M. 233 (Passing of decree on mortgage does not affect right to enforce covenant in the mortgage deed.) 1937 R. 484. But where the mortgage deed provided that the mortgagee would be entitled to recover the amount after 4 years, limitation for the personal relief would be six years from the date when the mortgage-money became payable. 1933 L. 329=144 I.C. 738. *See also* 1936 S. 14. 43 C.W.N. 38= 1939 C. 26. Where a suit is instituted more than six years after the making of the mortgage, and the mortgage-money is payable on demand, a personal decree is barred. 51 A. 473=1929 A. 137. *See also* 1930 L. 993. (A suit brought after six years after the first default was held barred). As to the operation of the article in favour of a person not a party to the contract on which he sues, *see* 9 I.C. 988; on appeal, 41 C. 13=17 C.W.N. 1143; *see also* 4 M.H.C.R. 366 (Registered pro-note endorsed to plaintiff). Whether signature of defendant is necessary to attract the operation of the article, *see* 25 M. 55; 35 C. 683; 17 C.W.N. 1143=41 C. 137; 20 C.W.N. 408= 31 I.C.394. Article applies to an action for breach of duty declared by S. 108, T. P. Act. 6 P. 606= 101 I.C. 707=1927 P. 248. A suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an expressed agreement between the partners to render accounts and to distribute the profits annually is governed by Art. 120 and not Art. 89 or Art. 100, or Art. 116. 29 N.L.R. 34=1933 N. 127. Article is not applicable to a suit by purchaser for refund of purchase money in respect of sale by him at Court auction when the sale proved infructuous. 28 Punj.L.R. 74. *See also* 18 P. 654 (Suit by dispossessed lessee for return of premium paid and for damages when dispossession was due to want of title in lessor). The suit was to recover arrears of maintenance due to plaintiff's mother up to the date of her death. A prior suit by the mother had been compromised and by that compromise, the annuity had been charged on certain properties and the security bond registered. The plaint in the present suit, however, contained no reference to the security bond; it was simply a claim for money due on account of arrears of maintnenance with interest. *Held*, that the suit was not governed by Art. 116 and that the period of limitation was only three years. 146 I.C. 1053=1934 P. 244.

BREACH OF COVENANTS CONTAINED IN REGISTERED DEED.—Where a contract is in writing and registered, a suit for breach of all covenants expressed or implied therein is covered by this article. 27 C.W.N. 1025=1924 C. 148; 14 N.L.J. 125 (F.B.); *see also* 17 L.W. 254=1923 M. 392; 22 L.W. 704=49 M.L.J. 668; 21 M. 8; 25 M. 587; 38 M. 1171; 12 C. at 481; 45 B. 935=23 Bom.L.R. 325=61 I.C. 70; 52 I.C. 269; 43 M.L.J. 64=1923 M. 28; 50 I.C. 673 (M.); 140 I.C. 805=37 L.W. 497=64 M.L.J. 336=1933 M. 126; 31 I.C. 877=11 N.L.R. 186; 88 I.C. 699; 8 P. 432=1929 P. 388; 1929 M. 775; 1929 A. 293; 57 C. 683=1930 C. 568; 1931 L. 448; 167 I.C. 809=1937 R. 39 (Suit for breach of covenant for title contained in sale-deed) As to suit on a covenant to indemnity in a sale-deed, *see* 40 A. 605=48 I.C. 18. As to suit for recovery of periodical payments due by a usufructuary mortgagee to the mortgagor under an agreement contained in the mortgage-deed, *see* 40 I.C. 594. *See also* 1937 N. 246 (Suit for unpaid purchase money due under registered sale deed). *See also* 5 P. 753. A suit by a vendor against vendee for breach of covenant by the latter to pay a mortgage debt of the vendor out of the sale price falls within Art. 116. 1935 A.L. J. 279=1935 A. 411; 34 A. 429=9 A.L.J. 534 =14 I.C. 244; 87 I.C. 804=1925 A. 488. *See also* 29 N.L.R. 298=1933 N. 379; 17 P. 751. The starting point is not the date of the deed nor the date when the fact of non-payment came to vendor's knowledge, but the date when vendor himself was obliged to pay the debt and thereby incurred loss. 1935 All. 431. But *see* 60 C 761=146 I.C. 863=1933 C. 641. As to suit by creditor to recover the debt from the vendee under such covenant. *see* 41 C. 137=17 C.W.N. 1143. Suit for damages based on a clause of indemnity or on a covenant for title and quiet possession contained in a registered sale-deed is governed by Art. 116. 1929 L. 388; 1921 L. 260. *See also* 1929 M. 775. Where it was declared that certain property could not be sold in execution of a decree obtained by the plaintiff on his mortgage-deed and the decree became thereby infructuous and a suit for a simple money decree having been barred on that date the plaintiff sued for damages for breach of a covenant for indemnity contained in the mortgage-deed. *Held*, that the suit was governed by Art. 116 and not by Art. 62 or 97. *Held, further* that the suit was in time whether it was reckoned from the date of the objection to the plaintiff's execution or the date of the decree nullifying the decree in favour of the plaintiff. 1932 A.L.J. 317=1932 A. 358. *See also* 17 P. 751. Where an agent has undertaken by a registered agreement to re-pay the

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amount found to have been misappropriated by him within a month of the ascertainment of the amount, a suit by the principal for the recovery of the misappropriated amounts is governed by Art. 116. 44 C.W.N. 793=1941 C. 257. Suit to enforce payments of Government revenue and under-proprietary rent based on registered conveyance of immovable property in lieu of maintenance falls within this article : 1929 O. 311.

STARTING POINT OF LIMITATION.—It depends on the article under which the suit would have fallen had the contract not been registered, whether under special articles or under the residuary Art. 115. *See* 15 C.L.J. 17 ; 3 A. 600 (F.B.). [In the numerous reported decisions, this article has been read along with other special articles which would apply if the contract is not registered for which, *see* under the respective articles.] In a suit to recover compensation for the breach of contract to indemnify the vendee against the claims of a mortgagee, the starting point is the date when the purchaser is compelled to pay off the prior mortgage under Art. 83 read with the article. 2 L. 316=64 I.C. 431. But *see* 60 C. 761=146 I.C. 863=1933 C. 641. In a suit for damages for breach of a covenant of title, time begins to run from the date of the breach of the covenant. 45 B. 955 ; 61 I.C. 70 ; 8 P. 432 ; 1940 M. 233. That is from the date when it is found that the vendor had no title or the purchaser is dispossessed of the property in consequence thereof. 133 I.C. 76=1931 S. 141. *See also* 14 N.L.J. 125 (F.B.) ; 41 L.W. 728=68 M.L.J. 588. Where the purchaser could not get possession of some of the lands sold, and his suit against the person in possession was dismissed, limitation for a suit for damages against his vendor would start only from the date of dismissal of the suit against the stranger in possession. 64 M.L.J. 336=1933 M. 126. As to starting of limitation for a suit by a purchaser from an auction-purchaser who undertook to obtain delivery of possession from Court and give possession to him claiming possession of the property or return of consideration, *see* 1933 M. 153=143 I.C. 504. But where the vendor admittedly had no title to the property and the vendee had not been put in possession, a suit for the recovery of the purchase-money must be brought within 6 years from the sale-deed. 49 B. 596=27 Bom. L.R. 637 ; *See also* 31 I.C. 877=11 N.L.R. 186 ; 25 L.W. 11=1927 M. 273 ; 38 M. 887 ; 38 M. 1171 ; 35 M. 39 ; 17 L.W. 254=1923 M. 392 ; 29 M.L.J. 454=31 I.C. 179 ; 88 I.C. 699 ; 21 I.C. 740 ; 118 I.C. 203. *See also* cases cited under Art. 97 on the point. A suit for refund of purchase-money under an invalid sale is governed by this article and time runs when the defect in title is discovered. 8 P. 432=1929 P. 388 ; 1930 S. 66. *See also* 137 I.C. 61=1932 N. 3. Inapplicability—Plaintiffs wrongly paying defendants to redeem mortgage—Third person obtaining foreclosure decree—Plaintiffs paying him to redeem mortgage—Suit to recover money wrongly paid to defendants. 1935 O. 378=11 Luck. 110. Where the agreement is that a debt due to a third party should be paid and it is not so paid, the starting point of limitation is the date when the vendee repudiates his liability or the date when the payment of the debt by the vendor himself or the performance of the contract is rendered impossible. 8 P. 860. *See also* 33 Bom.L.R. 136=133 I.C. 267=1931 B. 365. Time runs in such a case from the date when the vendor is actually damnified. 14 L. 380=1933 L. 109 ; 33 Bom.L.R. 136. *See also* 144 I.C. 362=1933 L. 793 (34 A. 429, Diss.). Where vendor's properties are sold in execution of a decree obtained by a creditor, who must have been paid off by the vendee according to the terms of the sale-deed, the starting point of limitation for a suit by the vendor against the vendee for the purchase-money is the date of the sale of the properties when the vendor actually suffered loss. 64 M.L. J. 526=1933 M. 424=56 M. 724. Under Art. 116 time begins to run from the date of breach of contract under a registered instrument. Where no time is fixed for payment, it runs from the date of the deed itself and a suit brought more than six years after the date is barred by time. 1929 A. 775. Vendor and purchaser—Amount kept with vendee to pay previous mortgage—Surplus to be paid to vendor—Claim for surplus. *Held*, that Art. 111 is not applicable to the case but Art. 116 is applicable and the period would commence from the date of the breach, *i.e.*, where for the first time in the suit instituted by the vendee for redemption, the Court of first instance would find that a smaller sum than the amount left with the vendee was due. 11 .O.W.N. 691 =1934 O. 240. Where a registered kabuliyat expired on 31st March, 1922, and the lessee sued to recover damages from the lessor on 30th April 1925, *Held*, that the suit was barred by Art. 116. 58 C. 930=133 I.C. 179. As to continuing or successive causes of action, *see* under Art. 115. In a *rehan* bond there was a personal covenant to repay on a certain date and in addition, there was a clause regarding dispossession which gave the mortgagee the right to realise from the mortgaged property from the person of the mortgagor and from his other properties. if he was dispossessed from the *rehan* property. The mortgagee sued basing his cause of action on dispossession and after sale of the mortgaged property in execution of his decree applied for a personal decree for the balance. *Held*, that this article applied, and that on the mortgage deed as it stood, the dispossession was as much a cause of action in a registered deed giving rise to limitation under Art. 116 as the cause of action of failure to pay on the date fixed in the bond and that the starting point for limitation was the date of dispossession. 13 P. 228=1934 P. 578. Where possession was not given to the, lessee in accordance with the terms of a lease deed, and the lessee sued to recover the advance paid by him, *held*, that the breach of the covenant to deliver possession occurred from the commencement of the lease and that it was not a continuing breach . 138 I.C. 119=1932 M. 225. *See also* 1939 P.W.N. 220. Where a sale was declared to be null and void by the Court and the vendee sued to recover the purchase price and relied on an express covenant in the sale deed. *Held*, that the suit was governed by Art. 116 and time commenced to run from the date when the sale was declared void by the trial Court and not from the date when such decision was affirmed in appeal. 148 I.C. 825=

Description of suit.	Period of limitation.	Time from which period begins to run.
117. Upon a foreign judgment as defined in the Code of Civil Procedure, 1908.	[1][Six years] ...	The date of the judgment.
118. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	[1][Six years] ...	When the alleged adoption becomes known to the plaintiff.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

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1934 L. 305 (2). Sons impugning sale-deed by father—Trial Court granting them decree followed by delivery of possession—Decree affirmed on appeal—Suit by vendee for refund of price—Limitation—Starting point. 156 I.C. 177=1935 A. 876. Mortgage by Hindu father for antecedent debts and for fresh cash advances—Suit against son after death of father—Limitation. *See* 40 Bom.L.R. 381.

Art. 117.—APPLICABILITY.—*See* 8 L. 54=102 I.C. 523=1927 L. 200 (2). Under Art. 117 a suit is filed in British India on a foreign judgment, it is in time, notwithstanding that under the law of the foreign state where the decree was obtained, execution of the decree in that state is barred by time, whether the decree is not enforceable because it is barred by the law of limitation prevailing in the foreign state is not relevant to be considered in a suit on a foreign judgment. The law applicable to the place where the suit is brought is applicable. The law of the place where the obligation arose need not be considered. Art. 117 deals only with the period of limitation. It does not create a right to sue. In India a foreign judgment itself forms a cause of action and a suit can therefore be based on it, and it has to be filed in six years. I.L.R. (1939) B. 639=41 Bom.L.R. 1084=1939 B. 522. The "date of the judgment" in Art. 117 is the date of the decree, and if there is the decree of the appeal Court, it is that decree which is the starting point for counting the period of limitation, and not the decree of the original Court. I.L.R. (1939) B. 639. *See also* 65 M.L.J. 572=56 M. 951. Where the Baroda Court passed an order calling upon the contributories to pay Rs. 20 per share, and a date was fixed for the payment of the call money and the liquidators were authorised by the Court to file suits against contributories residing outside the jurisdiction of the Baroda State. *Held*, that it was a foreign judgment, and a suit against a contributory outside the State was governed by Art. 117. 1935 L. 553. But *see* 62 M.L.J. 566.

Art. 118.—Art. 188 applies only to a suit under S. 42, Specific Relief Act, for a declaration that an adoption is invalid or that it did not take place, and not to a suit for possession of immovable property. 183 I.C. 853=1939 L. 135. A suit for possession by reversioner of the first adopted son alleging the second adoption of the defendant is invalid as having been made after the power to adopt has become extinguished under Hindu Law, if brought after six years, is barred by this article. 41 B. 728=41 I.C. 845. *See also* 40 P.L.R. 660=1938 L. 193.

STARTING POINT OF LIMITATION.—*See* 15 L. 645=1934 L. 274. Where plaintiff gives *prima facie* evidence of his want of knowledge the defendant must prove knowledge at a particular date when it is alleged limitation began to run. 1 L. 608=59 I.C. 124. *See also* 9 I.C. 163, as to onus of proof. Time runs from the time when adoption comes to the knowledge of the next reversioner and no fraud or inaction on his part would stop time running against the whole body of reversioners. 44 M. 218=39 M.L.J. 621; 24 M. 405; 29 M. 390. *See also* 28 I.C. 632=2 L.W. 377.

Arts. 118 and 119.—apply only to a suit for declaration in respect of an adoption and not to a suit for possession. 45 A. 1=20 A.L.J. 814; 1923 A. 361; 48 M. 1=1925 M. 497; 87 I.C. 938=1925 A. 79; 1927 P.C. 229 =53 M.L.J. 301; 48 B. 411=46 M.L.J. 598=1924 (P.C.) 137; 1924 N. 142; 44 P.R. 1911=11 I.C. 11; 11 C.P.L.R. 49; 81 P.R. 1914=25 I.C. 429; 30 M. 308. But *see contra* 41 B. 728=41 I.C. 845; 37 B. 513=20 I.C. 162, [24 B. 260 (F.B.) held to be good law even after 28 A. 727 and 39 C. 418 (P.C.) *infra*]. Compare the Privy Council judgment in 48 M. 883=52 I.A. 322=49 M.L.J. 769=1925 P.C. 249 (P.C.). This article will not apply to a suit for possession of immovable property by the adopted son, even if it is necessary to decide in this suit whether the adoption was or was not valid. 58 B. 280=149 I.C. 674=36 Bom.L.R.. 185=1934 B. 110. A suit by a Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be the adopted son of the deceased is not governed by Art. 118, and is in time if brought within twelve years from the death of the husband. 35 C.W.N. 465=1931 P.C. 84=60 M.L.J. 619 (P.C.). Suit to set aside adoption and for possession is governed by Art. 118. 6 P. 506=1927 P. 145. Adoption—Declaration of invalidity of—Suit for—Limitation—Presumptive reversioner—Death of, within period of limitation—Reversioner next in grade a minor at time of—Suit by, within 3 years after attaining his majority—If in time—Point referred toFull Bench but not decided by it. 56 M.L.J. 760 (F.B.). Suit for declaration that alienation by adoptee not binding on reversioners—Suit substantially for declaring invalidity of adoption—Art. 118 applies. 1929 L. 579. Omission to bring within the period prescribed by Art. 118 a suit for declaration that an alleged adoption is invalid is no bar to a suit by a reversioner for possession of the property on the death of the

Description of suit.	Period of limitation.	Time from which period begins to run.
119. To obtain a declaration that an adoption is valid.	[1][Six years] ..	When the rights of the adopted son, as such, are interfered with.
120. Suit for which no period of limitation is provided elsewhere in this schedule.	[1][Six years] ...	When the right to sue accrues.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch, I, for "Ditto."

NOTES.

limited owner. 39 C. 418=39 I.A. 19=22 M.L.J. 240 (P.C.); 8 L. 48; 52 M.L.J. 711=1927 M. 674. Suit to declare invalidity of adoption—Knowledge of alleged adoption for over 6 years—Suit is barred by Art. 118. 1927 P.C. 229=53 M.L.J. 301 (P.C.). *See also* 28 A. 727; 33 I.A. 156; 24 Bom.L.R. 158=1922 B. 223 (F.B.) [34 A. 8 and 24 B. 260 (F.B.) to the contrary are not now good-law]; 1930 L. 438.

Art. 119. [*See also* under Art. 118.]—Where adoption is challenged and rights interfered with, suit to establish adoption must be brought within 6 years from the date of such interference. 43 B. 63=47 I.C. 639 (2); What amounts to interference under the article. 1 R. 186=1924 R. 34. Something incompatble with the recognition of the adoption must be proved. 58 I.C. 394=22 Bom.L.R. 974. Where in a suit for possession, the adoption is denied, the suit is governed by Art. 144 and not by this Article. 81 P.R. 1914=25 I.C. 429; 58 B. 280=149 I.C. 674=36 Bom.L.R. 185=1934 B. 110. *See also* cases cited under Art. 118. 1924 N. 142.

Art. 120.: SCOPE.—Art. 120 is applicable only where no other article covers the suit. 14 I.C. 19; 28 I.A. 148; 24 A. 24 (P.C.); 1933 L. 581; 50 I.C. 6; 21 C. 157 (P.C.); 26 C. 514 (F.B.); 34 M. 167; 3 A. 170; 37 M. 381=22 M.L.J. 485; 36 I.C. 418; 1930 O. 395; 145 I.C. 186=1933 L. 581; 146 I.C. 939=1933 L. 615; 24 M.L.J. 184; 31 I.C. 335; 37 M. 381; 35 I.C. 98 (M.). Wording of plaint so as to escape Art. 91 will not bring the suit under Art. 120. 37 A. 640=29 I.C. 968. Art. 120 applies to all declaratory suits. 27 A.L.J. 794=1929 A. 529. Alienation by Hindu widow—After born reversioner—Suit for declaration of his rights—Governed by this Article 16 P.L.T. 236=1935 P. 256. Starting point (*Ibid.*). Coparcener excluded from enjoyment—Suit for declaration and injunction. This article is applicable and not Art. 127. 1935 P. 95. Plaintiffs wrongly paying defendants to redeem mortgage—Third person obtaining foreclosure decree—Plaintiff paying him to redeem mortgage—Suit to recover money wrongly paid to defendants. Suit governed by Art. 97 and not Art. 120. 1935 O.W.N. 549=1935 O.378i

STARTING POINT OF LIMITATION.—Time runs when the right to sue first accrues. *See* 30 M.L.J. 104, *i.e.*, when it accrues to the plaintiff or his predecessor-in-title and not when it accrued to one through whom the plaintiff does not claim. 22 A. 33 (F.B.); 37 A. 195. The starting point of limitation is the date on which the circumstance entitling the plaintiff to have his interests guarded first comes to his knowledge. 12 L. 262=1931 L. 70 (2)=130 I.C. 778. *See also* 20 P. L.T. 303=1939 P. 548. The words "when the right to sue accrues" may be taken to mean when the cause of action arises. The cause of action would comprise the facts which have necessarily to be proved in order to entitle the plaintiff to the relief asked for by him in a particular suit. 120 I.C. 880=58 M.L.J. 349. *See also* 41 P.L.R. 321=1939 L. 6; 1940 A.L.J. 459=1940 A. 424; 1939 L. 6; 1931 L. 270=143 I.C. 725 (as to the interpretation of the words). There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. 1930 P.C. 270=57 I.A. 325=59 M.L.J. 621 (P.C.); 15 P. 151=17 P.L.T. 131=1936 P. 323. *See also* 47 L.W. 438=1938 M. 193=(1938) 2 M.L.J. 434. The expression "right to sue" means the right to bring the particular suit with reference to which the plea of limitation is raised. 58 C. 1187=58 I.A. 125 61 M.L.J. 9=1931 P.C. 89 (P.C.). A suit by an after-born son to declare that an alienation by way of mortgage effected by a Hindu father is void and for setting aside a decree obtained on foot of that mortgage must, under Art. 120, be brought before the expiry of 6 years from the date when the right to sue accures, *i.e.*, the date of the mortgage so far as the relief by way of setting aside the alienation is concerned. 59 M. 667=1936 M. 440=70 M.L.J. 360. In a suit for declaration that certain mortgages and sales held in pursuance of those mortgages are void and not binding on the plaintiff, the plaintiff's right to sue accrues not only when the mortgages are created but also when the mortgagees bring the mortgaged properties to sale the sales give a fresh starting point. 15 P. 151=17 P.L.T. 131=1936 P. 323. Sale by guardian—Money left with vendee to be paid to minors on attaining majority—Suit by guardian as reversioner claiming the money. *Held*, that Art. 111 did not apply because the plaintiff was not the vendor of the property, but had acted merely as the *de facto* guardian of the two minor girls under the Customary Law, that the suit was governed by Art. 120 and that limitation ran from the date of the death of the younger girl. 1933 L. 860.

ILLUSTRATIVE CASES—SUITS FOR DECLARATION OF TITLE TO IMMOVABLE PROPERTY.—Suit by plaintiff in possession for declaration of his title to immovable property. Time runs when the defendant did the first act prejudicial to plaintiff's title. 1900 P.R. 20. *See also* 26 C.W.N. 206; 1930 P.C. 270=579 A. 325=59 M.L.J. 621=

11 Lah. 657; from the date of denial by defendant of plaintiff's title. 61 P.R. 1908. *See also* 1933 L. 412=142 I.C. 606. When the denial comes to the plaintiff's knowledge. 24 B. 533; 29 M.L.J. 574=30 I.C. 660; when a decision adverse to the plaintiff is given by a competent revenue authority. 45 A. 461=21 A.L.J. 409; 18 R.D. 619=16 L.R. 122 (Rev.). *See also* (1942) 1 M.L.J. 472. When a cloud is cast upon plaintiff's title, 120 I.C. 321=1930 N. 92; 1929 A. 529; 115 I.C. 629; 1930 A. 420. In the case of a suit for declaration of title to the property which is in *custodia legis* article is applicable. 35 Bom.L.R. 440=1933 B. 276=145 I.C. 190. In a suit for declaration and possession of immovable property, the relief for possession is negatived, the fact that possession is refused cannot make the suit one for a declaration only so as to make it fall under Art. 120 and thus reduce the period of limitation otherwise available to the plaintiff. 39 Bom.L.R. 224. A claim to something or some sum of money which had become barred would not revive when it has been brought into Court. 1933 M. 503=144 I.C. 602=37 L.W. 194. The right to sue accrues only when the defendant infringes or at least has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. 35 Bom.L.R. 440=1933 B. 276; 12 P. 727; 14 P.L.T. 258=1933 P. 250. Where the plaintiff sued for a declaration that he was entitled on behalf of a *math* to obtain and retain the possession of the property which was in *custodia legis* and held by the administrator and for an injunction restraining the defendants from recovering possession and from asserting their claim. *Held,* that the plaintiff having claimed in his own right, time commenced to run from his installation to the office. 35 Bom.L.R. 440=1933 B. 276=145 I.C. 190. Suit for declaration of title and that plaintiffs are in possession of underground rights. *See* 52 I.A. 109=4 P. 244=48 M.L.J. 328 (P.C.). Suit for declaration that the property mortgaged to defendant is plaintiff's property. 52 I.C. 646=17 A.L.J. 973. A suit for declaration by a co-sharer in possession is not barred, if brought within six years from an attempt to oust him from possession. 32 P.L.R. 1418. *See also* 14 L. 267 (F.B.); 1938 R. 407; 41 C.W.N. 1090; 67 C.L.J. 74. A person in possession is not bound to bring a declaratory suit on any and every possible invasion of his title and suit brought within six years of the last of such invasion is in time. 3 L. 43=1922 L. 94; 43 I.C. 175 (A.); 79 P.R. 1917=42 I.C. 346; 1930 N. 92; 115 I.C. 629; 1933 L. 53=145 I.C. 241; 1939 L. 428; 1938 L. 318; 1940 L. 154. A fresh attack on title or invasion of right gives rise to a new right to sue for declaration. If there be successive attacks at intervals, time would run from each of these attacks and if the last attack which is made the basis of the suit be within six years of the suit, the suit will be in time. Hence when the plaintiff remains in possession, though frequent successive threats and attacks on his title are made by the defendant, his title is not extinguished and so long as his title subsists, he has right to sue for declaration and his suit would be considered to be within time if he makes a threat or attack made within six years, the foundation of his suit. I.L.R. (1939) 1 C. 349=43 C.W.N. 57. *See also* 1939 L. 428; 1938 L. 227; 1936 O. 387. Every notice of ejectment is a fresh invasion of title and gives rise to a fresh cause of action. 6 L. 132=89 I.C. 299=1925 L. 391. A suit by plaintiff for a declaration that he alone was entitled to succeed to his father's property and that the defendant had fraudulently procured the entry of his name in the revenue records is governed by Art. 120 and the cause of action arises when the fraud becomes known tothe plaintiff. 148 I.C. 776=1934 L. 574. Suit for declaration of title and correction of entry in the revenue records is governed by this article. 9 I.C. 804; 20 I.C. 262 (C.); 32 I.C. 872 (C.); 1929 L. 379; 1930 L. 284 (2); 120 I.C. 321. There is a conflict of rulings as to commencement of limitation in such cases. All the early rulings would be seen collected in. 12 A.L.J. 810. *See also* following cases:—*Allahabad.*—20 A. 35 (F.B.); 31 A. 9=5 A.L.J. 637; 20 A.L.J. 231=1922 A. 115; 50 I.C. 767=17 A.L.J. 588; 102 I.C. 172=1927 A. 597; 98 I.C. 811; 100 I.C. 45=1927 A. 296; 145 I.C. 728=1933 A. 663. *Calcutta.*—1923 C. 307; 20 I.C. 262; 53 I.C. 968=23 C.W.N. 883; 1939 C. 749; 25 C.W.N. 1022=63 I.C. 954; 34 I.C. 702=23 C.L.J. 561=58 C.L.J. 120. *Punjab.*—73 P.W.R. 1918=44 I.C. 912; 38 P.L.R. 1916; 99 P.W.R. 1914=23 I.C. 458; 53 I.C. 595=98 P.W.R. 1919; 86 I.C. 117=1925 L. 417; 1929 L. 379=15 L. 469=1934 L. 134. *Oudh.*—23 O.C. 46=53 I.C. 893; 22 O.C. 369=54 I.C. 317. *Patna.*—45 I.C. 432=3 P.L.J. 361; 42 I.C. 397; 11 I.C. 199=2 P.L.J. 557=1933 P. 698. *Madras.*—42 M.L.J. 457=1922 M. 184; 52 M.L.J. 323. Fresh cause of action gives fresh starting point. 98 I.C. 811=1927 A. 148; 150 I.C. 814=1934 A. 539. *See also* 13 P. 517. If the order of the Settlement Court about the defendants being recorded as under-proprietors is a wrong to the plaintiff, the wrong is complete when the order is passed, and the entry made, and it cannot be regarded as a case of continuing wrong. Where the plaintiff sues for a declaration that the defendants do not possess any under-proprietary rights in the lands in suit basing his cause of action on the wrong entry in the Settlement Court and not on any fresh invasion of his rights made subsequently, the limitation in respect of the said cause of action begins to run from the date of the order of the Settlement Court, and the fact that the plaintiff purchased the lands in suit subsequent to the making of the settlement entry cannot stop the running of limitation against him. 166 I.C. 774=1937 O. 291=1937 O.W.N. 207. *See also* 40 C.W.N. 566=1936 C. 456. A mere entry of names in the khewat does not debar for ever the person against whom the entry is made from suing for declaration, if six years are allowed to expire after the entry. Any fresh act which can amount to a fresh invasion of his right or a fresh attempt to cast a cloud on his title would create a new cause of action in his favour. 27 A.L.J. 794=1929 A. 529. *See also* 115 I.C. 629; 1933 A. 663=145 I.C. 728; 153 I.C. 73=1935 A. 174; 1936 P. 129; 1936 P. 321; 42 C.W.N. 96; 40 C.W.N. 566=1936 C. 456; 1940 O. 283; 1937 C. 745; 1937 O. 291; 1936 O.W.N. 784=164 I.C. 118=1936 O. 387. The rejection of the application for correction of entries in

NOTES.

revenue records gives cause of action, but as a fresh invasion of plaintiff's right occurred when the direction was made by the Revenue Officer for partition of the occupancy rights, limitation began to run from the latter date. 1930 L. 284. *See also* 120 I.C. 321. Limitation for a suit for the correction of an entry in record-of-rights is six years from date of final publication on the record of rights. (1 P.L.J. 73, Ref.) 1933 P. 698 (2); 161 I.C. 465=1936 P. 129. Suit for declaration of plaintiffs' exclusive title to property and also for declaration that the revisional survey entries in record-of-rights were wrong —Suit filed after six years—Plaintiffs were in exclusive possession of the property. *Held*, that the suit was not for the correction of record-of-rights but for declaration of plaintiffs' exclusive title, and was not time barred. (1 P.L.J. 73, Dist.) 163 I.C. 408 (1)=1936 P. 321 (2). Time commences to run from the time when the plaintiffs right was actually infringed. 1934 C. 192=58 C.L.J. 120. *See also* 1942 O.W.N. 225. So long as an adverse entry in the Revenue Records does not injure the plaintiff he need not come into Court at all and hence a plaintiff in a suit for declaration that he is an under-proprietor is not out of time if he institutes the suit within 6 years of the injury which the entry created namely ejectment. 1942 O.A. 162=1942 O.W.N. 217. *See also* 1942 O.W.N. 225. Where the mutation entries in the name of the defendants were made with the plaintiff's consent and the plaintiff had no grievance until the defendant's asserted title on that basis. *Held*, that it was the wrong assertion which constituted the cause of action for a declaratory suit. 144 I.C. 316=1933 O. 283=10 O.W.N. 366. Plaintiff was in possession of the land which was the subject of alienation by will in favour of the defendant; mutation was effected in favour of defendant whereupon plaintiff sued for declaration of his title. *Held*, that it was unnecessary for him to bring any suit to set aside the alienation by will as he was in possession of the property and that his suit fell under S. 45, Land Revenue Act, and was governed by Art. 120, Limitation Act, and not by Sch. I, Art. 1, Punjab Limitation Act. 15 L. 469=1934 L. 134. *See also* 164 I.C. 118=1936 O. 387. A person executed a deed of gift of property in 1924 but did not deliver its possession to the donee. Donee got the property mutated in his name in 1932. On this the donor brought a suit to declare the gift invalid. *Held*, that as possession was never delivered to the donee, time for such suit began to run only when the donee first attacked the title of the donor by getting mutation sanctioned in his favour. 161 I.C. 592=1936 L. 49. *See also* 1938 L. 671=40 P.L.R. 940. Portion of estate—Separate registration—Refusal by Collector—Fresh application by owner. 57 M. 460=1934 M. 373=67 M.L.J. 544. Dismissal of application for correction of jamabandi—Suit for declaration—Plaintiff in possession—Starting point. 1935 O. 181; 1935 O. 181. In a suit for declaration every fresh denial gives rise to fresh cause of action. 1927 L. 887. The fact that in the written statement, the defendant denies the title of the plaintiff does not give rise to a fresh cause of action. 115 I.C. 629. Declaratory suit after an order of attachment made by a Magistrate under S. 146, Cr. P. Code. There is no continuing wrong in the order and time runs from the date of attachment. 85 I.C. 631=1925 N. 236; 49 C. 544=26 C.W.N. 432=1922 C. 419; 26 M. 410; (1937) 2 M.L.J. 296. But *sse* 20 C.W.N. 481 holding that it is a continuing wrong. In 20 A. 142 suit to recover possession brought more than 6 years was held to be within time under Arts. 142 and 144. Where however the Magistrate wrongly put a party in possession, a suit for recovery of possession against that party is not governed by this article but by Art. 142 or 144. 16 I.C. 620=16 C.W.N. 1073. Suits regarding claim orders cases of attachment before judgment are governed by Art. 120 and not by Art. 11. 44 M. 902=41 M.L.J. 252 (F.B.); 152 I.C. 297=1934 P. 580. Art. 11 governs only a suit by decree-holder to declare an alienation by his judgment-debtor as fraudulent after an adverse order has been made against him in objection proceeding, and does not apply to a suit by other creditors who had not attached the property, which is governed by Art. 120. 138 I.C. 412=1932 L. 516. *See also* 1936 P. 535=1936 P.W.N. 779. A suit for a declaration that the plaintiff has a charge on a certain immovable property is governed by this article. 45 B. 597=60 I.C. 903=23 Bom.L.R. 84. Where the land is in the possession of occupancy tenants, a suit for declaration that the plaintiffs are entitled to collect rents and for an injunction restraining the 1st defendant from wrongfully collecting the same, is in effect a suit for possession governed by Art. 144 and not Art. 120. 34 Bom.L.R. 1469.

OTHER DECLARATORY SUITS.—Suits for a declaration of a public right of way. 26 C.W.N. 587. Suit for declaration of a right to graze cattle—Burden of proof. 1933 L. 370=144 I.C. 976. Representative suit for declaring certain land as graveyard and for injunction directing defendants to remove buildings erected thereon. 178 I.C. 125=1938 L. 254. Suit to have a Municipal election declared void. 35 A. 308=20 I.C. 490; suit for declaration that the defendant's name as lessee in the lease is only benami for the plaintiff. 35 A. 149=18 I.C. 698. *See also* 25 C. 49. Suit for declaration that an alienation of ancestral land by father of the plaintiff is not binding on him. 34 I.C. 253. *See also* 77 I.C. 174; 33 M. 31 (alienation of tarwad property); 106 I.C. 35. Suit by remote reversioner to set aside alienation by Hindu widow and for a declaration of its invalidity. 27 O.C. 173=1924 O. 381; 5 L.W. 482=38 I.C. 270; 37 A. 195=26 I.C. 737=13 A.L.J. 196; 1 L. 69=55 I.C. 924; 15 P.R. 1916=33 I.C. 161. An allegation of collusion of the nearest reversioner will not bring it under Art. 125. 18 I.C. 710; 46 I.C. 202 (F.B.). *See also* 41 M. 659=24 M.L.J. 183; 10 M.L.J. 229. So also suit to declare void a gift made by the Hindu widow in favour of her daughter *and a stranger*, is not governed by Art. 125, but by this article. 1933 A. 856=1933 A.L.J. 1305. Suit by widow of deceased co-parcener against surviving coparcener for rendition of accounts Art. 120 applies. 182 I.C. 426=1938 L. 139. *See also* 44 L.W. 208; 1936 L. 49 (Suit by donor to declare gift invalid). Time runs from the date of alienation and not when the alienation becomes known to the plaintiff. 33 Bom.L.R. 1418; 38 M. 1064=33 I.C. 45. After-born reversioners

NOTES.

cannot claim an extension of time under S. 6 or S. 7. 6 L. 405=1925 L. 654. Where the alienation was by a Hindu widow of an unrecognised portion of a *bhag* and the reversioner sued to set aside after the lifetime of the widow. *Held*, that the alienation being void *ab initio*, the starting point for limitation under Art. 120 is the date of the sale-deed. 32 Bom.L.R. 1013. No fresh cause of action arises when alienee from widow alienates. 1929 L. 779. Article applies to a suit to set aside surrender by Hindu widow. 101 I.C. 275=1927 N. 193. A suit by adopted son to set aside alienations by his maternal grandmother—Cause of action arises from the date of the plaintiff's adoption. 38 M. 396=20 I.C. 625. *Cf.* 42 M. 656=25 M.L.J. 219=46 I.C. 202 (F.B.). Where the sons sued to set aside certain alienations made by a Hindu father and it appeared some of the properties transferred had been transferred by gift to the alienor by his father. *Held*, that the suit related to joint family property and was governed by Art. 120 and not Art. 126. 150 I.C. 963=1934 L. 397. A suit by a worshipper at a mosque for a declaration that an alienation made by the mutwalli of waqf property is invalid and not binding on the trust. 2 P. 391=1923 P. 475. Suit by trustee for a declaration that a mortgage decree was not binding on the trust porperty—Time runs from the date of the mortgage suit. 137 I.C. 707=1932 M. 589. *See also* 1933 L. 270. Suit to set aside alienation of temple property by trustee for private purposes is governed by Art. 120 and time runs from the date when plaintiff had notice of the alienation. 1928 M. 837. *See also* (1938) 1 M.L.J. 91 ; 1938 M. 999=48 L.W. 577 (Suit by trustee against banker for recovery of trust funds misapplied by banker in a reduction of private debt of co-trustee). A suit for declaration that a sale by a trustee is invalid is governed by Art. 120. 24 I.C. 369=26 M.L.J. 537 ; 1928 M. 837. But where recovery of possession is prayed for, the suit would fall under Art. 134. 41 M. 1124=38 M.L.J. 357. *See also* 1936 L. 784. Suit to remove unauthorized mutawalli—Art. 120 applies. 41 P.L.R. 166. A suit for ejectment against the mortgagees of property dedicated to an endowment brought more than six years after the dates of mortgages being governed by Art. 120 is barred. It cannot come under S. 10 of the Act as that section expressly excludes asssignees for consideration. Nor does it come under Art. 134 as a Hindu Religious Endowment does not constitute a trust within the meaning of the article and secondly the suit is not for possession but merely for ejectment. (1922 P.C. 123, Rel. on.) 165 I.C. 48=1936 L. 784. As to right to conduct festival in temple, *see* 1941 M. 498=(1941) 1 M.L.J. 322. A suit by a Hindu reversioner for declaration of the nullity of an adoption by the widow. 41 A. 492=50 I.C. 938. Article is applicable to a suit to set aside a deed as void *ab initio*. 26 C.W.N. 479 ; 1928 A. 267=26 A.L.J. 289 ; to a declaratory suit for setting aside a will. 27 I.C. 574. Also to a suit based on trust created by will. 1929 L. 834. A suit to avoid an alienation under S. 53 of the T. P. Act. 22 L.W. 592 ; 1926 M. 66 ; 2 L.W. 479 =29 I.C. 62. As to when time begins to run in such cases whether on the date of the alienation or on the date when the option given by S. 53, T.P. Act, is exercised, *see* 22 L.W. 592. *See also* 7 L.W. 280=44 I.C. 551, holding that time runs from the latter date. *See also* 8 O.W.N. 593 on the point. In such cases the right to sue accrues only when the creditor has a clear and definite knowledge of the facts which constitute fraud and of its effect upon his interests. 132 I.C. 51=1931 O. 333. Suit for declaration that razinamah decree is void. 47 M.L.J. 801=1925 M. 194. Suit to set aside compromise decree against minor. 22 A.L.J. 521, *See also* 2 L. 164 =62 I.C. 794. Where the suit was for compensation based on a contract in the compromise decree, *held*, that the suit was governed by Art. 115 and not 120. 12 P. 792. Suit for declaration that attachment and sale are illegal and for restitution governed by this article. Time runs from the date of sale and not from the date of attachment. 36 M. 383=22 M.L.J. 108 ; *see also* 60 I.C. 529 (Sale held in contravention of S. 158 of B. T. Act). Suit for declaration of title to surplus sale proceeds under the Bengal Land Revenue Sales Act—Time runs when such right is denied. 47 C. 331=24 C.W.N. 294. For a suit by third party transferee of tenure under Ss. 12 and 13, Bengal Tenancy Act, for restraining sale of tenure in execution of decrees not binding upon him, limitation begins to run when the landlord applies for the sale of the tenure and not when the decree was obtained. 57 I.A. 214=59 M.L.J. 607=1930 P.C. 193 (P.C.). Art. 120 governs a suit by a landlord to avoid a transfer of occupancy right by a tenant at will, and the period begins to run from the date of the testator's death. 13 L.L.T. 40. Suit for declaration of right to moveble property. 26 M. 410 ; 21 C. 157 (P.C.). Suit for declaration that defendant is not the son and heir of the deceased. 54 I.C. 300. Suit for dissolution of marriage or declaration of divorce. 8 O.L.J. 650=1922 O. 109. *See also* 22 B. 430 ; 1936 A.L.J. 574 (suit for damages for enticing away plaintiff's wife). Suit for declaration of the plaintiff's status or right under S. 42, Specific Relief Act. 25 A. 1 (P.C.) ; 33 A. 430. *See* 2 B. 120 ; 15 B. 422. *See also* 1939 N. 197 (Suit for relief under S. 54, Specific Relief Act and for possession of land). Where a company rejected the request of the plaintiff to have his name entered along with that of his son as the owner of certain shares in June, 1918, a suit brought by the plaintiff for declaration of his title thereto in June, 1924, is in time, though the shares might have been purchased in 1914. 33 Bom.L.R. 250=133 I.C. 241=1931 B. 269. Suit by tenant against landlord for declaration that he is not entitled to collect excess rents : 33 M. 171. Mortgagor executing a perpetual lease in favour of a third party—Insufficiency of security for the mortgage—Suit by the mortgagee to avoid the lease—Suit is governed by Art. 120. 100 I.C. 728=1927 O. 148. Where the prayer for declaration is merely ancillary to the main relief, the suit is not thereby governed by this article. 1924 R. 11 : 15 I.C. 545. Suit for declaration as to character of partition and invalidity of alienation falls under this article. 31 Bom.L.R. 1240. Suit by sons for setting aside alienation of their father, when vendee was

NGTES.

never in possession is only declaratory and comes under this article. 1929 A. 750 (2). Where the act of the Government in respect of which a declaration and injunction are sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, in such a case neither S. 59, Revenue Recovery Act, nor Art. 14, applies but Art. 120 applies. 57 M. 501=1934 M. 147 =66 M.L.J. 715. But if the ground of such a suit is not that the act of Government was *ultra wires* or illegal but a mere irregularity which does not vitiate the main proceedings, but relates only to some question of detail such as the exact amount to be collected or something of that kind, which does not make the proceedings *ultra vires* in such a case Art. 14, may apply or in a case falling under the Revenue Recovery Act, even S. 59 Revenue Recovery Act, may apply. 1934 M. 147. Where the Government has acquired the land and has paid the money to one who was apparently entitled to it, a suit by a person who has also got interest in the land and claims the money paid by the Government is governed by Art. 120 and not by Art. 17 or Art. 62. 1935 P. 42. Suit against Secretary of State to declare as *ultra vires* an order of forfeiture. 16 B. 455. *See also* 29 C.W.N. 365=1924 P.C. 150. Suit by Zemindar against Government—Prayer for declaration that enfranchisement of service inam was not valid and binding—Limitation—Starting point. 58 M. 141=68 M.L.J. 409. Suit to set aside Government Order rejecting objections to the marking off the plaintiff's lands in the patta and excluding certain others, and for declaration of his right. 47 M. 572=47 M.L.J. 35. Suit for declaration as to land being held rent free—Prayer for possession and injunction added but unnecessary falls under this article, the starting point of limitation being the date of the institution of rent suits. 1929 C. 417 =49 C.L.J. 281. The plaintiff's suit for declaration that defendant was only an annual tenant and not owner as alleged to have been asserted by him is governed by Art. 120. (31 A. 9, Foll.) 118 I.C. 62=1929 N. 124. The plaintiffs alleged that the order by the Collector disposing of the suitlands in favour of the second defendant was null and void, that the plaintiffs being the owners of the adjacent land and the grant being of alluvial land, the grant should have been made to plaintiffs under S. 63 of the Bombay Land Revenue Code. The suit was for declaration against the Secretary of State and for possession as against his grantee. *Held*, the relief regarding possession could not be awarded in this suit: that it was really a suit for declaration and injunction and governed by Art. 120 and not by Art. 144. 33 Bom.L.R. 772=55 B. 447=1931 B. 369. Where it was proved that the guardian *ad litem* was guilty of gross negligence in the conduct of a suit and the minor sued after attaining majority for a declaration that the decree was not binding on him. *Held*, that Art. 120 was applicable and that limitation commenced to run, not the moment the decree was passed, but only when the gross negligence of the guardian became known to the plaintiff. 1930 M. 173= 58 M.L.J. 349. *See also* 33 Bom.L.R. 1033= 1931 B. 500; 1936 M.W.N. 351=1936 M. 804. Where a guardian sells immovable property belonging to a minor without the sanction of the Court and subsequently executes a second sale with the permission of the Court, the later transferee can sue for possession outright and need not expressly sue to have first sale set aside. To such a case Art. 120 and not Art. 91 applies. 34 C.W.N. 948. *See also* I.L.R. 1940 M. 27=1940 M. 106 (suit for money advanced by guardian for necessaries of minor. Where funds subscribed by a large number of persons are held in trust for a particular purpose, which fails or comes to an end, there arises a resulting trust of such funds as remain, in favour of the contributors or subscribers or, if they are dead, their personal representatives. The unexpended balance belongs to the subscribers rateably in proportion to their subscriptions. Any one of the subscribers can maintain a suit against the person holding the funds to recover his own share in the funds in proportion to his subscriptions. The fact that the funds are held by one of the subscribers who undertakes to pay interest on the funds would not be inconsistent with the transaction being in the nature of a trust and would not make it a deposit or constitute the holder a banker. A suit by a contributor to recover his share is governed by Art. 120 and the limitation commences to run from the date when there is a failure of the purpose whereupon the resulting trust arises. 1938 M. 641=(1938) 1 M.L.J. 616.

SUIT FOR INJUNCTION.—Governed by this Article 12 M. 445 : 26 A. 391 ; 21 M. 398 1923 A. 452; 3 L.L.J. 228=60 I.C. 20; 2 L.L.J. 463= 56 I.C. 1003 ; 42 B. 333=45 I.C. 592 (mandatory injunction) ; 49 B. 586=27 Bom.L.R. 503=1925 B. 373 ; 89 I.C. 405=1925 L. 653. *See also* 1938 L. 259. Suit for mandatory injunction for removal of encroachment on public road is governed by Art. 120. 29 P.L.R. 308=1928 L. 792 (1). So also suit for injunction for removal of water spout. 109 I.C. 638. In a suit alleging interference with the plaintiff's right of worship on a holy hill and claiming relief by way of injunction and declaration in respect of *charans* or footprints of saints, which the defendants had removed and replaced by *charans* of a different type abhorrent to the plaintiffs. *Held*, that the suit was not barred by Art. 120 as the act complained of was a continuing wrong and that under S. 23 of the Act, a fresh period began to run at every moment of the day on which the wrong continued. 60 I.A. 313=12 P. 681=37 C.W.N. 1021=65 M.L. J. 163 (P.C.). Suit by reversioner to restrain waste of movables by a Hindu widow. 44 M. 984=41 M.L.J. 279=65 I.C. 10. Suit for removal of encroachment on communal land —Time runs from the date of encroachment. 88 I.C. 176. *See also* 13 I.C. 661 ; 1940 L. 359. Suit for injunction against a co-owner denying title is governed by Art. 120. 14 L. 267=145 I.C. 553=1933 L. 705 (F.B.). So also suit to restrain a co-owner from preventing the plaintiffs from using the common property for the specific purpose for which it had been set apart ; and it is not governed by Art. 32, though the defendant had perverted the use of the property to an unauthorised purpose. 14 L. 267. But if the relief claimed is one for possession, then Art. 144 will apply. 14 L. 267. Suit for permanent injunction—Removal of construction on *shamilat* of which both plaintiff and defendant are owners.

NOTES.

35 P.L.R. 472=1934 L. 701. *See also* 1939 N. 197.

Suit for Movables.—Suit by reversioner to recover movable property on the death of a Hindu female is governed by the article. 25 C.W.N. 585=1922 C. 321; 32 C.W.N. 913=55 C. 903. *See also* 34 P.R. 1914=21 I.C. 919; 46 I.C. 627=3 P.L.J. 522; 32 C.W.N. 913=55 C. 903=1928 C. 670. A suit to establish a right to inherit the property even though movable of a deceased person is governed by Art. 120. 1940 L. 475. A suit for the recovery of money wrongfully withdrawn by the defendant from Court by setting up an adverse title to the claim of the plaintiff, is governed by Art. 120 and not by Art. 62. 69 C.L.J. 108=1939 C. 413. As to recovery of ornaments by virtue of inheritance right, *see* 32 C.W.N. 133. A suit for a declaration that the plaintiff is entitled to an eight annas share in certain movable property and for recovery of possession thereof from the defendant wrongfully withholding the same is governed by Art. 120 and not by Art. 49 or 62. 36 C.W.N. 758=55 C.L.J. 420. *A* deposited his jewellery with his friend *B* at the time of *B's* marriage to be used by him for the purpose of the wedding on condition that it would be returned whenever *A* asked for it. *Held*, that the transaction was a deposit and not a loan and the mere fact that *B* was allowed to use the jewellery did not take the transaction out of the category of a deposit as that expression is used in Art. 145 and Art. 120 has no application. 1930 L. 913. Where a donor had given subscription for a specific purpose which became impossible, he was entitled to refund, and the suit was governed by Art. 120. 11 O.W.N. 937=1934 O. 329. *See also* 1941 N.L.J. 184=1941 N. 181 (suit for profits against person entrusted with property for safe custody).

Suit for Pre-emption.—In respect of lease, 19 A.L.J. 442=62 I.C. 884; suit by rival pre-emptors against one another in respect of the same sale. 80 P.R. 1912=14 I.C. 328. *See also* 164 I.C. 366=1936 L. 503. Where possession has not been taken by the vendee a suit for pre-emption by the vendor under a covenant to pre-empt in the sale-deed would be governed by Atr. 120. 40 M.L.J. 443=62 I.C. 27. So also a suit by *othidar* for pre-emption, and time runs from the date he comes to know of the sale. 38 M. 67=23 M.L.J. 607. Also suits for pre-emption in respect of a contemplated sale. 1922 N. 14.

Suit for Accounts is governed by Art. 120 when it is not covered by any other Article. 14 C. 147 (P.C.). *See also* (1942) 1 M.L.J. 472; 55 L.W. 79=(1942) 1 M.L.J. 274. As to whether plaintiff in such a suit brought within time is entitled to go back more than six years and open up the whole account *see* 28 I.C. 221 (M.); 13 Bom.L.R. 1014; 19 M. 425; 14 C. 147 (P.C.); 9 C.L.J. 383; 8 C. 788; 1936 M. 170; suit for rents and profits of land to which both plaintiff and defendant have claim—Art. 120 applicable. 1940 Rang.L.R. 136=1939 R. 365. A co-sharer's suit for his share of the income of the joint property is governed by Art. 120 and the starting point is when the right to sue accrues, *i.e.* when the right of the plaintiff is denied or when there is an ouster. He may be entitled to an account of the share of income for a period which may be more than 6 years before the date of suit. It cannot be said that even in the absence of ouster or assertion of hostile title to the knowledge of the plaintiff, his right to share in the income should be confined only to a period of 6 years before the date of suit. 55 L.W. 196=1942 M.W.N. 239=(1942) 1 M.L.J. 408. *See also* 142 I.C. 708=1933 M. 200 holding that account can be claimed for the whole period. Suit by a member of a firm against his *sub-partner* for contribution based on a settlement between him and the defendant, in respect of the loss sustained by the plaintiff in the partnership, is governed by this article and not by Art. 61 or Art. 106. 38 L.W. 858=65 M.L.J. 789. A suit for dissolution and accounts of a subsisting partnership is governed by Art. 120. 37 L.W. 288=1933 M. 353=144 I.C. 573. So also a suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an express agreement. 141 I.C. 277=1933 N. 127=29 N.L.R. 34. *See also* 1933 S. 324=27 S.L.R. 308. Hundi vested in defendant for payment of debts of third person—Suit for accounts in respect of Art. 89 or 120 applies—Starting point. 1936 M. 876. A member of a Hindu family had assigned to him a mortgage bond by the *karta* of the family at the partition which took place in 1929. The mortgage bond was however repaid in fact in 1922. An action being brought by the member on the mortgage with an alternative claim for a money decree against the *karta* if he had received the money. *Held*, that this being merely a case of conversion by the *karta* or a case where having held the money for many years from the date of the partition, he must be said to hold it in trust for the plaintiff in which event Art. 120 would apply and not Art. 62. 1935 P. 159=156 I.C. 887. The article applies to suit for account against a *karta* of a joint Hindu family. 25 C.W.N. 356=58 I.C. 877. *See also* 44 C.W.N. 93; 1938 L. 139; by a ward against the guardian; 50 C. 910; 30 M.L.J. 11 (recent cases); by a sharer against co-owner of Jaghir appointed by the Government as the manager. 40 M. 291=30 M.L.J. 341. *See also* 142 I.C. 708=1933 M. 200. *See also* 7 Cut.L.R. 87; I.L.R. (1940) 1 C. 110=1940 C. 363; 1937 Pesh. 28; 1941 Sind. 50; (1940) 2 M.L.J. 494 (sale certificate in respect of property jointly purchased by two persons—Money for stamp paid by one—Suit for contribution against the other—Art. 120 applies not Art. 61). Where money due to tenants in common was received by one or more tenants to exclusion of the rest, a suit by a co-sharer for accounts against other co-sharers. 168 I.C. 41=1937 Pesh. 28; 1938 L. 139; by a Temple Committee. 31 M.L.J. 857; 1939 M.W.N. 360 (suit against trustee for accounts); against an executor or administrator, 32 B. 364; 10 B. 242; 12 Bom.L.R. 881; 13 C.W.N. 557; 19 M. 425; 7 M.L.T. 123; 1935 C. 511; 1935 M. 594 (receiver spending money for estate and surety for the same); by an executor against his co-executor. 10 B. 242; 29 Bom.L.R. 418. Banker and customer—Current account—Suit to recover amounts due falls under this article. 33 C.W.N. 412=56 C. 556=1929 C. 714. A suit by a member of an unregistered company for refund of subscriptions is in substance one for an account governed by Art. 120. 7 R. 540. Article applicable to an

NOTES.

equitable claim against a trustee, liable to account for an account and ascertainment of what may be due, is Art. 120 and not Art. 62, and limitation does not begin to run until the "right to sue" accrues, *i.e.*, until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant. Consequently, the plea of limitation fails when the defendant is unable to specify the particular date at which the claim to an account was denied by him. 35 C.W.N. 145=60 M.L.J. 1=58 I.A. 1=8 R. 645 =1931 P.C. 9 (P.C.).

WITHDRAWAL OF SUIT.—In a suit to have an order of withdrawal of a suit vacated and to prosecute the suit further, the plaintiff's cause of action arises as from the date of the withdrawal of the suit from which date he would get 6 years under Art. 120. 67 C.L.J. 320=1938 C. 874.

MISCELLANEOUS—SUITS GOVERNED BY THIS ARTICLE.—Suit by trustee against his co-trustee for breach of trust. 20 M. 398. Suit by trustee of temple to recover money from former trustee. 152 I.C. 315=40 L.W. 275=1934 M. 542. Art. 120 applies to trustee against a receiver appointed under O. 40, C. P. Code, for his negligence in the management of the estate, when such suit is brought by the plaintiff under leave granted to him in proceedings arising out of exceptions to the receiver's accounts by the Court which appoint the receiver. To such a suit, neither S. 10 nor Art. 36 nor Art. 89 nor Art. 115 of the Limitation Act is applicable. The "right to sue" accrues in this class of suits, when the leave to sue the receiver or the ex-receiver is given to a person by the Court which had appointed the receiver. 46 C.W.N. 294. A suit by a trustee against a stranger to recover trust funds which have been applied in breach of trust falls under Art. 120 and not under Art. 36. The right to sue accrues when the trustee becomes aware of the breach. 67 I.A. 448=I.L.R. (1941) M. 175=1941 P.C. 1=(1941) 1 M.L.J. 393 (P.C.). Suit against trustee for neglect of duty. 18 B. 401. Suit by beneficiary against trustee. 58 I.A. 279=10 P. 851=61 M.L.J. 78=1931 P.C. 196 (P.C.). Suit to declare decree against minor void on ground of gross neglect of guardian. 1936 M. 804. Administration bond to Court—Assignment by Court—Suit by assignee—Article applies—Starting point—Assignment, if gives fresh starting point of time. 165 I.C. 672=1936 B. 363=38 Bom.L.R. 632. Suit for administration of deceased's estate. 25 M. 361=12 M.L.J. 183; 36 B. 111=13 Bom.L.R. 1025. *See also* 67 I.A. 406=53 L.W. 1=(1941) 1 M.L.J. 594 (P.C.); 22 M. 583 (suit for administration of fund). Claim by administrator against debtor of estate of deceased—Limitation—Starting point. 62 C. 120. A suit by the zemindar to recover the cess paid by him to Government from the inamdar is one to enforce a statutory liability and is not one for rent or one based on a contract, express or implied, and falls under Art. 120. 1937 M. 217=(1937) 1 M.L.J. 91 (F.B.). *See also* 185 I.C. 626 (Suit to recover annuity under a well); 42 Bom.L.R. 54 (suit by shareholder of com pany for dividend); 1941 N.L.J. 665 (suit to enforce equitable claim). Compensation payable under Land Acquisition (Mines) Act, being a statutory liability, suit for recovery of the same is governed by this article and not by Art. 2. 15 P. 510=17 P.L.T. 279=1936 P. 513; 1939 L. 583. Suit by one co-sharer against another in possesision of the property for compensation for use and occupation or for his share of the rents and profits. 23 C. 799; 33 I.C. 705 (M.); 5 P.R. (Rev.) 1915=32 I.C. 102. *See also* 28 A. 161; 37 A. 318; 1923 N. 229; 41 I.C. 848=13 N.L.R. 127; 39 M. 54=33 I.C. 705; 4 Luck. 265=1929 O. 83; 131 I.C. 511 =1931 R. 150; 135 I.C. 836=1932 A. 272; 1933 L. 92 [48 M. 648 (F.B.)] Foll. Suit for mesne profits. 1 R. 405=1924 R. 155; 165 I.C. 266=1936 A.L.J. 984=1936 A. 706; 1940 C. 400. Suit for profits of land belonging to the plaintiff which were wrongly received by the defendant from the Collectorate, while the land was under attachment under S. 146. Cr. P. Code, 50 C. 475= 1923 C. 379. *See also* (1937) 2 M.L.J. 296. As to effect of order under S. 144, Cr. P. Code, *see* 53 L.W. 315=1941 M. 498=(1941) 1 M.L.J. 322. Art. 120 applies to a suit by a landlord challenging a transfer of an occupancy right in contravention of the provisions of the Punjab Tenancy Act. 39 P.L.R. 771=1937 L. 824. Rents collected by defendants prior to compromise giving plaintiff's right to such rents—Kist falling later—Suit by plaintiffs to recover same from defendant—Limitation—Starting point. 16 P. 184=18 P.L.T. 162. Claim for mesne profits in a suit for partition and profits is within Art. 120. 29 C.W.N. 270=1925 P.C. 93 (P.C.). So also suit for joint possession for common enjoyment. 1928 N. 96. A suit for partition of joint property. 1 C.L.J. 73. *See also* 28 I.C. 953 (A.); 37 A. 318 =13 A.L.J. 407. There is a continuing right of suit so long as the parties or co-owners. 30 M.L.J. 104; 28 A. 627. *See also* 1939 R. 365; 55 L.W. 196=(1942) 1 M.L.J. 408; 20 C.W.N. 481; 1927 M.W.N. 696. Suit by a Mahomedan heir for his share of the inheritance. 44 A. 244 =20 A.L.J. 71=1922 A. 525; 63 I.C. 685=14 S.L.R. 137. Suit for share of profits—Suit by members of joint family against purchaser of another member's interest in property. 41 L.W. 138=68 M.L.J. 487. Alienation by father—Suit by sons to set aside—Decree declaring invalid and awarding share to sons—Alienee continuing in possession—Suit by sons for profits—Art. 120 and not Art. 109 applies. 1936 M. 654=162 I.C. 771=43 L.W. 706. Joint Hindu family—Collection of outstandings by one member—Suit for share. 42 M.L.J. 507=45 M. 648. *See also* 30 M.L.J. 104=32 I.C. 83 (suit by Mahomedan co-heir); 1937 O. 394. (claim against co-sharer in respect of improvements made to joint property). Suit against co-heirs for share—Estate consisting of immovable property and business claim to immovable property is governed by Art. 144 and that for accounts is governed by Art. 120. 1936 R. 407. Suit by co-mortgagee for his share of the money realised by another. 79 I.C. 294. Suit for contribution as between co-mortgagors is not governed by this article. 10 O.W.N. 919=1933 O. 478. Where some of the properties furnished as security under a bond executed as a condition for stay of execution were sold in execution of another decree subject to a charge, and on the failure of the purchaser to pay off the charge, the owner of the properties brought a suit in effect praying for a declaration of his right to indemnity and for its enforcement

NOTES.

by the sale of the property. *Held*, that it was not necessary for the plaintiff to pray specifically for a declaration which was involved in the prayer for sale of the property, that the main relief was the enforcement of the charge and that the suit was governed by Art. 132 and not Art. 120. 57 M. 218=66 M.L.J. 4. Suit for contribution under S. 70, Contract Act. 43 M.L.J. 271=1923 M. 14; 25 C.W.N. 813=62 I.C. 615. *See also* 1937 O. 394. Suit to recover father's debts from the sons on basis of the son's pious obligation under Hindu Law. 42 C. 1068=19 C.W.N. 849=20 I.C. 629 (F.B.). Time runs when the debt became payable by the deceased. 23 M. 202 (F.B.), overruling 17 M. 122. *See also* 23 A. 206; 28 A. 508. Suit to enforce an award. 49 B. 603=1925 B. 519; 45 B. 329: 59 I.C. 755; 102 P.R. 1915=32 I.C. 88; 31 I.C. 816 (M.). *see also* 1928 B. 264 (suit to recover instalments fixed by award). It cannot be said that all suits, irrespective of their nature, which are based on an award must be governed by Art. 120. 1929 R. 275 (2). Suit to recover compensation for breach of the award. 19 I.C. 376 =6 S.L.R. 148. *See also* 34 A. 43=8 A.L.J. 1138. [5 A. 263 and 16 A. 3, holding that an award is a contract to which Art. 113 would apply are no longer good law.] Agreement that defendant should render account of income to plaintiff in case plaintiff wins certain Will suit—Plaintiff bringing suit for accounts after winning first suit. Art. 120 applied, and under that article, the right to sue did not accrue until the date of the decree of the first Court in the will suit, which is the proper starting point for limitation. 161 I.C. 843=1936 M. 170. Suit by tenant against landlord to apportion rent. 11 C. 284. Suit in respect of public charities. 24 I.C. 360; 33 I.C. 45. Suit by District Board for subscriptions collected by defendant from the public for the construction of a bridge over a river—Cause of action arose only when definite steps had been taken towards the construction of the bridge. 143 I.C. 496=1933 M. 524=64 M.L.J. 574=37 L.W. 631. *See also* 50 L.W. 466=(1939) 2 M.L.J. 579. Bihar Municipality granting right to collect tolls from market on contract for payment of fixed sum—Suit against grantee for recovery of amount—Art. 115 and not Art. 120 applies. 18 P.L.T. 252=1937 P. 360. But suit for recovery of license fee due in respect of demise or lease of premises under S. 30, Bom. Mun. Boroughs Act, 1925 is governed by this article and not Art. 110. 30 S.L.R. 146=165 I.C. 360. *See also* 1938 P. 192; 173 I.C. 678=1938 Sind 48 (suit for terminal tax). A suit by a District Board to realise a certain amount as tax on circumstances and property, is not really a suit for recovery of money but for the recovery of a liability under a particular suit. To such a suit the three years rule of limitation would not apply. It is governed by Art. 120. I.L.R. (1941) All. 276=1941 A.L.J. 28=1941 A. 152. Suit for construction of will. 1 C.L.J. 73; 20 C. 906; 33 I.C. 45 (M.); 37 C.L.J. 482=1924 C. 411. (The right is a continuing right so long as the estate is in the hands of the executor and the administration not completed). Suit against Secretary of State to recover surplus sale proceeds in a sale for arrears of revenue. 20 C. 51 (F.B.) overruling 18 C. 234. Suit claiming exclusive right of worship of an idol. 4 C. 683; or a turn of worship, 46 C. 455=47 I.C. 25=22 C.W.N. 994. Suit to recover profession tax. 13 M. 124. A claim by a liquidator of company under S. 235, Companies Act. 47 A. 669=23 A.L.J. 473=1925 A. 519. *See also* 1935 L. 335; 1937 P. 293. Suit to recover revenue as Government's assignee. 26 M. 730. As to applicability of this article to suit for redemption after sale of equity of redemption contrary to the provisions of O. 34, R. 14, C. P. Code. *See* 47 C. 377=24 C.W.N. 220. Suit by auction-purchaser to recover the purchase money under S. 315, C. P. Code, 1882 (now O. 21, R. 93) on the ground that the judgment-debtor had no saleable interest. 35 A. 419=19 I.C. 986; 50 C. 115=27 C.W.N. 183; 23 M.L.J. 487=17 I.C. 437; 16 M. 361; 40 C. 187. Where an auction purchaser who under a decree obtained by a third party loses a part of the property purchased by him brings, a suit against the decre-holder for refund of the purchase money, the suit is governed by Art. 62 or 97 and not by Art. 120. 1937 O. 286=1937 O.W.N. 83. Suit by judgment-debtor to recover excess amount realised in execution. 140 I.C. 472 =1933 L. 112. Suit by trustee for reimbursement out of the trust estate for money spent out of his pocket for purposes of the trust. 38 M. 260=28 M.L.J. 347 [37 C. 229 (P.C.), Foll.]. Suit for reimbursement, by a person *C* put in charge of the property, pending determination of the rights of *A* and *B* of the wages of watchmen of the property paid by him. 128 I.C. 66=7 O.W.N. 760=1930 O. 42. *See also* 1926 P. 205 =5 P. 249=94 I.C. 826. Suit for declaration of valdity of appointment to office of karnam of new group of villages formed on regrouping, is governed by Art. 120. 99 I.C. 634=1927 M. 148=51 M.L.J. 678. Suit by a partnership consisting of some of the members of a joint Hindu family against the family for advances made to it out of the partnership funds. 44 I.C. 428=34 M.L.J. 32. *See also* 45 L.W. 749=1937 M. 599. Suit to remove a Pandara Sannadhi from office. 40 I.C. 627=32 M.L.J. 271. Where the office is not hereditary, a suit to oust a person wrongly holding the office of Mutawalli is governed by Art. 120. 44 C.L.J. 339=99 I.C. 205=1927 C. 130. So also a suit for a declaration that the plaintiffs are the Mutawallis of the trust property or a suit for possession of the office of the Mutawalli. 29 I. C. 375=1930 A. 886. *See also* 42 C.W.N. 1138=1938 C. 709; 40 Bom.L.R. 1288. Right to conduct festival in temple—Dispute between Vadagalais and Tengalais—Former getting order under S. 144, Cr. P Code, against latter—Festival not performed from 1914 to 1927—Subsequent order under S. 144, Cr. P. Code, in 1930—Suit by Thengalais in 1930 to declare illegal not barred. 53 L.W. 315 =I.L.R. (1941) M. 544=1941 M. 498=(1941) 1 M.L.J. 322. [A claim to hereditary office is governed by Art. 124. 1931 M.W.N. 8=133 I.C. 193=1931 M. 505.) *Maharki watan* falls under the term 'hereditary office.' In a *Maharki watan* having several branches, each one claims a share for his branch alone to the exclusion of others, and the alternative working of a branch year by year is also exclusive of others. A suit by a branch for possession of its share is therefore governed by Art. 124 and not by Art. 120. I.L.R. (1937) N. 151=168 I.C. 351=1937 N.84. A suit claiming a share in the proceeds of a Moglai

NOTES.

Hak (grant of revenue of certain villages) is governed by Art. 120, and limitation begins to run for the date of demand and refusal. 39 Bom. L.R. 277=1937 B. 217. *See also* 43 C.W.N. 469. Suit to enforce pledge of moveable property where no personal decree is sought for, is governed by Art 120, 40 A. 512=16 A. L.J. 449. *See also* 22 C. 21; 17 A. 184; 24 Mr 528 (F.B.), 37 Bom.L.R. 165. Suit for price of goods sold where the seller seeks only a personal decree and not the enforcement of any charge on the goods with him is governed by three years' rule of limitation and not by Art. 120. 132 I.C. 422=1931 A. 229. Suit by mortgagor for recovery of the mortgage money left with the mortgagee for payment of prior creditors, on default being made by the latter in such payment is governed by Art. 120. 133 I.C. 615=1931 A.L.J. 533=1931 A. 549. *See also* I.L.R. (1941) Kar. 495; 1932 A.L.J. 556=1932 A. 454 (purchaser failing to pay a mortgage debt). Suit for the recovery of the price of work done and materials supplied on a contract to build a house. 103 P.R. 1913=22 I.C. 576. But *see* 2 L. 376=1922 L. 108 holding that such a suit falls under Art. 115. Claim by solicitor for costs decreed to him mentioning him by name. 34 Bom.L.R. 670=1932 B. 378. Article 120 is the relevant article as regard the *malika*, and there is no right of action at all in respect of such a subject-matter as the *malikana*, unless and until a certificate under the Pensions Act has been obtained. A suit brought within six years from the grant of the certificate is not barred under Art. 120. 56 I.A. 267=51 A. 439=1929 P.C. 166=57 M.L.J. 160 (P.C.). In the case of a claim for payment of *zarichaharum* to the owner of the site, the suit should be brought within six years from the date of the confirmation of the sale. 130 I.C. 12=1930 A.L.J. 1284=1931 A. 25. A suit by a junior member of a family governed by rule of primogeniture for a plot of land in lieu of maintenance on the strength of family custom is governed either by Art. 120 or 144, the choice between the two provisions of law depending upon the question whether the suit is treated as one of declaration or for possession. 1929 L. 872 (2). Arts. 129 and 131 do not apply to such a case, as Art. 129 is restricted in its operation to a suit for maintenance in which the right is based on Hindu Law and not upon custom, and Art. 131 is confined to a suit in which the plaintiff seeks simply to establish his right to maintenance and does not ask for aconsequential relief.(83P.R. 1906,Foll.) 1929 L. 872 (2). Suit against directors for misapplication of the company's funds in *ultra vires* transaction falls under this article. Time runs from the earliest date when the specific injury actually arose. 54 B. 226. A right to sue for misfeasance of directors of companies arises from the date of misfeasance and is governed by Art. 36 or Art. 120, 54 M. 153=1931 M. 58 =60 M.L.J. 280. Article applies to suit for damages for enticing away plaintiff's wife. 1936 A.L.J. 574=163 I.C. 974=1936 A. 454. Also to suit for restitution of conjugal rights against wife, and this is a continuing wrong. 38 Bom.L.R. 502=164 I.C. 628=1936 B. 289. A suit by the mortgagee to recover the mortgage money under S. 68 (*b*) of the T. P. Act is governed either by Art. 116 or Art. 120. 7 O.W.N. 1045; 1925 R. 223; 161 I.C. 461=1936 R. 80. Possessory Application by mortgagee for correction of entry rejected—Limitation for suit governed by Art. 144 and not Art. 120. 1936 O.W.N. 243=1936 O. 168. Suit by mortgagee auction-purchaser for possession—Property in possession of lessee of mortgagor—Art. 144 applies and not Art. 120. 1936 O.W.N. 399=162 I.C. 225. As to whether an application for revocation of probate is governed by Art. 120, *see* 35 C.W.N. 387=1931 C. 713. If one entitled to use a land as *sehan darwaza* uses it for a purpose like starting a sugar mill he is increasing the burden and the Article applicable would be Art. 120 and not 32. 1937 A.L.J. 1231=1938 A. 20.

Arts. 120 and 125.—A deceased had made a gift of his land to certain person. During registration proceedings his daughter unsuccessfully contested the registration of the land in alienee's name. However the daughter did not bring any title suit afterwards. The reversioners of the deceased subsequently brought a suit for a declaration that the alienation was void against them and hence should be set aside. *Held*, that the mere failure on the daughter's part to bring a title suit after failure in registration proceedings did not amount to constructive alienation for purposes of Art. 125, which, therefore, did not apply; and the uit bythe reversioners brought more than six years after the land registration entry was barred under Art. 120. 165 I.C. 21=1936 P. 535. Where a Hindu widow and her daughter execute a sale-deed in respect of property inherited from the last male owner, the daughter having only a *spes successionis*, it cannot be said that there is any alienation by the daughter. The alienation has to be regarded as one by the widow alone. A suit by the daughter's son after the death of the widow, but during the lifetime of the daughter, his mother, to have the alienation declared invalid and not binding on him, is governed not by Art. 125, but by Art. 120, and would be barred unless brought within six years of the date of the alienation, 165 I.C. 448=1936 M.W.N. 339=44 L.W. 208. *See also* 1941 C. 41.

Arts. 120, 127 and 132.—*See* 1938 P. 16. The right of a member of a Malabar tarwad to maintenance is a proprietary right and based on co-ownership in the property of the tarwad. The claim to recover maintenance or arrears of maintenance falls within Art. 127, and the mere fact that the claim is based on a *karar* executed by the members of the tarwad cannot alter the nature of the claim. But Art. 127 cannot be availed of *by an assignee* of the right from a member, the article being restricted in its scope to the members of a joint family. The article applicable to a suit by an assignee is Art. 120. Where the maintenance is charged on the tarwad income under a *karar* entered into by the members of the tarwad, the claim so far as it is sought to be enforced against the income of the immovable property of the tarwad would be governed by Art. 132. 163 I.C. 190=43 L.W. 711=1936 M. 573.

Arts. 120 and 131.—SUIT BY MUTAWALLI AGAINST SECRETARY OF STATE FOR DECLARATION OF RIGHT TO RECEIVE YEOMIAH ALLOWANCE.—A suit by the holder of the office of mutawalli or katheeb of a mosque against the Secretary of State for India for a declaration that he was entitled to the *yeomiah* allowance as the lawful

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII—Twelve years.	
121. To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or inapatni taluk or other saleable tenure sold for arrears of rent.	Twelve years ..	When the sale becomes final and conclusive.
122. Upon a judgment obtained in British India, or a recognizance.	[1][Twelve years] ..	The date of the judgment or recognizance.
123. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	[1][Twelve years] ...	When the legacy or share becomes payable or deliverable.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

mortgage—Suit by mortgagee as heir of mortgagor for possession of equity of redemption—Defendant obtaining mutation in his favour—holder of the office is a suit to establish a periodically recurring right attached to the office of mutawalli and is governed by Art. 131 of the Limitation Act, Art. 120 does not apply to such a suit. A suit brought within 12 years of the Secretary of State's refusal to recognise the validity of the plaintiff's claim would be in time. The fact that the allowance does not vary from year to year but is fixed would not make any difference as to the limitation applicable. I.L.R. (1941) M. 587=1941 M. 428=(1941) 1 M.L.J. 374.

Arts. 120 and 142.—Where in proceedings under S. 145, Cr. P. Code, the Magistrate passed an order for attachment of the property which was taken possession of by a Tahsildar who was appointed as receiver, the possession of the receiver is in the eye of law the possession of the true owner and the plaintiff could maintain a suit for a mere declaration of his title and it is not necessary for him to institute a suit for possession. A suit is governed by Art. 120. The suit being neither in substance nor in form a suit for possession of immovable property, Art. 142 has no application. 164 I.C. 118=1936 O.W.N. 784 =1936 O. 387.

Arts. 120 and 134 and S. 10: MORTGAGEES OF ENDOWED PROPERTY—SUIT FOR THEIR EJECTMENT.—A suit for ejectment against the mortgagees of property dedicated to an endowment brought more than six years after the dates of mortgages being governed by Art. 120 is barred. It cannot come under S. 10 of the Act as that section expressly excludes assignees for consideration. Nor does it come under Art. 134 as a Hindu Religious Endowment does not constitute a trust within the meaning of the article and secondly the suit is not for possession but merely for ejectment. 165 I. C. 48=1936 L. 784. *See also* 48 I.A. 302=44 M. 831.

Art. 121.—"Incumbrance" does not include adverse possession. 44 C. 412=39 I.C. 213. *See contra* 25 C. 167. [Followed in 43 C. 779= 31 I.C. 801]. Article applies also to an assignee of a purchaser. 22 W.R. 29.

Art. 122 applies only where a suit is maintainable on a judgment, 20 C.W.N. 58; 18 A. 509. As to what judgments can be sued upon, *see* 8 B. 1; 7 C. 74; 9 C.W.N. 952; 24 C. 473. Where a former suit ended in a declaratory judgment, and the decree was not framed in an executable form, a suit will lie to enforce the rights so declared, and such a suit will be governed by Art. 122. 40 L.W. 792=1934 M. 665=67 M.L.J. 413.

Art. 123: SCOPE.—*See* 9 C. 79; 14 B. 236; 25 M. 361. When a suit is barred by this article the right to property is extinguished. 23 B. 80. Suit for legacy falls under this article. 36 B. 111 =12 I.C. 702=13 Bom.L.R. 1025; 41 C. 271 =25 I.C. 370 (residuary legatee suing); 25 M. 361; even if administration is also prayed for ancillary it was only ancillary to his claim for legacy, article would apply. 25 M. 361.

APPLICABILITY.—Art. 123 applies only where the suit is brought against an executor or administrator or some person *legally charged with the duty of distributing the estate*. 59 I.A. 74=54 A. 93= 1932 P.C. 81=62 M.L.J. 371 (P.C.). *See also* 14 B. 236; 12 M. 487; 16 M. 61 (F.B.); 34 M. 511 (F.B.); 9 C. 79; 17 O.C. 157=24 I.C. 45; 44 C.W.N. 221=1940 C. 93, Art. 123 does not apply to the claims of profits in the estate of a deceased in respect of movable property. 178 I.C. 475=1938 R. 416. The words "*payable*" and "*deliverable*" in Col. 3 of Art. 123 indicate that there must be some person who is under a duty to pay the legacy or to deliver the distributive shares. It is not necessary however that the persons liable to pay must be executors or administrators. They must be persons in possession of the estate and legally bound to pay the legacy or hand over the distributive shares. Hence, where a testator has in his will directed that the person in possession of his estate would pay maintenance allowance to certain lady, a suit to recover that allowance is governed by Art 123. 44 C.W.N. 221=1940 C. 93. (Article inapplicable to suit against co-heir). 12 R. 409=152 I.C. 768=1934 R. 318. But *see* 40 M. 190=43 M.L.J. 486=1922 M. 457, holding that article applies to suits for legacies against any person rightly or wrongly in possession of the estate. A suit by the plaintiff to recover possession of certain Government Promissory Notes in accordance with the terms of a will left by the original owner against the defendant alleged to have the notes in his custody contrary to the terms of the will not governed by Art. 123, as the defendant is not charged with any duty of distributing the estate. [59 I.A. 74 (P.C.), and Foll.

Description of suit,	Period of limitation.	Time from which period begins to run.
124. For possession of an hereditary office.	[1][Twelve years] ..	When the defendant takes possession of the office adversely to the plaintiff. *Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Lch. I, for "Ditto".

NOTES.

Appl.] 36 C.W.N. 758=55 C.L.J. 420. A suit by the heirs of the deceased owner for possession of the property from the defendants in possession of the property, without any colour of title and not claiming under the original owner is not governed by Art. 123. 10 R. 82=137 I.C. 200 =1932 R. 55. *See also* 164 I.C. 556=1936 R. 838. But a suit for recovery of a legacy from persons who are in possession of the estate and who are legally bound to pay the same is governed by Art. 123: 1934 A.L.J. 230=56 A, 711 =1939 A. 239. *See also* 185 I.C. 626 (suit for annuity under a will). *See also* 71 P. 350=19 P.L.T. 202=1938 P. 600.) Where a Muhammadan dies intestate, his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution, and if a suit is brought by one of the heirs to recover his share, Art. 144 and not Art. 123 applies. 1933 L. 784 (2); 117 I.C. 803=1929 L. 549; 59 I.A. 74=54 A. 93=1932 P.C. 81=62 M.L.J. 371 (P.C.). *See also* 1929 B. 141; 45 B. 519=59 I.C. 780=22 Bom.L.R. 1429; 42 B. 943=22 Bom.L.R. 936=58 I.C. 42. *See also* 4 L. 402 =1923 L. 519; 34 M. 511 (F.B.); 30 M.L.J. 104; 1928 A. 467; 31 Bom.L.R. 199=1929 B. 141; 1933 L. 784; 17 O.C. 157=24 I.C. 45. The decisions in 5 R. 582=106 I.C. 828=1921 R. 6 and 3 R. 77=1925 R. 22 are no longer good law in view of the Privy Council decision in 59 A. 74, *supra*, A suit for accounts by an heir of an intestate person or an administrator against an executor *de son tort* is governed by Art. 123 and the latter is liable to account for mesne profits for a period of twelve years before suit. 30 Punj.L.R. 503 =1929 L. 753. Article is inapplicable to suit against a person who is a representative only for the purposes of management. 14 Bom.L.R. 236. A suit to recover an undistributed share of an intestate is governed by Art. 123. 43 B. 845= 51 I.C. 209=21 Bom.L.R. 384; 1 R. 405=1924 R. 155. *See also* 42 I.C. 809; 1923 R. 110; 88 I.C. 609=1925 R. 233. As to suit for whole of intestate's property, *see* 16 P.R. 1897; 10 Bom.L.R. 210 at 229. As to suit by an heir to recover money or movable property, *see* 21 C. 157 (P.C.); 34 M. 511; 34 P.R. 1914; 19 A. 169. Where the amount of maintenance granted under a will is to come out of income of particular property and the defendants are in possession of the property under the will, the proper article to apply to the suit for arrears of such maintenance against the defendants is Art. 123 and not Art. 62. 132 I.C. 684=35 C.W.N. 347=1931 C. 670. As to commencement of limitation in cases of testate and intestate succession, *see* 8 C. 788; 19 M. 425 (case of Parsis). Time does not run until person liable to deliver or to pay has the share or money in his hands. 48 M. 312=52 I.A. 214=48 M.L.J. 627=1925 P.C. 105 (P.C.). *See also* 1937 R. 354.

Art. 124: HEREDITARY OFFICE.—*See* 19 C. 776; 26 M. 113; 14 C.W.N. 497. The words "hereditary office" have been used in Art. 124 in contradistinction to cases where the office is to be filled in by nomination. Accordingly this article applies to a suit for possession of the office of shebaitship, where there is no suggestion that the appointment of the shebait is to be made by nomination and the rights of shebaitship, therefore, vest in the heirs of the founder. 13 Luck. 344=1937 O.W.N. 745=1937 O. 373. As to scope of the explanation in the third column, *see* 10 I.C. 573. Per *Rankin, C.J.*—Intention of Art. 124 was to treat hereditary offices like land for the purposes of barring suits for possession of the office and extinguishing the right to possession after a certain period. The inheritor of such an office cannot therefore be entitled to deny that he derives his right from or through his predecessor. 37 C.W.N. 29=1932 C. 791 (F.B.).

ADVERSE POSSESSION.—Title can be acquired by adverse possession. 24 M. 219; 27 M. 192. Suit to be brought within twelve years of defendant's adverse possession. 6 M.L.T. 167; 9 M.L.T. 485; 1931 M.W.N. 8=133 I.C. 193= 1931 M. 505. Defendant can tack on to his possession that of a person through whom he claims. 39 A. 636=42 I.C. 77; 9 M.L.T. 485; 24 M. 219; 1 M. 343; 49 I.C. 393=36 M.L.J. 93. But not so in the case of independent trespassers. 23 M.L.J. 134=16 I.C. 225. Nor can the vacant period preceding defendant's possession be tacked on to it. 10 I.C. 95=9 M.L.T. 485. As to claim to an hereditary office and to the property attached thereto, *see* 23 M. 271 (P.C.); 6 A. 1 (P.C.); 27 M. 142; 28 M. 197; 25 C. 354; 1936 C. 291. If the former claim is barred, the right to the latter also is lost with it. 23 M. 271 (P.C.); 35 M. 92; 28 M. 197; 36 M. 418. But conversely mere possession of the properties attached to the office without performing the duties of the office is not adverse possession of the office. 29 M.L.J. 558=30 I.C. 962; 20 M. L.J. 781=10 I.C. 573; nor mere receipt of emoluments. 40 C. 244=18 C.W.N. 1022=41 I.A. 267=27 M.L.J. 100 (P.C.) reversing 39 C. 287. Plaintiff not alleging that his office is being held adversely by another—Art. 124 does not apply. 1928 M. 377. In the case of a suit for possession of an hereditary office, time runs against the

Description of suit.	Period of limitation.	Time from which period begins to run.
125. Suit during the life of a Hindu or Muhammadan female by a Hindu of Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	[1][Twelve years] ..	The date of the alienation.

LEG. REF.

[1]Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto.".

NOTES.

plaintiff from the time when the defendant takes possession of the office adversely to the plaintiff. If the predecessor of the present plaintiff has allowed his rights to the office to get barred by limitation, those who are next in succession to him should also be deemed to have lost their rights. [23 M. 271 (P.C.), Foll.] 1931 M.W.N. 8=133 I.C. 193=1931 M. 505. Co-owners—Stranger alienee from one—Possession if adverse. *See* 50 C.L.J. 382=1930 C. 180.

SUITS GOVERNED BY THE ARTICLE.—Suit by trustee of a choultry for recovery of possession of the building. 46 M. 525=43 M.L.J. 737 (2) =1923 M. 88. Suit by a Malabar *stani* for possession of *stanom* property from a person claiming adversely thereto. 41 M. 4=33 M.L.J. 26=42 I.C. 22. Suit for possession of the hereditary office of shebait. 3 P.L.J. 326=47 I.C. 290. Where the management once reverts to the representatives of the founder on his death, and a certain person succeeds as heir-at-law, it would be in contravention of the Hindu Law of Inheritance to say that the endowment should be held in a series of successive life-estates by the heritors. The office becomes hereditary in the hands of the heir and a suit by him for possession would be governed by Art. 124 and not by Art. 144. There is no distinction as regards limitation between a claim to an office and a claim to the property of endowment. 1940 A.L.J. 705= I.L.R. (1940) All. 815=1941 A. 1. As to suit in respect of *Maharkiwatan see* 1937 N. 84.

Art. 125 : SCOPE.—Art. 126 applies only when the possession of the female concerned is that of a Hindu or Mahomedan female as such, that is to say, by virtue of her being a Hindu or Mahomedan female ; it does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest. The article cannot apply to cases where the claim and the possession are independent of the status of the parties. The mere fact that by accident the life-estate holder and the plaintiff happen to be Hindus or Mahomedans as the case may be is not sufficient to attract the application of Art. 125. 15 P. 151= 163 I.C. 940=17 P.L.T. 131=1936 P. 323. Article applies to suits only by persons who, if the female died at the time of instituting the suit, would be entitled to the property. 38 M. 406 (P.C.) ; 40 M. 818=38 I.C. 223 ; 5 L.W. 482= 38 I.C. 270 ; 29 M. 408 (F.B.) ; 32 C. 473 ; 70 P.R. 864=25 I.C. 463 ; 1928 L. 242=108 I.C. 184 ; 8 L. 215=100 I.C. 84=1927 L. 198. This rule may not apply if the nearer heir is a female and only a limited owner. *See* 40 M. 818. Suit by such limited owner is governed by article. 2 L. 5=58 I.C. 333. A remote reversioner, however, has a right to join as plaintiff along with or in substitution for the presumptive reversioner. 38 M. 406=42 I.A. 125=28 M.L.J. 535 (P.C.). Article covers suits in respect of alienations of land only. 7 P.R. 1914=25 I.C. 463. Equity of redemption is not covered by the term. 108 P.R. 1912=17 I.C. 864. House and site is covered by the term. (*Ibid.*) 32 P.R. 1904.

ALIENATION.—Gift also is alienation. 20 W.R. 1 ; 1923 L. 53 ; 58 I.C. 333=2 L. 5 ; 1936 P. 535 ; also mortgage, 40 I.C. 63=25 P.R. 1917 ; 88 I.C. 578=1925 M. 567. The word 'alienation' in Art. 125 has not been used in the restricted sense of a transfer by means of a registered instrument. The article applies to all cases in which the widow has directly or indirectly parted with her proprietary right in the estate and passed the same to some third person. The entry of the names of her illegitimate children in the revenue papers followed by her possession of the property is enough to constitute an alienation of the estate by the widow. 184 I.C. 169=1939 All. 526. As to Court-sale brought about by the collusion of the widow, *see* 35 M.L.J. 364= 47 I.C. 578 ; 14 B. 512 ; 19 A. 524. *See also* 80 I.C. 534=1924 M. 617, holding that it amounts to alienation. Article does not apply to a suit to set aside surrender by Hindu widow. 101 I.C. 275=1927 N. 193. Suit to set aside a gift by a Hindu widow to her daughter and a stranger is not governed by this article, but by Art. 120. 146 I.C. 977=1933 A.L.J. 1305=1933 A. 856. *See also* 40 P.L.R. 131=1937 L. 760. The word 'reversioner' should not be imported into Art. 125. Art. 125 is not restricted to suit by reversioners. A suit by certain members of the proprietary body of the village to declare that an alienation by a widow shall not affect their reversionary rights is governed by Art. 125. 40 P.L.R. 786=1938 L. 457 ; 44 L.W. 208 ; 17 P.L.T. 16.

ILLUSTRATIVE CASES.—Suit by reversioner not born at date of alienation—Time runs from the date of alienation in the absence of fraud of collusion on the part of the nearer reversioners. 41 M. 659=35 M.L.J. 57=46 I.C. 202 (F.B.) ; 15 W.R. 1. But *see* 22 A. 33 (F.B.). *See also* 1936 P. 535. Disability provisions have no application in such cases. 22 P.R. 1907 ; 27 C. 379. But *see contra* 28 M. 577 ; 9 C.W.N. 795 ; 36 M. 570=23 M.L.J. 269=16 I.C. 839 ; 22 A. 33 (F.B.) ; 32 C. 62. *See also* 1927 M. 216=25 L.W. 161. As to suit by an adopted son in respect of alienation made by adoptive mother before adoption, *see* 8 M.L.J. 121. *See also* 26 M. 143,

Description of suit.	Period of limitation.	Time from which period begins to run.
126. By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	[1][Twelve years] ..	When the alienee takes possession of the property.
127. By a person excluded from joint family property to enforce a right to share therein.	[1][Twelve years] ...	When the exclusion becomes known to the plaintiff.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. for "Ditto".

NOTES.

Commencement of Limitation.—Time runs from the date of alienation and not when the plaintiff has knowledge of it. 16 I.C. 547 (C.). *See also* the decisions on the point under Art. 120 in the case of suits by remote reversioners falling under that article. It is the date of alienation by way of mortgage and not the date of the decree obtained on it that furnishes the starting point. 86 I.C. 1016=1925 M. 941. *See also* 6 C.L.J. 20. As to confirmation of an alienation. *see* 25 M. 731 ; 26 P.R. 1896. Mortgage by Hindu widow's mother—Later mortgage by widow after attaining majority in renewal of it—Death of widow—Suit by reversioners for declaration that alienation was invalid—Suit filed after twelve years of first mortgage but within twelve years of later mortgage is barred. 31 L.W. 336=58 M.L.J. 417. In a suit to set aside an alienation by a Hindu widow, if the property was ancestral of the husband and the contesting reversioner, Punjab Act I of 1920 is applicable and period of limitation is 6 years. If the property was non-ancestral, *qua* the plaintiff, the suit would be governed by this Art. 125. 146 I.C. 350=1933 L. 945.

Art. 126 : Scope.—Article inapplicable to Hindus governed by Dayabhaga Law. 23 W.R. 419. The words "*set aside*" do not include a suit for declaration that the alienation does not affect the plaintiff's rights. 70 P.R. 1914=25 I.C. 463. Suit to set aside alienation of father when the alienee is not in possession is governed by Art. 120 and not by Art. 126. 25 A.L.J. 734 =1927 A. 702=50 A. 163 ; 1928 B. 383. The expression "ancestral" in Art. 126 has been used in the ordinary sense of Hindu Law, and cannot be given a wider sense for Limitation Act. 150 I.C. 963=36 P.L.R. 214=1934 L. 397.

Applicability.—*See* 26 I.C. 873 ; 3 L. 426= 1923 L. 268. Article applies whether the alienee had the knowledge that the land purchased formed part of ancestral property or not. 23 B. 137 (F.B.). Suit by after-born son and the son in existence at the time of alienation—Maintainability. 40 C. 966=40 I.A. 213=25 M.L.J. 512 (P.C.) ; 34 I.C. 794=30 M.L.J. 592. *See also* 1935 A. 742. The after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from his birth. 8 W.R. 15 (F.B.) ; 66 I.C. 938=1923 O. 52 ; 24 O.C. 330=64 I.C. 757 ; 79 I.C. 1010=1924 A. 677 ; nor is there any extension in favour of minors. 90 I.C. 184=1925 O. 678. S. 6 does not apply to the case of a son who was begotten before but born subsequent to the alienation sought to be set aside, and a suit to set aside an alienation brought by such son more than twelve years after the alienee took possession of the property is barred by Art. 126. 132 I.C. 216= 1931 M. 456=60 M.L.J. 521. Alienation by father and uncle jointly is covered by this article 1927 A. 54. *See also* 1940 B. 136 (alienation by grandfather). Father and son mortgaging family property—Father selling the equity of redemption and the alienee redeeming and taking possession—Suit by the son's alienee for a moiety of the property on payment of half the mortgage money—Article applies. 41 M. 650=34 M.L.J. 528=45 I.C. 867. As to commencement of limitation, *see* 14 P.R. 1915=25 I.C. 33 ; 79 I.C. 666=1924 O. 423. Where certain property which was the exclusive property of the minor was sold by the guardian, Art. 126 does not apply to a suit by the ward or his transferee to set aside such alienation. (13 L.W. 416, Rel. on.) 118 I.C. 481=1929 M. 313=56 M.L.J. 332. Mortgage with possession by Hindu father—Subsequent sale to mortgagee—Suit by sons to redeem mortgagee, ignoring sale after 12 years from the date of sale is not maintainable and is barred by Art. 126. 112 I.C. 151. A suit by a Hindu grandson to set aside an alienation of joint family property made by his grandfather before his birth, without any justifying cause, would be barred by limitation if instituted more than 12 years after the date of the alienation, under Art. 144 The suit is governed by Art. 144, and not Art. 126, which applies only to cases of alienation by a father and not by a grandfather. I.L.R. (1940) B. 109= 42 Bom.L.R. 208=1940 B. 136.

Art. 127 : Applicability.—*See* 77 I.C. 697 =26 O.C. 191. Art. 127 would come into play only where the claim is made by the plaintiff as a member of a coparcenary ; where he puts up his claim on the ground of co-ownership and no as a member of a coparcenary, the case is governed by Arts. 144 and adverse possession for twelve years from the date of denial by the defendant of the plaintiff's title would extinguish his claim. 31 N.L.R. (Supp.) 191=162 I.C. 577=1936 N. 80. Article governs the question of adverse possession between co-parceners. 37 B. 84=17 I.C. 657=14 Bom.L.R. 913. *See also* 159 I.C. 453=1936 P. 68. Exclusion from joint family property, *see* 1924 A. 812 ; 15 I.C. 184=16 C.W.N. 266 (P.C.) ; 5 C. 938 ; 21 B. 325 ; 49 A. 763=102 I.C. 66=1927 A. 455 ; 11 M. 380 (392) ; on appeal 14 M. 237 (P.C.) ; 11 C. 777 (P.C.) ; 30 M. 201 ; 1927 M. 595=102 I.C. 300 ; 116 I.C. 845=27 A.L.J. 324=1929 A. 302. A claim to either joint possession or enjoyment by turns or rotation of a right to worship and take part in the service of a deity must stand in the same way as a claim to immovable property,

Description of suit.	Period of limitation.	Time from which period begins to run.
128. By a Hindu for arrears of maintenance.	[1][Twelve years] ..	When the arrears are payable.
129. By a Hindu for a declaration of his right to maintenance.	[1][Twelve years] ..	When the right is denied.
130. For the resumption or assessment of rent-free land.	[1][Twelve years] ..	When the right to resume or assess the land first accrues.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto".

NOTES.

and is governed for purposes of limitation by Art. 127. It is a *vritti* or *nibandha*. 39 Bom.L.R. 94=1937 B. 202. Where plaintiff's claim as coparcener is distinctly denied, residence as dependent in the family house does not prevent time from running. 37 M.L.J. 612=52 I.C. 470; 43 L.W. 711 (assignment of arrears of maintenance by member of Malabar tarwad). as to what constitutes exclusion. *see also* 1923 O. 61" Right to share—Meaning, *See* 15 I.C. 394=15 O.C. 111. The suit contemplated by Art. 127 is a suit by a member of a joint family against other members to be restored to joint enjoyment. 15 I.C. 394. Co-parcener excluded from enjoyment of joint property—Suit by for declaration of rights and for injunction—Limitation. 1936 Pesh. 95. Partition suit—Income accruing between preliminary and final decrees—Suit for share in—Limitation. 1935 N. 137=156 I.C. 672. A purchaser of a share in the joint family is not a member of the joint family. 14 C. 544; 9 M.L.J. 397. *See also* 18 C. 642; 23 B. 130 (F.B.); 12 M. 292 as to who can sue under the article. The article does not apply to a suit for possession or property by right of inheritance. 10 A. 343. Suit to recover property sold by one coparcener—Article a pplies. 42 M.L.J. 364 =1922 M. 369. Art. 127 does not apply where a stranger has acquired the property Where the managing member of a joint family and a minor represented by his mother sold the property in 1904 to a stranger who in turn sold it to another stranger in 1917, a suit brought by the minor on his attaining majority in 1924 is barred under Art. 144. 137 I.C. 367=34 Bom.L.R. 354=1932 B. 255. Suit by heir of one tenant-in-common against the heir of another tenant-in-common. Article does not apply. 43 M. 288=38 M.L.J. 149. Does not apply to undivided property of a family governed by Mahomedan Law. 80 I.C. 118. *See also* 41 B. 588=19 Bom. L.R. 579 (F.B.); 38 B. 449=32 I.C. 195; 38 I.C. 25; 32 I.C. 1002=38 M. 1099. [As to suit by person converted to Islam, *see* 57 P.R. 1916= 35 I.C. 549]. Nor to suits by Burmese Buddhists, L.B.R. (1903) 184; U.B.R. (1897-1901) 458. Where the suit was filed for a declaration in respect of family property divided at partition, *held*, that the suit was not governed by Art. 127. 31 Bom.L.R. 1240. A suit to reopen a partition and to re-adjust the shares of the parties thereto on the ground that certain properties really belonging to third parties were allotted to the plaintiff is governed by Art. 96 and not Art. 127. 54 M. 883=61 M.L.J. 430=1931 M. 707. Art. 127 does not apply to a suit for possession of immovable property by one member of a family against another who is separate from him, if the property claimed is not joint family property. Such a suit is governed by Art. 144. Even property which has continued undivided after a division between brothers is not "joint family property" within the meaning of Art. 127 and a suit to recover possession of his share in such property by the separated member is governed by Art. 144. 58 I.A. 106=1931 P.C. 48=60 M.L.J. 386 (P.C.).

COMMENCEMENT OF LIMITATION is from the time that one is excluded from ejnoyment to his knowledge. 37 B. 64=17 I.C. 642; 45 M. 648=42 M.L.J. 507, (F.B.); 18 B. 197. In the case of a minor, the time can be computed at best from the date of his attaining majority. 116 I.C. 840 =1929 A. 302.

EXCLUSION, WHAT CONSTITUTES.—25 L.W. 1= 25 A.L.J. 25=28 Bom.L.R. 1409 (P.C.). There is no difinition of the word "exclusion" in the Act and the question whether a person has been excluded from joint family, must depend upon the facts of the particular case. An intention to exclude is an essential element. It is necessary, therefore, for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person and that exclusion was to his knowledge. 56 I.A. 316=53 B. 699=57 M.L.J. 287 (P.C.). Knowedlge of guardian of minor sufficient. 37 M.L.J. 256=52 I.C. 725.

BURDEN OF PROOF.—It is for the defendant pleading limitation to show that the plaintiff was excluded from joint estate for more than 12 years and that the exclusion was known to the plaintiff. 22 B. 259; 18 B. 197; 25 B. 367; 105 I.C. 410. Rule as to adverse possession as between members of a joint Hindu family discussed.145 I.C. 780=35Bom.L.R. 779=1933B.386.

Art. 128.—*See* 107 I.C. 641=1928 M. 561; 1924 N. 176=75 I.C. 833; 12 P. 869. Art. 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied and the person *inter alia* wants to establish that status; but where such status is not denied, Art. 128 applies. 1933 L. 747.

Art. 129.—Where there is no denial there is no bar under the article and proof of denial lies on him who pleads the bar. 26 M.L.J. 205=20 I.C. 831.Article does notapply to claim formaintenance under contract. 23 C.465; 12P. 869.

Art. 130: ADVERSE POSSESSION BETWEEN LANDLORD AND TENANT.—Where a tenant claimed land as rent free to the knowledge of the plaintiff and no suit for resumption or assessment was brought till 12 years after the suit is barred. 39 C. 453=15 C.L.J. 203; 13 I.C. 517. *See also* 1936 C. 289. Suit for resumption of a life jagir must be brought within 12 years of the death of the grantee. 1924 P. 298. Suit by a *saranjamdar* to levy assessment upon rent free lands falls within Article. 45 B. 694=61 I.C. 40.

Arts. 130 and 131.—Art. 130 applies only if the land is found to be rent free. 38 C.L.J. 207= 1923 C. 392; 47 I.C. 420=28 C.L.J. 254. Mere

Description of suit.	Period of limitation.	Time from which period begins to run.
131. To establish a periodically recurring right.	[1][Twelve years] ..	When the plaintiff is first refused the enjoyment of the right.

LEG. REF.

[1]Substituted by Act XI of 1923, S. 2 and Scn. I. for "Ditto".

NOTES.

non-payment of rent for any period does not bar the landlord's right to have the rent assessed and to recover rent. Such a suit would fall under Art. 131 and for the bar of limitation, there must be some overt act such as refusal to pay the rent or assessment before time begins to run. 38 C.L.J. 207=1923 C. 392. *See also* 1936 A.L.J. 1384=I.L.R. (1937) All. 140=1937 A. 57; 17 P.L.T. 819=1937 P. 96; 22 C.W.N. 685=46 I.C. 428; 19 I.C. 64. Suit to recover assessment on land held by the defendant adversely to the plaintiff for over 12 years is barred. 40 B. 606=36 I.C. 505.

Art. 131.—Test as to applicability of article. 1933 P. 695=150 I.C. 242. Under Art. 131 the mere exclusion from the enjoyment of a right does not cause time to run, unless the exclusion is the result of a refusal made upon a demand. 18 L.L.T. 5. Where the particular Art. 102 applies, the more general Art. 131 will be excluded. 43 L.W. 431=1936 M. 149=70 M.L.J. 220. Plaintiff sued in CivilCourt for a declaration that defendant was an under-raiyat under him, that he (defendant) had denied that relationship and refused to pay rent to him and further prayed for his eviction. *Held*, the Civil Court had jurisdiction only to decide whether the relationship of landlord and tenant existed, but not to grant relief of possession as this was within the jurisdiction of Revenue Court under the Chota Nagpur Tenancy Act and that the article to be applied for deciding the question of limitation was Art. 131, and not Art. 142 or 143. 1933 P. 695. This article applies to suits to recover moneys due under a periodically recurring right, whether or not there is prayer for declaration that the plaintiff is entitled to such a rent. 38 M. 916=26 M.L.J. 377. Right to recover rent is periodically recurring right. 28 I.C. 600=13 A.L.J. 333; 16 W.R. 201; 14 M.L.J. 477. Article not confined to suits for declaration of a title but includes the recovery of arrears in respect of the right. 34 A. 246=9 A.L.J. 297; 38 M. 916=26 M.L.J. 377. But *see* 55 B. 193 below. Where a claim is expressly for arrears of revenue and not for the establishment of a right, Art. 62 and not Art. 131 applies. Art. 131 applies in express terms to a suit to establish periodically recurring right and not to recover sums due under such a right. A suit may claim both the reliefs, but while the former claim falls under Art. 131, the latter claim falls under Art. 62. 55 B. 193=131 I.C. 465=1931 B. 189, as to scope and application of article. *see also* 16 M. 294. Article does not apply where there is no relationship of landlord and tenant. 45 B. 638=60 I.C. 892. Perpetual and periodically recurring right—Distinction. *See* 39 M.L.J. 492=58 I.C. 788. Right of mutwalli to *teomiah* allowances received by another—Article not applicable. 58 I.C. 788. A claim to get a manibam or an annual alowance from and out of the revenue collections is a periodically recurring right, within the meaning of Art. 131. 164 I.C. 794=44 L.W. 250=1936 M. 704. Where the essence of the claim in a suit is the establishment of the title of the plaintiff, as against a rival claimant, to an office to which a remuneration periodically payable by Government is attached, and not the establishment of the liability of the Government to make the recurring payment in question, Art. 131 cannot have any application. Though the Government is a party to the suit, if there is no prayer for recovery of specified sums from the Government, and if all that the plaintiff asks is to make binding on the Government a decision as to the rival claims of himself and another to an office to which certain emoluments payable periodically by the Government are attached, it cannot be said to be a suit against the Government to establish a right to receiveemoluments,because the essential question in the suit is not the liability of the Government to make a payment under a periodically recurring right. 1939 M. 570=(1939) 1 M.L.J. 476. *See also* 53 L.W. 325=1941) 1 M.L.J. 374; 1941 P. 116; Suit to establish right to offerings of temple—Article applied. 22 O.C. 346=54 I.C. 540. The following have also been held to be periodically recurring rights;—A claim to worship an idol for a particular period in the year. 8 C. 807; a right to recover burial fees. 24 W.R. 385; a right to receive a monthly allowance from a zemindari. 7 M. 341; A claim to recover water cess illegally levied is not a suit to establish periodically recurring right. 37 M. 322=24 M.L.J. 365; a suit for a declaration that plaintiff is entitled to a certain share in the offerings of a temple is a suit to establish a periodically recurring right. 22 O.C. 346=54 I.C. 540. If a decree for rent has been passed within 12 years before the subsequent suit for rent has been instituted, the claim is not barred by time. 12 I.C. 329. *See also* I.L.R. (1937) A. 120=1937 All. 57 (suit for ground rent where plaintiffs' right was denied 12 years before suit); 1941 P. 201. A claim to enhance rent is a recurring cause of action and limitation runs from the date of refusal. Where the right to enhance the rent is based not on a contract but on statute, the article would not apply. 1924 P. 193. *See also* 2 P.L.J. 124=39 I.C. 85. A party whose right to *malikana* is denied must sue within 12 years of refusal. The article does not apply where in a previous suit plaintiff has got a declaration of his title. 40 I.C. 864; 2 P.L.W. 64. In 1889, the right to 2 per cent. of the Government assessment conferred on the plaintiff's ancestor was altered into one for a fixed annual sum. In 1913, his claims to the old percentage were definitely negatived. *Held*, that Art. 131 and not Arts. 14 or 120 applied and the suit was well in time, as it was within 12 years of the refusal by the Government in 1913, to admit any right in the plaintiff to a variable annual sum. 61 I.A. 190=58 B. 306=1934 P. C. 108=66 M.L.J. 614 (PC.)There must be a definite demand and refusal Mere omission to exercise the right will not start a period of adverse possession. 41 B. 159=38 I.C. 54. *See also* 21 I.C. 179=19 C.W.N 386;

Description of suit.	Period of limitation.	Time from which period begins to run.
132. To enforce payment of money charged upon immovable property. [2][*Explanation.*—For the purposes of this article— (*a*) the allowance and fees respectively called *malikana* and *haqqs* and (*b*) the value of any agricultural or other produce the right to receive which is Secured by a charge upon immovable property, [3][and (*c*) advances secured by mortgage by deposit ot title-deed shall be deemed to be money charged upon immovable property.]	[1][Twelve years] ..	When the money sued for becomes due.

LEG. REF.

[1] Substituted by Act XI of 1923, for "Ditto."

[2] Explanation substituted by Act I of 1927.

Added by Act XXI of 1929.

NOTES.

46 P.W.R. 1914=23 I.C. 445. As to what constitutes refusal, *see* 7 M. 341. Mortgage and lease—Expiry of lease—Suit by mortgagee for mortgage money and profits after 12 years. *Held*, barred and that this article did not apply.. 41 L.W. 398=1935 M. 377.

Art. 132 : What is immovable Property.—*See* 18 P. L.T. 801=1938 P. 16. Standing trees are immovable property within Art. 132. 9 I.C. 478. A turn of worship is not an interest in immovable property and a suit to enforce a mortgage of such a right is governed by Art. 120 and not by Art. 132. 46 C. 455=22 C.W.N. 994. An ice factory and interest under mortgage deed are immovable properties. 103 I.C. 742=1927 L. 373. A suit to recover malikana is governed by Art. 132 where the plaintiff seeks to recover it in respect of an interest in land ; and to such a suit, Art. 131 does not apply. 1934 P. 44. *See also* 40 I.C. 864 ; 2 P.L.W. 74 ; 14 Luck. 467 =1938 O.W.N. 1368=1939 O. 57 ; 46 L.W. 358 (suit for arrears of *kavimera* or percentage o melwaram of zemindari villages).

Applicability of Article to Instalment Bond.—Where under a bond the whole amount becomes payable on default in the payment of instalments, the money becomes due under Art. 132 when a default is made and tims runs from the date of default. 63 I.C. 886=19 A.L.J. 712 ; 8 Luck. 240=142 I.C. 64=1933 O. 66 (F.B.). The test is obligation undertaken by the borrower under the bond. 63 I.C. 886=19 A.L.J. 712. *See also* 63 I.C. 25=19 A.L.J. 456 ; 37 A. 400 ; 28 I. C. 910. Acceptance of overdue instalments, if amounts to waiver. 27 C.W.N. 893=1924 C. 1379. Where there is an option to the mortgagee to sue for the whole amount on default of payment of interest or to wait until the period fixed, he must sue for the whole amount as to when the cause of action therefor accrued. 31 I.C. 808=153 P.W.R. 1915 ; 45 I.C. 613 ; 32 I.C. 551 (*contra*). *See also* 59 I.A. 376=63 M.L.J. 187=7 Luck. 442 (P.C.) ; 64 M.L.J. 606 =37 L.W. 751. Instalment bond—Arrears of interest—Omission to sue, if amounts to waiver. 29 I.C. 854=113 P.L.R. 1916. *See also* 62 I.C. 762=1921 M.W.N. 384 ; 20 A.L.J. 346. Right to action when accrues—Instalment bond. 39 M. 981=31 M.L.J. 864 ; 47 I.C. 655.

To Loans in Kind.—A suit to recover the value of paddy charged upon immovable property is governed by Art. 132. 64 I.C. 310 ; 64 I.C. 210 =25 C.W.N. 57 ; 58 I.C. 995=23 C.W.N. 951. *See also* 32 C.L.J. 221 ; 47 C. 125=23 C.W.N. 949 ; 51 I.C. 241 ; 33 A. 708 ; 50 I.C. 608= 29 C.L.J. 368.

To Mortgages.—Where a mortgage is for a definite period, it means that during that period neither the debtor is liable to pay nor the creditor is entitled to recover the debt. For the debtor's default during the term of the mortgage to be regarded as a cause of action for the suit, the default ought to be such as would entitle the mortgagor to redeem before the expiry of the term. Where it is clear from the document that there was no intention that the mortgagee should be given the right to recover the entire amount of the mortgage debts simply on the occurrence of a default of payment of the annual interest, the right to sue for the entire amount cannot arise till the expiry of the term fixed. Art. 132 would come into operation only when the mortgagee is bound to sue and not when he has the option to sue. I.L.R. (1939) N. 515=1939 N. 242. A default clause in a mortgage bond which provides that in default of payment of any instalment stipulated the whole money should become due is exclusively for the benefit of the mortgagee and it gives him an option either to enforce his security at once on default or, if the security is ample, to stand by his investment the full term of the mortgage. If the mortgagee accepts payments of overdue instalments which are tendered to him he must be taken to have waived his right of enforcing the default clause in the bond, and limitation does not run. 1938 M. 836=(1938) 2 M.L.J. 251. *See also* 40 Bom.L.R. 47. Suit on mortgage—Stipulation in bond that whole amount would beocme payable on default to pay interest for 3 years—Default committed—Subsequent payment of interest—Limitation—Terminus a *quo*. 40 P.L.R. 571=1938 L. 570. *See also* 43 C.W.N. 38=1939 C. 26. Money charged on immovable property—Suit to enforce puisne mortgage against balance of sale proceeds in the hands of prior mortgagee—Suit governed by Art. 132. 41 C. 654=41 I.A. 45. *See also* 1941 S. 158 (Suit for money due under mortgage by conditional sale). Where a third mortgagee pays off the first mortgage to which he becomes entitled by subrogation and claims to enforce his

NOTES.

priority against the mesne incumbrancer, the claim is barred if brought more than 12 years after the expiry of the term of the first mortgage. 39 C. 527=22 M.L.J. 468 (P.C.); 52 M.L.J. 532. *See also* 1930 N. 166; 8 O.W.N. 522. The starting point for the enforcement of a charge acquired by one of the mortgagors who redeemed the whole mortgage is the date of payment. 137 I.C. 86=1932 A. 250. [28 A. 482 (P.C.), Foll.]; 105 I.C. 302 *See also* 1928 A. 251=109 I.C. 38=26 A.L.J. 208; *see* 35 C.W.N. 409=1931 C. 251 (F.B.) overruling the decision in 25 C.W.N. 283 and holding that a suit by a redeeming co-mortgagor for contribution can be filed within 12 years of the date on which the original mortgage was paid and is not barred if instituted beyond the period within which the original mortgagee could institute his suit on the mortgage, had it not been redeemed. *See also* 1936 M. 500= 70 M.L.J. 532; 1936 M. 782=44 L.W. 135; 154 I.C. 267=1935 O. 245; 13 P. 356=1934 P. 612; 1938 O.W.N. 290. Where a subsequent mortgagee pays off a prior mortgage and acquires rights of subrogation under that mortgage, he must enforce the rights so acquired before a suit on that mortgage would be time barred. 164 I.C. 725=1936 A.L.J. 586=1936 A. 636. A suit by a simple mortgagee for sale against the mortgagor or persons claiming under the mortgagor is governed by Art. 132. 59 M. 312=44 L.W. 887=1936 M. 70. Where a decree for sale on a mortgage has been converted into immovable property, the mortgagee of such decree is entitled to the benefit of not only the new security, but also of Art. 132. 37 I.C. 4=39 A. 74. *See also* 63 I.C. 504. A suit for sale of ancestral property mortgaged by Hindu father is governed by Art. 132. 19 I.C. 878=17 C.W.N. 1022. Art. 132 applies to a suit to enforce a second mortgage executed in consideration of a prior mortgage and a fresh advance. 1921 L. 293. Claim for personal decree is under Art. 116. 1930 L. 993. Art. 132 does not apply to a suit for redemption of the prior mortgage brought by the puisne mortgagee who was authorised by the mortgagor to redeem the earlier mortgage. 34 P.L.R. 502=1933 L. 503=14 L. 596; *see also* 1934 A. 946=153 I.C. 604; 153 I.C. 808=1935 O. 139=1938 O.W.N. 290. A suit by a principal to enforce a charge on immovable property created by an agent to secure 'monies which might be found to have been defalcated by him, is governed by Art. 132. 44 C.W.N. 793=72 C.L.J. 480=1941 C. 257. Where a portion of the mortgaged property is acquired under the Land Acquisition Act and the mortgagor withdraws the compensation money, a suit filed by the mortgagee to enforce his security and claiming a simple money decree in respect of the compensation money withdrawn, is a suit 'to enforce payment of money charged upon immovable property' within the meaning of Art. 132. The cause of action is not the withdrawal of the compensation money, but the non-payment of the mortgage debt. I.L.R. (1938) All. 513=1938 A.L.J. 313=1938 A. 221 (F.B.).

OTHER MISCELLANEOUS SUITS.—This article applies also (1) to foreclosure suits. (20 I.C. 465=16 O.C. 157; 9 O.W.N. 1081; 1932 O. 178); (2) suit by first mortgagee against second mortgagee, who has foreclosed the mortgage (34 I.C. 704=12 N.L.R. 90); (3) suit or application under S. 48 of the Dec. Agri. Rel. Act (10 I.C. 910=13 Bom.L.R. 284); (4) suit to enforce existing charge (45 B. 597=60 I.C. 903). Sums claimed by the Municipality on account of house-tax and water-tax are declared by statute to be a first charge upon the buildings or lands with reference to which the tax is imposed. Consequently, Art. 132 applies to a suit to recover such sums. 123 I.C. 379. *See also* 1939 A. 510. Even though money is payable "on demand" actual demand is not necessary under this article. 31 I.C. 335=1916 M.W.N. 121. Suit against the surety on a mere money bond is not a suit for payment of money charged on immovable property. 105 I.C. 168=53 M.L.J. 453. Where plaintiff asks for money decree only and does not seek to enforce a charge on immovable property, Art. 132 does not apply. 56 A. 711=1935 A. 239. A suit by the shebait of a temple who made certain payments under S. 170, B. T. Act, to enforce a statutory mortgage under S. 171, is governed by Art. 132. 35 C.W.N. 678==1931 C. 493. *See also* A.I.R.1939 A. 510. (Su tunder U. P. Mun. Act, S. 177). Suit for the enforcement of a charge over properties furnished as security under a bond executed as a condition for stay of execution is governed by Art. 132. 1933 M.W.N. 486. *See also* 1936 L. 784 (suit to eject mortgagee of endowed property). Vendee directed to pay mortgage debt—Failure to pay—Suit on the basis of breach of contract is governed by Art. 132. 107 .I.C. 679. *See also* 1936 A. 870. A suit to recover royalties charged upon lease-hold premises is subject to 12 years' limitation period (Art. 132). 38 C.W.N. 481=1934 P.C. 119=66 M.L.J. 479 (P.C.). The vendor has a statutory charge over property in the hands of the vendee for purchase-money left with the vendee, and limitation is 12 years under Art. 132. 1934 A.L.J. 682=1934 A. 525. *See also* 1936 A. 870. A Hindu widow's maintenance is not a charge on her husband's properties and a suit to recover arrears of maintenance is not governed by Art. 132. 12 P. 869. *See also* 43 L.W. 711 (Malabar tarwad). 1936 O. W N. 892=1936 O. 413.

STARTING POINT OF LIMITATION UNDER THIS ARTICLE.—*See* 20 A.L.J. 140=1922 A. 37; 19 A.L.J. 827; and 406; 59 M. 312=1936 M. 70; 17 A.L.J. 1068=42 A. 70; 12 A.L.J. 982=36 A. 567; 8 A.L.J. 233; 35 B. 438; 1922 P. 499. Where mortgage is evidenced by a promissory note accompanied by deposit of title-deeds, 12 years' limitation does not run from date of execution of promissory note, merely because promissory note is payable on demand. The question to be considered is whether the words "on demand" are mere words, or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises. 148 I.C. 721=1934 R. 51. Under Art. 132 money can become due only when the mortgagee can sue for his money and also the mortgagor can redeem the mortgaged property. 56 A. 496=1934 A.L.J. 371=1934 A. 152. Art. 132 is not applicable to a suit by a municipality for recovery of property tax which is made a first charge on the property under S. 85 of the

Description of suit.	Period of limitation.	Time from which period begins to run.
[1]133. [*Omitted by Act I of* 1929].		

LEG. REF.

[1] Which has been omitted by Act I of 1929 ran as follows :—

133. To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable con consideration.	[Twelve years]	The date of the purchase.

NOTES.

Madras District Municipalities Act of 1920. Such a suit is governed by S. 345 of the Madras District Municipalities Act and must be instituted within three years from the date of the cause of action. 41 L.W. 457=1935 M. 378. The question when money sued for becomes due has to be decided with reference to the terms of each bond. 134 I.C. 609=1931 P. 285. Suit on mortgage—Option given to mortgagee to enforce payment of whole in default of instalment—Time begins to run from the date of the first default in payment. 1927 A. 244=99 I.C. 762. On this point, *see also* 1928 M. 637=107 I.C. 650 ; 108 I.C. 768 ; 6 O.W.N. 925=1929 O. 536 ; 138 I.C. 786= 1932 O. 253. But *see* 7 Luck. 442 (P.C.) *infra.* In the case of a mortgage deed payable on demand time runs from the date of the loan and not from the date of demand. 6 R. 297=1928 R. 189. Where period is fixed, time runs from that date. 1928 O. 289=3 Luck. 439 (F.B.) ; *see also* 1941 Sind 158 ; notwithstanding any option given to the mortgagee to sue in case of any default by mortgagor. 50 A. 328=1928 A. 159. *See also* 1935 A.L.J. 515=1935 A. 421 ; 1928 O. 493 ; 1931 A.L.J. 29=133 I.C. 311=1931 A. 203 ; 131 I.C. 547=1931 A. 537 ; 43 C.W.N. 38= 68 C.L.J. 109=1939 C. 26. Clause empowering the mortgagee to sue on default should be deemed to have been inserted exclusively for his benefit and as such it would give him an option to enforce the security at once or stand by his investment for the full term of the mortgage. 64 M.L.J. 606 =37 L.W. 751 ; 59 I.A. 376=7 Luck. 442=63 M.L.J. 187 (P.C.) ; 30 N.L.R. 290=1934 N. 191. In such a case, the mortgagee has successive or recurring causes of action, and it is left to his option to avail himself of any one of these causes of action, and base his suit upon any of them. 134 I.C. 609=1931 P. 285. When the deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made on payment of interest agreed to be paid yearly, the limitation commences to run from the date of such default in spite of a further covenant to the effect that the mortgagee may not sue on such a default. 8 Luck. 240=1933 O. 66 (F.B.). The mortgage-money does not become due within the meaning of Art. 132 until the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. *See* 7 Luck. 442 (P.C.), *supra.* The rule as to starting point is the same even in respect of applications under O. 34, R. 6, C. P. Code, for personal decree. 1934 A.L.J. 261=1934 A. 397 (F.B.). Applicability—Puisne mortgagee obtaining decree for sale without impleading prior mortgagee—Subsequent suit to redeem prior mortgage. Art. 148 applies and not Art. 132. 33 C.W.N. 1067 (F.B.). *See also* I.L.R. (1937) N.367=1937 N. 205. Where the mortgage is a combination of usufructuary with simple mortgage, a suit to recover mortgage-money from lands brought after 12 years of the execution of the mortgage-deed is barred by Art. 132. 1929 S. 235. The amount due on a simple mortgage was payable in 1909. In 1914 the simple mortgagee brought a suit for sale on which he omitted to implead certain subsequent purchasers of the equity of redemption. In 1924 the properties were in execution of the mortgage decree sold by Court and purchased by the plaintiff. In 1926 the plaintiff sued to recover possession from the purchasers of the equity of redemption and subsequently applied to amend his plaint and add a prayer for a decree for sale : *Held*, a suit for sale should have been brought within twelve years from when the amount fell due (*i.e.* 1909) and not from the date fixed by the mortgage decree ; the relief sought by the amendment was time barred even at the date of plaint. 61 M.L.J. 316=133 I.C. 497= 1931 M. 542. *See also* 60 C. 1193=1933 C. 912. Where twelve years have expired from the date of repayment fixed in the mortgages, a suit whether for sale or for foreclosure is *prima facie* barred by limitation under Art. 132. The receipt however, of rent by the mortgagee of a portion of the mortgaged property will save limitation under S. 20 of the Act. Similarly a valid acknowledgment will extend the period of limitation by virtue of S. 19 . 6 O.W.N. 393=119 I.C. 835. Where there is breach of warranty as to possession before the expiry of the term fixed and the mortgagee was dispossessed, starting point of limitation is the date of dispossession. 1930 C. 703. Where a mortgagee is not bound by the terms of the mortggage to enter into possession of the mortgaged property and to apply the rents and profits thereof towards the payment of the debts though he has power to do so, the mere fact that the mortgagee permits the mortgagor to receive the rents and profits from a certain year does not give rise to a cause of action. No specific time having been fixed for the payment of the debt, the money does not become due and the cause of action does not arise until demand for the payment of the mortgage debt is made by the mortgagee and is refused by the mortgagor. 57 I.A. 134=54 B. 495=59 M.L.J. 379. A claim to enforce contribution is governed by Art. 132 and the starting point is the time when the money sued for becomes due. 7 O.W.N. 401=1930 O. 260. Mortgage suit—Submersion of mortgaged porperty under water—No suspension of limi

Description of suit.	Period of limitation.	Time from which period begins to run.
134. To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	[Twelve years] ...	[1][When the transfer becomes known to the plaintiff.]

LEG. REF.

[2] Substituted by Act I of 1929.

S. R. Murthy. G. 47. 22-7-42. NOTES.

NOTES.

tation. 146 I.C. 856=1933 P. 693.

ART. 134 : SCOPE OF ARTICLE.—*See* 36 C.L.J. 35=50 C. 39=1923 C. 1. Where the mortgagee sells the property to a stranger and then repurchases it, his possession is not as representative of the purchaser, but only as a mortgagee and is liable to be redeemed within 60 years. 58 I.C. 39 ; 44 B. 848 ; 29 I.C. 403 ; 45 I.C. 549. A person in possession of trust property under an invalid mortgage deed cannot acquire a valid mortgagee's right by prescription as against the trust. 17 L.W. 521=1923 M. 545. The transferee from a trustee or mortgagee can take advantage of Art. 134 so long as the legal title and possession has been transferred to him. 32 M.L.J. 85. *See also* 1936 L. 784. 190 I.C. 405= 1940 C. 228. Art. 134 does not apply to a suit for redemption against donees from mortgagees. 13 I.C. 375=4 Bur.L.T. 265. *See also* 26 O.C. 197=1924 O. 44 ; 1923 O. 246.

APPLICABILITY.—Absolute transfer is necessary. 1927 M. 1028. In a case of a conflict between Art. 134 and Art. 141, only Art. 134 will be applied. 44 M. 951=41 M.L.J. 163. Art. 134 cannot possibly apply to a transfer in *invitum* or by operation of law or in execution. 1927 M. 1028 ; 1927 A. 619=102 I.C. 891. Dedication of property for religious purposes—Subsequent mortgage by heir of settlor—Decree—Transfer in discharge of—Suit by sons of mortgagor to recover possession from transferee—Limitation—Starting point.—Art. 132 and not Art. 134 applies. 1940 M. 920=(1940) 2 M.L.J. 409. Art. 134 applies only to cases where a transferee for value from a mortgagee takes that which is *de facto* a mortgage upon a representation made to him. 99 I.C. 280=1927 A. 177. *See also* 102 I.C. 135; 34 C.W. N. 961. The article does not apply to cases of transfers by sub-mortgagees. 99 I.C. 280=1927 A. 177. *See also* 1 Luck. 529. Title adverse to original mortgagor must have been set up. 1927 A. 689=103 I.C. 255. Art. 134 is not applicable where the mortgagee did not purport to do anything outside or opposed to his mortgage. 134 I.C. 366=33 Bom.L.R. 603. Question of *bona fides* or good faith does not arise. 1927 M. 1028 ; 1929 N. 267 ; 34 C.W.N. 961. Art. 134 does apply even where the mortgagee has ceased to be a mortgagee by getting the equity of redemption and has obtained possession not under the mortgage but under the purchase of the equity. It is immaterial that the mortgagee should have thought that he was absolute owner if in fact he was mortgagee. It is also immaterial whether he gets possession before, under or after the mortgage, if in fact he purported to transfer the property to the transferee. 56 I. A. 192 =51 A. 367=1929 P..C. 158 (P.C.). A close perusal of Art. 134 would show that it was brought into existence with the object of enabling the filing of suits for possession of properties primarily mortgaged and subsequently transferred by the mortgagees in excess of their rights. Since Art. 134 contains a stringent provision of law the onus of proving facts which would attract the provisions of this in preference to Art. 148 or even possibly Art. 144, would lie heavily on the party who wishes to claim the benefit of an abridged period of limitation. 1938 M. 394= (1938) 1 M.L.J. 101. *See also* 1942 Pesh. 39. The transfer of property mortgaged contemplated by Art. 134 is something other than an express transfer of the original mortgage. Art. 134 contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage 56 I. A. 192 =51 A. 367=1929 P.C. 158 (P.C.). Art. 134 applies even to transfers by trustees and mortgagees and there is no distinction between transfers by these two classes. (1926 M. 81, Rel. on). 118 I.C. 682=1929 N. 267 ; 34 C.W.N. 961 ; 1930 L. 192 (1). Under Art. 134 there must be a valid transfer between the transferor and the transferee though it might not be operative as against a trust or any other person, and time runs only from the date of the transfer. 1930 M. 298. The starting point of limitation is the date of transfer and not the date of taking possession by the transferee. 118 I.C. 659. [But now see the amended Act.] *See also* 1930 M.W.N. 1148. The Amending Act I of 1929 does not revive a suit which had become barred before that date. 140 I.C. 182=9 O.W.N. 835. It is the duty of the plaintiff to give the date on which he alleges that he came to know of the transfer. 9 O.W.N. 835; *see also* 1939 C. 26.

CONSTRUCTION.—Art. 134 should be construed strictly. 39 I.C. 582=20 O.C. 162. *See also* 52 I.C. 159=22 O.C. 72.

NECESSITY FOR GOOD FAITH—CONFLICT OF RULINGS.—The omission of the words "in good faith" in the Act does not enable a person who purchases with full knowledge that his vendor's title is merely that of mortgagee, to get the benefit of Art. 134. 37 A. 660=30 I.C. 956 ; 118 I.C. 639 ; 32 P.L.R. 359 ; 1942 Pesh. 39. 132 I.C. 184=1931 L. 464. But *see* 47 C. 866. Art. 134 applies only when the transferee from the mortgagee obtains the transfer with the belief that the transferor had an absolute title to make the transfer. 1 L.W. 687=26 I.C. 1 ; 57 I.C. 497 ; 1929 M. 145=115 I.C. 149 ; 118 I. C. 639. Art. 134 is applicable to cases where the transferee from the mortgagee professedly takes an

Description of suit.	Period of limitation.	Time from which period begins to run.
[134-A. To set aside a transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment,	[1][Twelve years] ...	When the transfer becomes known to the plaintiff.

LEG. REF.

[1] Articles 134-A, 134-B and 134-C inserted by Act I of 1929, sec. 3.

NOTES.

absolute title to an interest in the property transferred. 7 L.W. 482=34 M.L.J. 431. *See also* (1916) 1 M.W.N. 28=32 I.C. 265. Under Art. 134 the transferee without notice and the transferee with notice are on the same footing. 47 C. 866=58 I.C. 705=24 C.W.N. 690; 140 I.C. 182 (Oudh). But *see* 37 A. 660; 24 Bom.L.R. 319=1922 B. 234. Alienation of debutter property by a shebait, though in excess of his powers falls under Art. 134 if the transferee was ignorant of the fact that the transferor had exceeded his powers. 9 I.C. 133. *See also* 1923 L. 219. A purchaser by private treaty from an auction-purchaser of the rights of a mortgagee is entitled to the protection afforded by Art. 134 if he purchased in the *bona fide* belief that he was purchasing an absolute proprietary title and the limitation begins to run from the date of purchase by private treaty. 1930 A. 417; 30 I.C. 564=13 A.L.J. 877. Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of Art. 134. 40 M. 745 =32 M.L.J. 24. The purchaser need not prove that he purchased "without constructive notice of the limited title of the vendor." 1917 M.W.N. 5=38 I.C. 194. Art. 134 is not restricted in its application to purchaser in good faith, but applies also to an alienee from a trustee who takes the property with full knowledge that the alienor was acting in excess of his power. 130 I.C. 780 =1931 L. 129.

INVOLUNTARY TRANSFER.—Involuntary transfer—Execution sale of trust property of personal debts of trustee—Limitation for recovery of trust property. 44 M.L.J. 588=46 M. 751. *See also* 61 I.C. 627=43 A. 164; 61 I.C. 546. The article does not apply to a purchaser in Court-auction. 5 L.W. 690=32 M.L.J. 85; 50 C. 49; 1927 A. 61=102 I.C. 891.

TRANSFER BY TRUSTEE.—The head of the Mutt is not a trustee with regard to the endowed properties and therefore Art. 134 does not apply to an alienation by the head of a Mutt. 44 M. 831=41 M.L.J. 346 (P.C.); 104 I.C. 125= 53 M.L.J. 306=1927 M. 850; 60 I.A. 124=12 P. 251=1933 P.C. 75=64 M.L.J. 505 (P.C.) (suit by a mahant to avoid an alienation by his predecessor and recover possession of the properties alienated is governed by Art. 144.) But *see* 1928 M. 614; 1922 P.C. 123. The Dharmakartha of a temple is not a "trustee" within the meaning of the article and a suit to recover possession of lands improperly alienated by him is governed by Art. 144. 62 M.L.J. 493=137 I.C. 487=1932 M. 328. Under the article each succeeding shebait does not acquire a fresh start for the purpose of limitation. 17 C.W.N. 873 =16 I.C. 927. A Matadhipathi can set aside an alienation made by his predecessor within 12 years of his becoming Matadhipathi. 38 M. 356=25 M.L.J. 393. *See also* 52 I.C. 914=37 M.L.J. 231; 1922 L. 271; 53 M. L. J. 306=1927 M. 850; 12 P. 251 (P.C.), *supra*. Art. 134 does not apply where the head of a Mutt has alienated the pro perties not proved to be subject to a specific trust. 1 P. 475=1922 P. 243. Where the property transfered is claimed in the suit by a Mahant who alleges that it belongs to a religious institution, the rule of limitation governing the suit depends upon the nature of the property. 1930 L. 191 (2). Art. 134 does not apply to suits to avoid alienations of the generally endowed property vested in the *sajjadanashin* and mutawalli of a wakf. 35 Bom.L.R. 252=1933 B. 217. A mutawalli has a beneficial interest in the endowed property and an alienation made by him is valid during his lifetime and a suit by succeeding mutawalli to recover possession of the property alienated is governed by Art. 144. 1933 M. 533 =64 M.L.J. 706. But *see* 60 I.C. 689. Art. 134 does not apply to a *wakf*. 50 C. 329=44 M.L.J. 624 (P.C.).

PERMANENT LEASE.—A suit brought by a shebait of some family idols to recover possession of debutter property dedicated to the service of the idols, but of which plaintiff's predecessors had granted a permanent lease, more than 12 years before suit is not barred by Art. 134. 38 C. 526 =21 M.L.J. 1145 (P.C.). *See also* 44 I.C. 567 =27 C.L.J. 201; 43 C. 34=29 I.C. 337. The word "transfer" in Art. 134 is wide enough to include a lease in perpetuity. (43 C. 34 and 40 M. 745, Foll.) Where property belonging to the idol is transferred and the rent reserved in favour of the idol of the temple is only eight annas, such rent is not valuable consideration within the meaning of Art. 134. 126 I.C. 279=1930 M.298.

POSSESSION UNDER TRANSFER.—A suit by a succeeding trustee to recover possession of trust property, mortgaged by his predecessor and foreclosed by the mortgagee is governed by Art. 134. 47 C. 866=58 I.C. 705. Art. 134 is inapplicable to a transfer from a trustee or mortgagee under which possession is not taken by the transferee. 40 M. 1040=33 M.L.J. 320 (F.B.).

MISCELLANEOUS.—Art. 134 does not apply to a person, who being interested in part of the mortgage redeems the whole, he being only a charge holder and not a mortgagee. 38 A. 138 =34 I.C. 244. Though under Art. 134 the possession derived under a mortgage could be perfected by twelve years' adverse possession, yet if a new right accrued before 12 years were over, to the ownership of the properties, the adverse possession is broken up. 39 M. 879. *See also* 36 A. 327. The operation of the article begins only from the date on which the purchaser takes possession. 1930 M.W.N. 1148. *See also* 40 M. 1040=33 M.L.J. 320 (F.B.)

ART. 134-A: APPLICABILITY.—Where a suit

Description of suit.	Period of limitation.	Time from which period begins to run.
made by a manager thereof for a valuable consideration.		
134-B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowments to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years ...	The death, resignation or removal of the transferor,
134C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of movable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years ...	The death, resignation or removal of the seller.]

NOTES.

was instituted by *A*, a Hindu idol, for injunction against *B* restraining him from disturbing *A* in his possession, on the basis of an alleged transfer to *B* by a former mahant of the plaintiff, *held*, that what *A* asked for was not only an injunction but for setting aside the transfer to *B* and the suit was governed by Art. 134-A. *Held further* that if however *B* filed a suit against *A*, no period of limitation would run against *A* in his defence. 178 I.C. 806=1938 L. 752. The word " plaintiff " in the third column of Art. 134-A must, in the case of a representative suit brought on behalf of the general body of worshippers or beneficiaries or persons interested in an institution, be understood to refer only to the plaintiff or plaintiffs *eo nominee* on record, and cannot be taken to mean every individual member of the community or body of persons who are represented by the plaintiff or plaintiffs on record. 50 L.W. 658 =1940 M. 81=(1939) 2 M.L.J. 920. Where in a suit on behalf of an idol for a permanent injunction restraining the defendant from dispossessing the plaintiff from a certain land the substantial relief claimed by the plaintiff is to set aside a transfer of the land made by a previous mahant in favour of the defendant, the suit falls under Art. 134-A and as limitation begins to run from the time when the transfer becomes known to the plaintiff, the initial onus of proving that his suit is within time is on the plaintiff. If neither in the plaint nor at any subsequent stage of the case the plaintiff has ever fixed any date on which he alleges that he came to know of the transfer to the defendant, the suit must fail on that account. 40 P.L.R. 184=1938 L. 470.

ART. 134-B.—[*See* 73 C.L.J. 475 cited under Art. 144 *infra.*] Where an estate known as the Patdi estate is held for life by each holder for the time being and passes on his death to the next holder unencumbered by debts or charges except those imposed by Government, and the estate is made inalienable and impartible by rules framed by the Government on the lines of the Bombay Saranjan Rules which Saranjan Rules do not apply to the estate, and there is no rule in the rules governing the estate to the effect that there is to be a formal resumption on the death of each holder and re-grant to the successor, if any alienation of a part of the estate is made by a holder it will be invalid from its inception and not merely from his death. But if the alienee continues in possession of the part transferred to him for over 12 years during the lifetime of the alienor or his successor, he acquires a title to it by adverse possession not only as against the holder during whose tenure he completes 12 years' possession but as against all subsequent successors. Though the successor does not claim through his predecessor, but claims in his own right, the successor gets the estate as it was at the time of the death of the predecessor. If, therefore the estate had lost by adverse possession a particular part of it, and if the alienee had become its owner by the extinction of the holder's title thereto, the estate which comes to the successor is the estate minus the part the ownership of which had passed from the estate to the alienee's family. It would be open to a person to acquire title by adverse possession for over 12 years, and the fact that the alienor holder had only a life estate would not come in the way of the acquisition of title by adverse possession. Even if the analogy of the head or mahant of a math is applied to the holder of the estate, it would make no difference. On that analogy Art. 134-B would apply, and if the alienee completes 12 years' possession after the death of the alienating holder, he perfects his title by adverse possession. 44 Bom.L.R. 146=A.I. R. 1942 B. 138. Where a perpetual lease is granted of trust property the lease is void and a suit by the succeeding manager to recover possession is governed by Art. 134 (*b*) and time commences from the death or removal of the previous manager who effected the transfer. 14 L.R. 905 (Rev.) Art. 134-B applies to a transfer of endowed property made, whether before or after the Amending Act of 1929 which introduced this article in the Limitation Act came into force.

The word ' transfer ' in the article is wide enough to include a lease. 41 C.W.N. 693= 1937 C. 305. *See also* (1941) 1 M.L.J. 644 (F.B.). The general rule is that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. So a suit brought in 1930 by the Sajjadanashin of a Takia to recover possession of immovable property comprised in the wakf which had been transferred by trustee *de son tort* is governed by Art. 134-B as inserted by Act I of

Deseription of suit.	Period of limitation.	Time from which period begins to run.
135. Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable preperty mortgaged.	[Twelve years] ..	When the mortgagor's right to possession determines.
136. By a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	[Twelve years] ...	When the vendor is first entitled to possession.

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto."

NOTES.

1929. 39 P.L.R. 222=1937 L. 9. *See also* 73 C.L.J. 475. A suit by a committee of management of a *thakardwara* to recover possession of property originally belonging to the *thakardwara* which had been alienated by the previous mahant is governed by Art. 134-B and the time is twelve years from the death, resignation or removal of the transfer. 39 P.L.R. 355=1937 L. 660. *Held*, by the Full Bench (Abdur Rahman and Krishnaswami Iyengar, J., diss.) (1) where a manager of a Hindu Religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach the alienation by suit, Art.134-B and not Art. 144 will apply even when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager; (2) that even assuming that Art. 144 is applicable to such a case, adverse possession commences from the date of the death, resignation or removal of the previous manager who effected the alienation and not from the date of the election or appointment of the succeeding manager; and (3) that if the succeeding manager happens to be a minor at the date of the election or appointment, he will be entitled to the benefit of S. 6 of the Act, but where his appointment is made after the period of limitation has started to run, S. 6 will not help him. I.L.R. (1941) M. 599=1941 M. 449=(1941) 1 M.L.J. 644 (F.B.). Inam grant burdened with service of Acharya purusha in temple—Usufructuary mortgage—Suit by successor to declare void—Limitation. 1940 M.W.N. 404.

ART. 135.—A suit by a mortgagee against the mortgagor or his successors-in-title is governed by Art. 135. 50 I.C. 762; 63 I.C. 579. *See also* 1939 L. 212. A suit by a mortgagee without possession for possession of the mortgaged property on the basis of ownership is well within time, if lodged within twelve years of the foreclosure proceedings under Ben. Reg. XVII of 1806. 40 P.L.R. 798=1938 L. 809. For the purpose of Art. 135 the mortgagor must either have actual possession or an unconditional right to recover possession from somebody who has in fact got it and unless and until he has that right, time does not start to run. 57 B. 593=35 Bom.L.R. 956=1933 B. 439. The time for a puisne mortgagee to sue for possession begins to run from the date of redeeming the prior mortgagee who was in possession of the property and not from he date of his mortgage. 48 I.C. 916. Where according to the terms of a mortgage deed the mortgagee is entitled to obtain possession of the mortgaged property in default of payment of interest, and the mortgagor fails to pay interest in the very first year after the mortgage, the cause of action for a suit for possession accrues in that year. The fact that interest was paid and accepted by the mortgagee in certain subsequent years cannot by itself be held to be sufficient to show that the default was condoned and the parties were restored to their original position. 40 Bom.L.R. 48. But *see* (1938) 2 M.L.J. 251; 1939 N. 242; 1938 L. 570. Mortgage stipulation for the mortgagor retaining possession on paying a certain sum to the mortgagee at every harvest—Further stipulation for recovery of possession in default of payment of interest—Default in payment of interest—Suit for possession 14 years after the execution of the mortgage. *Held*, that, on the finding that no interest at all had been paid to the mortgagee by the mortgagor, the mortgagor's right to possession determined as soon as there was default and time began to run against the mortgagee, and the mere fact that the mortgagee might, but did not, apply for the personal remedy against the mortgagor was not an impediment either to the starting, or to the running of the time. 121 I.C. 190=1930 L. 327. *See also* 1934 L. 993.

ART. 136.—The expression "out of possession" in Art. 136 implies that some person is in possession adversely to the vendor some person holding in a character incompatible with the idea that the ownership remained vested in the vendor. 51 I.C. 123=29 C.L.J. 241. *See also* 64 I.C. 552=23 Bom.L.R. 967. Possession contemplated by Art. 136 is not confined to actual occupation only; it also includes constructive possession. 151 I.C. 357 (2)=1934 R. 223. Article applies to such possession as a member of the joint family is presumed to have, in the family property, until excluded therefrom. 51 I.C. 123=29 C.L.J. 241; (1911) 2 M.W.N. 175; 1915 M.W.N. 29. Where there have been transfers by successive vendors, all out of possession the term 'vendor' includes the first in the series of vendors entitled to sue for possession. 24 I.C. 216. Delivery of symbolical possession is operative against the judgment-debtor but is wholly ineffectual to affect the title or interrupt the actual possession of others. 29 I.C. 841=22 C.L.J. 574. The possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a stranger. If a cotenant were to sell his share in a joint property to a stranger some time after twelve years from the date when he and other co-sharers became entitled to the property, it would not be proper

Description of suit.	Period of limitation.	Time from which period begins to run.
137. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	[1][Twelve years] ...	When the judgment-debtor is first entitled to possession.
138. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	[1][Twelve years] ..	The date when the sale becomes absolute.
139. By a landlord to recover possession from a tenant.	[1][Twelve years ..	When the tenancy is determined

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto".

NOTES.

to defeat the right of the purchaser by saying that the suit was barred became his vendor first became entitled to possession on the date on which co-sharers became entitled to the property. 58 B. 410=36 Bom.L.R. 284=1934 B. 273. Starting point is the time when the vendor is first entitled to possession. 67 C.L.J. 294=1938 C. 790.

ART. 137.—When an auction-purchaser at a Court-sale has obtained judicial possession, he may sue for actual possession, within 12 years from the date of or his assigns may sue the judgment-debtor for obtaining such possession. 17 I.C. 518. Suit for possession against remainderman—Partition—Life-estate given to father with remainder to his son—Rights of son. 25 Bom.L.R. 456=1923 B. 415. Art. 137 is not applicable to a suit for possession after confirmation of Court-sale where judgment-debtor is in possession at the date of sale. 26 C.W.N. 364. Art. 137 does not apply to a purchaser at a sale held in execution of mortgage decree. 1923 M. 160 (2). A suit for actual possession of property obtained in execution of a decree when symbolical possession was given, falls under Art. 144 and not under Arts. 136 and 137. 35 I.C. 87.

ARTS. 137 AND 142.—*See* 19 P.L.T. 250.

ARTS. 137, The words "entitled to possession" in Art. 137 mean "able to exercise his right of possession" and the words "out of possession" imply that the judgment-debtor at the time of the sale was not in a position to exercise his rigkt of possetion. 1938 R. 65. 1938 Rang. 65.

ART. 138.—Art. 138 applies only to suits between the auction-purchaser and the judgment-debtor or his representative in interest. 35 A. 432=18 I.C. 465. Art. 138 does not apply to a case where the judgment-debtor was not in possession at the date of the sale. 67 C.L.J. 294=1938 C. 790. The expression "purchaser at a sale in execution of a decree" in Art. 138 does not cover the case of a judgment-debtor who purchases the property in execution of his own decree. 52 M.L.J. 1=50 M. 403=1927 M. 288; 11 P. 165, which holds that Art. 138 makes no distinction between a decree-holder purchaser and a third party purchaser. The former as well as the latter has twelve years within which to bring a suit for recovery of possession of the property purchased in execution of the decree. But *see* 10 P. 670 (F. B.). It will not be doing any violence to the language of Art. 138, if the word "purchaser" in it is limited to a stranger *i.e.* to a person who is not a party to the decree and who is not a decree-holder. 1936 Pesh. 85. Possession—Suit by auction-purchaser—Limitation. 15 I.C. 10=10 A.L.J. 13. Judgment-debtor in possession—Formal possession with purchaser—Effect of. 36 B. 373=14 I.C. 447. *See also* 19 P.L.T. 95=1938 P.W.N. 177=1938 P. 189. Art. 138 should be read with S. 47, C. P. Code. The one does not override the other. 35 B. 452=11 I.C. 987. A suit by decree-holder auction-purchaser against a person who has not acquired a title from the judgment-debtor is not governed by Art. 138. 36 C.L.J. 140=27 C.W.N. 259. Art. 138 is applicable only to cases where purchaser has not obtained possession. 26 C.W.N. 364. *See also* 40 I.C. 662. Article applies to a suit by the auction-purchaser, though the sale took place before the passing of the Act provided the plaintiff had time enough under that article after the passing of the Act to bring his suit. 38 I.C. 609. A suit by a purchaser in a Court-auction for recovery of possession of the properties, after confirmation of the sale is governed by Art. 138 and not by Art. 180. 47 I.C. 844. Whatever might be the effect of the formal delivery of possession under the C. P. Code as against the judgment-debtor himself, such formal delivery of possession cannot take effect as actual possession against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. Where the plaintiffs did not bring the suit within 12 years of the purchase but only brought it within 12 years from the date of obtaining formal delivery of possession through Court, *held*, that the suit was not within time. 5 O.W.N. 616=1928 O. 391. Mortgagee of tenure purchasing property in execution of decree—Tenure sold for arrears of rent during mortgage litigation—Suit by mortgagee alleging that certificate of sale was fraudulent and did not affect the encumbrances. The period of limitation applicable was the period provided by Art. 138 and not by Art. 95. 167 I.C. 481=1937 P. 331.

ART. 139.—Art. 139 applies even to suits brought against the representatives of the original tenant after the determination of the original tenancy to recover the property leased. Where a rent deed in respect of certain houses created a tenancy for an indefinite period in favour of the tenant and it was stated to be terminable at the will of the lessor, it was held that at best a

Description of suit.	Period of limitation.	Time from which period begins to run.
140. By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immovable property.	[1][Twelve years] ...	When his estate falls into possession.

LEG. REF.

[1]Substituted by Act XI of 1932, S. 2 and Sch. I for "Ditto."

NOTES.

tenancy for life was created in favour of the tenant and that it came to an end with his death and further that a suit by the lessor for recovery of possession of the property would be barred, if not brought within 12 years of the date of the death of the tenant. 1941 A.L.J. 327=1941 A. 306. *See also* 41 P.L.R. 457=1939 L. 455. Defendants who were let into possession of the suit lands belonging to a Mahomedan darga in consideration of their services as *mujawars* (attendants and servants of the shrine) were dismissed in 1898, but continued in possession. In a suit brought in 1926 by the *sajjadanashin* to recover possession of the lands, the defendants pleaded adverse possession. *Held*, that the defendant's plea of adverse possession was inconsistent with the application of Art. 139. 61 I.A. 50=56 A. 111=66 M.L.J. 431 (P.C.). Expiry of lease more than 12 years before suit—Suit for possession barred. 26 C.W.N. 722=1923 P.C. 184 (P.C.). *See also* 37 I.C. 955; 42 P.L.R. 535=1940 L. 410. While it is true that a tenant who holds over cannot set up an adverse title to the landlord, still the landlord can recover possession only if he sues within 12 years of the expiry of the period of lease. 20 A.L.J. 696=1922 A. 423. *See also* 26 C.W.N. 722; 44 A. 583=20 A.L.J. 593; 102 I.C. 231; 105 I.C. 859=1927 B. 650. But *see also* 68 M.L.J. 552 (P.C.) noted below. Lessee not paying rent after expiry of lease—Adverse possession. 18 I.C. 899. Landlord and tenant—Denial of title—Non-payment of rent—Effect. 36 I.C. 829. *See also* 57 I.C. 269; 46 L.W. 848=1938 M. 73; 41 P.L.R. 457=1934 L. 455. A tenancy on sufferance does not fall within Art. 139. 97 P.R. 1915=32 I.C. 35; 16 I.C. 546. Under Art. 139 the cause of action in cases in which the Malabar Tenants Improvements Act applies, does not arise till the value of improvements is paid to the tenant. 38 I.C. 651=(1916) 2 M.W.N. 324. *See also* 47 L.W. 236. An intention to hold adversely to the landlord need not necessarily follow a holding over. 3 L.W. 408=30 M.L.J. 492. A tenant continuing in possession after expiry of the lease cannot be said to be in adverse possession unless he actually surrenders possession to his landlord. 1914 M.W.N. 728; 53 I.C. 212; 1923 P. 201. Where, after the expiry of the period fixed in a lease, the tenant continues in possession as tenant on same terms expressed in the lease, he cannot claim adverse possession and there is no period of time from which it can be said that the statute runs so as to debar the lessors from their remedy for the recovery of the property. 39 C.W.N. 552=1935 P.C. 59=68 M.L.J. 552 (P.C.). The landlord must sue a stranger dispossessing his tenant from year to year and holding the land absolutely against them both within 12 years from the date of such dispossession. 15 I.C. 146=1912 W.N. 669. In the case of tenancy from year to year, limitation runs in favour of a person asserting permanent right in the property only from the date of the end of the tenancy under Art. 139. 9 I.C. 141=21 M.L.J. 166. The relationship of landlord and tenant between the parties has not been established. Art. 139 does not apply for a suit in ejectment of defendants by plaintiff. (1926 C. 193, Affir.) 56 I.A. 119=56 C. 1003 (P.C.). Whatever possessory rights a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the "tenancy-at-sufferance" is heritable. The son of such tenant cannot style himself as a tenant holding over. His possession is nothing better than that of a trespasser. His possession is clearly adverse to the owner of the land and would ripen into a prescriptive title by 12 years' possession. 30 N.L.R. 155=148 I.C. 561=1934 N. 67. The limitation begins to run against the landlord from the date when by efflux of time tenancy comes to an end. 1934 N. 67.

Art. 140.—Art. 140 contemplates a suit by a remainderman or reversioner for possession of immovable property when his estate falls into possession. 65 I.C. 826=34 C.L.J. 129. By the expression "falls into possession" is meant the time when a reversioner or a remainderman becomes entitled to the actual possession of the estate. 8 O.W.N. 349=1931 O. 177. The possession of one trespasser can be tacked on to that of another and a continuity of adverse possession may result thereby only when the interest of both are not different and antagonistic. 119 P.L.R. 1914=22 I.C. 855. Art. 140 governs suit against a trespasser by a lessor for the recovery of his leased out land. 15 I.C. 146=1912 M.W. N. 669. Art. 140 has no application against a tenant as Art. 139 governs such suits. 15 I.C. 146. Art. 144 applies when the purchaser of the rights of a devisee sues to obtain possession of the property if the devisee or his transferee has once obtained possession, and Art. 140 applies if the devisee has not obtained possession. 56 I.C. 929. A person claiming only an equity of redemption does come within the meaning of remainderman. 56 I. A. 192=51 A. 367=33 C.W.N. 761=1929 P. C. 158 (P.C.). If the plaintiff succeeds in making out a *prima facie* case under Art. 140 the burden is on the defendant to show that the dispossession took place at a time when the property was in possession of the last male owner. 43 C.W.N. 772.

Art. 141: APPLICABILITY—(1) GENERAL.—Article applies only when a reversioner is entitled to possession on the death of the female. 18 I.C. 811=11 A.L.J. 179; 25 C.W N. 585; 25 A.L.J. 861. Where on the death of

Description of suit.	Period of limitation.	Time from which period begins to run.
141. Like suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female.	[1][Twelve years] ..	When the female dies.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I for "Ditto."

NOTES.

the widow, the reversioner is deemed to be in constructive possession, no one else being in possession, Art. 141 is not applicable to a suit instituted by him after mutation of names in defendant's favour some years after. 36 C.W.N. 326=138 I.C. 349=1932 C. 504. Art. 141 is extension of Art. 140 and specially refers to reversioner succeeding to the estate after widow's death. 40 B. 239=33 I.C. 484. Art. 141 applies only to cases where it is proved that the last full owner was in possession at the time of his death. 27 I.C. 954=19 C.W.N. 1210. *See also* 27 I.C. 250=18 C.W.N. 904; 1941 C. 632. Where succession vests jointly in two female heirs between whom no partition of the property is made, a suit by one on death of the other for the property cannot be said to be one for recovery of possession under Art. 141. 27 I.C. 83. Article does not apply to cases in which the Hindu or Mahomedan female had been in possession of the full estates. 44 I.C. 308; 41 M. 538. *See also* 18 I.C. 289; 33 I.C. 371. Where a widow is found to have been lawfully holding her husbands' estate for life, whether under a will or under the provisions of S. 22 of Act I of 1869, no question of adverse possession arises and the suit for possession by a reversioner is governed by Art. 141. 6 Luck. 282=7 O.W.N. 1010=1930 O. 481 (26 I.A. 71 and 56 I.C. 267, Foll.) Art. 141 does not contemplate the same kind of estate as one under Art. 140, *i.e.*, by grant or devise. 33 I.C. 371. The argument that the word "entitled" in Art. 141 necessarily means "entitled under the law and not extinguished by limitation," and that the article applies only to a suit brought by the first Hindu entitled to possession on the death of the first female heir is not supportable. 26 A.L.J. 1049=1928 A. 561 (F.B.).

(2) CO-WIDOWS.—Under Art. 141 time begins to run only on the death of all the female co-heirs. There can be no acceleration of the right of a reversioner without his knowledge and consent by any agreement between the female co-heirs. 12 L.W. 656=39 M.L.J. 567. *See also* 42 B. 714=47 I.C. 153. Suit by a widow to set aside gift of husband's property by her co-widow—Limitation runs from the date of co-widow's death. 1927 N. 226.

(3) REVERSIONER.—A suit by a reversioner challenging the alienation of a Hindu widow should be instituted within 12 years of the widow's death. 10 O.W.N. 147=1933 O. 170. *See also* 1937 P. 105=17 P.L.T. 16. The general principle is that adverse possession, however long held, cannot impair the right of a person who was not, during the continuance of that adverse possession, entitld to possession. As the right of a reversioner is only a *spes successionis* and his reversionary interest falls into possession only on the death of the widow, adverse possession against the widow can hardly be regarded as hostile to the reversioner whose right is until the widow's death, only an expectancy. I.L.R. (1939) N. 624=1939 N.L.J. 391=1939 N. 260. *See also* 20 N.L.J. 278. The article applicable to a suit by an adoptee for possession of immovable property on the death of a Hindu female who was in possession as the adopted mother under an agreement is Art. 141, even if it is necessary to decide in the suit whether an adoption was or was not valid. 58 B. 280=36 Bom.L.R. 185=1934 B. 110; 149 I.C. 434=35 P.L.R. 338 (suit by reversioner). But a suit by an adopted son after the death of a Hindu widow for possession, alleging previous possession and dispossession is governed by Art. 142. 60 C.L.J. 391=1935 C. 228. Possession taken by a trespasser during the lifetime of a Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow. 41 A. 154=47 I.C. 222. *See also* 50 C.L.J. 260. But *see* 1929 O. 153. *See* 32 C.W.N. 913=55 C. 903=1928 C. 670 in which the case-law in the point is fully discussed. A suit by a Hindu daughter for possession of her father's property after her mother's death falls under Art. 141. 20 I.C. 179=11 A.L.J. 333. *See also* 38 A. 117. A suit for possession of immovable property by a Hindu female succeeding as a reversioner to another Hindu female owner is governed by Art. 141 [26 A.L.J. 1049 (F.B.), Foll.] 167 I.C. 527=1936 A.W.R. 1279=1937 A. 188. In a case where there has been more than one female heir in succession, the suit has to be brought within 12 years of the death of the last female holder. 20 N.L.J. 278. Art. 141 is inapplicable when time has once coommenced to run against the last full owner. 1923 B. 364. The special period provided by Art. 141 overrides the general provisions of Art. 144. 42 B. 69=43 I.C. 233. The reversioner has a fresh cause of action on the date of the death of the limited owner. 30 I.C. 991=2 L.W. 751; 42 I.C. 228=32 M.L.J. 627; 17 I.C. 136. The statute of limitation can never begin to run against a reversioner in consequence of dispossession of the limited owner and in all cases the reversioner has 12 years from the death of the widow or dauhgter or mother in which to sue for recovery of possession of property from which the Hindu famale was dispossessed. The only case where adverse possession will run against the reversioner is where it is the result of a decree which is binding against the reversioner. 50 C.L.J. 260. *See also* 1928 A. 561 (F.B.); 1930 A. 307; 139 I.C. 28=34 Bom.L.R. 385=1932 B. 434. So also in the case of surrender by widow. Where, a widow made a surrender of her estate in 1884, in favour of her daughter, who died in 1894, the right of the male reversioners to sue arises on the daughter ter's death and is barred under Art. 141 if brought more than 12 years thereafter, though in time if the computation is made from the subsequent death of the widow. (46 A. 59, Appr.) 61 I.A. 200=57 M. 749=1934 P.C. 105=67 M.L.J. 20

Description of suit.	Period of limitation.	Time from which period begins to run.
142. For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	[1][Twelve years.]	The date of the dispossession or discontinuance.

LEG. REF.

[1]Substituted by Act XI of 1923, S. 2 and Sch. I for "Ditto."

NOTES.

(P.C.). The basis of the doctrine of surrender is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. There is therefore no difference between surrender to a daughter and surrender to the nearest male reversioner. 67 M.L.J. 20 (P.C.). This rule is applicable also to the case of a Mahomedan occupying a similar position. The wordings of Art. 141, Act XV of 1877, and of the present Act IX of 1908 make this amply clear. 108 I.C. 817=1928 O. 155. Whether the adverse possession against the widow runs against the reversioner is a question of fact. 1928 A. 561 (F.B.); 1931 O. 25. A suit by a reversioner to recover possession of the properties of a limited owner sold in execution of a decree obtained against her husband is governed by Art. 141 and not by Art. 144. 48 C.L.J. 368. Where there has been no decree against widow or other act in law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled after the widow's death to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. 56 I.A. 267=51 A. 439=1929 P.C. 166=57 M.L.J. 160 (P.C.). *See also* 9 P. 634=1930 P. 573; 139 I.C. 28=34 Bom.L.R. 385=1932 B. 434. Suit for partition between alienee from one member and reversioners. *See* 53 B. 472=1929 B. 345. Widow's alienation—Subsequent adoption—Death of adopted son as minor—Succession by widow—Suit by reversioner after widow's death is not barred. 1930 M.W.N. 811. *See also* 17 P.L.T. 16. Adverse possession against woman holding a widow's or a daughter's estate is binding against the reversionary heirs. 51 C.L.J. 23. Suit by reversioner to recover possession on the death of widow. Art. 141 applies and not Art. 2, Sch. II, of the Punjab Act I of 1920. 1930 L. 111. *See also* 51 C.L.J. 23. On the death of the last taluqdar to an estate, succession to which was governed by the terms of the primogeniture sanad, his wife entered into possession of the properties, and in the mutation proceedings, the position she claimed was that of a claimant to the estate under S. 22 (7) of the Oudh Estates Act, *i.e.*, as a limited owner. So the right of the next heir to sue for complete proprietary title accrues only after, and not before, the death of the limited owner. A suit for possession by him is governed by Art. 141. 150 I.C. 495=11 O.W.N. 351=1934 O. 190.

(4) LIMITED OWNERS (MORE THAN ONE).—Article applies where the reversioner is entitled to the property on the death of more than one limited owner taking jointly, and time runs from the death of the last limited owner. 43 M. 855 =39 M.L.J. 567.

SUIT FOR POSSESSION.—Suit for possession on declaration of title by plaintiff as reversionary heir on his mother's death against defendant—Art. 141 applies. 23 C.W.N. 977=47 C. 274.

SUIT FOR SHARE IN INHERITANCE.—A suit for the share in inheritance is barred after lapse of twelve years of the death of the last male owner. 33 I.C. 742=84 P.R. 1916.

STARTING POINT.—The starting point is the death of the last surviving widow. 33 A. 312= 9 I.C. 50; 1930 O. 481. The reversioner's right to sue accrues from the time of the death of the widow and possession for 12 years under a gift from the widow during her lifetime does not bar the suit. 1922 A. 421. *See also* 65 I.C. 866=34 C.L.J. 141. When time has once commenced to run against the last male holder, it continues to run and is not suspended or, in any way, affected by the mere circumstance that the owner is succeeded by a female entitled to the usual woman's limited estate. After twelve years have run out from the date of the original entry of the trespasser, which happened in the lifetime of the last male owner all persons claiming through or under him are barred. It is settled law that Art. 141 of the Limitation Act is inapplicable to such a case. 43 P.L.R. 308=1941 L. 271. *See also* 1942 O.W.N. 191.

Arts. 141 an5 143.—Applicability—Award giving properties to Hindu widow for maintenance for life—Clause providing for forfeiture on widow becoming unchaste—Properties to go to husband's brothers on death of widow—Suit for possession of the properties by the reversioners within 12 years of the widow's death but beyond 12 years of unchastity—If barred—Limitation applicable—Waiver of forfeiture—Death of widow gives fresh cause of action for suit. 1937 A.L.J. 139 =1937 A. 268=I.L.R. (1937) All. 268.

Arts. 141 and 144.—Where under a special custom, a widow is entitled to possess the property of her husband during her life, her possession, however long it lasts, could not be adverse to the ultimate heirs so as to create an absolute right to the property in her favour after the expiry of 12 years. This is so even though the husband had executed an invalid will in her favour giving full ownership in the property. Accordingly a suit for possession of the property by the ultimate heirs is governed by Art. 141, and not by Art. 144 and a suit by them within 12 years from the date of the death of the widow is, therefore, within time. 165 I.C. 322 (2)=1937 O. 4. *See also* 50 L.W. 571=1940 M. 102.

Arts. 142 and 144.—In all cases in which the applicability of Art. 142 or Art. 144 is in controversy, it is necessary to scrutinize the pleadings of the plaintiff and to ascertain exactly the allegations on which the plaintiff has come into Court and the reliefs sought by him. Sometimes the pleas raised in defence by the defendant are also relevant to the enquiry. 37 P.L.R. 171; 152 I.C. 906=1934 P. 593; 152 I.C. 1=1934 A.L.J. 973=1934 A. 993 (F.B.); 147 I.C. 805

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=11 O.W.N. 104=1934 O. 21; 30 S.L.R. 472. In a case which falls under Art. 142, the plaintiff must prove not only title but also possession within 12 years of suit. But before that article can apply, it must be shown, either that the plaintiff was dispossessed, or that he discontinued the possession. This can be established either by the facts admitted in the plaint or pleadings, or if not admitted there, then by the facts actually found. But unless that is done the case cannot come under Art. 142 and so the residuary Art. 144 would apply. 1938 N.L.J. 418=1939 N. 7. *See also* 1942 N.L.J. 99; 1942 A.L.W. 225=1942 O.W.N. 281. The essential difference between Arts. 142 and 144 is that, in the first case the owner bases his claim from the date of his dispossession, and in the second he bases his claim on his title without regard to his possession or dispossession and time begins to run from the date that the defendant's possession became adverse to the plaintiff. Where the plaintiff sued on the basis of his title which was admitted, it was not for him to prove possession on his own part within 12 years, but it was for the trespasser to prove his adverse possession. [45 B. 1020 (P.C.), Rel. on.] 108 I.C. 109=1928 O. 246. *See also* 1928 L. 306 (a case of waste land); 1937 Sind 226; 1940 Sind 49; 1940 M. 798=(1940) 2 M.L.J. 190; 1938 L. 241; 1939 L. 172. A suit for possession, the claim being based on dispossession, is governed by Art. 142, and the burden is on the plaintiff to establish his possession without limitation. 153 I.C. 371=1935 O. 88. Where the plaintiff does not claim to have been dispossessed or to have discontinued possession, Art. 144 and not Art. 142 applies. 30 N.L.R. 284=148 I.C. 62=1934 N. 36. *See also* 151 I.C. 490=1934 L. 576; 1937 P. 252 (plot incapable of possession by actual user). In cases where the plaintiff sues for possession of immovable property *both* on the ground of title and on the ground of his possession having been disturbed by the defendant if he proves his title, the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact, the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent, Art. 144 will apply to such a suit but it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case, Art. 142 will apply and the burden will be on the plaintiff. 11 O.W.N. 104=1934 O. 21. Whether Art. 144 or 142 applies, depends on frame of suit but plaintiff has to justify such frame. 1930 L. 330. Property standing in Hindu women's name in possession of tenants—Muchilikas taken and rent collected by adopted son who lived amicably with adoptive mother—Death of adopted son—Strained relationship between mother-in-law and daughter-in-law and scramble for possession—Suit for possession by donee from mother-in-law—Limitation,—Art. 144 and not Art. 142 applies. I.L.R (1938) M. 220=1938 M. 8=(1937) 2 M.LJ. 606. The effect of Art. 142 of the Act of 1871 and Art. 141 of Act of 1877 was to create a fresh rule in regard to limitation in all cases in which the prospective right arising out of adverse possession had not already ripened into an absolute title. 1942 O.A. (Supp.) 145 (2)=942 A.W.R. (H.C.) 84 (2) 200 I.C. 269=1942 A. 175.

Atr. 142.—[*See also* under Art. 144]—APPLICABILITY OF ARTICLE.—Art. 142 is restricted to suits which are in terms and substance based on the plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. Where the suit is based on plaintiff's title acquired by inheritance. Art. 144 is applicable. 134 I.C. 599=1931 O. 382. *See also* 1937 N. 159; 30S.L.R. 472; 8 O.W.N. 1153; 136 I.C. 256=1932 O. 122; 1933 A.L.J. 105; 1933 N. 274; I.L.R. (1941) Nag. 655; 73 C.L.J. 4 7 "Dispossession" and "discontinuance"—Meaning of. *See* 71 M.L.J. 749; 74 C.L.J. 261; 1939 All. 257=1939 A.L.J. 94=I.L.R. (1939) A. 454; 1939 C. 354. "Discontinuance" in Art. 142 means that a person in possession goes out and is followed into possession by another person, because unless he is so followed he will in law be deemed to continue in possession and therefore there will be no discontinuance. I.L.R. (1939) All. 454=1939 A.L.J. 94=1939 A. 257. The word "discontinued" connotes three elements—two physical and one mental. There msut be (1) actual withdrawal (2) with an intention to abandon and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contract, a collusion, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. 69 C.L.J. 38=1939 C. 354. *See also* 1938 Sind 198; 1938 N.L.J. 418=1939 N. 7; 1942 N.L.J. 99. If a person discontinued his possession and never resumed it, it is a case governed by Art. 142 and not Art. 144. 59 I.A. 130=11 P. 272=1932 P.C. 55=62 M.L.J. 296 (P.C.). Where the plaintiff alleges possession of land and it is found that part of the land is *de facto* in the possession, of another person, the suit must fall under Art. 142. 39 B. 335=28 I.C. 24. *See also* 8 O.W.N. 349=1931 O. 177. A suit for possession of immovable property of which the plaintiff while in possession of the property has been dispossessed or has discontinued possession is governed by Art. 142 and does not raise an issue of adverse possession but adverse possession for over twelve years, if made out by the defendant, may imply dispossession of the plaintiff. 58 I.A. 29=10 P. 407=1931 P. 18=60 M.L.J. 183 (P.C.) (Adverse possession of mining rights in a village granted on lease to defendant)....Where the plaintiff prays for possession, alleging recent forcible dispossession, the suit is governed by Art. 142 and it is for the plaintiff to establish his previous possession and dispossession by the defendant; it is not for the defendant to prove his adverse possession for more than twelve years. 143 I.C. 428=1933 L. 627. *See also* 161 I.C. 833=1936 R. 124; 1941 C. 632; 1941 O.W.N. 615=1941 O. 415; 1940 O.A. 1251 (suit for possession of property transferred by *pardanashin* guardian). Attachment under S. 146, Cr. P. Code—Suit for possession—Art. 142 applicable *See* 49 C. 544; 22 C.L.J. 283. Suit by reversioner for possession from trespassers against widow—Art. 142 applies. 65 I.C. 826=34 C.L.J. 129. Also to a suit by an adopted son for possession from trespassers against widow. Time runs from date of adoption. 1 Luck. 733=1928 O. 155. In a suit governed by Art. 142, the

NOTES.

plaintiff must prove his possession within twelve years from the date of suit and on failure to do so, the suit should be dismissed. 56 I.C. 951 ; 6 P.L.J. 51=61 I.C. 46 ; 1924 P. 341 ; 1927 L. 186=101 I.C. 254 ; 108 I.C. 732 ; 1928 P. 653 ; 107 I.C. 779 (2) ; 1931 O. 177 ; 134 I.C. 475 (Oudh) ; 1933 R. 48 ; 1933 S. 279 (F.B.). Where the plaintiffs claim that they were in possession of the land and were dispossessed shortly before the suit, the case is clearly governed by Art. 142 and the onus is on the plaintiffs to show that they were in possession within 12 years of the suit. 65 C.L.J. 603=1938 C. 150 ; 1938 C. 206; 1940 A. 428. *See also* 1937 N. 129 ; 1940 C. 194; 38 P.L.R. 365; 42 P.L.R. 521 ; 44 C.W.N. 935 ; (1940) 2 M.L.J. 190. Art. 142 is very general in its scope, and the only conditions necessary are that the suit should be for possession of immovable property and that the plaintiff while in possession of the property must have been dispossessed or must have discontinued his possession. Obviously the word "plaintiff" in this article includes his predecessor-in-title as well. There are no words in this article which would confine its applicability to suits based on possessory title only, or confine it to plaintiffs who claim the property wholly and are not co-sharers or co-owners with the defendants. (51 A. 1042 and 1933 A.L.J. 105, Overr.) 1934 A.L.J. 973=1934 A. 993 (F.B.). *See also* 42 P.L.R. 497 ; I.L.R. (1940) M. 953=52 L.W. 149=1940 M. 798=(1940) 2 M.L.J. 190 (F.B.) (plaintiff suing as purchaser at Court auction sale held in execution of mortgage decree is not outside the scope of Art. 142). Where therefore a plaintiff, who was a co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees sometime prior to the institution of the suit. Art. 142 applies and not Art. 144. (F.B.) 1934 A. 993. *See also* 22 P.L.T. 1001. If Art. 142 applies, the *onus* would be upon the plaintiff to prove that his suit is not time barred ; it is otherwise if the case falls within Art. 144 ; for in such a case the *onus* would be upon the defendant to prove that his possession had been adverse to that of the plaintiff for more than 12 years. 8 R. 556=1931 R. 40 ; 7 R. 85=1929 R. 153. *See also* 38 C.W.N. 1126. The proof by plaintiff of his possession may be such as the land is capable of by exercising acts of ownership thereon. The acts of ownership need not be continuous ; nor need they be frequent. A party may be said to be in possession of land when he exercises such acts of ownership in respect of the case as might be expected in the circumstances of the case or having regard to the purpose for which land can be used. 149 I.C. 1109 (2). Defendant proved to be in possession for 15 to 20 years—Plaintiff relying on defendant being in permissive possession—Plaintiff to prove possession within 12 years. 7 R. 85. *See also* 1933 R. 413. Suit for possession against alleged tenant—Tenancy not proved and defendant found to be in possession for more than 12 years before suit—Suit barred. 1933 L. 893. Art. 142 refers to dispossession or discontinuance of possession. 50 C. 49 ; 20 C.W.N. 481=31 I.C. 242 ; 60 I.C. 860 ; 45 I.C. 548 ; 99 I.C. 831. Legal possession remains with the true owner even though property is attached under S. 146, Cr. P. Code. *See* 20 C.W.N. 481=31 I.C. 242. *See also* 1922 C. 234 ; 45 I.C. 548. An isolated act of trespass does not constitute dispossession. 20 I.C. 79. Of successive independent trespassers who have been continuouly in possession for the statutory period, the first trespasser gets the title and not the last, who is in possession at the time when the title of the real owner is extinguished. 40 I.C. 50=32 M.L.J. 85. *See also* 45 M. 370=42 M.L.J. 319. Whether the last of several but independent trespassers can defeat the owner's title although he himself has been in possession for only a few days before the date. 40 Bom.L.R. 166=1936 B. 210. *See also* 1940 O. 114=1940 O.W.N. 291. Art. 134 does not apply to suits to avoid alienations of the general endowed property vested in the *sajjadashin* and *mutawalli* of a wakf. Such suits are governed by Art. 144. Where as a result of the alienations the previous encumbrances have been paid off, it cannot be said that there were several trespassers in succession so as to bar the true owner under Art. 142 after the lapse of 12 years from the date of the earlier mortgage. 35 Bom.L.R. 252=1933 B. 217. Where a trustee or manager of a religious endowment grants a tenancy of property belonging to the trust in excess of his powers, the alienation is good for the alienor's tenure of office and the alienee's adverse possession commences under Art. 144 only from the cessation of office of the alienating trustee. But where the trustee in effecting the alienation by way of sale purports to deal with the trust property as his own, his act amounts to a repudiation of the trust and the possession of the vendee will be adverse from the date of the alienation. 47 L.W. 165=1938 M. 415=(1938) 1 M.L.J. 113. Dispossession implies an ouster from possession followed by the possession of another person. 5 P.L.J. 592=1921 P. 36. *See also* 61 I.C. 78=2 P.L.T. 133. If a trespasser admits that a portion of the land belongs to the owner when the owner challenges his possession but declines to vacate the land in spite of demands, there is open dispossession and the owner must bring his suit within 12 years of dispossession. The admission of the trespasser cannot give further time to the owner unless such admissions come within S. 19 of the Limitation Act. 60 C. 404=1933 C. 414=144 I.C. 177. When a plaintiff sues for possession on the allegation that while in possession he was dispossessed by the defendant, he must show the time of dispossession and he must bring the suit within twelve years from that date. 56 I.C. 40 ; 5 P.L.J. 592=1921 P. 29 ; 6 O.W.N. 908 ; 1928 P. 653 ; 108 I.C. 732 ; 1928 P. 128 (a case of occupancy tenants) ; 30 Bom.L.R. 1463. Suit to recover possession—Plaintiff's possession within limitation period not proved—Defendant's title by adverse possession not perfected—Plaintiff cannot recover. 1930 O. 46=6 O.W.N. 908. *See also* 8 O.W.N. 349=1931 O. 177 ; 1941 A.M.L.J. 48. The presumption is that the possession of one tenant in common is the possession of all. 10 I.C. 554=5 S.L.R. 49. Land proved to be under water within twelve years of suit—Suit by owner to recover possession—Burden of proof—Art. 144, not Art. 142 is the governing article. 10 P.L.T. 122. *See also* 72 C.L.J. 320=1941 C. 193. Where the plaintiff was actually dispossessed long after the date of the

NOTES.

order dismissing his application under O. 21, R. 100, C. P. Code, limitation for a suit to establish his title and recover possession is that provided under Art. 142 and not Art. 11-A. 1929 P. 553=117 I.C. 634. Where a minor sued after attaining majority to set aside a void lease, *held*, that Art. 142, and not Art. 44 or Art. 91 applied to the case. 34 C.W.N. 642. Even if the judgment-debtors continue to be in the possession of the properties in spite of the delivery of the properties made through Court, yet, as against the judgment-debtors to the suit and persons represented by them, the effect of such delivery should be taken to be that the decree-holder is in possession ; and consequently a fresh cause of action arises against the judgment-debtors and limitation begins to run only from the date of the delivery made through Court. 122 I.C. 164=1930 M. 206. *See also* 1936 Pesh. 7 ; 1928 L. 910. Possession through tenants is sufficient. 1928 C. 765. Constructive possession delivered to auction-purchaser—Refusal to deliver actual possession by squatter—Suit for recovering possession—Art. 142 and not Art. 144 applicable. 3 Luck. 506=5 O.W.N. 372 (F.B.). *See also* I.L.R. (1940) Mad. 953=1940 M. 798=52 L.W. 149=(1940) 2 M.L.J. 190 (F.B.). Transferee from Court auction-purchaser—No possession through Court—Suit for possession—Art. 142 applies. 1930 C. 586. A suit to set aside a revenue sale and for possession is governed by Art. 142. 53 C.L.J. 524=133 I.C. 102. Applicability of article—Occupancy raiyat—Suit for possession of holding from landlord—Limitation. *See* 39 C.W.N. 502.

DISCONTINUANCE OF POSSESSION—BURDEN OF PROOF AS TO.—62 I.C. 707. *See also* 17 L. 449=162 I.C. 330=1936 L. 208 ; 71 M.L.J. 749 ; 30 N.L.J. 18=1933 N. 274. Plaintiffs alleging to have let defendants into possession—Defendants pleadings title by adverse possession—Allegations on either side not proved—Effect. 1927 M. 287; 58 B. 397 ; 36 Bom.L.R. 445 ; 1934 B. 207. In a suit falling under Art. 142, the fact that the date of dispossession is not given or proved is immaterial, for, if the plaintiff can show possession within twelve years, the fact that he is not in possession at the time he institutes his suit establishes that some time in the interval he has been dispossessed. (122 I.C. 81, Foll.) 144 I.C. 72. A suit was instituted for possession of a property on the ground that the defendant was holding it as a licensee. The defendant denied the title of the plaintiff and pleaded his own title on adverse possession. *Held*, that in such a case the question of title was of paramount importance and that, if the title vested in the plaintiff, he would still be entitled to succeed, even though he had failed to establish the alleged tenancy or licence unless the defendant was able to establish his adverse possession under Art. 144. 117 I.C. 384. Where the agreement is that the plaintiffs should resume possession uoon repayment of the loan, possession cannot be held to be discontinued within the meaning of Art. 142. Per Otter, *J.*—Where the mortgagee, who is in possession of the property claimed, cannot be said to be a mortgagee because the unregistered mortgage for over Rs. 100 in his favour cannot be legally proved, but it is clear that neither the mortgagor nor the mortgagee *ex hypothesi* intended that the possession of the mortgagor should be discontinued for ever, the case does not fall under Art. 142. 8 R. 556=1931 R. 40. There can be no discontinuance of possession by reason of the mere submergence of the land. 34 C.W.N. 772=1930 P.C. 198 (P.C.). *See also* 72 C.L.J. 320=1941 C. 193. The mere fact that a mine has not been worked by the owner does not amount to a discontinuance of possession within Art. 142. 44 I.C. 297=22 C.W.N. 441. If the owner leaves his land in the possession of a stranger for over twenty years and lives away cultivating other lands, it constitutes abandonment. 19 I.C. 1=1913 M.W.N. 218. Where two persons are in a joint possession of land by mutual consent for twelve years in ignorance of the fact that one is entitled to the whole, limitation against the latter by discontinuance under Art. 142 or by adverse possession under Art. 144 arises. 18 I.C. 869=17 C.W.N. 595. But *see* 41 B. 5. Joint owners of occupancy holding—One of them leaving the village and settling elsewhere—Holding in the possession of the other joint tenant and his heirs—Suit by the heirs of the former for possession after more than twelve years is barred under Art. 142. 119 I.C. 8. *See also* 41 Bom.L.R. 631 (Suit for partition of share purchased from a Hindu coparcener).

CONSTRUCTIVE POSSESSION— Constructive possession—Proof of title — Delivery of symbolical possession, effect of.—36 C.L.J. 140=27 C.W.N. 259 ; 1936 Pesh. 7. The right of trespasser by adverse possession is confined to the land actually in his possession. 5 P.L.J. 273=56 I.C. 184. *See also* 16 L. 442=1935 L. 475 (F.B.).

SUBMERGED LAND—CONSTRUCTIVE POSSESSION.—Where a plaintiff sues to recover possession of lands as re-formation *in situ* alleging that he has been dispossessed from them, the burden lies on him under S. 142 of the Limitation Act to prove that he was in possession within twelve years of the suit. He can discharge this burden by proving that he was in constructive possession within that period. He would be in constructive possession, if he was the rightful owner and would be in time if he could prove either that the lands had appeared above water within twelve years of the suit ; or if they had appeared earlier that they had become first fit for user within that period. The fact that he had no physical possession at the time of the last submergence is not material for the purpose of enabling him to call to his aid the principle of constructive possession, provided that this title had not been extinguished by adverse possession before the last submergence. For, if a trespasser was in possession before submergence and had not perfected his title by adverse possession for 12 years or more, on submergence his possession ceases and the possession of the owner revives and continues till the lands are again formed and become fit for user and occupied by another. 44 C.W.N. 935.

PERMISSIVE POSSESSION.—Permissive possession is not adverse possession. 41 B. 5 ; 36 I.C. 715 ; 2 L.L.J. 511. But *see also* 18 I.C. 869=17 C.W. N. 595.

POSSSION FOLLOWING TITLE.—Where the plaintiff establishes his title to the property, he could rely upon the presumption that possession goes with the title. If there is no satisfactory evidence in rebuttal, the presumption must be given effect

NOTES.

to. 24 Bom.L.R. 373=1922 B. 243; 100 I.C. 336=9 L.L.J. 9; 1929 P. 529 (1) (Case of parti land). *See also* 117 I.C. 384. In a case with evidence equally strong on both sides, the presumption of possession arises on title. When there is no evidence on either side, presumption from title will save limitation under Art. 142 in the case of arable lands. 35 I.C. 554=1 P.L.J. 146. *See also* 5 P.L.J. 478=1921 P. 305 (F.B.); 1924 L. 276; 53 C.L.J. 411; 54 M. 622=1931 M. 644=61 M.L.J. 224; 134 I.C. 319=53 C.L.J. 411=1931 C. 501; 58 B. 397. Where plaintiffs put forward a case of effective possession and adduced evidence in support of it, but the Court found against it, they cannot give up that case and rely upon the presumption of possession following title. 1931 M. 282=60 M.L.J. 430. But *see* 54 M. 622 holding that even in such a case, the possession presumed by law must be displaced by proof of effective acts of possession by the defendant.

POSSESSORY TITLE.—In a case where the suit is resisted on the ground of acquisition of title by prescription, it is not for the plaintiff to prove his possession within twelve years. It is for the defendant to prove his adverse proprietary title. 1923 A. 55. *See also* 1923 B. 361. Effect of entry as to possession in the settlement record. *See* 2 L.L.J. 230. Possession under an illegal order or decree of a Court is not possession that can avail plaintiff under this article. 29 I.C. 10.

EJECTMENT SUIT.—The plaintiff in an ejectment action must in order to succeed strictly prove his own title. 42 C. 384=27 M.L.J. 333 (P.C.). In a suit for ejectment, the onus is on the plaintiff to prove not only his title to possession but the fact of his dispossession or discontinuance of possession within twelve years. 18 I.C. 17=25 M.L.J. 95 (P.C.); 8 L. 655; 98 I.C. 1061 (2); 33 C.W.N. 1160. Title must be strictly proved to entitle plaintiff to ejectment. 36 I.C. 890=20 C.W.N. 773. The period of limitation applicable to a suit for possession of a temple is that contained in Art. 142 and not Art. 131. 52 I.C. 67 (4 Cal. 683, Dist.) In a suit for possession where the entry in the record-of-rights is in favour of defendants, plaintiff must prove his possession within twelve years of a suit. 54 I.C. 960. A suit to set aside an invalid sale to the extent of the plaintiff's joint share and for possession thereof is governed by Art. 142 and not Art. 123. 42 I.C. 121. Court-sale—Formal delivery of possession to purchaser —Judgment-debtor continuing in possession along with co-owners—Suit for partition—Decree in favour of purchaser—Subsequent suit to recover actual possession after a lapse of 14 years from the formal delivery is barred—No case of possession and dispossession. 50 A. 813=1928 A. 412. *See also* 1928 L. 910. Death of adoptive father—Widow enjoying property as of right—Suit to recover property filed after twelve years. *See* 129 I.C. 328=1931 O. 25; 131 I.C. 758=60 M.L.J. 619=1931 P.C. 84 (P.C.); 130 I.C. 849. Dedication to dharmasala by father—Son seeking to set aside the same after twelve years of father's death is barred. 1928 O. 348. Grant for maintenance—Grantor obtaining decree for resuming possession of property granted but possession remaining with grantee even thereafter for more than twelve years—Suit by grantor for possession is barred. 1928 P.C. 165 (1) =109 I.C. 818=55 M.L.J. 251 (P.C.). The plaintiff filing his suit in the Civil Court within the ordinary twelve year's period of limitation for ejecting a trespasser is *under no obligation to satisfy the Court* that he had sufficient cause for not filing his suit earlier. All that he need prove is that he came within twelve years of the accrual of his cause of action. 1930 A.L.J. 256=1930 A. 193 (F.B.). The mere decision of a *Tanaza* or the mere passing of an order and a mere entry in the record-of-rights as well as a mere order under S. 145, Cr. P. Code, do not necessarily constitute actual physical dispossession. 110 I.C. 623=1928 P. 653. Dispossession contemplated in Art. 142 refers to actual physical dispossession and there is no dispossession under that article until some one else takes *khas* possession. Dispossession is when a person comes in and drives out the other from possession. 56 C. 914=1929 C. 297. Where a Hindu widow who had been enjoying the property as tenant-in-common along with her brothers-in-law sued to establish her possession and it appeared that her title had not been denied and that she had been receiving rents and profits, *held*, that there was no dispossession under the Act and that the suit was not barred by limitation. 56 C. 914.

PARTICULAR CASES—(1) ALLUVION.—Where a plea of limitation and denial of plaintiff's title is set up in a suit for possession to accretions by alluvion, the onus is on plaintiff to prove title and possession within limitation. 34 A. 612=17 I.C. 94. Trespasser whose title is not perfected by adverse possession cannot tack on to his period of possession the period during which the land remained submerged. 19 O.C. 374=37 I.C. 715.

(2) WASTE LAND.—[*See* Vacant Land]. In a case where plaintiff sues for possession, alleging dispossession by the defendant, the onus is on him to prove his possession and the factum of dispossession within thelve years of suit. 26 C.W.N. 724=1922 C. 557. A suit for possession of waste land is governed by Art. 142. 59 I.C. 891=111 I.C. 533. Where the plaintiff alleges he had effective possession of a waste land till dispossession by defendant one year prior to suit, the onus is on him to prove his possession within twelve years of the suit. 60 M.L.J. 430=130 I.C. 845=1931 M. 282. As regards waste and unoccupied lands the presumption is that possession follows title. 39 I.C. 971; 42 I.C. 412. *See also* 17 L. 449=1936 L. 208; 53 C.L.J. 411=1931 C. 501. The mere fact that the land in dispute was such as was not capable or actual continuous physical possession does not necessarily make it waste land so as to attract the application of the principle that possession follows title. 58 C.L.J. 478=1934 C. 294. In respect of waste land allowed to remain so, there cannot be a discontinuance of possession and the onus is on the defendant to prove when his possession became adverse. 25 I.C. 12; 36 I.C. 207; 38 I.C. 120. *See also* 43 P.L.R. 222=1941 L. 241. (suit by Government for possession of public street).

(3) JUNGLE LAND.—In waste and jungle lands, possession may be exercised by grazing of cattle, putting up boundary marks, fences, etc. They form no exception to the general rule that the plaintiff must prove possession and dispossession within twelve years. 23 C.W.N. 724=1923 C. 557; 1928 C. 118. In the case of

Description of application.	Period of limitation.	Time from which period begins to run.
143. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	[1][Twelve years] ...	When the forfeiture is incurred or the condition is broken.

NOTES.

jungle land it is not enough for the plaintiff to prove his title. But he can make a case by showing that the land in question was incapable of possession by any one or that in fact no one was interfering with his right. It is *possession* and not *user* that should be shown. In such a case the possession of the rightful owner must be held to continue up to the time when the lands are shown to be capable of being possessed. 33 C.W.N. 1160. *See also* 1937 P. 252. It was admitted that the lands were parti and jungle lands, that the plaintiffs had a title to it but the defendant claimed a limited tenancy interest only as against the admitted proprietor, the zemindar. *Held*, that the defendant must either show title to tenancy right by contract or by the fact that he has been in possession for the necessary period and the onus is equally upon him to show the date upon which he came into possession and his title began. Such cases are governed by Art. 144 and not by Art. 142, and it is impossible for the judge in trying such a suit to raise any presumption against the plaintiff by reason of the absence of any witness on the part of the plaintiff. 149 I.C. 453 (2)=1934 P. 339.

(4) FISHERY RIGHTS.—Art. 142 applies to a suit for recovery of possession of a jalkar or declaration of plaintiff's title thereto. 34 I.C. 841. *See also* 23 I.C. 136 ; 2 P.L.J. 289 ; 39 I.C. 777.

(5) SERVICE TENURE.—A suit by a patnidar for possession of resumed lands is governed by Art. 142. 46 I.C. 895.

(6) VACANT LAND.—In cases relating to vacant sites, possession follows title and the mere fact that a trespasser has taken possession of a portion of a vacant site cannot affect the constructive possession of the real owner on the portion not trespassed upon. In such cases, the wrongdoer can by lapse of time gain title only to the area actually possessed by him, and in suits governed by Art. 142, it is only with regard to the portion of the site actually in possession of the trespasser that the plaintiff will be required to prove his possession within twelve years. As regards the portion actually built upon by the trespasser, the plaintiffs must show that this portion was a vacant site within twelve years of the suit, and, if they succeed in proving this fact, their constructive possession within the statutory period will be presumed. 17 L. 449=1936 L. 208. *See also* 1938 O. 214. Waste land—Nature of possession—Absence of specific acts of possession—Effect—Land leased for cultivation—Lessee cultivating bulk of area—Small portion remaining waste but trespassed upon and reclaimed by others—Suit by lessee for possession—Limitation. Art. 142 applies. 17 P. 210=19 P.L.T. 133=1938 P. 222. Where a strip of land in question is a piece of waste land lying on the boudary of one's property, possession of such land must be presumed to be with the person who proves title to the property. 1938 O.W.N. 744=1938 O. 214. In a suit relating to waste lands which falls under Art. 142 it must be determined whether having regard to the evidence as to the nature of the lands and the possession, the plaintiff has been able to establish actual or constructive possession within the statutory period. 70 C.L.J. 534=1940 C. 185. Dispossession, referred to in Art. 142 is a forcible dispossession or ouster and the discontinuance referred to in it, being interpreted *ejusdem generis* with possession, means something of the nature of an abandonment. So where a suit is based on title and dispossession, Art. 142 or Art. 144 will apply, as the case may be, for a plaintiff may fail to prove title and may yet prove possession within twelve years and win his suit. Where, however, a suit is based on title and an alleged permissive occupancy, Art. 144 applies and the case can be decided fairly on the question of adverse possession. Long and uninterrupted possession of jagir land without rent or term or conditions,in the full sight of the jagirdars, evidenced by permanent houses and not temporary hutments, constitutes adverse possesion in the full sense of that word. I.L.R (1939) Kar. 111=1938 Sind 198. Vacant land is capable of physical possession being taken of, if it is enclosed and the owners are deprived of all power over it. 111 I.C. 533. A Court must rely upon the presumption that possession follows title in case of land that was vacant before dispossession occurred, where the evidence as to possession is conflicting. 111 I.C. 533 ; 38 L.W. 952=1933 M. 871=65 M.L.J. 769 (54 M. 622, Ref.). If the position of a small isolated plot of uncultivated ground is such that the attention of the plaintiff zemindar would not be specifically directed to the question of whether it is in his mahal or in the mahal of another zemindar, the mere non-interference with the temporary occupation of this plot by the tenant of the other zemindar in the adjacent fields would not constitute any adverse possession. The plaintiff zemindar should be deemed to have continued his constructive possession and it could not be said that he was out of possession within the meaning of Art. 142. 1937 A.L.J. 131=1937 A. 238 ; 1938 O. 214 ; I.L.R. (1939) All. 454 =1939 A.L.J. 94=1939 A. 257.

ENCROACHMENT LAND.—Where the dispute relates to certain encroachment land the onus is on the plaintiff who alleges himself to be owner and seeks to recover possession to establish that his possession was within twelve years. The initial fact of the plaintiffs' title comes to his aid in such a case with greater or less force according to the circumstances : 10 L.L.J. 517=115 I.C. 420.

MINING LAND.—As to adverse possession of mining rights in a village granted on lease to defendant, *see* 58 I.A. 29=10 P. 407=60 M.L.J. 183=1931 P.C. 18 and 186 (P.C.).

Arts. 143 and 144.—Art. 143 does not apply to a case wherethere is no relationship of landlord and tenant. 22 I.C. 28=18 C.L.J. 553. *See also* 17 L. 403=1936 L. 394 ; 60 I.C. 312=24 C. W.

Description of suit.	Period of limitation.	Time from which period begins to run.
144. For possession of immovable property or any interest therein not hereby otherwise specially provided for	[1][Twelve years] ..	When the possession of the defendant becomes adverse to the plaintiff.

LEG. REF.

[1] Substituted by Act XI of 1932, S. 2 and Sch. I for "Ditto."

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N. 1064 ; 45 L.W. 347. A person holding under a permanent tenancy holds adversely from the day he denies his landlord's title and a suit for possession on the ground of forfeiture by the tenant falls under Art. 143. 36 I.C. 565=76 P.L.R. 1917. Under Art. 143, the starting point of limitation is the forefeiture itself; there is nothing in the article about the knowledge of the lessor. 38 M.L.J. 275=15 L.W. 164 ; 35 I.C. 235 ; 17 L. 403=38 PL.R. 887=1936 L. 394. *See* 1928 C. 714, for a case of forfeiture on the ground of remarriage of a widow. Suit for possession by a widow who made a gift of the land on condition of the donee maintaining her, alleging that the condition was not fulfiled, is governed by Art. 143. I.L.R. 1932 L. 645. *See also* 1937 A. 268=I.L.R. 1937 A. 424. Art. 143 is not limited in its application to those persons who have committed a breach of the condition against alienation which has entailed forfeiture, but also applies to those who are in possession by reason of the alienation which has entailed forfeiture. A suit to recover possession of properties demised on *adimayavana* tenure in Malabar, the claim being based on a forfeiture by reason of alienation and not upon the removal of the tenure at the expiration of twelve years as contemplated by the deed of tenure, is governed by Art. 143 and barred unless brought within twelve years from the date of the alienation. 30 L.W. 960=1930 M. 430 (2)=58 M.L.J. 89. Alienation by kasavargamdar—Suit by landlord—Limitation. *See* 45 L.W. 347=1937 M. 295.

ART. 144 : APPLICABILITY.—[*See also* under Art. 142]. Art. 144 is a residuary article and cannot be applied when some other article applies. I.L.R. (1937) N. 254=1937 .N. 129. It is clear from the position in which Art. 144 occurs and from the words used in that article that it is a residuary article in respect of all suits for possession of immovable property to which no other article specifically applies. Where the plaint in terms seeks possession of immovable property and the defence is one of adverse possession, the suit falls under Art. 144. I.L.R. (1939) B. 173=40 Bom.L.R. 1134=1939 B. 1. Art. 144 applies to suits for possession based on title. 136 I.C. 256=1932 O. 122 ; 134 I.C. 599=1931 O. 382 ; 8 O.W.N. 1153 ; 55 A. 209=1933 A. 775=1933 A.L.J. 105 ; 1936 L. 530. When a plaintiff comes to Court saying that he was in possession of a field up to certain time as owner and claims possession thereof, the suit is one for possession after dispossession falling under Art. 142 and not Art. 144. 1937 N. 129 ; 40 Bom.L.R. 166. The question whether the article of limitation applicable to a particular suit is Art. 142 or 144 has to be determined by reference to the pleadings. 147 I.C. 805=1934 O. 21 ; 30 S.L.R. 472. Art. 142 must be applied in every case where the plaintiff alleges his own dispossession by the defendant prior to the suit, *as also where* he does not make any such allegation, but it is found, as a fact, that he was dispossessed by the defendant prior to the institution of the suit. (51 A. 1042 and 1933 A.L.J. 105, Overr.) 1934 A.L.J. 973=1934 A. 993 (F.B.). *See also* 1933 R. 413. A declaration of title may be made on proof of 12 years' adverse possession. 13 L. 677=140 I.C. 604. Art. 144 is a residuary article which cannot be resorted to if the suit is governed by Art. 148 : 127 I.C. 889=1930 N. 300. Redemption of mortgage by one of the co-mortgagors—Suit by another for redemption of his share against the redeeming co-mortgagor —Art. 148 applies. 127 I.C. 889=1930 N. 300. But *see* 8 O.W.N. 637. *See also* under Art. 148. Art. 144 applies not to want of actual possession by the plaintiff but to cases where he has been out of, and another in, possession for the prescribed period. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be proved to bring the case, within the article. 120 I.C. 792=1930 L. 303. Art. 144 is applicable only to a possessory suit by the owner of the properties claimed against a person holding adversely to him without title. 10 P. 851=58 I.A. 279=61 M.L.J. 78 (P.C.) ; 161 I.C. 585=1936 P. 147. Where the plaintiff alleges he was in possession of the property till dispossession by the defendant who entered on it in his own right, the article applicable is Art. 142. 8 O.W.N. 349=1931 O. 177. *See also* 1933 R. 48=144 I.C. 274. So also where the plaintiffs allege that they had been dispossessed two months before the suit and the defendants did not plead adverse possession but pleaded possession under an irrevocable license. 1934 A.L.J. 147=1934 All. 362. Adverse possession of predecessor-in-title can be tacked on to that of the present occupier. 130 I.C. 296=1931 A. 323. A true owner would be barred by twelve years continuous adverse possession, even if that possession be that of two or more independent trespassers, who do not claim under one another. 1940 O.W.N. 291=1940 O. 184. *See also* 1938 B. 210. A suit may comprise various reliefs and the different reliefs may be governed by different articles of limitation. So where a suit comprises a prayer for declaration and for possession, the whole suit cannot be governed by Art. 144. 1936 M.W.N. 351=1936 M. 804. Where an estate partly consists of immovable property and partly of business, a suit for share in the estate of a deceased ancestor, against heirs in possession and managing the same cannot be maintained, so far as it relates to immovable property if not brought within 12 years of the death of the ancestor, under Art. 144, and that for an account of the business of the deceased ancestor, if not brought within six years under Art. 120. 1936 R. 407. A suit by the heir of a deceased person to recover

NOTES.

property from a person who also claims as heir is governed by Art. 144. 45 B. 570=59 I.C. 805; 35 C.W.N. 465=1931 P.C. 84=60 M.L.J. 619 (P.C.) (a suit by Hindu widow to recover possession of her husband's estate). 31 N.L.R. (Supp.) 191. (claim to estate as co-owner but not as member of co-parcenery) A trespasser cannot be allowed to tack on his possession to that of a former trespasser from whom he does not derive title. 45 B. 570. *See also* 49 I.C. 751 (Cal.); 2 P.L.J. 506; 41 I.C. 114; 16 I.C. 43; 37 M. 440; 109 I.C. 296; 1928 C. 563; 1930 L. 809. But *see* 8 O.W.N. 349=1931 O. 177. Where Art. 144 applies, no deduction of period under S. 16 is allowed. 26 C.W.N. 364. Where the property of a minor member of a Hindu family is alienated during his minority by a person who is not his guardian, either in fact or law, a suit by him to recover possession after attaining majority would be governed by Art. 144 and not Art. 44. 1922 L. 386. *See also* 107 I.C. I.C. 516=1928 N. 151. Where Art. 144 applies, it is for the plaintiff to prove his title and then the onus of proving adverse possession lies on the defendant. 32 I.C. 568; 1929 A. 753=51 A. 1042=134 I.C. 461 (All.) Article does not apply to suits for assessment of fair and equitable rent. 50 I.C. 908. Where a *malikhana* right was not enjoyed for 12 years, the right to sue for the money due on account of it, is barred. 21 I.C. 779=19 C.W.N. 410. Fishery right in another's water is not immovable property but an interest in immovable property. 12 I.C. 305=14 C.L.J. 572; 35 C.W.N. 1256. Projection of lanes is not immovable property. 138 I.C. 458=34 Bom.L.R. 395=1932 B. 224. But right to collect assessment of endowed lands is immovable property. 34 Bom.L.R. 1496. Melwaram right of the land in a zemindari when it consists of the imposition of the full assessment, would be an interest in immovable property. 1937 M.W.N. 189=1937 M. 303. Although the *equity of redemption in the case of a possessory mortgage* is an intangible thing, it is an estate in land and is fully capable of possession. A claim for it is one for possession of an interest in immovable property. A suit by the plaintiff as heir of the mortgagor for possession of a moiety share in the equity of redemption against the defendant who has obtained mutation exclusively in his favour is governed by Art. 144. 160 I.C. 922=1936 O.W.N. 243=1936 O. 168. Art. 144 would apply to a suit to recover a share by a Mahomedan heir from a person in management of the property. 31 Bom.L.R. 199=118 I.C. 785=1929 B. 141. Owner suing for possession—Jamabandis showing plaintiff as owner and defendants in possession—Land uncultivated for 12 years from two years prior to suit—Art. 144 applies and not Art. 142 —Defendant must prove adverse possession. 1929 L. 596. *See also* 1937 C. 343=41 C.W.N. 763 (Chowkidari lands). An inference of adverse possession may be drawn from circumstances, such as long possession and the absence of any proof of licence or agreement between the person in possession and the landlord. 130 I.C. 296=1931 A. 323. The word 'hostile' cannot be considered to mean that there must have been litigation on the subject between the parties. It is sufficient if it is proved that the title is entirely opposed to the interests of one and that the latter stood by and did nothing while the other person continued in possession in direct contravention of his alleged rights. 6 O.W.N. 829=1929 O. 433.

Constructive Possession.—Where lands are subject to periodical submersion, their possession is with the owner during submersion. The constructive possession is with the true owner. 44 C. 858=32 M.L.J. 505 (P.C.); 29 I.C. 278; 29 I.C. 156=19 C.W.N. 565; 58 I.A. 228=61 M.L.J. 632=1931 P.C. 162. Continuous adverse possession is not possible in the case of lands subject to seasonable submersion: 44 C. 858=32 M.L.J. 505 (P.C.). A mere assertion of hostile title by a trespasser when the land is under water and cannot be actually occupied, cannot affect the possession of the true owner. 20 I.C. 821=18 C.L.J. 274. *See also* 117 I.C. 202 (Pat.); 1930 L. 417 (1). Upon the grant of the surface rights by a zemindar, he is in constructive possession of the sub-soil, Cases as to adverse possession of mineral rights must ultimately fall to be decided under Art. 144, rather than under Art. 142. 50 I.A. 228=61 M.L.J. 632=1931 P.C. 162. The right of a trespasser by adverse possession is confined to land actually in his possession. 5 P.L.J. 273=56 I.C. 184. *See also* 16 L. 442=1935 L. 475 (F.B.); 1923 R. 23 (2); 1929 L. 625; 1930 L. 303. *Breaking of continuous* possession. *See* 140 I.C. 228=1932 S. 35.

Symbolical Possession, Effect of.—*See* 108 I.C. 396; 120 I.C. 602; 11 P. 165=1932 P. 145. Where *A* is in possession of the property adversely to the plaintiff, the plaintiff cannot by obtaining a decree against *B* and being placed in symbolical possession in execution of that decree thereby give himself a fresh start of limitation. 30 N.L.R. 284=148 I.C. 62=1934 N. 36.

Permissive Possession, Effect of.—*See* 1927 O. 582; 6 Luck. 136=140 I.C. 65=1930 O. 510 (uncle managing for nephew). Where a person is in possession of the property claiming only a lien over it for certain payment to which it is charged, he should not be considered to be in adverse possession. 134 I.C. 493=1931 L. 313; 16 N.L.J. 248; 142 I.C. 582=1933 C. 544; 1935 A.L.J. 662=1935 A. 569; 1930 L. 384. The mere tethering of cattle and storing of logs on a piece of waste land does not amount to a denial of the title of the true owner of the land; nor is it an indication of possession which is intended to be adverse to the title of the proprietor of the land. Where though foundations were laid, the land was never enclosed, it does not amount to an unequivocal assertion of an intention to appropriate the land. I.L.R. (1939) A. 217=1938 A.L.J. 1227=1939 A. 161.

Collusive Possession.—*See* 32 C.W.N. 863.

Acquisition of title.—The onus is on the defendant to plead and prove adverse possession for the statutory period in a suit for declaration of title based on the defendant's alleged repudiation of it. 37 I.C. 794 (39 M. 617, Foll.) As to acquisition of mining rights by adverse possession, *see* 58 I.A. 29=1931 P.C. 18=60 M.L.J. 183 (P.C.). In order to extinguish the right of the real owner, the adverse possession must be continuous. Acts of possession exercised at intervals over different portions of land in different years cannot amount to adverse possession. 57 I.C.

NOTES.

716. As to essentials for acquisition of title by adverse possession, *see also* 8 O.W.N. 1153. A defendant in order successfully to set up a title by adverse possession, must show that he was in possession of the land in such a manner as to indicate that he was claiming to be in possession as an owner and was intending to oust the plaintiff: 146 I.C. 987=1933 O. 462. Acquisition of title for limited interest. 19 I.C. 367 =17 C.W.N. 748. *See also* 30 I.C. 93=22 C.L.J. 153; 123 I.C. 695. There may be adverse possession of immovable property as well as any interest in it under Art. 144: 14 I.C. 212=16 C.W.N. 634; 1930 P. 476. A person in adverse possession of property claiming to hold it as *mutawalli* does not prescribe for more than a *mutawalli's* right in such property. 129 I.C. 375 =1930 A. 866. The quantum of interest acquired depends upon the *animus* with which possession is held by the person in actual possession of the property. Where there was an agreement to execute a usufructuary mortgage and it was under that agreement that the mortgagee came into possession then, though the usufructuary mortgage contemplated had not been executed, it must be taken that the mortgagee had been in possession only as a usufructuary mortgagee for the amount of the loan advanced. 123 I.C. 195. *see also* 1931 .A.L.J. 914; 14 P.L.T. 294; 54 A. 628=140 I.C. 653=1932 A. 393; 52 A. 976= 130 I.C. 697=1931 A. 18. The right of the mortgagor is not lost by the adverse possession of a trespasser for more than 12 years during the continuance of a usufructuary mortgage. The mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of the mortgaged porerty which he finds to be in possession of a trespasser, who denies his title to it. The period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption. 1935 A.L.J. 496=1935 A. 542. Adverse possession—Knowledge—Principal affected by agent's knowledge. 16 I.C. 891= 163 P.L.R. 1912. The possession of a judgment-debtor in spite of delivery of symbolical possession gives rise to a fresh cause of action for a suit for possession. 116 I.C. 70=1929 N. 298. So also possession of any person deriving subsequently title from judgment-debtor. 15 P. 372=17 P.L.T. 546=1937 P. 13. But where a party to the suit has symbolical possession given against him by methods informal, the said symbolical possession does not avail to stay adverse posession. 118 I.C. 391 (2)=1929 L. 545. *See also* 1933 A.L.J. 33=1933 A. 1733; 1933 P. 269. Where the land in actual possession of the judgment-debtor was in execution delivered to the decree-holder and subsequently the judgment-debtor dispossessed the decree-holder and regained possession, the decree-holder has 12 years from such dispossession to bring another suit for recovery of possession of the land. 140 I.C. 530 =1933 L. 22; 34 M.L.J. 97 (P.C.). A mere declaratory decree obtained in a suit under O. 21, R. 63 will not interrupt the adverse possession of the auction-purchaser in execution of the decree. 18 L. 255. Where the mother of an owner took possession of the property after her son's death and enjoyed to the exclusion of the son's widow who was the rightful heir, *held*, she had acquired title by adverse possession that and that it was not affected by the order of the mutation Court to the effect that she should have no power of transfer over the property. 10 O.W.N. 42=1933 O. 427. Where a Hindu widow who was in possession of the house left by her husband leaves it and lives in a rented house, and her mother-in-law continues to reside in the house, and on the evidence all that can be suggested is that she found it more convenient to live apart from her mother-in-law, it cannot be said that the occupation of the house by the mother-in-law alone after she left amounts to dispossession of the widow or that the possession of the mother-in-law is adverse to her. 1935 A. 639. Previous suit for possession and mesne profits of submerged land—Possession and mesne profits refused but declaration of title granted—Subsequent suit again for possession—Actual possession need not be proved. Plaintiff having established his title in the previous suit and not being barred by limitation was entitled to a decree 56 I.A. 305=1929 P.C. 225=57 M.L.J. 602 (P.C.). Where there has been an assertion of adverse title accompanied by the ouster of plaintiff, the mere fact that the plaintiffs subsequently obtained a declaratory decree, would not prevent the statute of limitation running against them. 120 I.C. 485=1930 L. 297. The possession by a vendee of *watan* lands becomes adverse from the date of the death of the alienor and a suit to set it aside will be barred if not brought within twelve years from that date by the *next watandar* or subsequent *watandar* claiming under the previous holder. 55 B. 21=1931 B. 24. District Fishery Board—Government prescribing as against District Fishery Board—Right of action vested in District Board not exercised—Collector being representative of Government and also President of District Board—Effect. *See* 31 L.W. 508=1930 M. W.N. 328. Hindu joint family—Possession of property as joint estate—Bar of plea as to separate estate. 32 Bom.L.R. 314. The space above the land is itself immovable property. So, a defendant who constructed a three-storied verandah projecting over the land of the plaintiff more than 12 years ago, acquires a right to the space occupied by such projection and the right to maintain it in its position. 151 I.C. 1094=1934 A.L.J. 846=1934 A. 1054. The mere planting of trees on another person's land does not amount to dispossession. 1930 O. 304. *See also* 1929 O. 328. But *see* 20 A.L.J. 208= 1922 A. 50; or the erection of a *khurli* or a mud trough for feeding cattle. 134 I.C. 294=1931 L. 489. Possession by intruder—Relinquishment before acquiring title by possession for 12 years —Leaves the rightful owner in the same position in all respects as he was before the intrusion took place. 120 I.C. 792=1930 L. 303. Person who loses his right to a holding by adverse possession should also be taken to lose his right in *shamilat* land appurtenant thereto. 134 I.C. 1106 =1931 L. 648.

Declaration of Title.—Art. 144 cannot apply to a suit for a declaration. 31 Bom.L.R. 1240. Where the property is in the actual possession of occupancy tenants, a suit for declaration and injunction regarding the right to collect

NOTES.

rent is a suit for possession to which Art. 144 applies. 34 Bom.L.R. 1469. Suit for confirmation of possession is not governed by Art. 144 or 142. 36 C.W.N. 783=1933 C. 842. Art. 144 and not Art. 120 applies to a suit for a declaration that a certain pathway is a public one and that none can obstruct it. To such a case S. 23 will apply. 69 I.C. 910=26 C.W.N. 587. A suit for possession and mesne profits with a declaration that an entry in the record-of-rights is incorrect is governed by the 12 years' limitation. 52 I.C. 361. *See also* 108 I.C. 417=1928 P. 353. Suit by one co-sharer against another for declaration of title and for possession is governed by this article. 155 I.C. 824=1935 A. 774. Whre a transfer is inoperative and a mere paper transaction, a suit to recover possession ignoring the transaction is governed by Art. 144. 25 Bom. L.R. 1207=48 B. 166. So also a suit to set aside alienation of a debutter property by a shebait in excess of his power. 9 I.C. 133. The wife of a Hindu lunatic as such is not competent to execute a sale-deed of her husband's lands and a suit by a reversioner after the death of both the husband and the wife to set aside the alienation is governed not by Art. 125 but by Art. 144; 42 M.L.J. 262=45 M. 361. Art. 44 and not Art. 144 applies to a suit by a ward who has attained majority, for possession of properties improperly alienated by his guardian. The sale is not void for an inadequate consideration. 28 I.C. 704=2 L.W. 365; 11 L.L.J. 108. *See also* 1931 A.L.J. 997. The possession of a purchaser under a void sale is adverse to the real owner. 47 I.C. 694.

POSSESSORY TITLE.—Possession of Government land for over 12 years throws the onus on the Government of proving possession or title within 60 years. But this rule does not apply to a public pathway even if possession is proved for over 40 years. 1 L.W. 758=27 M.L.J. 299.

POSSESSION PENDING SUIT.—Possession after institution of suit is not adverse. 29 I.C. 168.

PROOF OF TITLE.—Adverse possession must be adequate in continuity, in publicity and extent so as to show that it is possession adverse to the true owner. 41 M.L.J. 650=44 M. 883. *See also* 36 C.L.J. 472; I.L.R. (1939) Kar. 793; 1933 N. 274; 1933 M. 668; 144 I.C. 72=1933 L. 400; 50 I.C. 870; 1929 O. 328 (adjacent owner crossing boundary and planting trees and in possession for over 12 years). Where possession of the trespasser is open, visible and notorious in character, the Court may presume it to be adverse. 1932 O. 135=8 O.W.N. 1275. *See also* 142 I.C. 582 as to the essentials for adverse possession. Trespasser's possession of part of land—Adverse possession only to that area and not to the rest. 1929 L. 625.

BURDEN OF PROOF.—It is not necessary in order to establish adverse possession, that the proof of acts of possession should cover every moment of the requisite period. The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is capable. 61 I.A. 78=61 C. 262=1934 P.C. 23=66 M.L.J. 134 (P.C.). Case of adverse possession against Government as to fishery right in a navigable river. 66 M.L.J. 134 (P.C.). As to burden of proof in cases where the suit is based both on the ground of title *and on dispossession, see* 147 I.C. 805=11 O.W.N. 104=1934 O. 21; 1937 O.W.N. 585=1937 O. 328; 67 C.L.J. 115=1938 C. 689. Also as to the test of the applicability of Art. 142 or Art. 144 to any case, *see* 1934 O. 21. *See also* 1926 O. 313. If Art. 142 applies, the *onus* would be upon plaintiff to prove that his suit is not time-barred. It is otherwise if the case falls within Art. 144; for in such case, the *onus* would be upon the defendant to prove that his possession had been adverse to that of the plaintiff for more than 12 years. 8 R. 556=1931 R. 40. *See also* 7 R. 85=1929 R. 153; 1931 L. 251; 11 P. 165=1932 P. 145; 134 I.C. 599=1931 O. 382; 1933 A.L.J. 105; 143 I.C. 497=1933 A. 775=55 A. 209; 1933 N. 274; 141 I.C. 234=1933 L. 105. *See also* 61 I.A. 50=66 M.L.J. 431 (P.C.) noted *supra.* 1933 L. 722; 146 I.C. 725=34 P.L.R. 1007; 1933 S. 279=146 I.C. 777. (F.B.). Art. 144 applies to a suit in which the plaintiff sues for possession of immovable property on the basis of his title, and in such a suit, if the plaintiff proves, his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. 1933 A.L.J. 105; 168 I.C. 309=1937 O. 328. But where the trial Court required the plaintiffs to prove in the first instance that they were in possession within 12 years of the suit and it only required the defendants to prove adverse possession in the event of the plaintiffs failing to establish this fact and the plaintiff accepted this but failed to discharge the burden. *Held,* that he cannot subsequently complain that onus has been wrongly placed on him and that his possession must be presumed from title. 1934 L. 1019 (2). Where a party raises a plea of adverse possession the first thing he has to establish is that he had been actually in possession of the property. 1933 O. 283=10 O.W.N. 366; 8 O.W.N. 349=1931 O. 177. Where it was admitted that the lands were parti and jungle lands and that the plaintiffs had a title to it but the defendants claimed a limited tenancy interest only as against the admitted proprietor, the zemindar, *held,* that it was governed by Art. 144 and not by Art. 142 and that it was impossible for the judge in trying such a suit to raise any presumption against the plaintiff by reason of the absence of any witness on the part of the plaintiff. 149 I.C. 453 (2)=1934 P. 339. *See also* 1941 L. 241.

STARTING POINT.—A suit by a mortgagee auction-purchaser for possession of the mortgaged property against a lessee who is in possession thereof under a lease executed by the mortgagor after the execution of the mortgage, is governed by Art. 144 and not by Art. 120 as it is not necessary for the plaintiff to sue or pray for cancellation cf the lease. 12 Luck. 161=1937 O. 146. *See also* 1937 P. 13; (1940) 2 M.L.J. 190. An adverse decision in settlement proceedings was held to mark the starting of adverse possession despite the existence of fiduciary relationship between the parties before the event. 33 A. 125=21 M.L.J. 109 (P.C.). Survey officer's decision under Survey and Boundaries Act, S. 11 or S. 12—Adverse possession of unsuccessful party not affected by the decision—Computation of period of limitation. (1940) 1 M.L.J. 79. Starting point—Purchaser from Government—

NOTES.

Adverse possession. 28 C.W.N. 66=1924 C. 394. Symbolical possession is effective against a judgment-debtor though not so against a stranger to the suit. 18 I.C. 751=17 C.W.N. 324; 36 C.L.J. 472=1923 C. 82; 108 I.C. 396. The *terminus a quo* under Art. 144 is the date when the possession of the defendants became adverse to the plaintiff and not to any other person from or through whom he does not derive his right. 1923 L. 642. *See also* 56 I.C. 733. Planting of trees on another person's land is active trespass and would be adverse possession. 20 A.L.J. 208=1922 A. 50; 1929 O. 328. But *see* 1930 O. 304, *supra*. Art. 144 applies to a suit by an adopted son for the recovery of immovable property within 12 years from the date of adoption. 27 M.L.J. 569=25 I.C. 692. *See also* 133 I.C. 899 (A.). Where the transferee enters into possession under a deed of transfer which is *ab initio* void on the ground of immoral consideration, the transferor cannot recover the property if the transferee has been in possession for more than 12 years. 35 Bom.L.R. 345=1933 B. 209. *See also* 1941 P. 354=22 P.L.T. 239.

Special Cases—Co-owners.—Where a person has begun to hold possession of land adversely to two co-sharers, each being the owner of a moiety and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, atlhough he has become jointly interested with the other. 38 M.L.J. 313 (P.C.). *See also* 1939 L. 315. But as a general rule, in the absence of proof of ouster, possession of one co-owner or joint tenant is not adverse to other co-owners or joint tenants. 64 I.C. 462. *See also* 54 A. 628=140 I.C. 653=1932 A. 393; 16 R.D. 286; 42 P.L.R. 276=1939 L. 315; 1940 C. 93; 31 N.L.R. (supp.) 191; 15 R.D. 261; 1931 A. 551; 22 I.C. 574=12 A.L.J. 102; 52 I.C. 629; 55 C. 653=1928 C. 535; 100 I.C. 650; 11 Luck. 82; 102 I.C. 161; 1927 M. 111; 2 Luck. 172; 1927 M. 176; 29 Punj.L.R. 131=1927 L. 886; 107 I.C. 211; 32 P.L.R. 649 (Rule as to adverse possession among co-owners stated); 1928 C. 396; 1927 N. 395; 1933 O. 439; 1933 O. 560. (Co-owners—Denial of title—Knowledge of person outsted necessary), 114 I.C. 497=34 C.W.N. 246; 1929 P. 624; 31 P.L.R. 659; 1929 B. 424; 1929 A. 910; 1929 O. 257. *See also* 1929 B. 323. Co-sharers—Lessees from different co-owners—Adverse possession by one—Effect against tenure-holder. 60 C. 1212=37 C.W.N. 835. Where brothers and sister are co-sharers and are living amicably together, the brothers cannot establish title by adverse possession against the sister unless they had expressly set up an adverse title to her knowledge. 1932 A.L.J. 621=1932 A. 666. *See also* 1933 L. 784; (1937) 2 M.L.J. 606. In cases where the litigating parties are co-owners or co-tenants having an equal right to use property for a specified purpose, the presumption of law is that the possession of one is the possession of all. Every such person is seized of the property *per my et per tout*, and anything short of denial of title cannot destroy the plaintiff's right. 14 L. 267=1933 L. 705 (F.B.). To suits between co-owners or co-tenants *inter se* where the title of one is denied by the other, Art. 144 or Art. 120 would apply, according as the relief claimed is one for possession or injunction. 14 L. 267. The mere statement by some of the co-heirs that they are the exclusive heirs of the deceased cannot amount to an overt act which would make the statute of limitation run against the other co-heirs. In such cases in order to prove title by adverse possession there must be ouster. 131 I.C. 105=1931 L. 439. *See also* 134 I.C. 491. The mere fact that one of them was in exclusive enjoyment of a common well does not lead to the inference of ouster of the other co-owner. 12 L. 101=1931 L. 339. In order that possession may be adverse, there must be (1) a disclaimer of the others' right by and open assertion of a hostile title on the part of the co-owner setting up adverse possession, and (2) notice thereof to others, either direct or to be inferred from notorious acts and circumstances. 148 I.C. 926=1934 Pesh. 7; 18 R.D. 39; 1934 A.L.J. 544=1934 A. 193. But exclusive receipt of profits continuously for a long period may point to an ouster, if the Court is satisfied that such taking of profits is an indication of a denial of right in the other co-tenant to receive them. 58 B. 410=36 Bom.L.R. 284=1934 B. 273. Where the co-sharer has built his residential house on the land, it amounts to an assertion of hostile and exclusive title to the knowledge of the co-sharers. 148 I.C. 943=1934 L. 84 (1). The question whether the exclusive possession of a co-owner in a joint property amounts to ouster or not depends on the circumstances of each particular case. Different co-owners can be in exclusive possession of different portions of joint property. In such a case, the fact that one person constructs buildings is not such an injury as cannot be remedied in a partition suit. 32 P.L.R. 653=1931 L. 631. *See also* 8 O.W.N. 710; 8 O.W.N. 854=1931 O. 381. Some overt act necessary. 1927 L. 887; 7 R. 164; 1929 R. 211; 1930 O. 517. Overt act nullified by subsequent admission of title of true owner. 106 I.C. 814=1928 L. 317. If the person possessed of legal title to an estate is also in the enjoyment of the profits of that estate more or less, his title cannot be held to have been extinguished by reason of the physical possession of the estate held by another person who has no title to it. Such person cannot put an end to the possession of legal owner by any secret intention in his mind. There must be an ouster or equivalent to an ouster. 6 Luck. 106=130 I.C. 65 (2)=1930 O. 510. Co-owners—Purchaser from one has right to sue for joint possession. 60 I.C. 589=23 Bom.L.R. 60. Art. 144 applies where the question is between a co-parcener in a jointHindu family and a stranger. 37 B. 84=17 I.C. 657. *See also* 54 M.L.J. 394 (P.C.). Where an uncle and a minor nephew are members of a joint Hindu family and a mortgage is effected by the uncle comprising not only the share of the nephew but of the entire land of the uncle and the nephew *in a suit for possession* by the nephew on the allegation that he is the owner of the property, the uncle cannot be said to be a guardian of the plaintiff within Art. 44 and the alienation is effected by the manager of the joint Hindu family and a suit to set aside such an alienation is governed by Art. 144 and not by Art. 44. 152 I.C. 633=35 P.L.R. 722=1934 L. 601. *See also* 16 L. 237; 1936 L.

NOTES.

996. But Art. 44 and not Art. 144 would apply, where the suit is by the sole surviving co-parcener of joint Hindu family, after attaining majority, to recover property alienated by his mother as guardian during his minority, on the ground that the alienation was beyond her power. 59 M. 549=43 L.W. 611=1936 M. 346=70 M.L.J. 352. A suit by one co-owner of a waste channel for a declaration that he was in possession jointly with the defendants interested with him is not a suit for possession after dispossession and therefore the article applicable is not Art. 142 but 144. 55 I.C. 247=1 P.L.T. 192. As to co-sharers in a Mahomedan family, *see* 1927 L. 790=100 I.C. 145; 1933 L. 784. The mere fact that after the death of a Mahomedan, the mutation takes place in the name of son does not by itself show that he asserted his exclusive title in opposition to the claim of his step-mother, especially when the mother and son lived amicably and in one house. 148 I.C. 926=1934 Pesh. 7. *See also* 1940 A.M.L.J. 9. Co-owners—No interception of rent proved — No question of adverse possession. 1929 C. 237. Lease by some—No assertion of hostile title otherwise—Lessee's possession is not adverse to other co-owner. 56 C. 914=1929 C. 297. Application by one to the Municipality to build a wall does not amount to an ouster. 109 I.C. 68=1929 L. 195 (2). Title of other co-owners not denied except very lately—Statement before Revenue Court admitting permissive possession—No adverse possession. 1928 O. 449=112 I.C. 522. Where the title of the co-heirs relates to a number of properties, any assertion of adverse title with reference to any one of the properties might have some bearing upon the question of adverse possession. 131 I.C. 211=1931 A. 193. Where in prior proceedings, the party never took up the position that he had been in occupation adversely of more than his share except the *kothri*. *Held,* that he had failed to establish adverse title except as regards the *kothri*. 139 I.C. 676=1932 L. 421. There must be, on the part of the co-owner setting up adverse possession, a disclaimer of the other's right by an open and unequivocal assertion of a hostile title; mere entry of name in the Revenue Registers and mere non-enjoyment of produce are insufficient. 118 I.C. 207=1929 S. 212. Presumption as to posession not being adverse—Applicability in favour of transferee from co-owner. 56 C. 616=1929 C. 250; 1930 O. 475. There can be no difference in principle whether a person is the original co-owner or has become a co-owner by virtue of a transfer. The burden would be on the transferee to establish that the denial of title and ouster were brought to the knowledge of the other co-owner and in the absence of proof he would not be able to perfect his adverse possession. 54 A. 628=1932 A.L.J. 425=1932 A. 393. *See also* 1937 Pesh. 69. Where a plaintiff, who was a co-sharer with some of the defendants who transferred a part of the property to third parties, *admits in the plaint that he was dispossessed* by the transferees some time prior to the institution of the suit, Art. 142 applies and not Art. 144. 1934 A.L.J. 973=1934 A. 993 (F.B.). Where certain land belonging to several co-owners was sold by some of them to a stranger and possession of the entire land was given to the vendee, the possession of the vendee is adverse to the other co-owners who did not join in the sale. The rule has no application to such a case. 116 I.C. 890 (1). *See also* 1930 C. 180 (a case of religious office). *See also* 34 Bom.L.R. 354=1932 B. 255. Where a coparcener sells not his undivided share but a specific property of the joint family and puts the purchaser in possession, the latter's possession becomes adverse to the other members even though the property sold is less than the vendor's share in the joint property. 1937 Pesh. 69. Where some items of joint property were rightly or wrongly taken possession of by a stranger and passed out of joint family and the stranger having been in possession thereof for more than twelve years and acquired an indefeasible right to them by adverse possession, one of the joint family members purchased them from the stranger with his own money, in such a case, the possession of that member cannot be said to be the possession of a co-sharer. 60 C. 1406=149 I.C. 410=1934 C. 356. Mere absence of a co-sharer does not amount to adverse possession. 4 Luck. 329=13 R.D. 79; 15 R.D. 259. Entry into possession by some under an invalid sale, when there is no intention on their part to hold sole possession to the exclusion of the rest, is no adverse possession 4 Luck. 503=1929 O. 284.; nor is one co-sharer's writing post card to another denying right to partition. 1929 L. 519; nor an assertion of hostile title made in a suit to which the other co-owners are not parties. 32 P.L.R. 824. Mere entry of names in the mutation register is no indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of the other co-sharers was denied. 115 I.C. 440=1929 O. 337. The mere fact that a co-sharer brought a suit to eject a trespasser is no evidence of denial of title of the other co-sharers and does not therefore amount to ouster. 1929 O. 337. Knowledge of person ousted is necessary. 34 C.W.N. 246. Constructive notice is sufficient. 34 C.W.N. 246. But where a tenant-in-common has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Court may presume that there has been an ouster, in which case the possession of the other co-sharers will be adverse. 117 I.C. 636 =1929 P. 624. *See also* 132 I.C. 772=1931 O. 381; 58 I.A. 106=1931 P.C. 48=60 M.L.J. 386 (P.C.). It is sufficient if adverse possession is adequate, continuous and exclusive; the true owner must be vigilant and it does not prevent time from running, if he could have obtained, but did not actually obtain, knowledge of the adverse possession. 28 N.L.R. 282. The ouster takes place when the title of the other co-sharers is denied. Mere entry of the name of one co-sharer would not be proof of adverse possession. Also mere non-participation in the profits by one co-sharer and exclusive occupation by another would not constitute adverse possession against the former in favour of the latter. Further knowledge on the part of the person whose rights are invaded is an essential element of adverse possession. 119 I.C. 866=1929 O. 402; 32 P.L.R. 824. But *see* 1930 A. 845; 1930 A.L.J. 1456; where it was held that definite assertion of adverse possession is not necessary and cultivation by a co-owner of the entire land is adverse possession. 1930 A. 845. Where, in spite of a decree for

NOTES.

joint possession in plaintiff's favour and an order in execution for formal delivery of possession, the defendant resisted all attempts of the plaintiff and effectively prevented him from obtaining actual possession, the resistance, coupled with an open denial of plaintiff's title, amounts to an ouster. 55 A. 173=1933 A.L.J. 33=1933 A. 173. Co-sharers—Court-auction-purchaser of share—Delivery of symbolical possession—Suit to recover actual possession—Commencement of limitation is from date of symbolical delivery. 31 Punj. L.R. 519; 1930 L. 251. A mortgage of property by one alone does not by itself show that the act is an adverse one. It must be proved that the mortgage was made with the knowledge of the other members interested. (1929 M. 27, Foll.) 122 I.C. 105 (2)=1930 L. 251. Where co-owners trespassed on the adjacent land belonging to the plaintiff and the revenue records showed that one or other of them were in possession for over 12 years before suit, *held*, that it was not a case of independent trespasser, that possession by one of them was really possession for all and that the suit against them was barred. 131 I.C. 341=1931 L. 232. Where of the two co-sharers, *A* and *B*, of a part share in a house, *A*, gets a transfer of the other major share from *C* against whom *B* had set up adverse possession, the continuity of adverse title set up by *B* breaks and cannot prevail against *A* who was at the time of transfer, a co-sharer in the property. 134 I.C. 522=1931 L. 251. Co-heirs under the Mahomedans Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. Consequently, in the absence of ouster, such possession is not adverse to the other co-heirs. 109 I.C. 658. *See also* 1929 L. 464=10 L. 849; 119 I.C. 335=1930 A.L.J. 1456; 7 R. 744=1930 R. 72; 32 P.L.R. 381; 59 I.A. 74=54 A. 93=1932 P.C. 81=62 M.L.J. 371 (P.C.). The mere fact that he exclusively grants a lease is not enough. 131 I.C. 211=1931 A. 193. Co-heirs under Mahomedan Law—Non-participation in rents and profits for 17 years—No denial of title—Suit to recover share is not barred. 31 Bom.L.R. 199=1929 B. 141.

DEBUTTER PROPERTY...—Adverse possession will also destroy title in lands attached to an idol. 36 B. 135=12 I.C. 926. Strong facts may be necessary in order to establish adverse possession in any case in which there is a reasonable possibility that the possession is being held under the idol's title; but where a non-shebait is holding property in open derogation of the trust, a plea of adverse possession can be sustained. 60 C. 54=1933 C. 295=144 I.C. 792. There can be no adverse possession against an idol by the shebait. 1933 C. 295. A suit to set aside an alienation by a mahant of endowed property is governed by Art. 134. 1922 L. 271. *See also* 1927 M. 1163; 55 C. 448=1928 C. 130=32 C.W.N. 248; 2 Luck. 239; 105 I.C. 355=1930 P. 455; 1941 P.W.N. 75=22 P.L.T. 239=1941 P. 354. *Quære*: Whether the possession of two joint shebaits becomes adverse to the idol when they openly claim to divide the property between them. 60 C. 54=144 I.C. 792=1933 C. 295. Sale of property belonging to idol by mahant—Suit by succeeding mahant to recover possession--Starting point of limitation is from the date of alienation. 9 P. 885=1930 P. 455. *See also* 35 Bom.L.R. 368=1933 B. 253=144 I.C. 277. But *see* 12 P. 251 (P.C.).; 68 M.L.J. 499 (P.C.); 71 M.L.J. 105 (P.C.); 1939 C. 21, *infra*. Where a person enters into the possession of property as the mahant of math and holds it on behalf of the math until a certain compromise which he enters into with a rival claimant, the mere fact that the parties to the compromise purport to confer upon each other an unrestricted power of alienation in respect of the endowed property does not change the character of that person's possession, and he does not hold the property adversely to the institution from the date of the compromise. 62 I.A. 47=39 C.W.N. 433=1935 P.C. 44=68 M.L.J. 499 (P.C.). Under the law which obtained prior to its amendment by the Indian Limitation (Amendment) Act (I of 1929), the article applicable to a suit by a mahant to recover math property transferred by the preceding mahant is Art. 144, and the period of limitation does not begin to run until the death of that mahant. 68 M.L.J. 499=57 A. 159=62 I.A. 47 (P.C.); 43 C.W.N. 102=1939 C. 21; 1936 P.C. 183=71 M.L.J. 105 (P.C.). Where a Mahant alienates property appertaining to a math without any legal necessity, the alienation is not void but is good for the period during which the alienor is in office. Where a Mahant alienated the math properties without any necessity, a suit by his successor in office to recover the properties transferred, would be governed by Art. 144 and not Art. 134 and would be in time if brought within 12 years of the death of the alienating mahant. 12 P. 251=60 I.A. 124=1933 P.C. 75=64 M.L.J. 505 (P.C.). If the alienation is by way of a permanent lease, the succeeding mahant can continue the lease, in which case the lessee's possession will not be adverse until the death of that mahant. But when the alienation is by way of a gift, in the absence of evidence to show that the possession which became adverse when the original grantor died was kept permissive by subsequent conduct, the adverse possession counts from the date of the first mahant, and when completed by possession for the statutory period bars the title of the mutt. 152 I.C. 251=67 M.L.J. 430=1934 M. 624. As to lessee from the head of the math claiming adverse possession, *see* 13 L. 677=140 I.C. 604. A person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more than a mutawalli's right in such property and may acquire to that extent the status of a mutawalli. The right of the office and the right to the possession of property are distinct jural concepts. 1930 A. 866=129 I.C. 375. *See also* 40 P.L.R. 319=1938 L. 369 (suit relating to mortgage). Art. 134 does not apply to suits to avoid alienations of the generally endowed property vested in the Sajjadanashin and mutawalli of a wakf. Such suits are governed by Art. 144. Where as a result of the alienations the previous encumbrancers have been paid off, it cannot be said that there were several trespassers in succession so as to bar the true owner after the lapse of 12 years from the date of the earlier mortgage. 35 Bom.L.R. 252=1933 B. 217. Where a mutawalli completely transfers wakf property to a

NOTES.

stranger by sale or mortgage, the periof of limitation for a suit to recover that property begins to run from the date of the alienation. Distinction between cases of permanent lease and sale pointed out. 35 Bom.L.R. 252. A sale by the mutawalli of wakf property, where the wakf provides for the private benefit of the family of the grantee as well as for the public benefit of a mosque, is valid during the lifetime of the vendor, and a siut by the succeeding mutawalli for a declaration that the sale is invalid and for recovery of possession of the property sold for the mosque is in time, if instituted within 12 years from the date of the death of the mutawalli who sold the property. 31 L.W. 396=1930 M. 582=58 M.L.J. 524; 37 L.W. 737=64 M.L.J. 706. There is no distinction in this respect between a lease and a sale. 1933 M. 533=37 L.W. 737=64 M.L.J. 706. Where a sale-deed is a mere paper transaction and inoperative a suit by the vendor for possession of the property is governed by Art. 144 and not by Art. 91. I.L.R.(1940)Lah. 546=41 P.L.R. 657=1939 L. 544. Where one of the *wahivatdars* sold his share of the endowed properties, limitation for a suit by another *wahiwatdar* or his representative to set aside the alienation on the ground that the properties were inalienable would run from the date of the alienation. 34 Bom.L.R. 1469. As to adverse possession of debutter property, *see* 60 C. 54=1933 C. 295 and 137 I.C. 487=1932 M. 328=62 M.L.J. 496 (Theory of perpetual minority of idol examined); 1932 A.L.J. 836; 34 Bom.L.R. 1469 (Right to collect assessment of endowed land). A permanent lease of debutter property by a *dharmakartha* when not justified by necessity for the preservation of the endowment, is valid during the tenure of office of the *dharmakartha* and is not void *ab initio* so as to make the possession of lessee adverse from the date of the lease. The proper date from which the adverse possession generally runs in such cases is the date of death, resignation or removal of the *dharmakartha* from office. 63 I.A. 261=59 M. 809=1936 P.C. 183=71 M.L.J. 105 (P.C.). It is, however, within the power of each successive *dharmakartha* to authorise, create or continue a new tenancy, and where the successor permits the lessee to continue in possession and receives rent during his tenure of office, the receipt of rent must be deemed to be with the knowledge, which must be imputed to him, that the tenancy created by his predecessor ended with his predecessor's tenure and can therefore only be referable to a new tenancy created by himself; and so with each successive *dharmakartha* and consequently the possession of the lessee does not become adverse till anything happens which takes the case out of the operation of the principle. 59 M. 809 (P.C.). So also in cases where lease is partly for necessity and partly not so. 162 I.C. 325=1936 M. 262. A trustee of a choultry alienated property belonging to the choultry as his own. He did not purport to pass title as manager of the choultry. *Held*, that the alienation was void, *ab initio* and possession of the alienee became adverse from the date of the alienation and not from the death of the trustee. 180 I.C. 462=1938 M. 60.

LANDLORD AND TENANT.—The article governs a suit by lessor for possession against a trespasser who has wrongfully dispossessed the lessee who was holding over. 57 I.C. 994. *See also* 1938 A.L.J. 561 (suit for possession under lease). In a suit by a landlord to eject the tenant, the Court must consider the length of the defendant's possession and the title claimed by him. If the tenant had been claiming occupancy rights for over twelve years, the right of the landlord is to sue for assessment of rent. 52 I.C. 650=29 C.L.J. 607. *See also* 30 I.C. 946=22 C.L.J. 151; 30 I.C. 942=22 C.L.J. 147; 1930 O. 310 (alleged tenant claiming an adverse possession). 1940 O.W.N. 990=1940 A.W.R. (cc.) 458 (suit by zemindar to recover possession of land after removal of structures and newly planted trees etc). Art. 144 has no application to a landlord's assertion and the tenant's denial of the right to enhance the rent of the holding. 43 I.C. 59=22 C.W.N. 856. But if the relation of the landlord and tenant subsists, a claim for assessment of rent and for mesne profits does not fail on the ground of adverse possession. 30 I.C. 917=22 C.L.J. 122. *See also* 45 C.W.N. 126. As to applicability of article to suits by landlord against tenant, *see also* 30 I.C. 896=22 C.L.J. 129; 55 I.A. 210=1928 P.C. 146; 1927 L. 759; 7 P. 341; 1928 C. 47; 28 I.C. 708=19 C.W.N. 136; 15 I.C. 64=16 C.W.N. 929. A tenant cannot hold adversely to his landlord by the mere fact of his encroachment. It is necessary that his adverse enjoyment should have been brought home to the notice of the landlord. 151 I.C. 256=1934 A. 722 (1). Mere non-payment of rent does not necessarily imply adverse possession. 134 I.C. 1037 (L.). It would not create any title to hold rent free by adverse possession. 1933 P. 175=145 I.C. 527. A suit to set aside an alienation of *sarva* inam property made by the holder thereof must be brought within 12 years from the death of the alienating inamdar. Limitation runs from the date of the death of the alienor. 176 I.C. 586=40 Bom.L.R. 400=1938 B. 331. The doctrine that possession of one co-owner is possession of all co-owners cannot apply to a case between the landlord and the tenant. 117 I.C. 636=1929 P. 624. The entry of the names of persons as tenants *bila faisla* is inconsistent with their possession being adverse. Such entries should be presumed to be correct unless they are rebutted. The mere fact that they have been in possession for a long time or that they had not paid any rent for the land cannot establish title by adverse possession. 12 R.D. 622=1929 O. 370. *See also* 1930 C. 339; 13 L. 432=1932 L. 586; 1933 P. 656. But where land was originally grove land but no rent was ever paid for 60 years and the grantee built upon the land without protest on the part of the landholder: *Held*, that the grantee acquired title by adverse possession and was not liable for rent. 149 I.C. 807=1934 A. 288. Landlord and tenant—Notice of ejectment—Reply notice by tenant claiming occupancy rights—Rent paid as usual—Possession of tenant whether adverse from date of notice. 1929 B. 197. The possession of agricultural land by a tenant cannot be adverse to the landlord even though the tenant might formerly have been a village zemindar. 6 O.W.N. 829=1929 O. 433. *See also* 1940 O.W.N. 990. A lessee cannot claim adverse possession for

NOTES.

himself during the lifetime of the head of the mutt who granted him the lease. 13 L. 677=140 I.C. 604; 1929 M.W.N. 840. *See also* 13 L. 482=140 I.C. 474=1932 L. 586. Limited right—Void lease of unrecognised sub-division of bhag—Possession of lessee for upwards of twelve years—Acquisition of title by prescription. 32 Bom.L.R. 930. Landlord and tenant—Use of land as *khalwara* for storing manure and allowing others to store manure—Possession is permissive, not adverse. 1930 L. 384; 1939 A. 161 (tethering of cattle and storing of wood and timber). Whatever possessory right a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the " tenancy at sufferance " is heritable. The son of such tenant cannot style himself as a tenant holding over. His possession is nothing better than that of a trespasser. His possession is clearly adverse to the owner of the land and would ripen into a prescriptive title by 12 years possession. 30 N.L.R. 155=148 I.C. 561=1934 N. 67. *See also* 1938 A.W.R. (B.R.) 363=1938 R.D. 602 (Art. 144 does not apply to proceedings under Agra Tenancy Act). A suit for possession by the recorded occupancy tenant dispossessed by one of the body of landholders is governed by 12 years' rule of limitation. S. 99 of the Agra Tenancy Act does not apply to it. It applies only when the landlord is also the landholder. 14 L.R. 218 (Rev.). A holding was purchased at Court-sale but the purchaser got only formal delivery of possession. After about 25 years, the purchaser surrendered the holding to the landlord and the landlord filed a suit for ejectment of the judgment-detbor describing him as an under-raiyat under the purchaser. *Held*, whatever right the purchaser obtained by the sale was lost by efflux of time, that there was nothing for the purchaser on the date of surrender to surrender in favour of landlord and that the suit should be dismissed. 145 I.C. 613=1933 P. 269.

MORTGAGOR AND MORTGAGEE.—It is not open to a mortgagee by denying the existence of a mortgage to curtail the period of limitation provided for a suit for redemption. 1923 A. 613 (1); 26 A.L.J. 149; 6 P. 102. Mortgagor and mortgagee—Adverse possession as between. *See* 25 I.C. 611. *See also* 109 I.C. 795; 14 I.C. 513; 13 I.C. 852. In case of possessory mortgage, *see* 107 I.C. 612=1928 L. 147. *See also* 1932 A.L.J. 474=138 I.C. 366=1932 A. 437; 42 Bom.L.R. 399=1940 B. 225. In the case of an invalid mortgage, the mortgagee prescribes as such and the result is in the ordinary circumstances that, after the period of limitation expired, he is entitled to retain possession until his mortgage is redeemed. Adverse possession is limited to the intention of the person in possession. 144 I.C. 439=14 P.L.T. 294=1933 P. 288. Under Art. 144 the possession of the mortgagor, who redeems the mortgage, does not become adverse as against his co-mortgagor when he recovers possession of the property on redemption. 1922 P. 129; 1923 P. 98; 2 Luck. 618=4 O.W.N. 713. *See also* 1930 N. 300=127 I.C. 889. But *see* 8 O.W.N. 637; 1938 R. 65; 32 P.L.R. 649; 32 P.L.R. 622=1931 L. 744; 132 I.C. 261 (O.). His possession would become adverse only when there is an open assertion of title by him of an exclusive title in himself. 141 I.C. 404=1933 L. 91=34 P.L.R. 239. As to conflict of decisions regarding the applicability of Art. 148 to such case, *see* the cases cited on the point under Art. 148. The plaintiffs mortgaged four survey numbers with possession to *Y*. Subsequently the plaintiff sold the equity of redemption in two of the plots to *G* and the defendants. Later on the defendants successfully sued to redeem the original mortgage, but did not implead the plaintiffs as parties. The plaintiffs having sued to redeem the mortgage and recover possession of the several items, *held*, that the decree for redemption which the defendants had obtained created a charge in their favour by virtue of S. 95, T. P. Act, and that the suit by the plaintiffs to recover possession was governed by Art. 144 and not Art. 148. *Held, further*, that the defendants acquiring the property did not hold as co-sharers and that limitation commenced to run from the date of the posession after redemption. 57 B. 134=35 Bom.L.R. 48=1933 B. 114. Mortgage suit—Execution of second mortgage with possession pending—Plaintiff placed in symbolical possession in suit—Same is equivalent to actual possession—Suit for recovery of actual possession—Starting point of limitation is the date of the said symbolical possession. 33 C.W.N. 963. *See also* 15 P. 372=17 P.L.T. 546. Where a person was in undisturbed possession for 25 years under color of an invalid mortgage deed, his possession was with the permission of the mortgagor and that the latter could recover possession of the property. (79 I.C. 232, Rel. on.) 1928 A. 552. The possession by a mortgagee of mortgaged properties is not *prima facie* adverse to the mortgagor. Also the mere payment of the mortgage-money without more cannot amount to adverse possession by the mortgagee after the date of payment. 33 C.W.N. 963; 120 I.C. 789 (2). Mortgagor and mortgagee—Equity of redemption conveyed to mortgagee—Sale held to be invalid—Possession under sale is not adverse. 53 B. 676=31 Bom. L.R. 778. As between the mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. The proceedings relating to mutation of names in favour of the mortgagee under a void deed of sale does not change the character of possession so as to enable the mortgagee to obtain a title by adverse possession. 118 I.C. 808=1930 O. 17. In the case of possessory mortgage, where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. 1929 P. 639. So also adverse possession against the mortgagor does not affect the right of the mortgagee when it commences after the mortgage. 50 C.L.J. 317=1930 C. 313=34 C.W.N. 519. Where a tenant borrowed a certain sum of money from the *malguzar* and usufructuarily mortgaged the holding to him and the malgazar leased the holding to another person in contravention of the rights which the mortgagor had, *held*, that the possession of the *malguzar* and his lessee was adverse to the mortgagor. 118 I.C. 74. *Malikhana qazba* re-

NOTES.

amining in possession of *shamilat* plots—Landlord's title not acknowledged—Title by adverse possession acquired. 12 L.L.J. 161. Sale of part of mortgaged property to mortgagee in possession —Discharge of mortgagee—Mortgagee continuing in possession of the remaining property also is adverse possession. 1930 C. 402. Where, during the plaintiff's minority, the equity of redemption in certain property owned by him was sold by his guardian, and the purchaser redeemed the property and was in possession ever since the purchaser's possession was adverse to the plaintiff from the commencement. 134 I.C. 366=33 Bom.L.R. 604. Where the plaintiff sued for possession as mortgagee of a certain land on the basis of a mortgage deed which was compulsorily registered and the suit was brought 12 years after the execution of the mortgage deed but within 12 years of the completion of its registration. *Held*, that, although under S. 47 of the Registration Regulation, the title of the plaintiff dated back to the date of the execution of mortgage-deed, it was not until the registration was completed that he became entitled to take possession and the possession of the defendant became adverse only from that date and the suit was, therefore in time. 37 P.L.R.J. & K. 23.

MINOR.—*See* 1937 O.W.N. 1012=1937 O. 521. Where the mother and her adult son executed a conveyance on behalf of two minor members also, and one of the minors did not repudiate the transaction on attaining majority but the other did, *held*, that the suit was governed by Art. 144 and time began to run from the date when the ward attained majority. 52 A. 768=1930 A.L.J. 852. Alienation by guardian—Subsequent transfer by alineee—Suit by ward against second alienee—Limitation. *See* 1938 M.W.N. 403. The possession of a *defacto* guardian or of his mortgagee as a derivative owner cannot be legally deemed to be adverse to the minor but when the *de facto* guardian effects a sale of the minor's property, the possession of purchasers would become adverse since the date they got into possession. 1930 M. 708 (2). Mahomedan minor of tender years living with his uncle who is managing the minor's property by family custom. Uncle's possession is not adverse to minor. 6 Luck. 106=7 O.W.N. 988=1930 O. 510. *See also* 1936 L. 996; 42 Bom.L.R. 208 (alienation by Hindu grandfather—Suit to set aside by after-born grandson—Limitation). 5 O. W.N. 832 as to adverse possession, against minor.

HUSBAND AND WIFE.—Where husband and wife are in joint possession, no question of adverse possession arises. 108 I.C. 435.

MALABAR FAMILY.—*See* 98 I.C. 860=1927 M. 244; 39 M.L.T. 211 (moplah tarwad).

REVERSIONER—SUIT BY.—As a remote reversioner's right is not derived from or through the nearer reversioner, possession adverse to the latter will not be adverse to the former. 4 L.L.J. 201=1922 L. 37. Adverse possession against widow is not so against reversioner. 101 I.C. 822=1927 N. 226. *See also* 1 L. 210=56 I.C. 733; 52 I.C. 8; 39 I.C. 204. During the lifetime of the limited owner, the possession of her property by her alienees cannot be adverse to the reversioners so as to destroy their contingent rights. [51 A. 188 (F.B.), Foll.] 154 I.C. 293 =1933 A. 493=1933 A.L.J. 1185. Where a sale is good for the lifetime of the alienating proprietor, the possession of the vendee can become adverse only after the death of the testator. 131 I.C. 105=1931 L. 439. On the death of the widow, with a life-estate, the share of the estate which stood mutated in her name went into the possession of her daughter. She died more than thirty years later. In a suit by the reversioners after the death of the daughter, *held*, that their right to sue arose on the death of the widow and as the daughter had no right to get possession on the death of her mother, her possession was adverse to the reversions and their suit was barred. 150 I. C. 519=11 O. W. N. 736=1934 O. 265. The rights of adopted son come into existence on the date of his adoption, and from that date he becomes entitled to possession of all the immovable properties belonging to him as against those who challenge and ignore his rights. Time for a suit for possession runs against him from that date, or, in case he is a minor at the time, from the date on which he attains majority. Merely because his adoption is disputed, and is subsequently declared to be valid by the highest Court of appeal several years later, it cannot be held that the cause of action for a suit for possession of the property accrues to him on the decision of the highest Court of appeal. The cause of action for a suit for possession of the property by him accrues in any event on his attaining majority, if not earlier. I.L.R. (1939) B. 173=40 Bom. L.R. 1134=1939 B. 1.

HINDU WIDOW.—Widow entitled to maintenance continued in possession after the death of step-son—Her possession is not adverse to reversioners. 57 M. 815=1928 M. 820 (2). *See also* 1931 O. 25. Where a widow who is only entitled to maintenance out of her husband's estate enters into possession of the property of her husband who was a member of a joint Hindu family at the time of his death, her possession of the share of her husband is *prima facie* adverse, unless it can be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited share of a Hindu widow. 6 Luck. 365=129 I.C. 328=1931 O. 25 (on the facts of this case, it was held that the widow prescribed only for a limited estate). *See* 8 O.W.N. 6=130 I. C. 849=1931 O. 89 (2) (where a Hindu widow acquired adverse possession as of right for over twelve years). A suit by a Hindu widow to recover possession of her deceased husband's estate is governed by Art. 144. 60 M.L.J. 619=131 I.C. 758=1931 P.C. 84. The holder of a life-estate and the remainderman should be considered as one and the holder of the life-estate under a will cannot as against the will assert an adverse title derived independently against the remainderman. 6 O.W.N. 549=119 I.C. 337=1929 O. 494. Widow entitled under custom to husband's property only during life—Invalid will by husband giving her full ownership—Suit by ultimate heirs for possession —Article applicable is 141 and not 144. 1936 O. W.N. 1123=1937 O. 4.

RECEIVER, POSSESSION OF—EFFECT.—1927 M. 61; 7 P. 319=1928 P. 260.

SERVICE TENURE.—If a land is held on service

Description of suit.	Period of limitation.	Time from which period begins to runs
	Part IX.—Thirty years.	
145. Against a depositary or pawnee to recover movable property deposited or pawned.	[Thirty years] ..	The date of the deposit or pawn.

NOTES.

tenure to be enjoyed as remuneration for services, the fact that no services have been performed for any length of time cannot by itself make the holding adverse. In order to make the possession adverse, there must be a refusal to perform the service or a claim to hold the land free of service. 1933 M. 668. *See also* 1940 M.W.N. 404=A.I.R. 1941 M. 217.

Tacking.—Having regard to the definition of "plaintiff" in S. 2, sub-S. (8) of the Limitation Act, a plaintiff claiming title by adverse possession cannot "tack" the possession of an independent trespasser from or through whom he does not derive his right to sue. [*Dixon* v *Gayfere*, (1853) 17 Beav. 421=51 E.R. 1097, Rel. on.] But a mortgagor can, for the purposes of the Limitation Act, avail himself of and "tack" on to his own adverse possession the adverse possession of his mortgagee. 61 I.A. 78=61 C. 362=1934 P.C. 23=66 M.L.J. 134 (P.C.). *See* 1923 N. 274.

Trusteeship.—The person concerned can sue for obtaining control or management of a religious institution within 12 years under Art. 144 when misapplication is not proved and the defendant does not deny the fact of his being a trustee. 43 M. 253=37 M.L.J. 460 (on appeal from 33 I.C. 216=1915 M.W.N. 657). As between co-trustees, *see* 39 M.L.T. 214=1927 M. 948. If a person could extend the time for suing by alleging that he had mistaken the meaning of an instrument, a most serious inroad would be made into the law of limitation and that quieting of title which is the reason for and the policy behind the statutes of limitation would be gravely disturbed. Hence, if a trustee alienates property which he honestly believes to be his own but which on a true construction of the deed of trust belongs to the *cestui que trust* time, which the trustee allows to pass owing to this mistake, counts when computing limitation for suit against alienee for possession. 180 I.C. 462=1938 M. 60.

Partition Suit.—Suit by an heir for his share in a Mahomedan's property is governed by Art. 144 and time runs from the date when the attempt to exclude or deny his right is made. 58 I.C. 42=44 B. 943. *See also* 1922 L. 193. Art. 144 applies to a suit for partition between tenants-in-common although a tenant has acquired his rights by a purchase at Court auction. 29 I. C. 976=28 M.L.J. 642. Art. 144 and not Art. 127 is applicable to a suit by one member of a family against another who is separate and divided from him for possession of immovable property which is not joint family property. Art. 144 also applies to a suit by such a divided member to recover possession of property which has continued undivided after the division of the members of the family, because such property is no longer "joint family property". 58 I.A. 106=1931 P.C. 48=60 M.L.J. 386 (P.C.). *See also* 31 N.L.R. (Supp.) 191=162 I.C. 577=1936 N. 80. As to suit to reopen a partition and to readjust the shares of the parties thereto, on the ground that certain properties allotted to the share of the plaintiff really belonged to a third party, *see* 54 M. 883=1931 M. 907=61 M.L.J. 430 cited under Art. 96.

Waste Land.—As to adverse possession in respect of, *see* 1927 L. 753; 100 I.C. 51. In respect of follow land, possession must be taken to follow title. 106 I.C. 130. *See also* 100 I.C. 51=1927 L. 230; 98 I.C. 880. In the case of waste land, possession is presumed to be with the owner and the mere fact that the owner has allowed his land to remain waste does not amount to a discontinuance of possession. 120 I.C. 792=1930 L. 303; 1923 L. 25. There is no rule to the effect that adverse possession cannot be acquired in respect of waste lands. 117 I.C. 636=1929 P. 624. Tethering of cattle, keeping dung cakes, building a khurli and passing over the vacant site do not amount to adverse possession. 11 L.L.J. 91=115 I.C. 71=1929 L. 432. But they, taken in conjunction with the fact that the defendant had enclosed the land in dispute which had been in existence for a period much longer than twelve years, would be sufficient proof of adverse possession. 1934 L. 684.

Miscellaneous.—A person obtaining possession under a pre-emption decree should be deemed to be in actual, physical, exclusive and continued possession. 13 R.D. 707=1929 O. 433. Possesssion if not permissive is adverse. It may be adverse even to the vendor in a case between the vendor and the vendee. (4 B. 89, Rel. on.) 33 C.W.N. 117=119 I.C. 123=1929 C. 218. Distinction as to starting point in case of void and voidable transfer. *See* 1938 M. 60. Licence to build—Licensee not repudiating title of owner—Plea of adverse possession by licensee is not sustainable. 31 Bom.L.R. 310. Where a conditional decree for possession has not been executed, the possession of the defendant becomes adverse to the plaintiff which would mature into ownership after 12 years. 133 I.C. 555 (L.). Lease by agent of principal's property—Suit to set it aside is governed by Art. 144. 1931 M.W. N. 856. When a dismissed *archaka* continues in possession although another has been appointed, his possession is adverse and a suit brought more than 12 years from the date of dismissal is barred 150 I.C. 156=39 L.W. 513=1934 M. 381. Art. 134-B has no application to a transfer of wakf property by a person who professes to make the transfer in his own right and in a secular capacity. The only article which can have any application to such a case is Art. 144, and limitation begins from the date on which the transferor obtained possession of the disputed property in the assertion of a hostile title to the wakf. 73 C.L.J. 475.

Art. 145.—A suit to recover deposited goods

Description of suit.	Period of limitation.	Time from which period begins to run.
146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immovable property mortgaged.	[1][Thirty years] ...	When any part of the principal or interest was last paid on account of the mortgage debt.
146-A. By or on behalf of any local authority for possession of any public	[Thirty years] ...	The date of the dispossession or discontinuance.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and ch. I, for "Ditto"

NOTES.

is governed by Art. 145. 8 L.W. 401=33 M.L.J. 577; 41 M. 620=34 M.L.J. 399. A depositary's depositary is not contemplated in the Act. 1940 Lah. 254. The word "deposit" extends to all cases where one man's property is handed by that man to another. 44 M.L.J. 431=17 L.W. 467. Unless there is something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all. 61 C. 119=58 C.L.J. 502=1934 C. 87. "Deposit" in this Act has the same meaning as in the previous Limitation Acts and means a deposit of goods to be returned *in specie* (*depositum* of Roman Law). 24 I.C. 852=37 M. 175. A suit by the heir or legal representative of a deceased employee for recovery of a sum of money deposited by the employee with his employer as security for good conduct is not governed by Art. 145. The article was never intended by the Legislature to apply to such a case. 20 Pat.L.T. 777=1939 Pat. 688. Where certain promissory notes remain with defendant, having been left by the plaintiff as security or at any rate for safe custody, then on either view, not Art. 49 but Art. 145 is the relevant article applicable to a suit in respect of such notes. 1938 A.L.J. 264=47 L.W. 649=1938 P.C. 110 (P.C.) The word "deposit" does not cover a transaction of the nature of a loan which can be more appropriately described as a contract of bailment. 126 I. C. 682=7 O. W. N. 769=1930 O. 395. There is only a thin difference between a loan and a deposit; where the arrangement is that the money handed over is to be paid to a third party on demand or on the happening of a specified event, the transaction is a deposit and not a loan. 1916 (1) M.W.N. 206=34 I. C. 347. Art. 145 is a special article applicable where the depositor seeks to recover from the depository moveable property deposited, and time runs from the date of deposit. 69 I.C. 900=26 C.W.N. 772; 6 R. 547 (jewels). The rule of limitation applicable to a suit against a depositor to recover movable property, even when the property is not recoverable *in specie*, is that contained in Art. 145. 22 C.W.N. 232=34 I.C. 959 (7 C.W.N. 476=35 I.C. 519, Foll.). Entrustment of jewel for raising loan—Loan repaid but jewel not returned—Suit for recovery of same—Limitation. 35 M. 636=22 M.L.J. 152. *A* deposited his jewellery with his friend *B* at the time of *B's* marriage to be used by him for the purpose of the wedding on condition that it would be returned whenever *A* asked for it. *Held*, that the transaction was a deposit and not a loan and the mere fact that *B* was allowed to use the jewellery did not take the transaction out of the category of deposit as that expression is used in Art. 145, and Art. 120 has no application. 1930 L. 913. This is so even when the jewel was used unauthorisedly. 1930 M. 364. Suit to recover gold and ornaments from a goldsmith or their value is governed by this article. 107 I.C. 473. *See also* 20 N.L.J. 198. A suit to recover pictures and manuscript is ordinarily governed by Art. 145, but when they are not returned on demand, Art. 49 would govern the suit and time runs from date of refusal. 41 A. 643=55 I.C. 45. G. P. notes belonging to two brothers of a joint family *D* and *G* were given as security for the service of *G*. In spite of a subsequent partition between them, the notes remained with the employer until *G* retired from service when the G.P. notes were given back to him and soonafter he died. In a suit by the heirs of *D* against the heirs of *G* for recovery of their share, *held* that the suit was governed by Art. 145 and not by Art. 49. *Held, further*, that the character of the transaction in so far as it was a deposit was not altered by the death of the depositary but that his heirs, in whose hands the thing deposited came, became depositary within the meaning of Art. 145. 61 C. 119=58 C.L.J. 502=1934 C. 87.

Art. 146.—Mortgage of oil-well—Further advance—Article applicable. 24 I.C. 310=1 L.W. 695 (P.C.).

Art. 146-A.—Art. 146-A applies only where the local authority suing has been dispossessed or has discontinued its possession; in other words, it contemplates prior possession of the land by the local authority which it subsequently loses by reason of any act done by the defendant or otherwise. The article can obviously have no operation in a case where the local authority is found not to have been in possession at all. Where at the date the Union Board was created, possession of the land was with the defendant, and the Union Board seeks to recover the land as part of a public road to which it became entitled upon its creation under the Act of its incorporation, it must sue for such recovery within 12 years from the date of its establish-

Description of suit.	Period of limitation.	Time from which period begins to run.
street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.		
	Part X.—Sixty years.	
147 By a mortgagee for foreclosure or sale	[Sixty years] ...	When the money secured by the mortgage becomes due.
148. Against a mortgagee to redeem or to recover possession of immovable property mortgaged.	[1][Sixty years] ...	When the right to redeem or to recover possession accrues :

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

ment under Art. 144. To such a case Art. 146-A has no application. 45 C.W.N. 802=1942 Cal. 151=73 C.L.J. 608. An open assertion of hostile title is not necessary to start limitation under Art. 146-A. Possession, provided it is not permissive or in the alternative discontinuance of possession by the Municipality is quite sufficient to make limitation run against the Municipality. 196 I.C. 648=1941 Pesh. 76. A Municipality loses its right to demand the removal of an encroachment and to recover the land encroached upon if a suit for possession of the land is not instituted on its behalf within 30 years of its having been dispossessed of it. 196 I.C. 648=1941 Pesh. 76. Operation of—Removal of encroachment by Municipal Committee. 159 I.C. 639. As to applicability of Art. 146-A, *see* 32 C.W.N. 396=1928 Cal. 485. "Road," meaning of—Suit for ejecting person in occupation of road site, *see* 1928 Cal. 485=32 C.W.N. 396. An application under sec. 364 (1), Calcutta Municipal Act, is plainly not a suit and therefore Art. 146-A, Limitation Act, which applies only to suits cannot apply to such an application. 40 Cr.L.J. 870=1939 Cal. 470.

Art. 147—Art. 147 applies not to foreclosure proceedings under the Regulation but to such suits for foreclosure as under the law then in force could be brought. 17 I.C. 467=10 A. L.J. 522. *See also* 74 C.L.J. 61.

Art. 148 : SCOPE OF ARTICLE.—In the absence of a special provision entiiting the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But the parties may agree that the mortgagor might discharge the debt within the period and take back the property, in which case the period of limitation for redemption commences as soon as the debt is discharged and not from the expiry of the terms provided for in the deed. 36 A. 195=41 I.A. 84=26 M.L.J. 474 (P.C.). On appeal from 29 A. 471. *see also* 160 I.C. 1066=1936 P. 63. Art. 148 is applicable to redemption of usufructuary mortgage and recovery of possession despite part of the consideration having become void. 35 M 114=21 M.L.J. 169. *See also* 1930 O. 270. (simple mortgage with a default cause as to delivery of possession).

APPLICABILITY OF ARTICLE.—*See* 1927 L. 828; 1936 Pat. 63 ; 1927 O. 457 ; 1 Luck. 529 ; 1927 A. 311. In the case of a mortgage by conditional sale executed before 1882, *i.e.*, before the T. P. Act came into force the mortgagor has a statutory right under the Bengal Regulations I of 1798 and XVII of 1806 to redeem within any stipulated period provided in the deed. Therefore even if there had been only a period of some years in the deed, the statutory right existed by which the mortgagors could have redeemed from the date of execution and a suit for redemption brought after more than 60 years would therefore be barred by the period of limitation under Art. 148 I.L.R. (1939) All. 990=1939 A.L.J. 1127=1940 All. 29. When a mortgage deed provides that, if the mortgagor pays the mortgage-money in the month of any Jeth within ten years, the property would be redeemed, and that, if the property is not redeemed within ten years, the mortgagee would become its owner, the mortgagor's right to redeem arises on the first Jeth succeeding the date of the mortgage, and a suit for redemption instituted more than sixty years after the first Jeth would, therefore, be barred by time. 1936 A.L.J. 1358=1937 A. 32. *See also* 1940 Mad. 639. Where a plaintiff in a suit for redemption of a Malabar kanom (usufructuary mortgage) seeks to dispossess persons who have been in possession for about 72 years, he should be required to prove posititively that there is a subsisting mortgage which he is entitled to redeem and that must be proved by actual proof that the mortgage was executed within the period of limitation or by proof of a valid acknowledgment which would save limitation. It is enough for him to prove that the mortgage was executed in a month of which the last 28 days would be within limitation and the first two days outside. There is no legal presumption that an event took place on any particular day within the month in which it is known to have taken place. No such presumption, if one exists, can take the place of positive proof of the actual starting point when a suit is challenged as barred by limitation. 1940 M.W.N. 446=1940 Mad. 639. Suit by puisne mortgagee for redemption of a prior mortgage is governed by Art. 148 and Art. 132. 14 L. 596=34 P.L.R.

Description of suit.	Period of limitation.	Time from which period begins to run.
		Provided that all claims to redeem arising under instruments of mortgage of immovable property situate in Lower Burma which had been executed before the first day of May, 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.
149. Any suit by or on behalf of the Secretary of State for India in Council, [1][the Secretary of State, the Crown Representative, the Central Government or any Provincial Government] [2][except a suit before a Federal Court in the exercise of its original jurisdiction.]	[3][Sixty years] ..	When the period of limitation would begin to run under this Act against a like suit by a private person.

LEG. REF.

[1] Inserted by A. O., 1937.

[2] Inserted by Act XIV of 1937, S. 2.

[3] The words "sixty years" was substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto"

NOTES.

502=1933 L. 503. *See also* 1937 Nag. 205 ; 33 C.W.N. 1067=1929 C. 609 (F.B.). Mortgage—Redemption by purchaser of equity of redemption of part of the mortgaged property—Suit by owner to recover possession governed by Art. 144 and not Art. 148. 57 B. 134=35 Bom.L.R. 48=1933 B. 114.

ILLUSTRATIVE CASES.—Where one of several mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for redemption against the redeeming mortgagor. Art. 148 is applicable. 20 A.L.J. 611=1922 A. 410 ; 38 A. 540=36 I.C. 452 ; 1929 A. 100 ; 1930 N. 300=127 I.C. 889 ; 1933 A. 228=144 I.C. 152. But *see also* 41 M. 650 ; 1923 L. 311 ; 8 O.W.N. 637 ; 43 Bom.L.R. 194=1941 Bom. 178. A co-owner redeeming the whole of the mortgage is not a mortgagee but a mere chargeholder and a suit by the other co-owners for possession on payment of a proportionate part of the mortgage-money is governed by Art. 144 and not by Art. 148. 41 M. 650=34 M.L.J. 528 ; 46 C. 411=45 I.C. 783 ; 32 P.L.R. 622=1931 L. 744 ; 32 P.L.R. 649 ; 132 I.C. 261=8 O.W.N. 637 ; 1933 L. 91=34 P.L.R. 239 ; 160 I.C. 933=1936 P. 60. But *see* 1922 A. 410 ; 38 A. 540 *supra*. [S. 92 (newly added) of the T. P. Act gives the right of subrogation to a co-mortgagor who redeems the entire mortgage and it would seem that he is in the position of a mortgagee and not that of a mere chargeholder with the result that a suit for redemption against him would be governed by this article.] Time begins to run from the date of the redemption of the mortgage by the redeeming co-mortgagor. 127 I.C. 889=1930 N. 300. *See also* 1938 Rang. 65. Purchaser of equity of redemption in part—Suit for redemption of another purchaser—Limitation. 40 A. 633 ; 47 I.C. 833. *See also* 18 A.L.J. 995. A claim of a mortgagor for recovery of over-payment or the surplus profits received by the mortgagee is a relief included in a suit for redemption and is governed by Art. 148. 26 C.W.N. 123=1922 C. 189. *See also* 103 I.C. 290=1927 N. 302. Art. 144 could not be invoked by the mortgagee if the mortgagor was not barred by Art. 148 from redeeming and recovering possession of the mortgaged property. 37 M. 423=23 M.L.J. 339. Where a mortgagee transfers the property as proprietor and subsequently gets possession of the property before the transferee acquired a title by 12 years' possession, the mortgage is subject to redemption within the period given by Art. 148. 52 I.C. 159. In the case of transfers by mortgagees, Art. 134 applies only where the transferee has acted in good faith. In other cases, the suit to redeem against him is governed by Art. 148. 132 I.C. 184=1931 L. 464. This article applies to suit by puisne mortgagee for redemption of prior mortgage. 1935 O.W.N. 40=1935 O. 139. Where the puisne mortgagee has already obtained a decree for sale on his mortgage without making a prior mortgagee a party, he is entitled to redeem a prior mortgage in a subsequent suit and the subsequent suit is governed by Art. 148 and not by Art. 132. 33 C.W.N. 1067=1929 C. 609 (F.B.); 1937 Nag. 205. And so also a suit by a puisne mortgagee for redemption of a prior mortgage against the auction-purchaser in a suit on the prior mortgage to which the puisne mortgagee was not impleaded as a party. 1934 A. 946. A co-mortgagor who redeems a mortgage is subrogated to the position of the mortgagee, and a suit against him for redemption by the other mortgagor or mortgagors is governed by the rule of limitation prescribed by Art. 148. Time begins to run from the due date of the mortgage and not from the date of redemption by the co-mortgagor. Merely because the co-mortgagor has redeemed the mortgage, time does not cease to run against the other mortgagor or mortgagors. 19 Pat. 938=21 Pat.L.T. 702.

Art. 149: SCOPE AND APPLICATION OF

SECOND DIVISION : APPEALS.

Description of Appeal	Period of limitation.	Time from which period begins to run.
150. Under the Code of Criminal Procedure, 1898, from a sentence of death passed by a Court of Session.	Seven days	The date of the sentence.
[1][150-A. Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days	The date of the finding.]
151. From a decree or order of any of the High Courts of Judicature at Fort William [2][Madras, Bombay and Lahore in the exercise of its original jurisdiction.	Twenty days ...	The date of the decree or order.
152. Under the Code of Civil Procedure, 1908, to the Court of a District Judge.	Thirty days ..	The date of the decree or order appealed from.

LEG. REF.

[1] Inserted by Act XII of 1923 S. 42.

[2] The words "Madras Bombay and Lahore, and Rangoon" were substituted by Act VIII of 1930, S. 2 and Sch. I, for "Madras and Bombay or the Chief Court of the Punjab or the Chief Court of Lower Burma," and the words "and Lahore" were substituted by A. O., for "Lahore and Rangoon."

NOTES.

ARTICLE.—Where land belonged to the Crown when it emerged out of the sea and plaintiff claims adverse possession against Government, he has to prove possession for the full period of 60 years. Proof of less period does not shift the onus on to the Government to show that plaintiff's possession began within 60 years. 39 M. 617=31 M.L.J. 324 (P.C.). (On appeal from 33 M. 1=20 M.L.J. 66); 16 I.C. 626=12 M.L.T. 159 is not now good law. When adverse possession is asserted as against the Government, it is not necessary that the adverse character of the possession should be actually brought home to the knowledge of the Government. It is sufficient that the possession be overt and without any attempt at concealment, and if the rights of the Government have been openly usurped, it cannot be pleaded that the fact was not brought to its notice. Apart from the longer period of limitation allowed to the Government by Art. 149, there is no discrimination in the Act between the Government and the subject as regards the requisites of adverse possession. 61 I.A. 78=61 C. 262=1934 P.C. 23=66 M.L.J. 134 (P.C.). Fishery rights in navigable river—Adverse possession against the Government Evidence of. 61 C. 262. All unoccupied sites are Government property unless an individual can establish in his own right a title to such unoccupied property either by proving that he got a title better than the title of the Government or that he has obtained a title by adverse possession, that is to say, by possession for 60 years. 45 B. 789=61 I.C. 440. Natham poramboke—Erection of a pucca thatched building and enclosing land by *kalli* fence—stray trees on the land—Effect. *See* 101 I.C. 96=25 L.W. 349=1927 M. 456. Suit by Government against Municipal Councillors for embezzlements of Municipal money by Municipal servant is governed by Art. 149. 40 B. 166=33 I.C. 428. Benefit of adverse possession against Government whether accrues to the purchaser from Government. 28 C.W.N. 66=1924 C. 394. Where Crown land had been handed over to a Municipal Committee for management, a suit for possession by the Committee against the defendant who has interfered with their possession is governed by Art. 149. 36 P.L.R. 251=1934 L. 960. Railway Company in management of Government lands—Grant of license in respect of such lands—Suit against licensee for mesne profits—Limitation. 17 Pat. L.T. 206. *See also* 18 Pat. L.T. 486=1937 P.W.N. 535=1937 Pat. 568 (Land acquired by Government for Railway under Land Acquisition Act).

Art. 151.—The expression "date of the decree" in the third column means the date the decree is directed to bear, *i.e.*, the date when the judgment is delivered and not when the decree is actually prepared or signed. 19 I.C. 410=17 C.W.N. 959. *Also* 25 I.C. 67 and 25 M.L.J. 560. "Decree or order—" Meaning of. *See* 4 R. 265=1927 R. 20.

Art. 152.—Art. 152 read with C. P. Code, O. 20, R. 7, is conclusive on the point that the "date of the decrees" for the purpose of calculating appeal time must be taken to be the date on which the judgments were pronounced. 25 I.C. 66=38 B. 653. A money decree against different defendants at different times in not consolidated decree against all for purposes of the Limitation Act, and limitation in respect of each decree runs from the date on which it was passed. 31 I.C. 917. Under Art. 152 there is no question of knowledge of the party regarding the date of the

Description of Appeal.	Period of limitation.	Time from which period begins to run.
153. Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council.	[3][Thirty days] ...	The date of the order.
154. Under the Code of Criminal Procedure, 1898, to any Court other than a High Court.	[3]Thirty days] ...	The date of the sentence or order appealed from.
155. Under the same Code to a High Court, except in the cases provided for by article 150 and article 157.	Sixty days ...	The date of the sentence or order appealed from.
156. Under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by article 151 and article 153.	Ninety days ..	The date the decree or order appealed from.

LEG. REF.

[1] Subsitituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto."

NOTES.

decree or judgment. 1936 L. 742. The "*date of the decree*" in Art. 152 is the date when the judgment is delivered in accordance with O. 20, R. 7, C. P. Code, and not the date when the Acts whether sufficient to constitute adverse possession—Government granting treepatta of decree is signed or prepared. In a case where the decree, or the judgment and the decree are amended on an application under S. 152, C. P. Code, the judgment or decree is not superseded in the eye of law, such amendment does not give the appellant a fresh starting point of limitation for filing his appeal. The time for filing the appeal runs from the date when the original judgment was pronounced, and if it is filed beyond time, the time can only be extended on an application made under S. 5 of the Limitation Act. 40 C.W.N. 83=165 I.C. 53.

Art. 154.—The 'order' contemplated by Art. 154 is the finding that is recorded under S. 476, Cr. P. Code, and consequently time for appeal begins to run from the time when the finding is recorded or is supplemented by an actual complaint. The fact that an appellant may not know that a complaint has been filed till after 30 days prescribed by Art. 154, have expired is immaterial as the appellate Court can excuse the delay under S. 5 of the Act. 52 B. 164=108 I.C. 26=1928 B. 64. Where a Court refuses to complain under S. 476, Cr. P. Code, it amounts to an order to the effect that it will not complain and an appeal is governed by Art. 154. 1931 M.W.N. 1064. The decisions in 40 C. 239; 1 L. 602 and 39 M. 750 holding that applications made to a higher Court in proceedings under S. 195, Cr. P. Code, are not appeals to which the article is applicable, are not good law. The time for 'filing' an appeal under S. 476-B, Cr. P. Code, has according to Art. 154 to be computed from the date of the complaint. But, if the person against whom the complaint is filed is ignorant of the filing of such a complaint, and on coming to know of it files an appeal within 30 days of his knowledge in such a case time can be extended under S. 5. 1938 N.L.J. 183.

Art. 155.—Application for leave to appeal under S. 449, Cr. P. Code, is governed by the 60 days' period under this article. 54 C. 52=101 I. C. 657=1927 C. 307. *Also* appeal to High Court under S. 476-B, Cr. P. Code. 104 I.C. 466=1927 C. 718. In cases coming under Ss. 562 and 563, Cr. P. Code, the proceedings fall into two parts—the sentence does not immediately follow the conviction but that does not deprive the person convicted of the right given him by S. 408 of appealing against either conviction only, or sentence only, or both. A person against whom a conviction is recorded under S. 562 and who is subsequently sentenced more than 60 days after the recording of the conviction can appeal against the sentence if he does so within 60 days from the date of the sentence. 1940 Rang.L.R. 386=1940 Rang. 257.

Art. 156.—Where judgment is pronounced on one day and the decree is to be passed on a later date on plaintiffs complying with a certain condition, time begins to run for purposes of appeal from the date of the decree. 34 I.C. 867=9 S.L.R. 193. Appeal to High Court—Starting point of limitation—Date of judgment. 28 Punj.L.R. 132=100 I.C. 909. *See* 135 I.C. 858=1932 R. 54. *See also* 1941 Pesh 74. Although rules of the Lahore High Court require that an order of appointment of a guardian of property of minor should be conditional on furnishing a bond, still, where the order appointing a guardian is not in these terms, it becomes final on the date on which it is passed and not on the date on which the security furnished is accepted and the period of limitation begins to run from the date of the order. 41 P.L.R. 592=1939 Lah. 170. Where an *ex parte* decree was set aside by the Court which passed it within the appealable period and therefore no appeal was thereafter competent to the defendant but the High Court, in revision, restored the *ex parte* decree, limitation runs only from the date of the order of the High Court reviving the *ex parte* order and not from the date of the *ex parte* order itself. The language of the third column should be so interpreted as to carry out the intention of the legislature, that is to say,

Description of suit.	Period of limitation.	Time from which period begins to run.
157. Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months ...	The date of the order appealed from.
THIRD DIVISION : APPLICATIONS.		
[1] [158. Under the Arbitration Act 1940, to set aside an award or to get an award remitted for reconsideration.	Thirty days ..	The date of service of the notice of filing of the award.]

LEG. REF.

[1] Substituted by Act X of 1940.

NOTES.

by dating the cause of action from a date from which the remedy is available to the party. 54 M. 455=1931 M. 149=60 M.L.J. 239. A subsequent amendment of decree relating to a clerical error as regards interest does not extend limitation for filing the second appeal where the question of interest was not attacked in the second appeal. L.R. 3 A. 27. Art. 156 applies to appeals to the High Court under S. 54 of the Land Acquisition Act. The expression "an appeal under C. P. Code" in the first column is not restricted to appeals the right to prefer which is conferred by the C. P. Code, but covers appeals, the procedure with respect to which is governed by the C. P. Code. 43 M. 51=37 M.L.J. 110. Per *Suhrawardy, J.*—If a decree is amended either by way of review or under S. 152 of the C. P. Code, the decree to be appealed from is the amended decree and no appeal should therefore lie from the original decree. The time for appeal should be reckoned from the date of the amended decree. 35 C.W.N. 251; 133 I.C. 571=1931 C. 578. Time for appeal from preliminary decree runs from the date of that decree and not from the date of final decree. 37 C.W.N. 179=146 I.C. 359=1933 C. 796. Where on an application for review of a dismissal of an appeal, the application is admitted, the appeal re-heard and a fresh decree dismissing the appeal is passed on different grounds, a fresh period of limitation for the appeal begins to run from the date of the new decree. 27 I.C. 732. For purposes of appeal, the time taken in review proceedings ought to be deducted. The fact that the review application is unsuccessful does not affect this rule. 11 Lah.L.T. 37. Memo. without copy of judgment would not save time. 1 P. 670=1922 P. 580. Where the power-of-attorney authorising the counsel to appear in the case contained some formal defects, which were rectified after the period for filing appeal expired, *held*, that the appeal should be deemed to have been filed on its first presentation. 134 I.C. 114 (L.). The period during which the Court is closed should be excluded under S. 4, 130 I.C. 265=1931 P. 60. From the next day after delivery of judgment the Court was closed for annual vacation. After the re-opening, excluding the time taken up for application for copy of the judgment the appeal was presented on the ninetieth day. *Held*, that the appellant was entitled to exclude the period of the vacation and that the appeal was in time (20 C.W.N. 1303 and 1929 P. 615, Foll.) 146 I.C. 931.

Art. 157.—Though the period of limitation for appeals against acquittals is six months, such appeals should be filed as early as possible. 10 R. 312=1932 R. 146. Appeal against order of acquittal in case tried by jury—Effect and scope of S. 449, Cr. P. Code—Limitation governed by this article. 151 I.C. 662=38 C.W.N. 854=1934 C. 610.

Art. 158.—Limitation under Art. 158 for objections to an award begins from the date of notice of filing of the award and not from the date of filing of the award. 63 I.C. 399=19 A.L.J. 404. But *see* 27 I.C. 371=8 S.L.R. 190, *contra* and 13 I.C. 234=5 S.L.R. 125; 29 C. 167. An application to set aside an award must be made within 10 days of the filing of the award and notice of such filing given to the parties. 1924 P. 153. Under Art. 158, three things are necessary for fixing the starting point of limitation (1) the award must have been filed; (2) in Court, and (3) notice of the filing has been given to the parties. Where the arbitrator handed over the award to the Reader during the absence of the Judge on leave, and the Judge resumed his duties on a later date and in the presence of the parties passed an order directing them to file objections within the time prescribed by law. *Held*, that the period prescribed under Art. 158 ran from the later date. 44 P.L.R. 249. (*See* now Act X of 1940). The word "Court" in Art. 158 means Court and not the chief ministerial officer, *e.g.*, the Registrar in the case of a High Court. 46 C. 721=53 I.C. 46=23 C.W.N. 280. The period of 10 days is to be computed from the day on which the parties receive notice of the submission of the award and not from the day on which it is actually received. 42 I.C. 266. A Court has no jurisdiction to pass a decree in terms of the award within 10 days allowed by Art. 158 for filing objections to the award. 45 M. 466=42 M.L.J. 303; 40 L.W. 364=1934 M. 619=67 M.L.J. 377. "Parties" in Art. 158 cannot be confined to parties personally but includes pleaders and other persons specially authorised by the parties to take notice. 1930 A.L.J. 995. Period requisite for obtaining copy of an award should be allowed while computing period for filing objections to the award. 142 I.C. 835=1933 R. 38. The mere fact that the parties agree to be bound by the award and not to object thereto does not prevent them

Description of suit.	Period of limitation.	Time from which period begins to run.
159. For leave to appear and defend a suit under summary procedure referred to in section 128 (2) (*f*) [2][or under Order XXXVII] of the [Code of Civil Procedure, 1908.]	[1][Ten days] ..	When the summons is served.
160. For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days ...	When the application for review is rejected.
161. For a review of judgment by a Provincial Court of Small Causes or by a court invested with the jurisdiction of a Provincial Court of Small Causes when exercing that jurisdiction.	[3][Fifteen days] ...	The date of the decree or order.
162. For a review of judgment by any of [4][the following Courts], the High Courts of Judicature at Fort William, Madras [Bombay, Lahore [5](* *) and the Chief Court of Sind] in the exercise of its original jurisdiction.	Twenty days ..	The date of the decree or order.
163. By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay cots of service of process or to furnish security for costs.	Thirty days ...	The date of the dismissal.

LEG. REF.

[1]The words "or under Order XXXVII" were inserted by Act XXX of 1925, S. 3, and the words "Ten days" in the second column were substituted by Act XI of 1923, Sch. I.

[2]Substituted by Act X of 1940.

[3]The words "Fifteen days" were substituted by Act XI of 1923, Sch. I

[4]The words in brackets were respectively inserted and substituted by Act X of 1927. *See also* Act XXXIV of 1926, S. 3 as to Sind. [*See also* Notes under Art. 164.]

[5]Words "and Rangoon" omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

from impeaching award on the ground of collusion. 15 L.W. 160=45 M. 466. Thert is no limitation for making an application to remit an award for re-consideration of the arbitrators owing to an illegality apparent on the face of it. 47 I.C. 597=8 L.W. 171. Art. 158 does not apply to the case of an application under para. 20, Sch. 2, C. P. Code. The application contemplated by Art. 158 is the application which is mentioned in para. 16, Sch. II. 1936 Pesh. 135. Art. 158 applies only to objections under para. 15 of the C. P. Code, Sch. II, *i. e.*, where the application is to set aside the award completely. Where the application, on the other hand, is only for the modification or remission of the award, it comes within para. 12 or para. 14 of the second schedule of the C. P. Code, and Art. 158 is not applicable thereto. 1933 A.L.J. 519=1933 A. 648. Art. 158 cannot possibly apply to a written statement by the defendant in an application to have an award made a rule of Court. 13 I.C. 520=14 O.C. 308.

Art. 159.—Scope—Conflict with Rr. 100 and 101, Rangoon Small Cause Court Rules. *See* 14 Rang. 728.

Art. 161.—*See* 24 C.W.N. 380=56 I.C. 551.

Art. 163.—SCOPE AND APPLICATION OF ARTICLE.—If a *plaintiff* or appellant seeks to set aside an *ex parte* order, limitation runs only from date of the order, but if a *defendant or respondent* seeks such relief, he can in cases where he has not had due notice, count limitation from the date of his knowledge of the order. 1 L. 363=58 I.C. 789; 1932 P. 557. *See also* 163 I.C. 274=38 P.L.R. 697=1936 L. 495. The benefit which the law allows only to a defendant or respondent cannot be allowed to an appellant. (*Ibid.*) Art. 163 is intended to be strictly followed and the Court has no discretion to enlarge the period of 30 days therein prescribed. 53 I.C 55. *See also* 107 I.C. 193=23 N.L.R. 185=1928 N. 91. Where, in an application under O. 9, R. 9, the Court granted an extension of time not known to law, *held*, that the order was illegal and must be set aside in revision. 52 C.L.J. 23. An application for restoration of a suit dismissed for default, by the representative of the deceased plaintiff more than 30 days after the dismissal is time-barred. 14 I.C. 221. An application to set aside the dismissal for default of a previous application for restoration under O. 9, R. 9, C. P. Code, made the very next day after such dismissal is clearly within time even though made more than thirty days after

Description of application.	Period of limitation.	Time from which period begins to run.
164. By a defendant, for an order to set aside a decree passed *ex parte*.	[1][Thirty days] ..	The date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree.

LEG. REF.

[1] The words "Thirty days" were substituted by Act XI of 1923, Sch. I, for "Ditto".

NOTES.

the dismissal of the suit for default. 1937 O. W.N. 372=1937 Oudh 344.

Art. 164: OLD AND NEW ACT—APPLICABILITY.—Limitation to be applied is that under the law existing at the time when the application was made. 37 A. 597=30 I.C. 573. If the right of defendant to make an application was lost under Art. 164 of Act of 1877 the provisions of Art. 164 of the new Act of 1908 cannot revive the right having regard to S. 6 of the General Clauses Act, 1897. 15 I.C. 551 =39 C. 506.

SCOPE OF ARTICLE.—It is only when summons is not duly served that ignorance of decree saves limitation. 108 I.C. 753. Art. 164 governs an application to set aside an *ex parte* decree passed on the original side of the High Court. Such an application should therefore, be made not later than thirty days from the date of the decree or the date of the applicant's knowledge of the decree. 46 C.W. N. 280. Where a suit was adjourned at the instance of defendant's counsel, but the defendant or his counsel did not appear on the adjourned date, and the suit was decreed *ex parte*, *held*, that the case was not one where the summons was not duly served. 1931 L. 268. Knowledge of the suit on a particular date is wholly immaterial; knowledge of the decree within 30 days is material for eomputing time. 1930 L. 397. *See also* 1931 L. 268.

CONSTRUCTION—NATURE OF KNOWLEDGE OF DECREE.—The knowledge of the decree mentioned in Art. 164 is knowledge of the particular decree and not a knowledge of a decree. A vague information about there being a decree is not sufficient for the period of limitation to run against the applicant. The question whether the knowledge which an applicant had on a particular date can be said to be a knowledge of the decree, is practically a question of fact, and in a case where applicant filed an application for time in the execution proceedings, from the fact that he knew that a decree was under execution, it cannot be inferred that he had complete information about the decree. 18 Pat.L.T. 72=1937 P. 17. *See also* 47 B. 485; 27 N.L.R. 53=134 I.C. 279= 1931 N. 119. 'Knowledge' in Art. 164 means certain and clear conception of a fact, *i.e.*, of the decree in the particular case and not of a decree. 38 C. 394=15 C.W.N. 399. *See also* 99 I.C. 621=1927 M. 381; 46 I.C. 777. The time is 30 days from the date of the applicant's knowledge of the decree and not 30 days of the knowledge of the suit. 1933 P. 279=12 P. 745=14 Pat.L.T. 326.

BURDEN OF PROOF.—Where application to set aside *ex parte* decree is made more than 30 days after date of decree, the onus is on defendant to show that he presented the same within 30 days of his having knowledge of decree. 109 I. C. 82; 1930 L. 191; 1929 L. 235; 107 I.C. 284; 139 I.C. 131 (L.). *See also* 164 I.C. 286 =1936 R. 305; 1926 L. 379; 1938 Cal. 535.

SCOPE AND APPLICATION.—The limitation laid down in Art. 164 applies to the case of a defendant only. 24 I.C. 27; 41 C. 819. *See also* 38 M. 442=21 I.C. 568; 25 A.L.J. 1032 (deposit under S. 17, Provincial Small Cause Courts Act). Art. 164 applies not only to decrees but to orders in executions which are decrees in Civil Procedure Code. 37 M. 462= 26 M.L.J. 189. An order under O. 21, R. 50, sub-cls. (2) and (3) granting leave to execute the decree against a partner is not a decree and consequently Art. 164 can have no application. 31 Bom.L.R. 995=1929 B. 386. A decision given under S. 152, C. P. Code, granting an application for amendment of a decree is an order and not a decree. Hence an application to set aside such an order is governed by Art. 181 and not by Art. 164. 145 I.C. 823=1933 R. 264. Time cannot be extended under S. 151, C. P. Code, or Limitation Act, S. 5. 1922 L. 266; 144 I.C. 394 (Nag.) The mere fact that the original application to set aside an *ex parte* decree which was made in time was consigned to the record room would not in any way necessitate a fresh application. 55 I.C. 824. A subsequent application must be considered as merely one in continuance of the suspended original application. Consequently no question of limitation arises in such a case. 55 I.C. 824. An application to set aside an order of adjudication of an insolvent passed *ex parte* has to be made under O. 9, R. 13, C. P. Code, and is governed by Art. 164: 138 I.C. 347=1932 L. 522. The limitation applicable for setting aside an *ex parte* decree under S. 150 of the Companies Act of 1882 is that provided by Art. 164. 1 L. 187 =55 I.C. 820. Act not applicable to proceedings on the ortginal side of High Court. 32 C.W.N. 411. Application to set aside *ex parte* decree—Security bond filed with application, but not verified—Verification after limitation period. *Held*, that the bond, though not verified in the first instance, was perfectly good and effective and that the application was within time. (29 A.L.J. 1049, Ref.) 1933 A.L.J. 992=1933 A. 933. *See also* 11 O.W.N. 1639= 1935 O. 35.

MEANING OF WORDS—"DEFENDANT".—The word "defendant" is wide enough to include the executor of the original defendant (since deceased) though not on record. 38 M. 442.

"SUMMONS."—The summons referred to in Art. 164 is the summons for the first hearing

Description of application.	Period of limitation.	Time from which period begins to run.
165. Under the Code of Civil Procedure, 1908, by a person dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	[Thirty days] ..	The date of the dispossession.

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto."

NOTES.

of the case, and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or some other cause and a case in which a suit is remanded for retrial by the appellate Court. The underlying principle in such cases is that where the existence of the suit has been brought to the notice of the defendants by due service of a summons on them, it is their duty thereafter to inform themselves of what is being done in the case. 154 I.C. 429=1935 Pesh. 7.

"DULY SERVED."—The words "duly served" in Art. 164 are used in the same sense as in O. 5, R. 19 of the Code, and means "served" in such a manner as to give the defendant information of the proceedings taken against him. 42 I.C. 611=11 S.L.R. 71. *See also* 1928 M. 655=54 M.L.J. 448; 1928 M.W.N. 49=1928 M. 815; 1927 M. 507=52 M.L.J. 477; 1927 M. 487=52 M.L.J. 512; 38 C.W.N. 1066; 1939 Rang. 436. A defendant, who has been duly served cannot get an *ex parte* decree set aside, unless he can show that he was prevented unavoidably from appearing at the hearing and Art. 164 is a bar if he does not seek to set it aside within 30 days after the decree. 27 I.C. 351=8 S.L.R. 153. Duly 'served' in Art. 164 cannot be construed to exclude a case where a summons was not served in sufficient time. 27 I.C. 351. In the case of substituted service a summons is duly served for the purpose of Art. 164, even though it does not in fact come to the defendant's knowledge and as time runs from the date of the decree in such cases, an application for setting aside an *ex parte* decree made after the expiry of 30 days from the date of the decree is clearly barred by limitation. 131 I.C. 344=1931 L. 118. In the case of substituted service, the article lays down that when the order is rightly made and the service directed by the order is properly effected, knowledge of the defendant is immaterial and time runs from the date of the decree. 122 I.C. 35=1930 M. 222; 1931 O. 369=132 I.C. 778. Where, however, an order for substituted service is improperly obtained, as being made on insufficient material contained in an application supported by affidavit, the summons cannot be said to have been duly served within the meaning of Art. 164, and the time accordingly runs not from the date of the decree but from the date when it first came to the knowledge of the defendant. 122 I.C. 35=1930 M. 222; 1924 L. 191. Substituted service cannot always be deemed to be due service within the meaning of Arts. 164 and 169. Due service is one which has achieved the object of service by bringing the claim against him to the knowledge of the defendant or respondent. 134 I.C. 1202=1931 M. 813=61 M.L.J. 920. *See also* 1931 M. 812=61 M.L.J. 931; 1931 A.L.J. 1049=1931 A. 727 (F.B.); 1939 Rang. 436=1939 Rang.L.R. 606.

NOTICE.—Where summons is once served, absence of notice of adjourned hearing will not attract the application of Art. 164. 57 I.C. 15; 139 I.C. 354=1932 L. 539. Article does not apply to a case where the defendant alleges service of summons but that he had no knowledge of any of the proceedings. 13 I.C. 642; 1912 M.W.N. 361. The notice of the application for final decree being as effectual as if it had been served on him personally, the limitation for his application to set aside the *ex parte* decree runs from the date of the decree. 1923 N. 13. Where the summons is served on a defendant too late to afford him sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons 'duly served' within the meaning of O. 9, R. 13, C. P. Code. In such cases the Court ought to issue fresh summons. An omission on the part of such a defendant to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful so as to carry with it the consequence of "knowledge". Such a defendant will be within time if he applies for setting aside the *ex parte* decree within 30 days of actual knowledge of the decree. 53 L.W. 246=1941 Mad. 435=(1941) 1 M.L.J. 319.

APPEAL.—No appeal lies against refusal of an application to set aside an *ex parte* decree. There is no inherent power to extend time prescribed by Art. 164. 1 P. 277=1922 P. 479.

REVISION.—The lower Court acting on certain decisions then in vogue held substituted service was due service. Subsequently a slightly modified view was taken in other cases. *Held*, it was not a case for interference in revision. 138 I.C. 146=1932 M. 472.

Art. 165: SCOPE AND APPLICABILITY.—Where the judgment-creditor fails to apply for removal of an obstruction under O. 21, R. 97, within 30 days, he is not debarred from making an application under O. 21, R. 35, to obtain a fresh warrant for possession. He need not file a suit for that purpose. Art. 165 has nothing to do with such an application for warrant for possession. 146 I.C. 11=35 Bom. L.R. 1033=1933 B. 457 (F.B.). But it will be applicable notwithstanding the fresh order for possession to a subsequent application in respect of the same obstruction, and if the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant for possession

Description of application.	Period of limitation.	Time from which period begins to run.
166. Under the same Code to set aside a sale in execution of a decree, [1][including any such application by a judgment-debtor.]	[2][Thirty days] ...	The date of the sale.

LEG. REF.

[1] Added by Act I of 1927.

[2] Substituted by Act XI of 1923 for "Ditto."

NOTES.

would not make the obstruction a fresh obstruction. 1933 B. 457 (F.B.) An application by judgment-debtor for re-delivery of property not covered by decree alleged to have been delivered is governed by Art. 181 and not Art. 165. 46 B. 1031=1922 B. 271. *See also* 34 I C. 231=14 A.L.J. 401 ; 1 Lah.L.J. 230. Art. 165 applies to proceedings under O. 21, R. 100, C. P. Code. 1925 C. 287 ; 58 C. 55= 132 I.C. 631=1931 C. 385. Where the claimant preferred his petition under O. 21, R. 100. within 30 days of his dispossession bringing the judgment-creditor and the auction-purchaser on record but failed to bring the sub-purchaser on record till he had notice of the sub-purchase and after 30 days: *Held,* that the petition was not barred by limitation, S. 22 not applying to applications, 58 C. 55=1931 C. 385. Art. 165 was not intended to apply to an application by judgment-debtor. Art. 181 applies to an application for restoration of possession. 1 Lah.L.J. 230. *See also* 46 B. 1031; 35 I.C. 231 *supra*. Application to set aside sale of plots not specified in the mortgage-deed and the decree for sale, and for recovery of possession comes under Art. 165 and not under Art. 166. 24 I.C. 137=17 O.C. 94.

Art. 166 : SCOPE AND APPLICATION.— Purchase by a decree-holder without obtaining leave to bid is irregular and not void and an application to set it aside is governed by Art. 166. 41 B. 357=39 I.C. 3. Under O. 21, R. 89, read with R. 92 (3), C. P. Code, and Art. 166 of the Limitation Act, it is necessary that not only the application but also the deposit must be made within thirty days of the date of the sale, and this period cannot be extended by the Courts, S. 148, C. P. Code, being inapplicable. 36 P.L.R. 101=1934 L. 875. But where the deposit by the judgment-debtor was not made in time owing to unnecessary delay on the part of the Court in issuing the chalan, there is no reason why he should suffer in consequence. Art. 166 is not limited to applications under O. 21, Rr. 89 to 91 of the C. P. Code. It is perfectly general and refers to an application under the Code to set aside a sale in execution of a decree. 54 I.C. 431=46 C. 975. *See also* 45 L.W. 486= (1937) 1 M.LJ. 569 ; I.L.R. (1941) Nag. 381. An application to set aside a sale in execution of a decree passed against the father, on the ground that the property sold belong to the applicant and not to his father, is governed by Art. 166. 1938 N.L.J. 389= 1938 Nag. 558 ; 1937 Mad. 560=(1937) 1 M.L.J. 569. Art. 166 cannot overside the special provision contained in O. 34, R. 5, C. P. Code. (1937) 1 M.L.J. 569. An application to set aside an execution sale on the ground that the sale was bad and a nullity as it was held without the valuation as required by S. 13 of the Bihar Money-Lenders Act falls under O. 21, R. 90, C. P. Code, and is governed by Art. 166 and is barred if preferred beyond 30 days of the sale. The mere fact that the application is labelled as being under Ss. 47 and 151, C. P. Code, will not take it out of O. 21, R. 90, C. P. Code, so as to make it maintainable though preferred beyond 30 days. 23 Pat. L. T. 139. *See also* 45 M. L. J. 829. The period of limitation under Art. 166 being fixed by statute and not by the Court, it cannot be extended under S. 148, C. P. Code, or under S. 5, Limitation Act. 148 I.C. 1082=1934 Pesh. 25. The Court cannot extend limitation in case of application to set aside sale. 57 I.C. 224. An application to set aside an execution on the ground of fraud must be made within the time prescribed by Art. 166. 51 I.C. 447. An application to set aside an execution sale on the ground of illegality though falling under S. 47 of the Code of Civil Procedure and not under O. 21, R. 90, is governed by Art. 166. 18 L.W. 780=45 M. L.J. 829. *See also* 130 I.C. 708=1931 A.L.J. 119=1931 A. 145; 1941 Pat. 566. Where an application is made after 30 days of the sale to set aside an execution sale on the ground that the proclamation of sale was not made in the village where the property was situate, Art. 166 bars the application. 19 L.W. 780= 45 M.L.J. 829. An application to set aside an execution sale on the ground that there was no attachment prior to the sale or that there had been a defective attachment falls within Art. 166. 1 R. 533=1924 R. 124. An application to set aside an execution sale whatever its nature and whether falling under S. 47, C. P. Code, or O. 21, R. 90, C. P. Code, is governed by Art. 166 and not by Art. 181. 43 M.L.J. 184=1922 M. 417. *See also* 16 L.W. 934=1922 M. 95; I.L.R. (1938) 1 Cal. 280=42 C.W.N. 87=1938 Cal. 113; 41 P.L.R. 436=1939 Lah. 113; (1940) 2 M.L.J. 503; 1941 Pat. 566; 61 I.C. 823=1921 P. 181. But *see also* 43 M. 13. *See contra* 145 I.C. 113=1933 L. 570. Art. 166 governs an application to set aside a sale under O. 21, R. 90 of the C. P. Code. 57 I.C. 404; 8 O.W. N. 633. An application by a defendant who is exempted by the decree from liability to set aside a sale of his property in execution by the plaintiff, is governed by Art. 181 and not by Art. 166. 43 M. 313=38 M.L.J. 62. If an execution sale is a nullity, *i.e.*, made with-

Description of suit.	Period of limitation.	Time from which period begins to run.
167. Complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree.	[1][Thirty days] ...	The date of the resistance or obstruction.

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto."

NOTES.

out jurisdiction, or is void *ab initio*, Art. 181 governs an application to set it aside and not Art. 166. 47 Mad. 313; 1931 L. 586=132 I.C. 493. *See also* 1941 Pat. 566=163 I.C. 34=1936 P. 496; 1937 R. 126 (Property sold in excess of the property mortgaged). Where a sale in execution of a decree is a nullity, Art. 166 does not apply. 23 I.C. 251=26 M.L.J. 267. *See also* 1930 L. 17; 1934 A.L.J. 859=1934 A. 314; 1936 Pat. 496; 1937 Rang. 126; 5 C.L.T. 22; 1940 Pat. 303. A sale held without notice of sale proclamation to judgment debtor is not a nullity and an application to set it aside is governed by Art. 166. 52 I.C. 809=11 L.W. 59. An objection or application by a judgment-debtor after the sale that his property is not liable to attachment and sale under sec. 60 is an objection under sec. 47 and is governed by Art. 166. 30 N.L.R. 135=148 I.C. 200=1934 N. 82. Art. 166 applies to an application to set aside an execution sale which is not void but voidable. But if the sale is void or a nullity, the period of limitation applicable is that prescribed by Art. 181. 19 Pat. 393=21 Pat.L.T. 223=1940 Pat. 303. Where certain property sold in execution of a decree which is executable only against the assets of the deceased judgment-debtor in the hands of his son, an application to set aside the sale by the son on the ground that part of the property sold was his personal property falls under Art. 166 and not under Art. 181. 189 I.C. 256=1940 Pat. 192. Where there is an execution sale of an insolvent's property after his adjudciation and in ignorance of it, and the Official Receiver applies to have it declared void, Art. 181 would appear to be the more suitable article applicable to such an application than Art. 166 which applies only to applications under Rr. 89 to 91 of O. 21, C. P. Code. 1940 N.L.J. 505=1940 Nag. 414. Though an application by a judgment-debtor for setting aside sale (on the ground that he was not notified either under O. 21, R. 22 of the application for execution under O. 21, R. 66 of the date of the preparation of the sale proclamation) falls under sec. 47, still it is governed by Art. 166. 130 I.C. 708=1931 A .143. On this article, *see also* 47 C.L.J. 75; 1937 M.W.N. 224; 1928 C. 60; 1928 M. 140; 102 I.C. 543 (Setting aside sale in insolvency). 54 C. 493 (Court sale by Registrar, Calcutta High Court, original side—Objection on the ground of wrong identification of property); 8 P.L.T. 186 (Setting aside rent sale); 52 M.L.J. 148; 46 C.L.J. 579; 6 R. 490. Application under O. 21, R. 89, C. P. Code, to set aside sale—Court ordering petition to be dismissed as withdrawn—Sale upheld in appeal—Fresh application to set aside sale—Continuance of earliar petition—Extension of time—C. P. Code, O. 21, Rr. 89 and 90. 40 L.W. 266=1934 M. 593=67 M.L.J. 189. *See also* 42 C.W. N. 478.

STARTING POINT.—For an application to set aside a sale in execution, limitation begins to run from the date of the sale and not the date of confirmation or date of deposit of 25 per cent. 17 I.C. 884. *See also* 1936 P. 558=1940 O.W.N. 381=1940 Oudh 261. But *see* 8 O.W. N. 633=132 I.C. 263=1931 O. 291 (sale complete only when a declaration about a person being the purchaser is made and a deposit of ¼ of the purchase-money is made and not where the bid is made. Where property to be sold in execution of a decree is self-acquired revenue paying land belonging to the judgment-debtor and the papers are sent to the Collector for sale under the Oudh Civil Rules, the Collector is acting merely as a sale officer under the directions of the executing Court and the Court remains seized with the execution and the sale is not completed until the Court formally accepts the bid and declares the purchaser under O. 21, R. 84, C. P. Code. The starting period of limitation under Art. 166 for an application to set aside the sale, is the date on which the Court approves of the sale and declares the purchaser. 153 I.C. 719=1935 O. 131. *See also* 1938 N.L.J. 10. Where no fraud is made out, the question of the date of knowledge of the judgment-debtor is irrelevant. 140 I.C. 732=36 C.W.N. 242=1932 C. 627. *See also* 1936 P. 558. Where an execution sale is alleged to be fraudulent and collusive, the period of taking proceedings to set aside the sale, in the case of fraud, would be three years from the time when the sale took place or when the plaintiff knew of the fraud. 74 I.C. 202. Sale when complete. 106 I.C. 333=1928 N. 111; 8 O.W.N. 633=1931 O. 291. An application to set aside a sale is made in time if service of the notice of motion is made within time. The fact that it comes on for disposal after the time prescribed does not matter. 60 C. 1106=1933 C. 886. Where a purchaser has actual notice of the application to set aside a sale, the absence of formal notice is not a bar to the maintainability of the application. 60 C. 1106=1933 C. 886.

Art. 167.—Acquiescence in the obstruction to previous attempt to obtain delivery of possession is no bar to a second application for removal of obstruction, though made more than 30 days after the acquiescence in the earlier obstruction. 66 I.C. 722=1921 M.W. N. 698. The failure of the decree-holder to complain of obstruction under O. 21, R. 97, C. P. Code, within 30 days prescribed by

Desccription of application.	Period of limitation.	Time from which period begins to run.
168. For the re-admission of an appeal dismissed for want of prosecution.	[1][Thirty days] ..	The date of the dismissal.
170. For the re-hearing of an appeal heard *ex parte*.	[1][Thirty days] ...	The date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree.
160. For leave to appeal as a pauper.	[Thirty days] ...	The date of the decree appealed from.
171. Under the Code of Civil Procedure, 1908, for an order to set aside an abatement.	[Sixty days] ...	The date of the abatement.
172. Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	[1][Sixty days] ...	The date of the order of dismissal.

LEG. REF.

[1] Substituted by Act XI of 1923 for "Ditto."

[2] The words "sixty days" were substituted by Act XI of 1923, Sch. I.

NOTES.

Art. 167 is no bar to a fresh application for delivery of possession under O. 21, R. 95. 24 I.C. 512. *See also* 1933 N. 369; 161 I.C. 524=1936 S. 11=30 S.L.R. 290.

Art. 168.—Where no date is fixed for the hearing of an appeal and no notice is given to the parties of any date for which the hearing has been fixed, an order dismissing the appeal for default is without jurisdiction. 1924 L. 279. The limitation allowed to a party seeking to set aside an *ex parte* order dismissing his appeal in default, runs from the date of the order and not from the date of the knowledge. The inherent power of the Court to break through the provisions of sec. 3 of Limitation Act cannot be invoked to enable it. 1 L. 363=58 I.C. 789. Assuming that an application under sec. 151, C. P. Code, lies for the re-admission of an appeal dismissed for want of prosecution, there is nothing in the terms of Art. 168 to exclude such an application from the operation of the article. 13 Luck. 425=1937 O.W.N. 743=1937 Oudh 426. An application for restoration of an appeal which has been dismissed for default of prosecution is governed by Art. 168 and sec. 5 has no application to such a case 142 I.C. 185=1933 R. 96. Where an appeal is dismissed for non-appearance of the appellant under O. 41, R. 17, C. P. Code, the only course open to the appellant is to have it restored under O. 41, R. 19, within the period of 30 days prescribed by Art. 168 and Court cannot exercise its inherent powers. 47 M. 17=45 M.L.J. 813. There is no distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process-fee under O. 41, R. 18, and an appeal dismissed before the hearing for default in payment of process-fee or of the costs of preparing the paper book. They stand upon the same footing and cannot be differentiated, and an application to restore an appeal in the one case is *ejusdem generis* with similar applications in the orher cases. In each instance the appeal is dismissed for want of prosecution, and to an application to restore any such appeals, Art. 168 applies. 1930 R. 228 (F.B.). An application for the restoration of an appeal dismissed for failure to furnish security for cost is governed by Art. 168. 61 M.L.J. 618. Even if Art. 168 does not apply, such an application ought to be made within a reasonable time, and by analogy should be made within 30 days. 40 I.C 234=28 C.L.J. 163.

Art. 169.—*See* 61 M.L.J. 920=134 I.C. 1202=1931 M. 813 cited under Art. 164 as to substituted service being due service. The expression "notice of appeal" in Art. 169 should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of and not the filing of the appeal. 42 P.L.R. 38=1940 Lah. 49.

Quaere.—Whether the expression "notice of appeal" in Art. 169, refers to first notice as regards the appeal having been filed or to the subsequent notice as to the dates fixed for hearing, *see* 1933 L. 882.

Art. 170.—A memorandum of appeal unstamped and presented along with a pauper petition cannot, if it is stamped subsequently after the period of limitation, and after the pauper petition is dismissed, be treated, as an appeal filed on the day on which the memorandum was filed and is therefore barred. 22 I.C. 884. *See* 7 P. 827 for memo. of cross-objections in *forma pauperis* in appeal.

Art. 171.—Where one legal representative of a deceased party is brought on record in time, there is no bar by time if others are brought in subsequently. 13 I.C. 313=22 M.L.J. 169 (3 A. 517; 12 B. 48, Foll.).

Description of suit.	Period of limitation.	Time from which period begins to run.
173. For a review of judgment except in the cases provided for by Art. 161 and Art. 162.	Ninety days ...	The date of the decree or order
174. For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.	[1][Ninety days] ...	When the payment or adjustment is made.
175. For payment of the amount of a decree by instalments.	Six months ..	The date of the decree.
176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	[2][Ninety days] ..	The date of the death of the deceased plaintiff or appellant.

LEG. REF.

[1] The words "Ninety days" were substituted by Act XI of 1923.

[2] Substituted by Act XXVI of 1920 for, "Ditto."

NOTES

Art. 173.—An application for a review of a decree of the High Court must be presented within 90 days of the decree and every day's delay over that period must be duly accounted for. 32 I.C. 100=3 L.W. 244. *See also* 30 Bom.L.R. 668 (subsequent regulation not a ground for review). 1929 A. 485. The fact that the judgment-debtor had no knowledge of the order makes no difference. It is open to the judgment-debtor in such a case to apply under sec. 5 for an extension of the period of limitation, if in fact he could prove that he had no knowledge. 1929 A. 485. Under Art. 173, 90 days' time is allowed to the petitioners for review from the date of their knowledge, but the contention that, where the knowledge is after that period, there is no period prescribed by the Limitation Act and Art. 181, at most applies is wrong. 119 I.C. 99=1929 A. 545.

Art. 174—Art. 174 is applicable only to a case where the judgment-debtor seeks to inform the Court of a payment alleged to have been made by him out of Court to the decree-holder. Article does not apply to an application by the decree-holder himself. 26 C.W.N. 529=35 C. L.J. 71; 15 L. 910=1935 L. 194. *See also* 1939 All. 581; 17 Pat.L.T. 195. This rule would apply whether the payment pleaded is sought to be proved against the decree-holder or his assignee. 1934 A.L.J. 198=1934 A. 209. In cases where fraud is alleged, the judgment-debtor must so inform the Court and protect himself, but he cannot be allowed to evade the provisions of Art. 174 and obtain a decision not properly coming under S. 47. 13 I.C. 424=16 C.W.N. 396. The judgment-debtor has his remedy by a suit properly framed. 16 C.W.N. 396. Agreement not to sell property in execution of sale—Sale in contravention of—Application to set aside on the ground of "fraud"—Limitation. 152 I.C. 763=40 L.W. 622. A mortgagor can claim an account of receipts and disbursements of income of the mortgaged property during the time the mortgagee was in possession under the decree. 38 I.C. 675=39 M. 1026. An application by a judgment-debtor to record satisfaction of decree made by him more than three years from the date of the revised decree against him is barred, even though it may be within three months from the date of the revised decree as against other defendants. 31 I.C. 917. *See also* 115 I.C. 139; 1935 M. 581=69 M.L.J. 77.

Art. 175—The date of the decree is not a *terminus a quo* of an execution application if there is an agreement between the parties altering the date. 1923 L. 381. On this article, *see also* 58 I.C. 393. Where an appeal is preferred, the date of the appellate decree is the starting point, even though the appeal is dismissed. 135 I.C. 858=1932 R. 54.

Art. 176—Neither Art. 176 nor Art. 177 applies to a case where the deceased is neither plaintiff nor an appellant nor a defendant nor a respondent, but is merely an applicant or opponent, in a proceeding which is instituted as a preliminary step to the filing of a suit or of an appeal. 28 S.L.R. 150=148 I.C. 819=1934 S. 36. Where on the death of a sole plaintiff before trial, the Court dismisses the suit for default of appearance, the order is unsustainable, and it is open to the legal representative of the deceased plaintiff to apply within the time prescribed by Art. 176, to be made a party. 35 A. 331=25 M.L.J. 148 (P.C.) Amending Act (XXVI of 1920) is not retrospective. 36 C.L.J. 263=1922 C. 491. An application under O. 22, R. 3 to bring on record the legal representative of a deceased appellant is governed by Art. 176 and S. 6 does not apply to such an application 35 I.C. 438. Two rival claimants—Application of one in time—Other's application barred. The latter cannot continue suit revived by the former. 104 I.C. 398=1927 N. 343. **Death of plaintiff—Legal representative living in different province presenting application to be made party on knowing of death—Ordinary period**

Description of application.	Period of limitation.	Time from which period begins to run.
177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	[1][Ninety days] ..	The date of the death of the deceased defendant or respondent.
178. Under the same Code for the filing in Court of an award in a suit made in any matter referred to.	[2][Six months]	The date of the award.
179. By a person desiring to appeal under the [3][Code of Civil Procedure, 1908] to His Majesty in Council for leave to appeal.	[3][Ninety days] ..	The date of the decree appealed from.
180. By a purchaser of immovable property at a sale in execution of a decree for delivery of possession.	Three years ..	When the sale becomes absolute.

LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I, for "Ditto"

[2] Substituted bp Act XXNI of 1920, 2, for "Ditto".

[3] Substituted by Act X of 1930.

NOTES.

of limitation can be extended. 1929 L. 634=119 I.C. 759. *See also* 1940 O.A. 518.

Art. 177.—*See* 28 S.L.R. 150 noted under Art. 176. The period of limitation was originally six months under the article. Act XXVI of 1920 sought to reduce the period to 90 days in the case of both Arts. 176 and 177 but amended only Art. 176 and left the words "ditto" in Art. 177 alone to denote the altered period of limitation under Art. 176 above. This led to some conflict of decisions as to which, *see* 1923 B. 294; 50 C. 549; 1922 L. 211; 62 I.C. 52. The amending Act XI of 1923 made the position clear by substituting "Ninety days" for the "ditto". *See* 4 L. 317 =1924 L. 65. Art. 177 has no application to execution proceedings. 10 I.C. 405; 11 P.546= 1932 P. 222; nor to *forma pauperis* enquiry. 116. I.C. 111 (2)=1929 S. 136; but applies to an appeal against an order in execution proceedings; if in such an appeal a respondent dies and his legal representative is not brought on record within the time limited, it would abate. 151 I.C. 777 (1)=40 L.W. 623=1934 M. 664 (1) Applications to bring on record the legal representatives of a deceased person are governed by Art. 177 and not Art. 181: 55 M. 1006= 1932 M. 574=63 M.L.J. 827. Where a suit was dismissed for default but the order of dismissal was subsequently set aside, and, during the interval, some of the defendants died, an application for impleading their heirs, after three months of the deaths of the defendants but within three months of the date of the restoration order could be entertained. 15 R.D. 476=12 L.R. 237(Rev.). The Limitation Act does not apply to proceedings under the Companies Act; when a member against whom an application is made for an order for the balance of contributions due from him dies pending the application, it is not necessary that his heirs should be substituted within 90 days as prescribed by the Limitation Act. The matter of the liability of the legal representatives is governed by S. 160 of the Companies Act and on the death of the member the liability automatically falls upon the representatives. 19 Pat. L. T. 214=1938 Pat. 287.

Art. 178.—The time for an application to file the award begins on the date the award is delivered to the parties and not the date of signatures by the arbitrators. 48 I.C. 711. An application to file an award beyond 6 months after date of its being given, is barred under Art. 178. Ss. 5 and 12 do not save limitation. 38 A. 85=31 I.C. 899. An arbitrator's award does not become invalid merely because it has not been made a rule of the Court within the prescribed period of limitation. 1930 O. 51 (1). An application under para. 20 of Sch. II, C. P. Code, is not the only remedy open to a person in whose favour the award is made. He can file a regular suit in which case Art. 178, does not apply. 1935 L. 134.

Art. 179.—In cases of application for leave to appeal to His Majesty in Council, the time for obtaining copies can be deducted for purposes of limitation. 1 P. 429=3 P.L.T. 289=1922 P. 255. *See also* 105 I.C. 852. Application for leave to appeal in a case under the Income-tax Act is also within the article. 59 C. 251=36 C.W.N. 127=1932 C. 587. Where there are two cases, two applications must be filed. Where only one is filed in time, the party cannot file another out of time. 140 I.C. 70=1932 L. 441. Application for leave to appeal against an order calling for finding can be made within 20 days from the final decree in the case. 35 Bom.L.R. 415=1933 B. 251=145 I.C. 258. *See also* 1941 Pesh. 3 (application to file award under Arbitration Act, Art. 181 and not Art. 178 applies). In a case where an application for the review of a judgment sought to be appealed against is summarily rejected, obviously because the grounds did not come in any way within the grounds prescribed by law to justify a review, the time so taken, cannot be excluded in computing the period of limitation for an application for leave to appeal to Privy Council against the said judgment. 1941 A.W.R. (Rev.) 1090=1941 O.A. (Supp.) 880.

Art. 180.—Where an auction-sale was confirmed before the Limitation Act of 1908, but

Description of application.	Period of limitation.	Time from which period begins to run.
181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.	[1][Three years] ..	When the right to apply accrues.

LEG. REF.

[1] Substituted by Act XI of 1923 and ,Sch. I, for "Ditto".

NOTES.

the application for possession was made after the coming into force of the Act, the application is governed by Art. 180 and is barred, if not made within three years from the date when the sale became absolute. 27 I.C. 420. An application for delivery of property sold in Court-auction should be made within 3 years from the date when the sale becomes absolute. In construing the meaning of words "when the sale becomes absolute" in Art. 180, regard must be had not only to the provisions of O. 21, R. 92 (1) but also to the other material sections and orders of the Code including those which relate to appeals from orders made under O. 21, R. 92 (1). Where, therefore, there is an appeal from an order of the Judge disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180, until the disposal of the appeal, even though the Judge may have confirmed the sale, as he was bound to do when he decided to disallow the above-mentioned application. (1932 C. 75 Rev.; 56 C. 608, Overr.) 61 I.A. 248=61 C. 945=1934 P.C. 134=67 M.L.J. 79 (P.C.); 62 C. 66=1935 C. 333. An application by a decree-holder purchaser for delivery of possession of the properties purchased by him in Court-auction is not an application to execute the decree and is governed by Art. 180. 32 I.C. 993=3 L.W. 191; 103 I.C. 335. *See also* 7 L.W. 16=43 I.C. 15. Application under O. 21, Rr. 90 and 92—After statutory period—Sale partially set aside—Application by purchaser for possession—Limitation—Suspension of. *See* 43 M. 185=54 I.C. 66 (F.B.). *See also* 1941 Pesh. 10. Revival of prior proceedings. *See* 25 L.W. 108=1927 M. 391. *See also* 65 M.L.J. 305=1933 M. 745 fallowing 50 M.L.J. 215.

Art. 181: CONSTRUCTION OF ARTICLE.—The expression "right to apply" in Art. 181 should not be rigidly construed. 18 N.L.R. 58=1922 N. 217. Art. 181 does not apply to an application under S. 16 of the Telegraph Act, such an application being in the nature of a plaint. 44 P.L.R. 275.

APPLICABILITY OF ARTICLE—GENERAL—Art. 181 is a residuary article adapted to many different classes of applications. The words in the third column are only the expression of a broad common law principle. They have to be interpreted and applied according to the substance of each case. 60 C. 19=1933 C. 251. As to the scope of the article, *see* 8 Pat.L.T. 28. Art. 181 applies to all applications for making of which the C. P. Code gives authority and to no others. 1 L. 187=55 I.C. 820; 102 I.C. 543=1927 N. 262; 39 I.C. 653 (P.); 145 I.C. 893=1933 A.L.J. 1283=1933 A. 789 (F.B.). The preparation of a decree-sheet in a partition suit is merely a ministerial act to which the provisions of Art. 181 do not apply. 188 I.C. 577=42 P.L.R. 148=1940 Lah. 202. Order for final decree for partition—Application offering to file stamp paper to have final decree engrossed on it is not subject to limitation. 1937 Oudh 409. *See also* 60 I.C. 123=12 L.W. 535 (Act applies only to applications under C. P. Code). But *see* 54 A. 1067=60 I.A. 13=64 M.L.J. 403=1933 P.C. 63 (P.C.) in which the question as to the applicability of the article to applications by the Liquidator under Art. 186, Companies Act, was doubted. Art. 181 applies to all applications to Civil Court, unless they are governed by some other article or provision. 1928 N. 194. In determining whether the article applies, the substance of the application and not its mere form is to be looked to. 49 A. 276=25 A.L.J. 201=1927 A. 16 (F.B.). *See also* 19 N.L.J. 101 (application under S. 62 C. P. Tenancy Act). Where a sale is void *ab initio* for want of jurisdiction, it is not necessary for an applicant to ask the Court to order the purchaser to deliver back to him the property on the ground that he had obtained no title to it. Where the applicant makes such an application, it is governed by Art. 181 and not by Art. 166, and the mere fact that he has also asked for setting aside the sale will not affect the nature of the application. 1937 R. 126. *See* 1940 C.W.N. 105=1940 Pat. 303; 1936 Pat. 496=42 C.W.N. 87; 1940 Pat. 192. A decision given under S. 152, C. P. Code, granting an application for amendment of a decree is an order and not a decree. Hence, an application to set aside such an order is governed by Art. 181 and not by Art. 164. 145 I.C. 823=1933 R. 264. The Limitation Act provides periods with reference to suits, appeals and applications, the last being matters arising out of suit. It has no application to proceedings in insolvency. 29 I.C. 168=17 M.L.T. 347. *See also* 60 I.C. 123=12 L.W. 535; 52 I.C. 188=1924 L. 331. Art. 181 governs application for an order absolute under S. 89, T. P. Act, and limitation commences on the date of the appellate decree. L.R. 3 P.C. 174 (P.C.). An application for making conditional decree passed by consent absolute would be governed by Art. 181. 1923 A. 29. An application under

NOTES.

S. 26-J of the B. T. Act governed by Art. 181. 38 C.W.N. 50. *See also* 1937 R.D. 509 (Agra Tenancy Act). Whether articles applies for leave to appeal to His Majesty in Council from a criminal appeal decided by High Court. 38 C.L.J. 406=1924 C. 338. An application for leave to appeal to Privy Council in a case under the Income-tax Act is governed by Art. 179 rather than Art. 181. 59 C. 251=139 I.C. 236=1932 C. 587. Application for recording part-payment and for execution as regards balance. 26 C.W.N. 529=35 C.L.J. 71=1922 C. 30. A certification by the judgment-debtor under O. 21, R. 2, C. P. Code, is an application under Art. 181, whereas one by the decree-holders cannot be held to be such. For the latter, there is no period of limitation. 15 Pat.L.T. 457=1934 P. 380. *See also* 1938 Nag. 281. The law does not require any application being made to bring on the record the legal representatives of a judgment-debtor and an execution application against them is not barred, merely because no application to substitute the legal representatives is made within three years of the death of the judgment-debtor. 1934 L. 55. Whether Art. 181 applies to an application to enforce an injunction under O. 21, R. 32, C. P. Code, or whether there is no limitation for it. 46 C. 103=45 I.C. 864. *See also* 162 I.C. 303=1936 L. 334. Application for substitution by assignee of preliminary decree. 20 I.C. 685=18 C.W.N. 450. Application to bring on record the legal representatives of a deceased person is governed by Art. 177 and not Art. 181. 55 M. 1006=1932 M. 574=63 M.L.J. 827. Where a person is not a party to suit or appeal, but on his death his legal representative is sought to be impleaded, Art. 181 applies and not Art. 177. 1924 L. 316. Where properties are sold in execution of an *ex parte* decree, and the *ex parte* decree is subsequently set aside, an application to set aside the execution sale is governed by Act. 181, and limitation starts from the date when the *ex parte* decree was set aside. 43 B. 235=48 I.C. 140. Art. 181 and not Art. 165 applies in case of an application by a judgment-debtor for restoration of immovable property delivered in execution proceedings in excess of what has been decreed by the Court. 42 M. 753=37 M.L.J. 340. Also to objection to execution proceedings (wrongful delivery). 4 Luck. 209=1929 O. 76. An application to set aside an attachment and sale in execution, by the judgment-debtor who continued in possession is governed by Art. 181. The right to apply accrued, not from the date of sale, but from when the notice of attachment served on him was returned. 133 I.C. 858=33 Bom.L.R. 781=1931 B. 446. Where there is an obstacle to the execution proceedings, for inrtance, possession of the property by a third party, as soon as that obstacle is swept away by a Court of competent jurisdiction declaring the title of the judgment-debtor to the property as against that party, the duty again arises upon the decree-holder to take execution proceedings within three years notwithstanding the fact that that party has filed an appeal. 40 P,L.R. 481=1938 Lah. 695. *See also* 1936 Sind 11. An application by the Official Receiver for having a transfer made by the insolvent avoided is not governed by Art. 181. The article applies only to applications made under C. P.Code. 60 I.C. 123=12 L.W. 535; 55 I.C. 820=1 L. 187; 1927 N. 262. 1940 N.L.J. 505. But *see* 52 I.C. 188=1924 L. 331. Art. 181 will apply only when there are definite circumstances excluding Art. 182. An oral agreement by the decree-holder to give time to the judgment-debtor made out of Court, which is not proved, does not make Art. 181 applicable and does not give a fresh starting point for limitation. 114 I.C. 894=1929 A. 606. The mere certification by the decree-holder of a payment made to him out of Court by the judgment-debtor under O. 21, R. 2 (1) is not an application under Art. 181, even though such certification is termed an application and is in the form of a petition. 56 I.A. 30=114 I.C. 581=1929 P.C. 19=56 M.L.J. 233 (P.C.). A petition for review of an order confirming an execution sale is governed by Art. 181: 116 I.C. 65=1929 N. 305. Where a preliminary decree for partition has been obtained, the right to get it made absolute accrues on the date when such decree is obtained and the limitation is 3 years from such date. 112 I.C. 205=1929 O. 117. In a partition suit, after the preliminary decree, the Court is bound to proceed further and to appoint a Commissioner to actually partition the property, and on the report of the Commissioner, if accepted, to pass a final decree. So, an application in a partition suit after the preliminary decree was passed for the appointment of a Commissioner is not subject to Art. 181 or any rule of limitation. (22 C. 425 and 53 M. 373, Rel. on.) 146 I.C. 201=1933 Pesh. 101 (2). For purposes of limitation under Art. 182 the date of the decree in a partition suit must be taken to be the date on which the order for drawing up the final decree was passed and not the date on which the necessary stamped paper for drawing up the decree was supplied by the decree-holder. 1940 Lah. 337. Where in a partition suit an order for drawing up final decree is passed and the judgment-debtor has disputed the adequacy of the stamped paper supplied by the decree-holder, the period which is taken up in getting final decision on the point by the High Court, should in any case be deducted as the decree-holder could not get a decree drawn up owing to the dispute raised by the judgment-debtor and his cause of action for execution should therefore be taken as suspended. 1940 Lah. 337. *See also* 41 Bom.L.R. 921. Art. 181 applies only to applications to Court for exercise of acts and powers which the Court is not bound to perform *suo motu*. An application for the exercise of purely ministerial functions which the Court has no discretion to refuse is not within the article. 1933 Pesh. 101; 1940 Lah. 202; 1937 O.W.N. 124=1937 Oudh 409; " Decree to be drawn up on production of succession certificates"—Judgment specifying no date within which to produce the certificate—Right to produce succession certificates, and apply for

NOTES.

drawing of decree not barred by Art. 181. 33 Bom. L.R. 618=134 I.C. 694=1931 B. 407. An application by transferee of Court auction-purchaser to recover possession falls under this article. 51 C.L.J. 560; 1930 C. 586. Art. 181 has no application to an application made to the High Court in revision of an order of a Criminal Court of inferior jurisdiction nor to civil revision petitions. 1930 O. 401. An application in a pending case is not governed by Art. 181 and is in fact not subject to any rule of limitation. 53 M. 378=59 M.L.J. 102. Where the original decree was capable of execution but the decree-holder sought to take advantage of a slight error in orthography and applied to execute the decree after an application for amendment had been granted *ex parte*, *held*, that the first decree was capable of execution and that the decree-holder could not claim an enlarged period of limitation because of the application for amendment. 27 A.L.J. 427=115 I.C. 118 (2)=1929 A. 253. An application under O. 21, R. 50 (2), C. P. Code, is not an application for execution of the decree within the meaning of Art. 182 and, consequently, is governed by Art. 181 and the commencement of the period of limitation is the date of the decree. 122 I.C. 392=1930 S. 180. Where an execution sale was impeached on the ground that it was a nullity, *held*, that the application was governed by Art. 181, not Art. 166. 11 Lah.L.J. 457=1930 L. 17; 132 I.C. 493=1931 L. 586; 151 I.C. 244=1934 A.L.J. 859=1934 A. 314. On this point, *see* under Art. 166. *See also* (1940) 1 M.L.J. 537 (application under C. P. Code, O. 21, Rr. 86 and 87); 46 L.W. 280=1937 Mad. 779 (application under C. P. Code, O. 21, R. 93). Where, in case of an instalment decree, an application has been made after some instalments have fallen due, the appropriate article is Art. 182 (7). Art. 181 has no application to such a case. But so far as default clause is concerned, Art. 181 would apply and the remedy for the enforcement of the default clause in the instalment decree is time barred, after the expiry of three years from the default in payment of instalments making whole amount due. The decree-holder cannot in such a case claim the recovery of future instalments, merely because in some future years there has been a default in the payment of the agreed successive instalments. His remedy to recover the instalments as and when they fall due is however not barred by the default clause. 149 I.C. 598=1934 A.L.J. 772=1934 A. 534. Preliminary mortgage decree —Provision for instalments—Default clause giving decree-holder right to apply for sale for all instalments remaining due—No payment made—Application for final decree five years after preliminary decree is not barred—Every default gives rise to a fresh cause of action. 55 L.W. 276=(1942) 1 M.L.J. 532.

SPECIAL CASES—MORTGAGE DECREE.—Where a preliminary mortgage decree for sale was taken up in appeal to the High Court, the period of limitation for an application for final decree runs from the date of the High Court decree. 21 A.L.J. 526=1924 A. 99; 25 A.L.J. 78 (P.C.). *See also* 20 A.L.J. 580=1922 A. 446; 20 A.L.J. 640=1923 A. 22; 1930 M. 356 (2); 1930 M. 353=58 M.L.J. 207; I.L.R. (1937) A. 481=1937 A. 285 Where the appeal was dismissed for want of prosecution, time would run from the date fixed for payment in the preliminary decree. But where the appeal is formally brought before Court and is withdrawn and dismissed, the order dismissing the appeal amounts to a decree and time would run only from the date of the appellate order. 64 M.L.J. 695=1933 M. 142 =143 I.C. 412. *See also* 38 L.W. 946=66 M.L.J. 24. Art. 181 applies to an application under O. 34, R. 5 of the C. P. Code, for a final decree in which preliminary decree was passed after passing of the present Code. 45 I.C. 76=7 L.W. 438. *See also* 6 P. 24 (P.C.); 50 B. 730=1927 B. 32; 1927 A. 305; 30 Bom.L.R. 724; 1938 O.W.N. 360=1938 Oudh 112; (1942) 1 M.L.J. 532. (Compromise decree); 48 I.C. 185=35 M.L.J. 507; 48 I. C. 732=35 M.L.J. 194; 56 I.C. 563. Applications for final decree are applications in the suit itself and not execution applications and Art. 181 applies to them. 42 M.L.J. 51. *See also* 42 B. 309=46 I.C. 107; 19 C.W.N. 473; 42 C. 294; 1929 A. 677; 16 I.C. 799; 14 M.L.T. 194; 32 I.C. 139; 15 I.C. 732; 18 N.L.R. 58=1922 N. 217; 54 I.C. 323; 47 I.C. 206=21 O.C. 176. Application for final decree in mortgage suit—Delay in making—Court's discretion to excuse under S. 5. *See* S. 5 *supra*. 68 M.L.J. 665 (P.C.). *See also* 166 I.C. 828 (application for personal decree in mortgage suit). Where the next friend of the minor plaintiff died after the passing of a preliminary decree in his favour, and the plaintiff applied for a final decree within 3 years of his attaining majority, *held*, that S. 6 of the Act had no application, that the suit was kept in abeyance and that the application for final decree was maintainable and was within time. 37 C.W.N. 184=144 I.C. 768=1933 C. 508. Where an application for a final decree was adjourned *sine die* on the defendant's attorney stating that the defendant had become insane and the defendant subsequently died, an application made for a final decree afterwards, serving notice of it on the heir of the deceased defendant could be treated as a continuation of the earlier one for purposes of limitation. 37 C.W.N. 583= 1933 C. 816. Preliminary mortgage decree in terms of compromise—Provision for instalment payment—Default — Application for decree under O. 34, R. 5—Time runs from the date of default in payment of an instalment. The fact that three years have elapsed from the date of the preliminary decree is immaterial. 130 I.C. 487=1931 A. 340. An application to deposit money due under O. 34, R. 5 is governed by Art. 181, 9 O.L.J. 14=1922 O. 33. Order for final decree for partition—Application offering to file stamp paper to have final decree engrossed on it—Not subject to limitation. 166 I.C. 718=1937 O.W.N. 124. *See also* 192 I.C. 93. An application to execute a decree for redemption beyond time is to be regarded as an application for extension of time and is governed by the provisions

NOTES.

of Art. 181, and the period of limitation begins to run at the latest on the last date fixed in the original decree for payment. 1929 R. 304. An application for a money decree under O. 34, R. 6 of C. P. Code is governed by Art. 181, and time begins to run when the right to apply accrues. 14 I.C. 591=9 A.L.J. 569. *See also* 1937 A.W.R. 103=1937 A. 285; 166 I.C. 828. But *see* 58 C. 741; 60 C. 19=1933 C. 251=143 I.C. 679; 35 A. 178=18 I.C. 731; 38 A. 21=30 I.C. 494; 43 B. 689=51 I.C. 924; 42 M. 52=35 M.L.J. 552; 49 A. 506=25 A.L.J. 485=1927 A. 1395; 935 R. 187. *See* 1929 A. 15. In the case of an application under O. 34, R. 6, the time from which limitation would run is the date of the confirmation of the sale, inasmuch as, unless and until the sale is confirmed by the Court after disposing of all the objections against it, the deficiency in the amount cannot be ascertained for the purpose of O. 34, R. 6. 58 C. 741=35 C.W.N. 231=1931 C. 166; 60 C. 19=1933 C. 251=143 I.C. 679. In this connection, the fact that the taxation of costs has not been completed is immaterial. 60 C. 19.

MESNE PROFITS.—An application for ascertainment of mesne profits under O. 20, R. 12, C. P. Code, is not one for execution and Art. 181 applies to it. 37 M. 186=24 M.L.J. 96. *See also* 25 O.C. 132=1922 O. 197 ; 1928 M.W.N. 222; 164 I.C. 670=44 L.W. 486=1936 M. 801=71 M.L.J. 388; 50 L.W. 933=(1940) 1 M.L.J. 54 (F.B.). And time commences from the date on which possession is delivered. 144 I.C. 553=1933 L. 876. But *see* 151 I.C. 755=1934 A.L.J. 86=1934 A. 465, where it was held that the Code does not require that a party should make an application for the ascertainment of mesne profits and that therefore Art. 181 cannot apply to such an application when made. *See also* 1937 R.D. 21.

PROBATE PROCEEDINGS.—Art. 181 has no application to petitions under Probate and Administration Act and consequently an application may be made even 4 years after death of the testator. 20 P.R. 1912=10 I.C. 130.

COMPROMISE DECREE.—Providing for instalment payments, *see* 26 A.L.J. 966 (F.B.). *See also* 30 Bom.L.R. 724; 130 I.C. 487=1931 A. 340. An application to the Civil Court under R. 14 (5) (*b*) of the rules under the Co-operative Societies Act to enforce an award obtained by a Co-operative Credit Society under the Co-operative Societies Act must be made within three years of the date of the award. The application being one to put in motion the machinery of the C. P. Code, is governed by Art. 181 of the Limitation Act. 44 L.W. 720=71 M.L.J. 759. *See also* (1940) 1 M.L.J. 268.

CONDITIONAL DECREE.—Time runs from date of decree and not from any later date when the decree-holder may choose to fulfil the condition. *See* 131 I.C. 559=1931 A. 326.

RESTITUTION—APPLICATION FOR.—Where a judgment-debtor who has been dispossessed of property not covered by the decree in execution thereof, applies for recovery of possession, the application is governed by Art. 181 and not by Art. 165. 24 Bom.L.R. 771=46 B. 1031 ; 5 Lah.L.J. 389=1924 L. 166. *See also* 44 L.W. 798=71 M.L.J. 795 ; 1937 R.D. 21. Art. 181 is applicable to an application for restitution. Time will run against judgment-debtor only from the date when the erroneous decree is superseded. 24 C.L.J. 467=38 I.C. 17=21 C.W.N. 564. *See also* 1938 A.W.R. (B. R.) 113=1938 R.D. 182; 1940 A.W.R. (H.C.) 579=1940 O.A. 1166; 69 C.L.J. 293=43 C.W. N. 515=1939 Cal. 349 ; 1941 All. 28; 32 C. W.N. 971=1928 C. 646 (S.B.) ; 43 I.C. 775=27 C.L.J. 451 ; 16 I.C. 238 ; 35 C.W.N. 1294; 6 L.W. 369=33 M.L.J. 413 ; 54 I.C. 664 ; 47 I.C. 47=3 P.L.J. 367 ; 7 O.W.N. 1153=130 I. C. 78=1931 O. 51. The right to apply for restitution accrues really on the date when for the first time a decision is given which entitles the party asking for restitution to have restitution. 1933 C. 422=144 I.C. 150. Where a decree is passed by the trial Court but reversed in appeal and the reversal is confirmed in second appeal, the time for an application under S. 144, C. P. Code, runs from the date of the first appellate decree and the period taken up in second appeal cannot be deducted. 1932 A.L.J. 724=1932 A. 609 ; 150 I.C. 1096=1934 A.L.J. 503=1934 A. 626 (F.B.). But *see* 1933 R 180=11 R. 275 ; 1937 R.D. 21, holding that Art. 182 applies to such applications and that even if Art. 181 applies, time begins to run from the date of the final decree. An application for restitution is in reality an application for execution of a decree and it is governed not by Art. 181 but by Art. 182, 44 L.W. 798=1937 Mad. 150=71 M.L.J. 795. Where an appellate Court has ordered restitution to a person who has been dispossessed under a decree and an appeal against that order has been dismissed by the High Court, the period of limitation under Art. 181 for an application for assessment of mesne profits begins to run from the date of the order of the High Court. 130 I.C. 78=1931 O. 51. *See also* 150 I.C. 1096 (F.B.) noted above and 17 N.L.J. 281. Where an *ex parte* decree is set aside, application for restitution is governed by Art. 181 and time runs from the date of the order setting aside the decree. 32 P.L.R. 395=134 I.C. 206=1931 L. 504. Application to enforce order of P.C. to obtain restitution—Art. 183 applies. 26 A.L.J. 587. *See also* I.L. R. (1940) Cal. 486=44 C.W.N. 438=1940 Cal. 260.

REVIVAL OR CONTINUANCE OF EXECUTION—APPLICATION FOR.—*See* 11 I.C. 972; 61 I.C. 817; 22 Pat.L.T. 992. If as a result of execution, a decree has been satisfied and if the decree-holder is compelled to refund or restore the property as a result of proceedings taken subsequently by the judgment-debtor or by a third party, the satisfied decree revives on the refund or the restoration of the property and an application to execute the revived decree would be competent within three years from the time when the right to apply accrued to the decree-holder. In such cases, the starting point for an application would be the date when the decree-holder is compelled to refund

NOTES.

the amount or restore the property. Where the High Court merely declares that the execution proceedings are ineffectual and it is the executing Court that orders restitution, limitation runs from date on which restitution takes place. 1935 L. 166. Where a decree-holder is prevented by an injunction from executing his decree, he must apply for execution within three years from termination of the injunction period, to save his decree from being barred. 42 A. 564=56 I.C. 1006. *See also* 166 I.C. 950=18 Pat.L.T. 90=1937 P. 43; 1927 A. 802; 49 A. 276=25 A.L.J. 201=1927 A. 16 (F.B.); 100 I.C. 790; 148 I.C. 525=1934 A.L.J. 363=1934 A. 294. But *see* 11 L. W. 42 and other cases cited *infra*. An execution application, which has not been judicially disposed of but simply removed from the Court's file for statistical purposes does not require to be revived. The Court had only to be apprised of in some recognized manner, and a subsequent application presented to the High Court requesting it to deal with the prior pending application, is not one to which either Art. 181 or 182 of the Act applies. 55 I.C. 526=11 L.W. 42. *See also* 19 L.W. 20=45 M.L.J. 822; 118 I.C. 769; 133 I.C. 316=1931 A. 458=1931 A.L.J. 436; 58 C. 1113=134 I.C. 939=35 C.W.N. 540 (execution stayed until further orders). All applications are not governed by the Limitation Act. Art. 181 does not apply to an application to continue execution proceedings which have been stayed. I.L.R. (1940) All. 246=1940 A.L.J. 180=1940 All. 151 (F.B.). Art. 182 does not apply to the case of an application to revive and carry through a pending execution; and such an application is not barred if brought more than 3 years after proceedings had ceased to be pending. 36 M. 553=14 I.C. 264=24 M.L.J. 545. Where, owing to an order staying a sale in execution of a decree, the decree-holder is prevented from taking further steps in the execution proceedings a subsequent application for execution must be treated as an application to continue the previous proceedings or to revive or carry through a pending execution which was suspended by no act or default of the decree-holder. 52 I. C. 116=20 O.C. 75. *See also* 54 I.C. 426=6 O.L.J. 656; 142 I.C. 534=1933 M. 325=38 L. W. 268; 22 P.L.T. 992. In such a case limitation is three years from the date on which the stay came to an end. 142 I.C. 534=1933 M. 325=38 L.W. 268. An application for reviving execution proceedings is governed by Art. 181 and the time commences to run from the time when the right to apply *first* accrues. The general principles of suspension of limitation might be applied in cases where a plaintiff or decree-holder is prevented under the circumstances from taking action in pursuance of his rights. It cannot be said that by reason of an appeal against the order setting aside the sale the decree-holder should be considered to be prevented from making a fresh application for execution of his decree. 34 C.W.N. 102=1930 C. 329. The application was barred by limitation as it was made more than three years from the date when the sale was set aside. 34 C.W. N. 102=1930 Cal. 329. Application for reviving execution proceedings, filed within 3 years after the petition for setting aside *ex parte* decree was finally disposed of in appeal was held to be in time. 35 C.W.N. 540. Where, on an application by the judgment-debtor, the satisfaction of the decree was recorded by the lower Court, and where this order was reversed on appeal, and the decree-holder subsequently applied for execution, held that Art. 181 applied, and that time began to run from the date of the appellate decree, *i.e.*, from the date when the bar to the executability of the decree was removed. 38 L.W. 557=1933 M. 785=65 M. L.J. 747. If execution case is struck off at request of decree-holder on his own statement, subsequent application by him will not be in revival of the prior one. So Art. 181 will not apply but only Art. 182. 1937 A.L.J. 375. Application for substitution under R. 11 of O. 22, C. P. Code—Starting point of limitation. 10 P.L.T. 763=1929 P. 565 (F.B.).

EXECUTION AGAINST SURETY.—Period of limitation for execution against the surety who had executed a surety bond when the decree was first put into execution, undertaking to pay the decree amount in case the decree-holder failed to realise the amount from the judgment-debtor does not run under any of the clauses of Art. 182 which is not exhausive of all execution applications. Art. 181 applies to such a case. Limitation is 3 years from the date when the decree was kept alive as against the judgment-debtor. 1933 O. 209=143 I.C. 808=8 Luck. 427. *See also* 41 C.W.N. 1099=1937 Cal. 452=65 M.L.J. 507 noted *infra* under Art. 182. Surety for judgment-debtor undertaking to produce him on each date of hearing—Failure to produce him on certain date—Execution proceedings terminating after several subsequent hearings—Execution against surety—Limitation. *See* 158 I.C. 459=1935 L. 174 (2).

REVIVAL OF SUIT—APPLICATION FOR.—An application by a Hindu reversioner to continue a suit instituted by a nearer reversioner since deceased is governed by Art. 181. 49 I. C. 268=9 L.W. 166. An application on the death of the plaintiff by a person on whose behalf the suit was filed by the plaintiff in a representative capacity, to be brought on the record as *eo nomine* plaintiff, is governed by Art. 181. 54 M. 770=132 I.C. 289=1931 M. 590=60 M.L.J. 659. An application to the Court to restore a suit in the exercise of its inherent power is governed by Art. 181. 47 I. C. 137.

MISCELLANEOUS.—An application by the judgment-debtor to set aside sale on the ground that the sale was without jurisdiction is governed not by Art. 166 but by the residuary Art. 181. 163 I.C. 34=1936 P. 496. Execution sale—Property of co-owner included in—Symbolical delivery of possession—Transferee from co-owner not having notice of sale and delivery—Application by transferee to establish his title within 3 years of his knowledge is within this article. The starting point of limitation is the date when his possession was sought to be interfered with. 1929 M.W.N. 811=1930 M. 12.

Description of application.	Period of limitation.	Time from which period begins to run.
182. For the execution of a decree or order of any Civil Court not provided for by articte 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years; or where a certified copy of the decree or order has been registered six years.	1. The date of the decree or order;, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or

NOTES.

On this article, *see also* 1936 S. 11; 1936 L. 334; 30 S.L.R. 88.

Arts. 181 and 182.—*See* 1939 Mad. 441=(1939) 2 M.L.J. 271; 54 L.W. 98=1941 Mad. 751=(1941) 2 M.L.J. 121. An application by the legal representatives of a deceased decree-holder for reviving the execution proceedings dismissed for default on the death of the decree-holder is not governed either by Art. 181 or 182 of the Limitation Act. The Code of Civil Procedure nowhere provides for such an application. It is a proceeding by which the inherent jurisdiction of the Court is invoked. The Court will exercise its inherent powers if it considers that justice requires its exercise and if it is satisfied that there are no such laches on the part of the applicant which would disentitle him to relief. 46 C.W.N. 326. Where a decree for money is made payable in instalments, and in default of payment of any instalment the whole decretal amount becomes payable immediately, it is open to the decree-holder to apply for execution even after three years from the date of default, and to recover such of the instalments as have become due within three years of the date of his application. A default clause in an instalment decree is certainly for the benefit of the decree-holder, and his failure to avail himself of it should not be held to deprive him of the remedy he would have apart from the clause. It is open to the decree-holder either to apply for the full amount on default or to waive that privilege. 163 I.C. 937=38 Bom.L.R. 492=1936 B. 268. Article 181 applies to an application for restitution, under S. 144, C. P. Code. An application under S. 144 is not an application for execution and Art. 182 does not apply to such an application. 40 P.L.R. 692=1938 Lah. 456. *See also* 41 P.L.R. 208=1939 Lah. 73; 1938 A.W.R. (B.R.) 113. The application for execution against the sureties is an application for execution of a decree as by operation of S. 145, C. P. Code, the sureties become judgment-debtors under the decree. Such an application for execution therefore comes under Art. 182. It cannot come under Art. 181, Limitation Act. 41 C.W.N. 1099=1937 Cal. 452. Art. 182 the Limitation Act has no application to the execution of a decree for possession of immovable property conditional on the payment of a sum of money on a future date. Art. 181 is the article applicable to an application for execution of such a decree; and time begins to run from the date of the decree or at any rate on the date fixed for payment of the amount. I.L.R. (1938) Bom. 649=40 Bom.L R. 512=1933 Bom. 367.

Arts.181 and 183—An application for a final decree for sale in a mortgagr suit in the High Court, under O. 34, R. 5, C. P. Code, is governed by Art. 181 and not by Art. 183. It is not the law that there is no limitation applicable to an application of the kind. I.L. R. (1938) Bom. 273=40 Bom.L.R. 507=1938 Bom. 354. *See also* 31 S.L.R. 180=1938 Sind 273. An application for a final decree in a mortgage suit is barred by limitation under Art. 181 if made more than three years after the date of the preliminary decree passed under O. 34, R. 4, C. P. Code. Such an application is not one to enforce the preliminary decree and Art. 183 is, therefore, inapplicable. 43 C. W.N. 537. *See also* 13 Rang. 325. An application made under S. 144, C. P. Code, to have restitution in consequence of an order of His Majesty in Counsil is governed by Art. 181, and not by Art. 183. Such an application cannot be regarded as one for *enforcement* of the final judgment or decree within the meaning of Art. 183, but is one for relief which is *consequential* upon the appellate Court's decree of reversal. I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438=1940 Cal. 260. *See also* 26 A.L.J. 587.

Art. 182: APPLICABILITY.—Where a decree-holder applies for executien and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation does not do so and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage in the execution proceedings. 37 C.W.N. 752=1933 C. 855; also where a decree-holder could have applied for fresh execution at any time after the dismissal of first execution petition, but the delay is due to his own negligence or laches and not to any defect in the decree or to any circumstances connected with the decree which prevented him from putting in an application for execution, Art. 182 applies. 59 M. 759=44 L.W. 403=1936 M. 284=71 M.L.J. 180. The date of the decree is the day on which judgment is pronounced and limitation begins to run from that date, although no formal decree can be drawn up in a partition suit until paper bearing a proper stamp under the Stamp Act is supplied to the Court. (1924 Cal. 351, foll.) 197 I.C. 217. *See also* 23 Pat.L.T. 202=1942 P.W.N. 139; 1938 Pat. 149. To make the provisions of the article apply to the execution of a decree, the decree must be such as to be capa-

NOTES.

ble of being enforced. 49 M.L.J. 1=48 I.A. 17 (P.C.) (On appeal from 42 I.C. 666). Where a decree is passed against the estate of a deceased person in the hands of the judgment-debtor, limitation for execution runs from the date on which some part of the estate comes into the judgment-debtor's hands. 49 M. L.J. 1=48 I.A. 17 (P.C.). S. 48, C. P. Code, does not supersede the law of limitation, but only fixes a period after which execution will not be granted, although not barred by the Limitation Act. 138 I.C. 149=1932 O. 220. *See also* 1938 P.W.N. 449; (1940) 1 M.L.J. 235. The words "provided for" mean that where execution is barred by S. 48, C. P. Code, execution cannot be allowed under Art. 182. An amendment of a decree does not give a new date for starting of limitation under S. 48, C. P. Code. 54 A. 622=138 I.C. 93=1932 A. 351. *See also* 1936 Mad. 434=70 M.L.J. 700; 1938 Pat. 57; (1940) 1 M.L.J. 235; 18 Pat. 395. Striking off decree as satisfied is no suspension of proceedings. 40 C.L.J. 246=84 I.C. 283=1925 C. 207. Where some minors were impleaded as co-mortgagees in the place of one of the co-mortgagees since deceased, and a final decree is passed but the execution application was filed five years after. *Held*, that it was barred by limitation. 37 C.W.N. 838. A redemption decree directed possession to be given on payment of a certain sum within six months, but did not provide as to what should follow in a case of default of payment. *Held*, that it could be enforced at any time within 3 years as provided by Art. 182. 76 I.C. 144=1924 L. 635. An award under the Arbitration Act when filed in Court becomes enforceable as a decree of Court and an application in execution is governed by Art. 182. 6 L.L.J. 564=75 I.C. 927; 142 I.C. 489=1933 S. 78=27 S.L.R. 109; 1937 Sind 261; 43 Bom. L.R. 1006. An award of arbitrator under S. 54 of Bombay Co-operative Societies Act is not a decree of a Civil Court within the meaning of this article. 165 I.C. 512=38 Bom.L.R. 927=1936 B. 396. The proper article of the Limitation Act governing an application for the enforcement of an award passed by the Registrar of Co-operative Societies under S. 51 of the Madras Co-operative Societies Act is Art. 182 49 L.W. 143=1939 Mad. 304=(1939) 1 M.L.J. 695. Awards under R. 22 of the Co-operative Societies Rules are executable as decrees and this being the case, the provisions of Art. 182. (1) are applicable. Under that article the period of limitation is three years from the date of the award. The date of the award does not mean the date written therein but the date on which such award is officially communicated to the person or persons affected thereby. I.L.R. (1940) 2 Cal. 460=1941 Cal. 152. Whether it becomes such on grant of certificate by Registrar under S. 59 of the Act. (*Ibid.*) Execution of decree against co-defendants—Application against any one of them shall take effect against them all. 47 M.L.J. 608=20 L.W. 585. Decree-holder consenting to postponement of execution pending judgment-debtor's suit—Period must be excluded. 84 I.C. 1027. S. 28 of the Provincial Insolvency Act imposes a disability on the creditor from proceeding against the person of the insolvent without leave of Court. So an application for execution, if made within the period of limitation from the order granting leave is not barred by limitation, even though it may be more than three years from the date of decree. 10 P. 422=134 I.C. 633=1931 P. 357. Application for leave to execute a decree against a partner of a firm under O. 21, R. 50 (2) is one in execution of the decree against the firm, and falls under this article and not under Art. 181. 30 S.L.R. 88=164 I.C. 1001=1936 S. 138. *See also* 1939 Sind 161=I.L.R. (1939) Kar. 589 (F.B.). An application for restitution is in substance an application for execution though the rules of O. 21, C. P. Code, may not apply. Consequently Art. 182 applies to such applications. 2 P. 227; 41 Bom.L.R. 1204=1940 Bom. 30; 1939 Nag. 101. A decree of the Chief Court of Lower Burma when put in execution before the High Court is governed by Art. 182. It does not become a decree of the Original Side of the High Court so as to get the benefit of an extended period of limitation. 6 R. 566=1928 R. 317. Secured creditor under S. 28 (6), Provincial Insolvency Act—Failure to execute decree against assets of insolvent within three years—Decree barred. 4 Luck. 241=1929 O. 71. An application by the Board of Commissioners for Hindu Religious Endowments, Madras, made to the District Judge for recovery of contributions under S. 70 (2) of the Madras Hindu Religious Endowments Act, after demand and refusal, is governed by Art. 182. The right to apply accrues only after the expiry of three months from the date of the demand made by the Board, and the amount becomes payable only then. 41 L.W. 264=1935 M. 217=68 M.L.J. 200.

CONDITIONAL DECREE.—Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies, Art. 182 is inapplicable and Art. 181 governs execution in such cases. 131 I.C. 559=1931 A.L.J. 319=1931 A. 326. *See also* 1938 All. 539 (decree on payment of Court-fee). Where a decree directs possession of property to be given to plaintiff on his paying a certain sum to the defendant and no time is fixed for payment, the decree holder is entitled to pay the money at once and ask for possession and an application made more than 3 years from the date when the decree was passed will be barred by Art. 181. *See also* 26 N.L.R. 353; 32 Bom.L.R. 427; 1931 All. 326.

CONSTRUCTION.—Article should receive a liberal construction in favour of decree-holder. 103 I.C. 279=1927 N. 308=24 N.L.R. 36. The provisions of Art. 182 should receive a fair and not too technical a construction. Its language ought not to be strained in favour of the judgment-debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder. 47 L.W. 693=1938 Mad. 323=(1938) 1 M.L.J. 135. Construction—Mortgage-decree and money decree—Construction of—Execution of money decree—Limitation. 5 Pat.L.T. 276=76 I.C. 452; 79 I.C. 477=16 S.L.R. 245. Where a decree was

NOTES.

dated wrongly and the decree-holder was misled by that, the decree ought to be regarded as having been passed on that date. 56 C.L. J. 185.

EXECUTION AGAINST SURETY.—Art. 182 is not exhaustive of all execution applications. Period of limitation for execution, against a surety who had executed a surety bond when the decree was first put into execution undertaking to pay the decree amount in case the decree-holder failed to realise the amount from the judgment-debtor, does not run under any of the clauses of Art. 182. Art. 181 applies to such a case. 1933 O. 209. Time for enforcing a surety bond given as a condition for stay of execution of a mortgage-decree runs only from the date when the property is sold and a deficiency arises. 136 I.C. 629=36 C.W.N. 701=1932 P.C. 131 =63 M.L.J. 85 (P.C.). *See also* (1940) 2 M. L.J. 831. It was held in the case of execution against a surety who had executed a surety bond at the time of attachment before judgment, that limitation on the bond began to run from the date of the decree itself and that execution was barred under Art. 182: 142 I.C. 368=1933 M. 219=37 L.W. 127. *See also* 6 R. 354. Surety for movables attached in execution—Limitation — Application for arrest of second surety—Prior application for recognition of assignment of decree and for arrest of first surety, if available to save limitation as against surety: *Held* that (*i*) steps taken in execution against the judgment-debtor are not steps against the sureties, nor are steps in execution against sureties steps in execution of the decree itself, so that the proceedings for the recognition of the assignment of the decree did not save limitation; (*ii*) that the application was governed by Art. 181 and not Art. 182; (*iii*) that the application for the arrest of the first surety, in which no relief was sought against the second surety, did not save limitation against the second surety and that the petition was, therefore, barred by limitation. 38 L.W. 450=1933 M. 722=65 M.L.J. 507.

CONTINUATION OF PROCEEDINGS. [*See* "REVIVAL AND CONTINUANCE OF EXECUTION" *supra*.]—Where the proceedings in pursuance of an application for execution are suspended by the executing Court through no act or default of the decree-holder, an application to revive and carry on the execution will not be barred, even though made three years after the suspension of the execution. 71 I.C. 963=1923 A. 471. *See also* 77 I.C. 871=1923 A. 600; 1940 A.W.R. (B.R.) 278=1940 R.D. 533; 12 Luck. 743=1937 Oudh 158; 1941 A.L.J. (Sup.) 5; 1936 Pat. 313. Per *Walsh, A. C.J.* and *Muherjee, J.*—Whether an application is in substance a fresh application or an attempt to revive a former one is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case. 49 A. 276 =100 I.C. 692=1927 A. 16 (F.B.). Where the original application asked for execution against the movable property to be pointed out by the servants of the decree-holder and attachment of crops in the following plots, and the subsequent application referred to the attachment of different crops in different plots, it was held that the later one was not in continuation of the prior one. 1941 A.L.J. (Supp.) 19. Where after dismissal of an application for execution of decree for want of prosecution, another application is made in a tabular form setting forth all the particulars required by O. 21, R. 11, C. P. Code, and praying that the decree may be executed and the property sold by "revival" of the previous proceedings, it should be construed as a fresh application for execution. 152 I.C. 36=1934 A. 1047. An execution application asking for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceedings. When the character of the application is different from that of the previous application, it cannot be treated as a continuation. 54 A. 573=138 I.C. 583=1932 A. 273 (F.B.). Where, without any fault or delay on the part of the decree-holder and without notice to him, the Court consigns an application for execution to the record room, a further appplication for execution will be treated as one for continuation of the old application. 1922 A. 433 (1). *See also* 8 Pat.L.T. 287=1927 P. 1121. Property of judgment-debtor attached on application for execution—Judgment-debtor obtaining from InsolvencyCourt order for staying execution—Case consigned to records but attachment continued—Judgment-debtor ultimately withdrawing his insolvency petition—Subsequent application, by decree-holder for revival of execution is only a continuation of his previous application. 165 I. C. 798=1936 O.W.N. 1239=1937 O. 158. A direction to consign papers to the record room is not a final disposal of the execution application. 49 A. 509=1927 A. 165=25 A.L.J. 249. (F.B.) As to order directing application to be struck off without notice to decree-holder, *see* 49 A. 276=100 I.C. 692=1927 A. 16 (F. B.). *See also* 3 P. 596=78 I.C. 766=1924 P. 576 (Execution proceeding struck off without any default on the part of the decree-holder). *See also* the cases cited on the point under Art. 181. An order in execution proceedings recording the execution petition with permission to the decree-holder to renew is a wrong order to pass, but once such an order is made, a subsequent execution petition becomes a continuation of the previous one. 121 I.C. 845 =1930 M. 303. An application for execution may be deemed to be one to revive and carry through a pending proceeding when the latter was arrested by reason of circumstances, over which the decree-holder had no control. 74 I.C. 279=1924 C. 419. *See also* 87 I.C. 561= 1925 C. 1185. 26 C.W.N. 338; 1924 M. 178; 89 I.C. 886; 60 I.C. 265; 19 L.W. 613; 1934 P. 532. Where execution sale is set aside at the instance of judgment-debtor, a subsequent application for execution is treated as one for continuation of earlier application. 64 I.C. 849=35 C.L.J. 135. *See also* 90 I.C. 799. In order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application, two

NOTES.

conditions must be satisfied, first that the previous application was dismissed for no fault or default on his part and, secondly, that the present application is similar in scope and character to the previous application. 72 I. C. 862. *See also* 4 Pat.L.T. 393=1923 P. 488. Where an execution application did not contain an express prayer to revive a previous application which had been dismissed, and the relief in it was quite different from what was claimed in the previous application, and besides, the application was made on a form prescribed for application for execution of decrees, *held*, that the application could not be said to be a continuation of the previous application. 115 I.C. 24=1929 L. 529. An application for revival of previous execution proceedings which contains an additional prayer for the arrest of the judgment-debtor is not a fresh application. 1930 L. 753. *See also* 1939 O.W.N. 267=1939 Oudh 118=1939 O.A. 296; 69 C.L.J. 165=43 C.W.N. 429=1939 Cal. 331; 1937 A.M.L.J. 53.

EXECUTION PROCEEDINGS, WHAT ARE.—An application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, is not a proceeding in the suit, but a proceeding in execution and comes within Art. 182, 47 B. 778=25 Bom.L. R. 810. *See also* 45 B. 819=61 I.C. 448. An application for restitution under S. 144, C. P. Code, is one for execution of decree of the appellate Court and is thus governed by Art. 182. 45 B. 1137=62 I.C. 233; 1931 M.W.N. 1006; 2 P. 227; 13 P. 411=15 Pat.L.T. 173 =1934 P. 246 (2) (F.B.); 152 I.C. 944=15 Pat.L.T. 745=1934 P. 646; 41 Bom. L.R. 1204=1940 Bom. 30; 1939 Nag. 101. But *see* 35 C.W.N. 1294 holding that Art. 181 applies. Time begins to run from the decree which for the first time gave the applicant the right to restitution: 35 C.W.N. 1294. An application for refund of purchase-money by the auction-purchaser is in time if brought within 3 years from the date of the decree of the High Court on second appeal confirming the claim of the claimant to the suit properties, although it may be more than 3 years from the date of the decree of the first appellate Court and of dispossession. 1931 M.W.N. 1006. Time must begin to run from the date of the final decree, however informally it is expressed. 74 I.C. 1017=1924 C. 131. Execution proceedings—Partial decree—Appeal—Dismissal—Starting point of application for execution. 60 I.C. 915=47 C. 813. Where an application for the execution of a decree is barred by limitation, it cannot be revived by a subsequent application for amendment. 59 I.C. 186 (C.) Execution proceedings are not closed by the Court merely recording them and the decree-holder's right to apply for their continuance accrues from day to day and is not barred until three years from the date when they cease to be pending. 47 M.L.J. 608=20 L.W. 585. *See also* 79 I.C. 891=1925 M. 218. But a judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation and that therefore it was not in accordance with law. 1923 C. 322 (2).

Art. 182 (1).—SCOPE AND EFFECT OF CL. (1).—Under this article the period of three years of limitation runs from the date of the decree and not from the date of the order to dismiss the appeal for want of prosecution. 25 C.W.N. 858=49 C. 203. *See also* 2 P. 712; 1934 R. 329. Art. 182 (1) contemplates only a decree or order made in such a form as to render it capable of being enforced in execution: if a further application is necessary to make the decree executable, then Art. 181 applies for such further application. 40 M.L.J. 1=25 C.W.N. 337 (P.C.). Date of decree—Instalment decree —Default —Waiver—Limitation. 25 Bom.L.R. 153=1923 B. 207. Execution of decree by legal representative—Limitation—Starting point is date of appellate decree. 51 C. 312=81 I.C. 569. Date of the decree—Copy of decree through Court's mistake bearing date on which it was drawn up instead of date of judgment—Application for execution made within limitation from former date not barred. 1938 Pat. 149. *See also* 197 I.C. 217; 1942 P.W.N. 139. The provision of cl. 5 of Art. 182 is not reetricted in its application by cl. (1). 41 M.L.J. 312=45 M. 35. Where a decree is passed in favour of one person and is transferred to two persons in parts, an execution application by one of such transferees enures to the benefit of the other transferee and saves limitation for his portion. 45 M. 35. The starting point of limitation for execution of the order for compensation passed by a partition officer is the date on which the partition came into effect. 14 R.D. 341. Where a compromise decree was passed in a mortgage suit, which was itself executable, but the decree-holder applied subsequently for a final decree which was passed without any objection by the judgment-debtor, *held*, that limitation for an application for execution commenced to run only from the date of the final decree and not from the date of the compromise decree. 121 I.C. 818. Where the parties to two cross-suits agreed, when the suits were pending, that after the two decrees were passed, the party who was entitled to the larger amount should pursue execution of the decree in his favour to the extent of the excess: *Held*, that the agreement showed a set-off and entitled the party in whose favour the excess was decreed to ultimately take out execution, that the excess could be only ascertained after the final decree was passed in appeal, if any, preferred by any of the parties, and that for purposes of the execution the date of the decree of the appellate Court and not of the trial Court was the starting point of limitation. 36 Bom. L.R. 645=1934 Bom. 307. Where an order or decree, separately executable, is passed at an earlier stage of a suit, limitation for applying for the execution of such decree or order runs from the date of the order or decree as the case may be. Where therefore the Court passes a preliminary decree for partition and along with it also passes a decree for costs to be paid by the judgment-debtor to the decree-holder, the order for costs being a separately executable order, execution of it must be taken within three years

NOTES.

of the date of the order. It is however open to the decree-holder plaintiff to ask the Court to incorporate the previous order for costs in the final decree, although execution of such order independently is barred by limitation. 175 I.C. 45=19 Pat.L.T. 798=1938 Pat. 188.

Art. 182 (2): Scope and Effect:—*See* 6 P. 780=8 Pat.L.T. 379=1927 P. 215. The word "appeal" in Art. 182 (2) means an appeal the result of which affects the decree sought to be executed. It does not mean any appeal which only affects the decree-holder's right to execute it at a particular time and in a particular circumstance. An appeal against an order dismissing an application by the judgment-debtor to record satisfaction of the decree, which would leave the decree valid and without modification, cannot be regarded as an "appeal" within the meaning of Art. 182 (2), for purposes of extending limitation. 52 L.W. 277=(1940) 2 M.L.J. 371. The language of Art. 182 (2) is sufficiently wide to include an appeal the result of which may affect the decree or order which it is sought to execute, in such a way as to render the execution proceedings in connection with such decree or order infructuous. Where, therefore, after an order for restitution was obtained by the respondent, the appellant continued litigation in various Courts and at last his final appeal failed, an application for execution for the order for restitution filed within three years from the date of the order in such final appeal but more than three years after the order for restitution was made, is not barred by limitation. 44 C. W.N. 859. It is perfectly plain on the language of Art. 182 that the words "where there has been an appeal," in the last column, mean an appeal from the decree sought to be executed, and not an appeal from another deeree, though made in the suit. 41 Bom.L.R. 921=1939 Bom. 454. *See also* (1937) 1 M.L.J. 407. Time for applying for execution runs from the the date of appellate decree even though appeal is only the against a portion of the trial Court's decree. 53 C. 901=97 I.C. 838=31 C.W.N. 262=1927 C. 89 ; 1929 C. 676. A preliminary decree in a partition suit was passed on 18th April, 1918, and confirmed by High Court on 20th March, 1923. A final decree was passed by the trial Court on 30th September, 1919, and on an application for execution filed on 24th March, 1925, *held,* that the appeal referred to in Art. 182 (2) was an appeal against the decree sought to be executed and as no appeal had been preferred from the final decree which was the decree sought to be executed, time began to run from 30th September, 1919, and the application was therefore barred, even though it was within three years of the date when the High Court confirmed the preliminary decree. 37 L.W. 180=1933 M. 315=64 M.L.J. 251=56 M. 458. *See also* 1928 P. 581 ; 6 P. 780=102 I.C. 811=1927 P. 215 ; 19 Pat.L.T. 798=1938 Pat. 188. Appellate decree, what is. 54 C. 1052=1927 C. 904 ; (1940) 2 M.L.J. 371. Where in remanding a case for trial *de novo* the appellate Court passed an order for costs against the guardian of the successful minor appellants and the suit though dismissed in the trial Court was ultimately decreed in appeal on a question as to the starting point of limitation for the execution of the order for costs against the guardian, it was held that the order for costs though not varied by the final order, in appeal was at least closely related to it since both were passed during proceedings in the same suit and that was sufficient reason for taking the date of the final decree in the suit on appeal as the proper starting point of limitation. 1942 O.A. 226=1942 O.W.N. 315. The time fixed for payment of the instalment under an instalment decree which is confirmed by the appellate Court should be allowed from the date of the confirmation of the decree. 49 B. 305=86 I.C. 894. *See also* 25 Bom.L.R. 153=1923 B. 297. There is no definition of appeal in the C. P. Code and any application by a party to an appellate Court asking to set aside a decision of a subordinate Court is an appeal within the ordinary acceptation of the term. An appeal is no less an appeal, because it is irregular or incompetent. Hence an appeal against an order granting the review comes under the definition. 57 B. 388=35 Bom.L.R. 432=1933 B. 255. Any application by a party to an appellate Court to set aside *or revise* a decree or order of a Court subordinate thereto is an "appeal" within the meaning of Art. 182 (2). 45 L.W. 457=1937 M. 385=(1937) 1 M. L.J. 453 (F.B.). The word "appeal" in Art. 182 (2) does not mean *bona fide* appeal. 74 I.C. 679=1924 C. 349. But *see* 1923 C. 288. Even though the appeal preferred was irregular in form and was dismissed on that ground, limitation would start from the date of the appellate Court's order. 59 A. 283=137 I.C. 529=1932 P.C. 165=63 M.L.J. 229 (P.C.) But *see also* 57 M. 741=1934 M. 303=66 M.L. J. 486. The contention that an appeal in order to save limitation under cl. (2) must be one to which the persons affected were parties and that it must also be one in which the whole decree was imperilled is not sound. 59 A. 283. The decision in 1930 A. 636 and 1930 P. 146 are not now good law. *See also* 1923 C. 228 ; 1924 C. 439. For purposes of Art. 182 (2), it is sufficient that there has been an appeal and there is no warrant for reading into the words of the article any qualification either as to the character of the appeal or as to the parties to it. Where there was an appeal from the decree in the suit in which respondent was awarded costs but the question as to costs was not the subject-matter of the appeal. *Held,* that the period of limitation did not begin to run from the original date of the decree. 15 L. 267=147 I.C. 689=1934 L. 318. The expression "where there has been an appeal" means an appeal which is likely to affect the decree sought to be executed. Where pending an appeal from a preliminary decree in a mortgage suit, which was confirmed on appeal, a final decree is passed, an application for execution of the final decree would be in time, if filed within three years of the date of the appellate preliminary decree, though beyond three years of the date of the final decree itself. It is not necessary to apply afresh for a final decree or to get the final decree amended. The

Description of application.	Period of limitation.	Time from which period begins to run.
		3. (where there has been a review of judgment) the date of the decision passed on the review, or

NOTES.

original final decree may itself be executed. 45 L.W. 278=(1937) 1 M.L.J. 407. *See also* 1939 Bom. 454 ; I.L.R. (1939) Mad. 252=48 L.W. 751=1939 Mad. 157=(1938) 2 M.L.J. 1048 ; 1939 Mad. 735=(1939) 2 M L.J. 86. The expression must be construed in its plain sense. Where, though an appeal is incompetent in law, it is *bona fide* presented, it satisfies the terms of Art. 182 : 79 I.C. 477=16 S.L.R. 245. Even when an appeal is dismissed for non-payment of Court-fees, limitation runs for purposes of execution only from the date of the order of dismissal. 74 I.C. 679. Where a memorandum of appeal filed with deficit Court-fees was neither registered nor numbered as an appeal but was rejected for non-payment of the requisite Court-fees within the time allowed, the order of the appellate Court has not the effect of a decree and it does not deal judicially with the appeal at all which never came into existence. Consequently, the starting point for limitation under Art. 182 for the execution of the decree is the date of the trial Court's decree and not the date of the order of the appellate Court rejecting the memorandum of appeal; 42 C.W.N. 698=1938 Cal. 533. *See also* 41 C.W.N. 1285=1937 Cal. 728. Where an appeal is preferred on insufficient court-fee and is duly registered as an appeal and numbered as such but subsequently rejected after notice to the parties and after hearing them, the time for execution begins to run from the date of the order of the appellate Court. 19 Pat.L.T. 243=1937 P.W.N. 1023=1938 Pat. 79. It is definitely established that Cl. (2) of Art. 182 has no application to appeals other than appeals against the decree itself. It does not apply to appeals from orders in collateral proceedings which may affect the decree to be executed. An application to cancel or modify an order recording satisfaction of a decree and to revive it, cannot be regarded as an application for the decree itself, so as to make Art. 182 (2) applicable to an appeal from the order passed on the application to revive the decree. 50 L.W. 497=1939 Mad. 872. An order directing the return of the memo. of appeal for presenting to the proper Court is not a "final order", nor is the Court an appellate Court within Art. 182 (2) and the time for executing the decree does not run from the date of such order. 39 M.L.J. 431=43 M. 835 ; nor where it is returned for re-presentation after some amendment. 163 I.C. 354=44 L.W. 59=1936 M. 613=71 M.L.J. 336. *See also* 1936 Lah. 479. In an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. 3 P. 327=79 I.C. 794; 59 I.C. 896. *See also* 59 A. 283 (P.C.) ; 1939 2 M.L.J. 271. (appeal by some of the defendants only). Continuance of proceedings—Incompetent appeal does not suspend limitation. 1923 C. 228. But *see* 74 I.C. 679=1924 C. 349 ; 134 I.C. 425=1931 P. 422. (Appeal dismissed as out of time gives a fresh starting point.) *See also* 19 I.C. 477 (S.) ; 35 Bom.L.R. 432=1933 B. 255=57 B. 388. But where a Court refuses to receive the memo. of appeal on file in view of O. 41, R. 1 (3), C. P. Code (Madras Amendment), there is no appeal, and time is not extended by Art. 182 (2). 57 M. 741=1934 M. 303=66 M.L.J. 486. An order of the appellate Court holding that the appeal had abated and refusing to set aside the abatement is a final order within the meaning of Art. 182 (2), since it deals judicially with matters before the Court. 60 I.A. 83=142 I.C. 326=1933 P.C. 68=64 M.L.J. 421=60 C. 662 (P.C.). The decision in 49 C. L.J. 111=104 I.C. 566=1927 C. 760 to the contrary is not good law. The dismissal for non-prosecution of an appeal to the Privy Council even after admission and appearance of the respondents does not constitute a final order or decree of the appellate Court within the meaning of Art. 182 (2), and limitation starts from the date of the dismissal of the appeal by the High Court. 11 P. 477=139 I.C. 198=1932 P. 231. *See also* 1936 L. 479. The appeal referred to is an appeal from the decree itself and not from an order rejecting an application to set aside the *ex parte* decree. 11 Lah.L.J. 61=1929 L. 283 ; 138 I.C. 692=1932 A. 601 ; 35 C. W.N. 155=131 I.C. 263=1931 C. 332. But *see contra* 18 Pat.L.T. 231=1937 P. 337. For execution purposes an appeal by itself never operates as a stay. There is the right to execute the moment the decree is passed; but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. 33 C.W.N. 958=50 C.L.J. 12=1929 C. 676. Assignment of decree pending appeal—Assignee not brought on record—Appeal and second appeal with decree-holder on record—Application for execution by the assignee within three years of second appellate Court's decree is not barred. 1930 A. 380. In all cases, what Art. 182 (2) refers to is a decree, *viz.*, one decree, and it is not permissible for Courts in execution to look into the matter and say that, as there are several reliefs which are severable, what is nominally one decree, consists of several decrees. In the case of a plaint claiming several reliefs where the Court passes a decree granting some of such reliefs and refusing the others, but where an appeal is preferred only against a portion of the decree regarding a particular relief, limitation for the execution of the other unappealed reliefs runs only from the date of the appellate decree. (1932 P.C. 165, Appl.) 1935 M.W.N. 329=1935 M. 557.

Art. 182 (3).—The real distinction between

Description of application.	Period of limitation.	Time from which period begins to run.
		4. (where the decree has been amended) the date of amendment, or

NOTES.

cls. (2) and (3) of Art. 182 is really one of the particular tribunal which passed the order by which the original decree is imperilled. If the order is made by the appellate Court, then Art. 182 (2) applies; but if the order is made by the original Court which passed the decree to be executed, then cl. (3) applies and the date from which limitation runs is the date of the order of the original Court. All cases in which the Court reconsiders its own judgment, whether in applications for restoration or in applications for "review" so called, are cases of review within the meaning of Art. 182 (3). An order allowing or rejecting an application for restoration of a proceeding decided *ex parte* is an order on "review" and therefore gives a starting point of limitation for execution. 18 Pat.L.T. 231=1937 P.337=16 Pat. 306. Art. 182 (3) is not applicable to cases where an application for review has not been granted but rejected, and in such cases limitation is not enlarged under the article. 20 Pat. 513=1941 P.W.N. 477=22 Pat.L.T. 26=1941 Pat. 213. Where there has been a review of the decree, the period of limitation for purposes of Art. 182 (3) should be taken to run from the date of the review, notwithstanding that the persons against whom time is reckoned were not parties to the review proceedings. [63 M.L.J. 329 (P.C.), Rel. on.] 141 I.C. 175 (2)=1933 M. 276=64 M.L.J. 75=36 L.W. 919. *See also* 1930 P. 207. A second execution application (filed after the amending Act IX of 1927 came into force) was returned for correction of some defects and only re-presented along with a third application for execution more than three years from the date of the first application. *Held*, that so long as no final orders had been passed on the second application, it was still pending and no question of limitation arose. 64 M.L.J. 401=37 L. W. 469=144 I.C. 167=1933 M. 540. As to the meaning of "final order," *see* 1932 O. 148 (F.B.). Recording of payment by Court under O. 21, R. 2 is not a final order. 1932 Oudh 198. Where there was an application for review and an appeal against the order in review, the decree-holder is entitled to the benefit of cls. (2) and (3) of Art. 182. The words in Art. 182 (3) "decision passed on review" mean a decision passed in review proceedings; and whatever such a decision is, it gives a fresh starting point of limitation. 162 I.C. 223=38 Bom.L.R. 215=1936 B. 162.

Art. 182 (4): SCOPE AND EFFECT OF CL (4).—The correction of mere clerical errors in a decree, *e.g.*. error in the number of the suit or in the name of judgment-debtor, does not amount to an amendment within the meaning of Art. 182 (4). Where the decree as it stood before such correction was fully capable of execution and the decree-holder took no steps for its execution for a period of three years, the decree becomes barred, and the subsequent verbal corrections will not have the effect of reviving the said decree or giving a fresh start to the decree-holder. 67 C.L.J. 92=41 C.W. N. 1151=1937 Cal. 581. Art. 182 (4) lays down clearly and without reservation that when a decree has been amended the period of limitation is three years from the date of the amendment. It is not stated that the amendment should have been made within three years from the date of the original decree or at a time when the original decree was subsisting. It is not the function of the executing Court to question the correctness or propriety of the amendment of the decree. I.L.R. (1941) Lah. 659=43 P.L.R. 11=1941 Lah. 131. *See also* 41 C. W.N. 1330; 1937 Pat. 453; 1938 Pat. 57. Where the original decree is incapabe of execution, time runs from the date when a decree properly capable of execution has been drawn up. 64 I.C. 522=34 C.L.J. 397. Where a decree capable of execution becomes barred, its amendment cannot entitle the decree-holder to a fresh period of limitation under Art. 182 (4), because after it is dead, it cannot be revived by a subsequent application for amendment. 5 Lah.L.J. 398=1924 L. 329. *See also* 1933 M. W.N. 23=37 L.W. 180=64 M.L.J. 251=1933 M. 315=56 M. 458; 1936 Mad. 434=70 M.L. J. 700; 147 I.C. 815=11 O.W.N. 10=1934 O. 43. But see *contra* 40 L.W. 896=67 M.L.J. 904; 167 I.C. 134=18 Pat.L.T. 18=1937 P. 316. *See also* 57 M. 795=39 L.W. 488=1934 M. 283=66 M.L.J. 492. The words of cl. 4 of Art. 182 are quite unqualified and do not speak of any particular form of amendment, whether the amendment is necessary or not, whether the decree is capable of execution without the amendment; it does not qualify the matter of amendment in any way under Art. 182 (4); if a decree has been amended, the starting point of limitation for execution is the date of the amendment. The fact that the amendment is applied for and made after three years from the date of the decree is immaterial. If an application for execution is made within three years of such amendment, it is in time and not barred. The executing Court is not competent to sit in appeal over the Court which passed the decree or made the amendment; it has only to see whether the decree has boen amended in order to see whether the execution application is barred by limitation. 16 Pat. 290=18 Pat.L. T. 18=1937 Pat. 316; *see also* 16 Pat. 453=18 Pat.L.T. 679=1938 Pat. 57. Art. 182 (4) allows an application for execution to be made within three years from the date when the decree is amended. It is beyond the competence of the executing Court to decide as to whether the order for amendment of the decree was proper or not. It may be the duty of the Court allowing the amendment to consider as to whether an amendment should be granted

Description of application.	Period of limitation.	Time from which period begins to run.
		5. (where the application next hereinafter mentioned has been made) the date of [1][the final order passed on an application made] in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or

LEG. REF.

[1] Substituted by Act IX of 1927.

NOTES.

at all when the application is made more than three years after the date of the decree; and i there is an order for amendment passed in such cases the parties of course could challenge that order by way of revision, but it is no business of the executing Court to enter into the propriety of the question as to whether the amendment should have been made or not, and once the decree is amended it has got to take the amended decree as it stands and allow execution of it provided the application for execution is made within three years from the date of the amended decree. 65 C.L.J. 455=41 C.W.N. 1330. *See also* 1935 A.L.J. 289.

If there has been an amendment of a decree which was incapable of execution, the period shall run from the date of the amendment, otherwise it must date back to the date of the original decree. 27 A.L.J. 427=115 I.C. 118 (2)=1929 A. 253. *See also* 1929 C. 650. Where a decree has been amended, it is not for the Court of execution to enquire whether the amendment was properly made, whether the original decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree. 1929 C. 650. *See also* 1930 P. 286.

Art. 182 (5).—Scope of—Difference between para. (5) and the rest of the pararagraphs. While all the paragraphs in Art. 182 excepting para. (5) deal with the question of what is the time from which limitation begins to run in the case of a first application for execution, para. (5) alone deals with the case of subsequent. applications. The wording of para. (5) shows that it refers to an application for execution where there has been a previous proceeding in execution in the Court. The other paragraphs do not deal with such a question. I.L.R. (1938) A. 342=1938 A.L.J. 117=1938 All. 210. What is clearly contemplated by Art. 182 (5) is that a judicial order is to be made on an application by the decree-holder, being a step-in-aid of execution and in order that an application for transfer should benefit the decree-holder, it must be in essence in continuation. 162 I.C. 984=1936 P. 313. A decree entitling a landlord to a certain enhancement of rent is not capable of execution. The entry of the decree in the revenue records is not execution of it, but merely a record of the facts as they exist. Accordingly, Art. 182 has no application to a mutation in accordance with such a decree. 16 Lah.L.T. 26. The *terminus a quo* under the *unamended* form of Art. 182, cl. (5) is the date of the application for execution or to take some step-in-aid of execution and not (as under the amending Act IX of 1927) the result of the application, *viz*.. the date of the final order passed on such application. 61 I.A. 62=38 C.W.N. 229=1934 P.C. 14=66 M.L.J. 79 (P.C.).

AMENDMENT NOT RETROSPECTIVE. — The amendment will not disturb vested rights and so, subject to this limitation, an application made after the 1st January, 1928, will necessarily be governed by the amended Act. 1930 P. 207.

STEP-IN-AID OF EXECUTION—(*a*) TEST OF APPLICATION BEING STEP-IN-AID.—There can be a step-in-aid of execution without any application for execution having ever been made at all. 178 I.C. 202=1938 Lah. 326. Anything done by the decree-holder through the machinery of the Court or any proceeding taken by the executing Court which is calculated to advance the case of the decree-holder in the direction of his ultimate object of reaping the fruits of his decree, can be treated as a step-in-aid of execution and save the running of limitation against him. 18 Lah. 671=39 P.L.R. 680=1937 Lah. 404. The necessary conditions which must be satisfied for the application to be one for execution or to take some step-in-aid of execution of the decree or order are that (1) the application must be in accordance with law, (2) it must be made to the proper Court, and (3) there must be a final order passed on the application. These conditions are adjectival both to the application for execution and to the application to take step-in-aid of execution of the decree or order. 137 I.C. 768=1932 O. 148 (F.B.). A step-in-aid of execution can be taken before an application for execution of the decree has been made in Court. I.L.R. (1939) All. 728=1939 A.L.J. 746=1939 All. 483. A step-in-aid of execution implies that there is already a decree which can be executed and in furtherance of which the step is taken. Where under O. 20, R. 12, C. P. Code, the Court fixes the amount of the mesne profits but defers the drawing up of the decree until payment of the necessary Court-fee by the plaintiff, an application by the plaintiff praying the Court to assess and receive the deficit Court fees or to prepare the final decree cannot be considered to be a step-in-aid of execution under Art. 182

NOTES.

(5). 23 Pat.L.T. 202=1942 P.W.N. 139. Art. 182 (5) gives two landmarks of time from which the period of limitation can run. One is the date of the final order passed on an application made for execution, and the other is the date of the final order passed on an application made to take some step in aid of execution. 1939 Rang.L.R. 508=1939 Rang. 406. Under Art. 182, Cl. (5) it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree, and it is not further necessary to show that such application was not merely colourable but had been made with a *bona fide* and genuine intention of obtaining execution of the decree and not simply for the purpose of gaining time and keeping the decree alive. [52 A. 11 (F.B.). Appr. 48 A. 468, Overr.] 61 I.A. 62=66 M.L.J. 79=55 A. 993 (P.C.). Application for execution of a decree made to a wrong Court canot be considered as a step-in-aid of execution. 177 I.C. 483=40 P.L.R. 721=1938 Lah. 451. The fact that an application for execution is subsequently dismissed on account of the decree-holder's default cannot make the application ineffective for saving the limitation, if it is a proper application made in accordance with law. It is the application,and not the result of the application, which is contemplated as being sufficient to save limitation. 167 I.C. 34=1937 O.W.N. 169=1937 O. 233. The words "for execution" in Art. 182 (5) mean "for the purpose of obtaining execution," the words "step-in-aid of execution" mean "step taken for the purpose of obtaining execution." 90 I.C. 938. *See also* 42 M.L.J. 303=45 M. 466. But where the applicant does not state what step he wishes to be taken, that application will not come under this clause. 150 I.C. 866=36 Bom.L.R. 115=1934 B. 113 (2). Where decree comprises two reliefs, an application to execute first portion is a step-in-aid. 44 A. 166=65 I.C. 358. In the case of a joint and several decree an application for execution made against any one of the judgment-debtors is a step-in-aid of execution against all. The fact that one of the judgment-debtors is not correctly impleaded in that the person who was mentioned as his guardian was not nominated by the Court, is immaterial. 197 I.C. 480=8 B. R. 225. *See also* 1938 Pat. 395. An application praying for a relief which perhaps the Court would not have granted is still treated as an application in accordance with law for the purposes of Art. 182: 49 M.L.J. 753=91 I.C. 11; 68 I.C. 116=26 C.W.N. 292. "Date of decree," meaning of. 1 Luck. 543=1927 O. 488. An application made to point out that the official of the Court had omitted to include interest granted under the decree payable to him and to correct the mistake by addition of interest after calculation, is necessitated by a mistake of an official of the Court and is a step-in-aid of execution. It is a judicial act and not a ministerial one. 114 I.C. 55=1929 L. 103. *Obiter*.—If execution of a decree is conditional on prior payment by the decree-holder of court-fees, or of the mortgage-debt in a redemption suit, or on discharge by the decree-holder of an incumbrance, or anything else, an application by the decree-holder for execution without fulfilling such a condition is nevertheless one in accordance with law, it being open to the Court, on such application, to order execution on previous compliance by the decree holder of the condition imposed by the decree. 122 I.C. 438. *Bonafides of decree holder* in making the application is not material. 1939 Rang.L.R. 587=1939 Rang. 433;41 P.L.R. (J. & K.) 31 (1934) P.C. 14 Foll.)

(*b*) APPLICATIONS AS STEPS-IN-AID OF EXECUTION—(1) GENERAL.—An application to take a step-in-aid of execution is not necessarily an application in execution. 41 M.L.J. 374=1922 M. 247. To constitute a step-in.aid it must pray for some relief which can be granted by the Court. 35 C.L.J. 82=1922 C. 44. *See also* 1932 A.L.J. 1035 as to the meaning of the word. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent of removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution. 137 I.C. 768=1932 O. 148 (F.B.). The word "application" in cl. (5) means a document containing a request. There is nothing to prevent the Court from treating a suit as an application. 7 O.W.N. 887=1930 O. 468. But *see also* I.L.R. (1939) 2 Cal. 33=43 C.W.N. 604=1939 Cal. 319; 1940 Rang.L.R. 82=1939 Rang. 296; 1938 N.L.J. 336=1938 Nag. 534 (Claim suit under C. P. Code, O. 21, R. 63). The step-in-aid of execution must be made while the decree is still alive. Certification cannot have the effect of reviving a dead decree. 7 O.W.N. 858. A plaint in a suit in a Munsif's Court for a declaration that certain immovable property of the judgment-debtor was liable to attachment and sale in execution of a decree obtained in a Small Cause Court can be treated as a step-in-aid of execution. But it cannot be treated as an application made to the "proper Court," unless the said decree of the Small Cause Court has, before the plaint is filed, been transferred to the Munsif's Court for execution. When the decree has not been so transferred, Art. 182 (5) will not apply to save limitation. 155 I.C. 505=1935 O.W.N. 672. *See also* 1940 N.L.J. 605 (Insolvency Court not proper Court for execution). An application to take a step-in-aid of execution may be made even though there is no pending application for execution. (45 M. 202, Foll.; 45 M. 466, Not Foll.) 151 I.C. 767=36 Bom.L.R. 510=1934 B. 266; 57 M. 808=39 L.W. 639=1934 M. 392=67 M.L.J. 762. Application by decree-holder to execute decree for more than is due to him does not by itself make it not one in accordance with law. 53 L.W. 155=1941 Mad. 528=(1941) 1 M.L.J. 267. *See also* 43 Bom.L.R. 883 (Assignment of decree to several persons jointly—Application by one alone saves limitation); *See also* (1940) 2 M.L.J. 502.

(2) WHAT APPLICATIONS AMOUNT TO STEPS-IN-AID.—Process application for attachment. 48 M.L.J. 678=1925 M. 880. An application or transfer of decree for execution. 3 Pat.L.T.

NOTES.

298=1 P. 328. *See also* 11 P. 785=1932 P. 309; 27 S.L.R. 109=142 I.C. 489=1933 S. 78; 10 O.W.N. 363=1933 O. 131=143 I.C. 678; 16 P. 288=18 Pat.L.T. 202=1937 P. 351; 162 I.C. 984=1936 P. 313; 1939 A.L.J. 1128 =1939 All. 57; 1940 Pat. 677=19 Pat. 354; 1937 O.W.N. 1116; I.L.R. (1940) All. 318= 1940 A.L.J. 381=1940 All. 331; 1937 Ran. L.R. 287=1937 Rang. 477 (order sending decree for execution to another Court); 71 C. L.J. 535=1940 Cal. 557; 1937 Nag. 305; 1936 A.W.R. 294=1936 A.L.J. 254=163 I.C. 231= 1936 A. 369; 1937 A.L.J. 278=1937 A. 397. An application to certify payment. 2 R. 393= 84 I.C. 473. *See contra* 137 I.C. 768=1932 O. 148 (F.B.); 56 M.L.J. 333=9 Luck. 288 (P.C.); 163 I.C. 915=1936 P. 386; 43 Bom.L.R. 880. Uncertified payment whether saves limitation. *See* 1927 C. 29. *See also* 101 I.C. 574; 1927 A. 827; 1932 A.L.J. 1035 (S. 20 proviso applied). Application by mortgagor in redemption suit to extend time for deposit of money. 41 M.L.J. 374=45 M. 202. An application by a transferee decree-holder for a recognition of his transfer and to execute the decree. 47 M.L.J. 447=80 I.C. 103=40 Bom.L.R. 411=1938 Bom. 309. But an application by a transferee to be brought on the record without asking for execution of the decree is not an application in accordance with law, as it is not an application for execution of the decree. 27 S.L.R. 314=1933 S. 341. An application is required under the provisions of O. 21, R. 11, C. P. Code, to contain certain particulars and to be signed and verified. It is the duty of the Court when it is presented to check the application to see that the necessary particulars are given under O. 21, R. 17 and the Court is then empowered either to reject the application or require its immediate amendment or its amendment within a fixed time. If the Court takes none of these actions it must be deemed to hold the application to be one in accordance with law. 1941 Pesh. 103. Application to make decree final may be step-in-aid. 79 I.C. 407=1924 B. 71. An application by a decree-holder to obtain an order which he has been directed by the executing Court to obtain is an application to take a step-in-aid. 63 I.C. 844 =23 Bom.L.R. 1013. Application to send for records. 23 A.L.J. 422=88 I.C. 271. Application for the issue of notice upon judgment-debtors. 68 I.C. 337=1923 P. 180. Even where an execution application is not in accordance with law, if an order had been made for issue of notice under O. 21, R. 22, a fresh period of limitation begins to run from the date of the issue of the notice. 90 I.C. 847; 1933 P. 658. Issue of a combined notice under O. 21, Rr. 22 and 16 upon the judgment-debtor is sufficient under the law to save limitation. 90 I.C. 847; 47 L.W. 538=1938 Mad. 553=(1938) 1 M.L.J. 710; 40 Bom.L.R. 676; 1938 Bom. 405=I.L.R. (1938) Bom- 708. But *see* 78 I.C. 241=1925 L. 233, *contra.* Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. And if such application is made in good faith for the purpose of executing the decree, it will be a step-in-aid. 116 I.C. 474=1929 R. 95. *See also* 1929 A. 625 (F.B.). (Good faith not necessary). An application that certain objections to the execution of the decree be rejected is a step-in-aid. 19 A.L.J. 641=63 I.C. 907. *Ses also* 50 M. 49. So also an application by the decree-holder to get rid of the objections raised by the judgment-debtor, and an application for extension of time in complying with the orders of the Court thereafter. 119 I.C. 228=1929 L. 335. Application to summon witness in claim proceedings. 64 I.C. 524=19 A.L.J. 843; 1923 A. 415. *See also* 103 I.C. 712=1927 L. 653 (Application to summon witnesses to resist judgment-debtor's objection). The decree-holders examined a certain witness in order to resist an objection filed by the judgment-debtor to the execution of the decree. *Held* that the action on behalf of the decree-holders was a step-in-aid. 4 P. 202=88 I.C. 807. Where, on the judgment-debtor's application under O. 21, R. 2, the decree-holder attends the Court with witnesses to contest the application informing payment out of Court, the act can be construed to mean a step taken in aid of execution. 1930 C. 304. Where a decree-holder, after executing the decree against the principal judgment-debtor and getting part satisfaction, files an application against the surety more than three years after the date of the decree, the case is governed by Art. 182 (5), Expl. I to the article does not apply to the case. The prior execution againt the principal judgment-debtor saves limitation against the surety also. The surety may no doubt be technically liable from the date of the decree, but in equity his liability arises only upon the failure of the principal to satisfy the decree. 58 M. 276=1935 M. 188=68 M.L.J. 119. *See also* 44 A. 793=1922 A. 481. Where a prior execution application is dismissed on the ground that the reliefs claimed are superfluous or incorrect, still it is an application in accordance with law and saves limitation. 3 P. 42=75 I.C. 312. An application for transfer of a decree to another Court for execution made at a time when the judgment-debtor is known to the decree-holder to be dead, is a step-in-aid and will save limitation. 45 C.W.N. 342. *Held, by ths Full Bench, Horwil, J., dissenting.*—An application to a Court in British India to send a decree passed by it for execution to a Court in a Native State, there being reciprocal arrangement between that state and the Government of India whereby the decrees of the state shall be executed in British India and the decrees of British Indian Courts shall be executed by the Courts in that state, is a step-in-aid of execution under Art. 182 (5), Limitation act, and the order on such application starts a fresh period of limitation. I.L.R. (1941) Mad. 574=53 L.W. 145=1941 Mad. 309=(1941) 1 M.L.J. 242 (F.B.). Where proceedings are taken in a Native Court but transferred to British Court, such a proceeding

NOTES.

is a step-in-aid of execution. 45 B. 453=59 I.C. 747 ; 31 Bom.L.R. 1105=1929 B. 418. So also application re-presented in time but dismissed on ground of too great delay. 21 L. W. 548=88 I.C. 88. Execution application returned for arrangement but not re-presented is not one in step-in-aid. I.L.R. (1940) Mad. 60 ; 1939 2 M.L.J. 671=1939 Mad. 841=50 L.W. 311 ; 1939 Mad. 429=(1939) 1 M.L.J. 87=49 L.W. 173 ; *See also* 1942 Mad. 216 =(1941) 2 M.L.J. 1018. As to effect of application for rateable distribution, *see* 1 Luck. 569. Application to substitute legal representative of judgment-debtor on record is step-in-aid. 103 I. C. 279=1927 N. 308 ; 103 I.C. 244=1927 A. 698 ; 26 A.L.J. 417 ; 24 N. L.R. 36. Where an execution application is filed against the legal representatives of the jugment-debtor in the Court which passed the decree and a notice thereon is issued to them to show cause why the decree should not be executed against them, it cannot be dismissed for want of jurisdiction, merely because it turns out to be ineffective owing to the non-existence of any property within the jurisdiction of the Court. 1934 L. 55. An application to bring on to the record the legal representatives of the defendant and to execute the decree is a step-in-aid of execution, even though so far as the prayer for execution of the decree was concerned the application was not in accordance with law, the applicant claiming under an oral transfer of the decree. 54 M. 852=134 I.C. 59=61 M.L.J. 541. A decree obtained by two persons was sought to be executed by one of them alleging that the other had relinquished his right during pendency of suit. On an objection being raised the other decree-holder gave a *purshis* stating that he had no objection if the decree were executed by the applicant alone. The application ultimately failed for want of prosecution. A question having been raised whether application was according to law and served as a step-in-aid of execution. *Held*, that the statement made by the other decree-holder in the *purshis* did not amount to a relinquishment or to an assignment of his interest in the decree. The application made in reliance of the alleged relinquishment was mistaken. It was however made by a person entitled to make it and was thus in accordance with law. (1931 L. 600, Foll.) 58 B. 428=36 Bom.L.R. 437=1934 B. 216. Before the expiry of one year from the date of decree, the decree-holder put in an application for execution in accordance with O. 21, R. 11, and on the same day he also filed another application for amendment of the first application, by which in effect he prayed that a precept be issued to the District Court of another district for attachment of money standing to the credit of the jndgment-debtor in the Allahabad Improvement Trust. The application was accordingly amended. *Held*, that the application was one in accordance with law and a step-in-aid of execution. 146 I.C. 991=1933 A.L.J. 902=1933 A. 844. Application against minor whose guardian was dead before date of application is good to give a fresh starting point of limitation. 65 M.L.J. 374=145 I.C. 714=1933 M. 696 ; 1936 N. 77 (17 M. 76 ; 35 C. 1047 and 19 A. 337, Not Foll.) Filing of batta memorandum for arrest. 1928 M. 563. (*See also* 28 M. 399, Rel. on.) But mere filing of receipts by decree-holder for costs on account of maintenance of judgment-debtor in jail is not a step-in-aid. 1928 L. 443. *See also* 23 C. 196 ; 22 C. 827. (*See* however 63 M.L.J. 792, *infra.*) The despatch by money order of the subsistence allowance for the judgment-debtor in jail to the jail superintendent who, under O. 21, R. 39 (4) is the proper officer to whom the payment should be made is "an application to the proper Court to take a step-in-aid of execution". 140 I.C. 498=63 M.L.J. 792. But *see* 62 I.C. 480. Application for payment of money deposited in Court is step-in-aid. I.L.R. (1938) All. 342=1938 A.L.J. 117=1938 All. 210. *See also* 39 P.L.R. 102=1938 Lah. 138 ; I.L.R. (1938) Lah. 586=40 P.L.R. 494= 1938 Lah. 678. An application for delivery of property by a decree-holder who has purchased the property in execution of his own decree is a step-in-aid, even though the application was dismissed for non-payment of batta. 30 L.W 683=57 M.L.J. 468. Cl. (5) of Art. 182 does not require that the application to take some step-in-aid of execution of the decree should be made in the course of execution proceedings; all that it requires is that an application should be made to take some step-in-aid of execution of the decree. That application may be made in connection with any other proceedings, which may not be strictly speaking proceedings in execution of the decree, but which affects the execution of the decree. 7 P. 708=9 Pat. L.T. 817=1938 P. 612 (filing list of witnesses). The filing of a batta application by the judgment creditor in an execution proceeding for summoning certain persons to attend Court and give evidence to show that the objection of the judgment-debtor that the decree had been satisfied was unture, is a step-in-aid. 1934 M. 710; also application for appointing receiver in pending execution proceedings. 1929 L. 57 ; also application of the decree-holder to file list of movables under O. 21, R. 12. 31 Bom.L.R. 1291 ; also application by the decree-holder for leave to bid at the execution sale. 53 M. 390= 1930 M. 588=58 M.L.J. 406. *See also* 12 L. 153=32 Punj.L.R. 84=1931 L. 81 (F.B.) (Majority holding that the question must depend upon the circumstances of each case). The execution of the attached decree on the application of the attaching decree-holder is a step-in-aid of execution of the decree in execution whereof the attachment has been made. 132 I.C. 667=1931 L. 705. A decree-holder having been adjudicated insolvent on his own application, the Official Assignee sold all the debts due to the insolvent to the appellant. It appeared that, after the insolvency, the original decree-holder filed an execution application and the appellant who took out execution later on relied on the application filed by the original decree-holder as a step-in-aid. *Held*, that the original decree-holder, who was on record, was entitled to execute the decree, and that his insolvency was not material as the Official Assignee had

NOTES.

transferred all his rights, and that consequently the transferee could rely on the prior application as a step-in-aid. 41 L.W. 295=1935 M. 383=68 M.L.J. 392. The institution of a suit under S. 61 of the Oudh Rent Act constitutes a step-in-aid of execution of the decree for arrears of rent, as the decree passed in such a suit requires the tenant to pay up the arrears within a certain time, in default of which he is to be ejected. 1939 O.W.N. 134=1936 O. 248. *See also* I.L.R. (1939) Nag. 367=1938 Nag. 19 (application for substitution of names in place of original decree-holder) ; 1940 Lah. 337 (application in partition suit for preparation of formal decree sheet on stamp paper); 1937 Sind 108=31 S. L.R. 14 ; 1939 O.W.N. 219=1939 O. 155 ; 1940 Bom.L.R. 507 (application for final decree). *See also* 40 C.W.N. 300=1939 Cal. 488 (application for final decree after final decree is passed is not step-in-aid). *See also* 18 L. 671=39 P.L.R. 680=1937 L. 404.

(3) WHAT APPLICATIONS DO NOT AMOUNT TO STEPS-IN-AID.--Application not indicating how the Court is to assisit the decree-holder. 1925 C. 1135. *See also* 150 I.C. 866=36 Bom.L.R. 115=1934 B. 113 (2). Mere filing of an affidavit by the decree-holder stating that there were no incumbrances over the property. 22 A.L.J. 410=78 I.C. 631. But the filing of affidavit of revenue is step-in-aid. 47 C.L.J. 362=1928 C. 302. But *see contra* 6 P. 694=108 I.C. 430=1928 P. 145. A "counter-statement" filed by the decree-holder in answer to an pplication by the judgment-debtor to enter up satisfaction of the decree is not a step-in-aid. 42 M.L.J. 303=45 M. 466. *See also* 50 M. 49 ; 64 M.L.J. 345=142 I.C. 197=1933 M. 403=37 L.W. 455. An application made to the Court to record a part payment or adjustment of the decretal debt under O. 21, R. 2, C. P. Code, is not a step-in-aid of execution which will prevent limitation running under Art. 182 (5). Such an application to record an adjustment under O. 21, R. 2, is a mere certificate and is no application at all under Art. 181 or Art. 182. 43 Bom.L.R. 880=198 I.C. 206=1942 Bom. 17. A mere adjournment has been held not to be a step-in-aid of execution, although an application for adjournment in order to obtain further evidence has been held to be a step-in-aid. 1923 B. 218. (27 C. 285, Ref.) An application for time to put in a petition for substituted service is not a step-in-aid. 35 L.W. 301=1933 M. 674=65 M.L.J. 271; 152 I.C. 987=1934 P. 662. An application by a decree-holder under S. 39, C. P. Code, for transfer of his decree to another Court for execution, in ignorance of the death of the judgment-debtor, is a step-in-aid of execution (17 M. 76 and 35 C. 1047 Foll.; 19 All. 337, Diss. from.) 151 I.C. 767=36 Bom.L.R. 510=1934 B. 266; 1934 L. 55. But *see contra* 1934 A.L.J. 829=1934 All. 463. An appeal against an order dismissing the application of the judgment-debtor to record satisfaction of the decree does not amount to an "appeal" within the meaning of Art. 182 (5) and would not save limitation for execution of the decree. I.L.R. (1941) Mad. 703=53 L. W. 545=1941 Mad. 616=(1941) 1 M.L.J. 614. Application for certificate of transfer is not application for execution. 23 A.L.J. 977=90 I.C. 274. Such an application does not become an application for execution, merely because it was made in a form prescribed for an application for execution. 11 P. 785=1932 P. 309. An application to the Court which passed a decree and transferred it for execution to another Court, to recall the decree from that Court and to send it back again to that Court for execution is not a step-in-aid of execution for it took the decree-holder no nearer execution than he was before the application. 1942 N. L. J. 101. *See also* 1937 R. 406. If the application for transfer is incompetent, because the Court to which the decree sought to be transferred has no jurisdiction to entertain the same, it cannot be treated as a step-in-aid. 1932 P. 309; nor an application to recall decree from transferred Court after the same has been returned with certificate of non-satisfaction. 1937 Rang. 406. An application for a copy of the decree to be executed is not step-in-aid. 39 M. L.J. 572=60 I.C. 117. The payment of process for issue of a warrant of arrest in execution of a decree, where the batta memo itself does not apply for the issue of process is not step-in-aid. 47 M.L.J. 537=82 I.C. 497; 1925 A. 646. *See also* 64 M.L.J. 692=1933 M. 438=38 L.W. 766. Mere service of notice. 6 P. 277=8 Pat.L.T. 652=1927 P. 218. Application by decree-holder for extension of time to file incumbrance certificate. 53 M.L.J. 766=106 I.C. 648=1928 M. 143. Application for payment out of money in Court. 48 M.L.J. 506=87 I. C. 989. Mere drawing out of money without any application. 144 I.C. 66=38 L.W. 205=1933 M. 597. *See also* 22 Pat. L.T. 792=1941 P.W.N. 559=1941 Pat. 428 (application for withdrawal of money awarded upon rateable distribution). Where, on an execution petition being put in, notice was ordered, and, on the absence of the judgment-debtors on the day fixed, the Court passed an order directing attachment, this does not mean to be a step-in-aid of execution. 45 M.L.J. 680=1924 M. 186. An application by a decree-holder to be put in possession of the property is not a step-in-aid. 2 P. 249. But *see contra* 24 M. 185; 19 A. 477; 27 C. 709; 35 B. 452; 57 M.L.J. 468=30 L.W. 683; 50 A. 211. *Pratt, J.*—The application for stay is not a step-in-aid of execution. 1923 B. 218. An application for the revival of previous proceedings for execution is a step-in-aid. 64 I.C. 727. Surety for payment of amount of mesne profits—Application for ascertainment of amount does not keep decree alive. 47 B. 778=1923 B. 366. Arrest warrant returned unexecuted—Order for fresh steps not step-in-aid. 18 L. W. 109=1923 M. 686; nor application to attach property beyond executing Court's jurisdiction. 90 I.C. 938=1926 A. 95. But *see* 14 R. 550=163 I.C. 403=1936 R. 271. Nor-application for arrest of judgment-debtor residing outside British India. 1940 Pesh. 27=189 I.C. 738. Where an application for execution was made to a Court which originally had no jurisdiction but subsequently acquired jurisdiction, and no fresh application was made after the conferment of jurisdiction. *Held*, that the application did not

NOTES.

save limitation. [39 M. 640 (P. C.), Rel. on.] 60 C. 1176=37 C. W. N. 1167=1933 C. 906. Where a decree has been transferred for execution to another Court, an application made to the Court from which the decree has been transferred is not a step-in-aid. 2 P. 247=74 I.C. 608. *See also* 63 I. C. 116=26 C.W.N. 292. An application by the transferee of a decree to substitute his name for that of the decree-holder is a step-in-aid of execution. 88 I.C. 112=1925 N. 362; 1933 R. 55=144 I.C. 310. *See also* 47 M.L.J. 447. Where both the parties apply to the Court to postpone the hearing of a pending execution with a view to arrive at a compromise, the application so made cannot be considered a step-in-aid. 25 Bom. L. R. 490=1923 B. 461. Nor an application for an injunction to restrain waste by judgment-debtor. 19 Pat.L.T. 798=1938 Pat. 188. Decree-holder purchasing portion of the property—Application for possession under O. 21, R. 95—Subsequent execution application to recover decree amount not satisfied—Same filed after three years of original application but within three years of the application for possession. *Held*, that the application for possession was not a step-in-aid and that S. 14 (2) did not apply to the case so as to save limitation, because the reliefs sought in the two proceedings were wholly distinct. 50 A. 670=26 A.L.J. 498=1928 A. 368; 11 P. 513 =139 I. C. 843=1932 P. 286. But *see* 50 A. 211; 1929 A. 390; 30 L.W. 683=57 M.L.J. 468. Where a decree-holder purchases property in execution but loses possession of the same in a separate suit by a third party, his fresh application for execution or for revival of execution, if one is maintainable, must be filed within three years of the trial Court's decree. 50 A. 211=107 I.C. 42=1928 A. 46. An opposition by the decree-holder to the judgment-debtor's application to set aside the execution sale is not a step-in-aid of execution. 1929 L. 529. Per *Sulaiman, J.*—The deposit of pre-emption money within the time fixed by the Court is neither a proceeding in execution nor any step-in-aid of it. (*Boys, J.*, contra.) 51 A. 998 =1929 A. 953. The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking a step-in-aid of such execution. 27 A. L.J. 553=115 I.C. 865=1929 A. 390. Payment made out of Court does not operate as step-in-aid of execution. 1935 A.W.R. 531 =1935 A. 259. *See* 56 M.L.J. 233 (P.C.); nor certification of payment under O. 21, R. 2 (1). *See* 137 I.C. 768=1932 O. 148 (F.B.); 1933 A.L.J. 256=1933 A. 364=146 I. C. 836=55 A. 393); because under that rule no application is necessary. 137 I.C. 768= 1932 O. 148 (F.B.); 9 Luck. 288=10 O.W. N. 1251=1934 O. 426. In order to save limitation, the payment must fall in with the provisions of S. 23. Decree-holder's certification is not an application to the Court. (56 I.A. 30 Rel. on.) 134 I.C. 922=35 C.W.N. 1192=1931 C. 719 (F.B.). A certification of payment made by a decree-holder, after the decree is statute barred, is not a step-in-aid and cannot revive limitation. 1933 S. 365. *See also* (1941) 1 M.L.J. 614. An application for modifying or cancelling an order recording satisfaction of a decree to revive the decree, which according to the record stands satisfied cannot be regarded as a step-in-aid of execution of that decree, which, unless and until it is revived, has no judicial existence. 50 L.W. 497=1939 Mad. 892. Payment of a portion of decree amount out of Court will not save limitation, S. 20 proviso applying to the case. 1932 A.L.J. 1035. *See also* 1933 M. 674. Uncertified payment by one defendant for himself only—Limitation not extended against others. 1932 A.L.J. 1035. An infructuous application for execution is no step-in-aid. 6 R. 566 =1928 R. 317. Decree for possession on payment of compensation—Application for extension of time for payment is not step-in-aid. 1930 M.W.N. 979=59 M.L.J. 579. A memorandum for the return of sale papers or an oral application for grant of time to file the sale papers or an affidavit filed subsequent to the petition for leave to bid is not a step-in-aid. 1931 M· W.N. 413. An application under O. 21, R.16 is not a step-in-aid of execution. 152 I.C. 987 ‖ . 1934 P. 662. An application for executiona gainst a dead person is not in accordance with law and cannot amount to an application for taking steps-in-aid. 1934 A.L.J. 829=4 A.W.R. 509. But *see* 1934 L. 55. An application for reconstruction of a decree destroyed by fire is not a step-in-aid (46 B. 269, Dist.) 150 I.C. 866=36 Bom.L.R. 115=1934 B. 113 (2). The obtaining of a certificate of search of certain documents from the office of the sub-registrar cannot be called a step-in-aid; nor the fact that the decree-holder got back certain documents filed by him in the previous execution. 9 Luck. 288=10 O.W.N. 1251=1934 O. 426. An order for attachment of the decree sought to be executed cannot be treated as a step-in-aid of the original decree. 149 I.C. 999=1934 C. 234. An application for a copy of a decree cannot be said to be a step-in-aid. 145 I.C. 915 (2)=1933 A. L.J. 1126=1933 A. 756 (1). An application, to constitute a step-in-aid of execution, has to be filed in the execution proceeding itself, and not in any other suit or proceeding, however, intimately connected the latter might be with the proceedings of the former. Where a claim to attached property is allowed, a suit by the decree-holder to set aside the order allowing the claim cannot be regarded as a step-in-aid of execution so as to save limitation for a fresh execution application filed beyond three years of the dismissal of the prior execution petition, though within three years of the final dismissal of his declaratory suit. 54 L.W. 45=(1941) 2 M.L.J. 754.

(*c*) ORAL APPLICATION.—An application to the Court to pay out money in satisfaction of a decree is a step-in-aid of execution. Such an application need not be in writing. 27 Bom. L.R. 671=89 I.C. 228 (22 B. 340, Foll.); 2 Luck. 419=1927 Oudh 134. Under Art. 182 the application need not necessarily be in writing. Where during the pendency of an execution application, several applications were made for arrest and for attachment and a second application was filed after the expiry of three years from the first petition but within three years of the subsidiary applications, *held*, that the later application was not time-barred. 7 R. 132=117 I.C. 578=1929 R. 152. A verbal application for amendment of the petition for execution which was already in proper form cannot be said to be a step-in-aid. 1930 C. 304. An oral application by a decree-holder for time to make inquiries as to the legal representatives of a deceased judgment-debtor is a step-in-aid. 151 I.C. 767=36 Bom.L.R. 510=1934 Bom. 266. As to presumption of an oral application from the mere facts of certification under O. 21, R. 2, *see* 137 I.C. 768=1932 O. 148 (F.B.).

(*d*) APPLICATION IN ACCORDANCE WITH LAW— DEFECTIVE APPLICATIONS.—Whether an application which is defective should be treated as one in accordance with law must depend on the facts of each particular case and no hard and fast rule can be laid down in this behalf. 27 S.L. R. 314=1933 S. 341. What has to be looked is whether the executing Court would or would not issue execution on the application as preferred to it. The expression "in accordance with law" must be taken to mean that the application, though defective in some particulars, is one on which execution could lawfully be ordered. If the omissions are such as to make it impossible for the Court to issue execution upon it, it must be held that the application is not in accordance with law. But an application in substantial compliance with the law will be effectual to stay the progress of limitation, whether the Court admits, or rejects, or returns the application or allows it to be amended. 36 Bom.L.R. 643; 1934 A. 307. *See also* 38 L.W. 877=1933 M. 872; 1937 O. W.N. 169=167 I.C. 34=1937 O. 233; 1937 S. 108; 1939 N.L.J. 596=1940 Nag. 87. The words "in accordance with law" are not necessarily limited to the provisions of law contained in O. 3 and O. 21; if the law required that an execution application should be accompanied by a particular certificate, but if it is not so accompanied by a certificate, that application will not be in accornance with law. (*Ibid.*) Even if the previous execution application was dismissed on the ground of gross carelessness because the judgment-debtor's name was wrongly spelt, it is an application in substantial compliance with the law to save limitation, whether it was admitted, rejected, returned, or allowed to be amended. (53 C. 664, Rel. on.) 149 I.C. 102=1934 P. 289. The words "in accordance with law" in Art. 182 (5), are general and cannot be construed to mean only in accordance with the Civil Procedure Code. The expression applying in accordance with law in Art. 182 (5) means applying to the Court to do something in execution which by law that Court is competent to do and it does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do. 1937 Pat. 522. *See also* 1939 Sind 272 application for arrest of person not liable under decree is not step-in-aid). *See also* 52 L.W. 415 =(1940) 2 M.L.J. 502; The expression "in accordanee with law" does not necessarily mean an application prescribed or required by law. An application would be in accordance with law, even though it is not required by law, provided it does not contravene any express provision of law or conflict with any principle of law. The words "in accordance with law" are adjectival not only to the words "to the proper Court for execution" but also to the words "to take a step-in-aid of execution." Therefore it is necessary to show that the prior application which is relied on as a step-in-aid of execution was in accordance with the law of limitation, *i.e.*, was within time. 170 I.C. 189=1937 Sind 121. *See also* 1937 Sind 108; 1938 Mad. 323=(1938) 1 M.L.J. 135. An execution application can be held to be not in accordance with law or if the defects, or omissions to be found therein were such as to make it impossible for the Court to issue execution upon it, and not merely because it was defective in some minor particulars. An omission to comply with O. 21, R. 12, C. P. Code, *viz.*, failure to annex a *talika* or inventory of the property to be attached, cannot *per se* be held to render the application not in accordance with law. 18 Pat.L.T. 954=1937 P.W.N. 957=1938 Pat. 75. An application for execution which is not accompanied by a copy of the decree cannot be held not in accordance with law, because there is no obligation on the decree-holder to produce a copy of the decree under O. 21, R. 11, C. P. Code. 46 L.W. 200=1938 Mad. 144=(1937) 2 M.L.J. 881. *See also* 1937 O.W.N. 169=1937 Oudh 233. Where the only defect in an application for execution is a mistake in the description of the suit given in it, the application is one in accordance with law within the meaning of Art. 182 (5). 42 C.W.N. 842. *See also* 1938 P.W.N. 73. The mere fact that more money is claimed in execution application than what is due would not render the application one not in accordance with law. It is not every defect contained in an execution application which renders it unavailing for the purpose of saving limitation under Art. 182 (5). 1940 M.W.N. 547=A.I.R. 1940 Mad. 893. An application presented by a person on his own behalf and as next friend of his minor brothers cannot be held to be not in accordance with law on the ground that the applicant did not get himself appointed as next friend. 1940 Mad. 893. An application made to a Court passing a decree to execute it in respect of property situated outside its territorial jurisdiction is an application made to a proper Court and is in accordance with law and is effective to constitute a fresh starting point for running of limitation, although the Court has no jurisdiction to carry on such execution. 1936 Rang. 271=14 Rang. 550. An application by the decree-holder for transmission of the decree for execution to a Court which does not in fact exist but which

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the decree-holder wrongly believes to exist is one "in accordance with law." A mistake in the description of the Court to which the decree-holder requests that his decree may be transferred is a mistake of fact, and cannot make the application one otherwise than in accordance with law, so long as he wants his decree to be transferred to a Court with jurisdiction to execute his decree. 1939 Mad. 378=(1939) 1 M.L.J. 827. *See also* 1940 Pat 677. Where the Court dismissed the prior application in the following words: "Decree-holder absent; application is incorrect. It is rejected", *held*, that the order of rejection should contain an express or implied finding that the application is not in accordance with law; and that there was no definite finding of the Court to that effect; and that the appellate Court can consider the previous application to determine if it was in accordance with law. 142 I.C. 762=16 N.L.J. 47. *See also* 1939 N.L.J. 596=1940 Nag. 87. Even a defective application for execution keeps decree alive as step-in-aid. 88 I.C. 266=1925 L. 535. *See also* 1924 B. 64; 1923 N. 236; 100 I.C. 475=1927 L. 106; 6 P. 440=1927 P. 324. An execution application without filing succession certificate is good as a step-in-aid of execution. 31 N.L.R. 126=153 I.C. 955=1935 N. 1. An application made to a Court passing a decree to execute it in respect of property situated outside its territorial jurisdiction is one made to a proper Court and is in accordance with law and is effective to constitute a fresh starting point for running of limitation, although the Court has no jurisdiction to carry on such execution. 14 R. 550=163 I.C. 403=1936 R. 271. An execution petitiod filed after the institution of insolvency proceedings without the leave of Insolvency Court is not one in accordance with law. 59 M. 759=162 I.C. 376=1936 M. 284=71 M. L.J. 180. *See also* 41 P.L.R. 799=1939 L. 270. Where the previous application contained only minor defects which would not vitiate the application, it would be a step-in-aid. 142 I.C. 762 (Nag.); 142 I.C. 489=1933 S. 78; 1936 A.M.L.J. 110. Omission to give form of notice to be issued is a minor defect. 142 I.C. 435=1933 R. 87. So also omission to note time and place of verification. 159 I.C. 494=1936 P. 62. Where the guardian *ad litem* of a minor judgment-debtor had died, but all the same an execution application was made against him, the application would be a step-in-aid. 134 I.C. 1107=1931 L. 636. An application for execution against two judgment-debtors, one of whom was dead at the time, saves limitation against the living judgment-debtor and the legal representatives of the deceased judgment-debtor. 1922 Nag. 112; 106 I.C. 391=1927 M. 1103. *See also* 39 M.L.T. 336; 11 P. 546=138 I.C. 91=1932 P. 222; 1938 M. 323=(1939) 1 M.L.J. 135; 1937 Lah. 792=39 P. L.R. 1008; 41 L.W. 173=1935 M. 161=68 M.L.J. 261. All *bona fide* applications against wrong persons as the legal representatives save limitation. 132 I.C. 262=1931 O. 312; 41 L.W. 173=1935 M. 161=68 M.L.J. 261; 52 L.W. 415=(1940) 2 M.L.J. 502 (Decree against joint family in hands of defendant.—Application for arrest of defendant saves limitation). 40 P.L.R. 25 (application made *bona fide* against dead judgment-debtor or wrong legal representative is step-in-aid of execution); 1937 Pat. 607 (Execution application by son in respect of decree obtained by father of joint Hindu family), Where the only defect alleged in an excution application against legal representative is that his name is not mentioned as such in the appropriate column, the application is still one in accordance with law. 45 L.W. 457=1937 M. 385=(1937) 1 M.L.J. 453. Formal defects in execution application are immaterial and would be good as steps-in-aid. 45 C.L.J. 86. Application for execution against wrong person by *bona fide* mistake. 5 Pat.L.T. 217=1927 P. 92. Where the application did not specify the mode in which the assistance of the Court was required, and it appeared that the object was to realise the decree amount by sale of property, *held*, that the application was valid in law so as to extend limitation. 138 I.C. 249=1932 L. 534. An execution petition in which the name of the defendant is given wrongly does not cease to be an application in accordance with law. 119 I.C. 596. An application for execution in which, owing to *bona fide* mistake, the minor judgment-debtor was described to be under the guardianship of a dead person, constitutes a step-in-aid. 4 P.L.T. 54=1924 P. 333. Where a major judgment-debtor was wrongly described as minor in execution petition and notice was issued thereon the decree helder is entitled to compute the period of limitation for a subsequent applicatian for execution from the date of issue of such notice. 118 I.C. 237 (All.). An application for execution made against one only of two executors under the *bona fide* belief that he was the only executor and that the other had resigned is an application inaccordancewith law, and in any event it is an application to take a step-in-aid. 11 P. 508=189 I.C. 840=1932 P. 306. A mere mistake in the calculation of interest in an application for exeution does not make the application one not in accordance with law. 43 A. 550=63 I.C. 362; 8 O.W.N. 639=132 I.C. 262=1931 O. 312; nor mere clerical error in the description of defendant. 1937 A. 397. Where in a suit which falls under S. 11, Court-Fees Act, a decree is passed and subsequently a final decree is passed for an amount larger than the amount in suit on which court-fees have been paid, and the Court demands the deficit court-fee and an application for execution is filed without the payment of such deficit court-fees, the application cannot fall within Art. 182 (5) and is not therefore a step-in-aid of execution. 1937 S. 108. Application returned for payment of additional fees is step-in-aid. 2 P. 809=4 P. L.T. 513=1924 P. 23. An application under R. 15 (1), O. 21, C. P. Code, though defective, saves limitation. A notice under R. 22, O. 21 issued on a defective application saves limitation 1 P. 609; 2 P. 597. "In accordance with law" is a phrase adjectival not only to the words "proper court for execution" but also to the words "to take some step-in-aid of execution." 15 S,

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L.R. 156=1922 S. 297; 137 I.C. 768=1932 O. 148 (F.B.); 27 S.L.R. 214=1933 S. 341; 1937 S. 121. A decree under S. 15-B, Dekkhan Agriculturists Relief Act, passed by consent of the parties does not require to be made final. Where, therefore, the decree-holder applies *for making the decree final or absolute*, the application and the Court's order thereon making the decree absolute are not in accordance with law, and the decree is a nullity and cannot be regarded as a step-in-aid of execution so as to save limitation. (*Ibid.*) But *see* 1937 L. 404. Where, under the terms of a decree, the surety was liable only to the extent of one-sixth of a decree, but nevertheless the decree-holder applied for execution of the whole of the decree against the surety and the judgment-debtors and that application was dismissed as incompetent, it is not 'an application in accordance with law' so as to save from the bar of limitation a subsequent application for execution. The former was for a relief which the Court had decided could not be given and which was entirely outside the law. 10 P. 183=131 I.C. 815=1931 P. 274. An order deciding that an application for execution by one or two or more plaintiffs is not competent, amounts to holding that the application is not "in accordance with law." 62 I.C. 507=15 S.L.R. 11. Execution in regard to two suits—Application not according to law with regard to one—Effect of. 163 I.C. 841=1936 A.L.J. 571=1936 A. 467. An application for execution, though not duly signed and verified by the decree-holder, but actually signed and verified by the pleader in the original suit, is in accordance with O. 21, R. 11 (2). 31 Bom.L.R. 355=1929 B. 196. But *see* 61 M.L.J. 516. Presentation of execution application by pleader who has no *vakalat* from his client, is not one in accordance with law. 44 L.W. 528=165 I.C. 659=71 M.L.J. 604. *See also* 1937 Mad. 760. Application signed by the vakil, who does not profess to be acquainted with the facts of the case, is not in accordance with law. An application for execution which does not contain any description of the property and other particulars required by O. 21, R. 13 cannot be deemed to be 'an application in accordance with law.' 129 I.C. 159 (1)=32 Bom.L.R. 1368=1931 B. 128. *See also* 42 Bom.L.R. 423=1940 B. 250; 51 L.W. 426=(1940) 1 M.L.J. 477. If the application is signed by a properly authorized person, it is in order. Non-production of the power of agency, if its production is ordered by the Court, may entail the dismissal of the application, but it will not render an application itself, otherwise valid, invalid. 159 I.C. 494=1936 P. 62. When the application is defective in material particulars and is rejected as being not in accordance with law, the application must be regarded as not having been presented at all. 134 I.C. 681=1931 N. 154 (F.B.). Where the previous execution application was not in accordance with law and the decree-holder refused to correct the same in spite of the Court's order, *held*, that the execution petition did not save limitation. 1931 A. 722=131 I.C. 33 (2). An application which has been returned for amendment but not re-presented is sufficient to save limitation. 143 I.C. 844=1933 M. 568=38 L.W. 224. But *see* 44 L.W. 59=1936 M. 613=71 M.L.J. 336. An execution application which does not contain the correct number of the suit, the decree in which it is proposed to execute, cannot be deemed to be an application in accordance with law. It has no judicial existence after it is returned without being filed for rectification; and if it is barred by limitation when re-presented, any order passed upon it, dismissing it, subsequently cannot avail to save limitation for a fresh execution petition presented contemporaneously. 50 L.W. 793=1940 Mad. 215=(1939) 2 M.L.J. 864.

UNSTAMPED EXECUTION APPLICATION IS NOT NECESSARILY INVALID.—Where action was taken on the application and properties were attached, it will save a subsequent application from the bar of limitation. 106 I.C. 485=1928 M. 142.

INSTALMENT DECREE.—Default in payment of instalment under decree waived by decree-holder—Limitation runs from date of default. 86 I.C. 1061=1925 C. 1012. *See also* 85 I.C. 784=1926 C. 212; 42 Bom.L.R. 276=1940 Bom. 148=I.L.R. (1940) Bom. 317. Mortgage—Instalment decree—Failure to pay instalments—Execution application—Effect—Step-in-aid of execution of all instalments. 46 B. 719=1922 B. 194.

STARTING POINT—FINAL ORDER.—An application for execution which is accepted by the Court, though out of time, starts a fresh period of limitatton. 63 I.C. 844=23 Bom. L.R. 1013. Under Art. 182 (5) as amended, the three years' time is to be calculated not from the date when the previous application is filed, but from the date when the final order on such application is passed. 34 C.W.N. 733. *See also* 1930 P. 207; 137 I.C. 768=1932 O. 148 (F.B.); 61 I.A. 62 (P.C.) noted *supra*. *See* 3 P. 596 under the article as it was prior to amendment. Per *Division Bench*.—An order is a "final order" if it terminates the execution proceeding so far as the Court passing it is concerned. It need not be on the merits. An order of rejection or dismissal would be a final order. 45 L.W. 457=1937 M. 385=(1937) 1 M.L.J. 453 (F.B.); 54 L.W. 708=(1941) 2 M.L.J. 1018; I.L.R. (1938) Mad. 326=46 L.W. 540=1938 Mad. 113. *See also* 41 C.W.N. 310=1937 C. 16. 'Final order' means final order in the proceeding to which the application gave rise. Where the Judge ordered notice to issue to the judgment-debtor returnable on the 13th November, 1929, and on that date the cases were closed at the decree-holder's request and he applied for execution against the same judgment-debtors on 8th November, 1932. *Held*, that the order closing the case was the final order and the application was in time. The fact that the application for execution is withdrawn or struck off at the request of the decree-holder does not prevent it from giving rise to a new starting point for limitation. 142 I.C. 435=1933 R. 87. ***Final order*** means an order which conclusively decides the matter between the parties as distinguished from interlocutory. 149 I.C. 136=1934 Pesh. 23. *See also* 53 L.W. 726=1941 Mad. 671=(1941) 2 M.L.J. 66 (Order stating that appeal has abated). *See also* 1941 A.L.J. 480=1941 A. 371; I.L.R. (1942) A. 658. The words do not mean an order which finally adjudicates upon the rights of the parties and disposes of the application for execution on its merits. Where the Court intends to dispose of the matter completely and no longer keeps it pending on its file, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order. 1936 A.W.R. 996=1936 A.L.J. 1140=1936 A. 820 (F.B.). Where the order striking off the case is coupled with an order for payment of costs by the judgment-debtors to the decree-holders, the Court must be deemed to have intended to dispose of the matter so far as itself is concerned, and such an order should be considered as a final order. 1936 A. 820 (F.B.); (1937) 1 M.L.J. 453 (F.B.); 1940 Mad. 281=(1939) 2 M.L.J. 469; 1940 Nag. 301; 1939 Rang. 406; 1939 Mad. 841=50 L.W. 311=(1939) 2 M.L.J. 671. An order returning an execution petition contemplates a final order to be passed at a subsequent stage after the petition is re-presented, and is not itself a final order as it does not deal judicially with the matter of the petition. Consequently, when an execution petition is returned for the purpose of remedying certain defects therein, but it is not re-presented by the decree-holder, the order of return does not furnish the decree-holder a fresh starting point for limitation. 163 I.C. 354=44 L.W. 59=1936 M. 613=71 M.L.J. 336. *See also* 1942 Mad. 216=(1941) 2 M.L.J. 1018. Amendment of decree after filing of execution petition, if gives fresh starting point. 161 I.C. 969=43 L.W. 390=1936 M. 434=70 M.L.J. 700. Where the execution Court transfers the execution to another Court to enable the decree-holder to receive his rateable distribution, so far as the Court seized with the execution is concerned, this is the final order. 149 I.C. 136=1934 Pesh. 23. *See also* 54 L.W. 34=1941 Mad. 731=(1941) 1 M.L.J. 837 (Order returning application for transmission of decree to another Court as decree had not been received from transferee Court saves limitation). It is not incumbent upon a decree-holder to furnish the sale papers along with the execution petition itself. The duty of the Court is to see whether all the requirements of O. 21, Rr. 11 to 14 are complied with. Where these requirements are complied with, an order returning the execution petition on the ground that the sale papers had not been produced is clearly illegal. Such an execution petition must be considered to be still pending, and the order returning it is not a "final order" contemplated by Art. 182 (5). (1942) 1 M. L. J. 542=1942 M. W. N. 254. A Judge has jurisdiction to decide wrongly as well as rightly, and when the execution proceedings begin upon an application which is valid in its inception, for the purposes of limitation, it does not matter whether the final order passed therein is in accordance with law or not; time will begin to run from the date of such final order. So, the fact that in the previous application, no notice to the assignor of the decree was issued as required by O. 21, R. 16 does not make all the execution proceedings void as if they never existed for purposes of limitation. 149 I.C. 98=1934 R. 101. Where a decree-holder makes an application to the Court which passed the decree asking for a certificate of transfer to another Court for execution, the final order on such application cannot be considered to have been passed until the date on which the required certificate is prepared and handed over to the decree-holder who has undertaken to present it before the other Court, and limitation is it be reckoned only from such date and not from the date of the order of the Court merely directing the office to prepare a certificate. 154 I.C. 718=1935 A.L.J. 370.

Who must apply in order to save Limitation.—Application to take some step-in-aid of execution need not be made during the pendency of application by the same decree-holder. 1928 L. 7. Execution application by decree-holder auction-purchaser. 1 P. 701=1922 P. 310. Mere mentioning the name of a person having several liabilities does not save limitation against him. 85 I.C. 557=1926 C. 267. Execution application by defendant in decree for partition gives fresh starting point in favour of plaintiff. 43 M.L.J. 379. *See also* 36 C.W.N. 772=139 I.C. 786=1932 C. 869. Sureties are not co-judgment-debtors within the meaning of the article. 85 I.C. 657=1926 C. 267. Execution against sureties does not save limitation against the principal debtors. 1926 Cal. 267; *See also* I.L.R. (1940) Lah. 223=42 P.L.R. 723=1939 Lah. 587; 1937 O.W.N. 680=1937 Oudh 351; 1939 A.L.J. 415=1939 All. 463. Steps taken by a person claiming adversely to the decree-holder cannot be taken advantage of by the decree-holder as steps-in-aid of execution. Though the decree-holder prefers objections to the proceedings taken by the adverse claimant, and though there might be an agreement between the decree-holder and the rival to act in a particular manner; the steps taken by the rival claimant cannot enure to the benefit of the decree-holder nor can the judgment-debtor be deprived of his right to plead limitation by any agreement between persons with interests hostile to each other, who have been carrying on litigation amongst themselves. 1938 P.W.N. 652=1938 Pat. 531.

Stay of execution by order of Court.—Order of the Court refusing to execute the decree until the judgment is produced amounted virtually to a stay of execution and the period must be excluded in computing the period of limitation for execution. 64 I.C. 598=19 A.L.J. 905.

Res Judicata—Per *Shah, J.*—An adjudication by Court that a certain application is in time cannot be re-considered when a question that it is out of time is raised at a later stage of execution proceedings. 46 B. 269=1922 B. 118. *See also* 41 C.W.N. 310=1937 Cal. 16; 1942 Mad. 5.

Plea in bar.—A judgment-debtor is at liberty to raise, on a subsequent application for

NOTES.

execution, that it is not maintainable on the ground that the previous application had been filed out of time. 37 C.W.N. 1145. The plea that a previous application for execution was barred by limitation and hence the subsequent application was not valid should be raised at the earliest possible opportunity. 22 L.W. 747= 1926 M. 177.

PROPER COURT TO WHICH APPLICATION IS TO BE MADE.—*See* 42 L.W. 5=69 M.L.J. 215. The words "made in accordance with law to the proper Court" in Art. 182 (5) is to be read also along with the concluding words "to take some step-in-aid of execution." As an Insolvency Court is not a proper Court for execution, any so called steps-in-aid taken in that Court do not extend the period of limitation. The time between adjudication of judgment-debtor and his discharge cannot be excluded. I.L.R. (1942) Nag. 306. Application for transfer of a decree already transferred not a step. 47 B. 56=1922 B. 359. Decree transferred for execution—Second application to same Court for transfer—Certificate of non-satisfaction obtained only later—Effect. 89 I.C. 958. Per *Full Bench*.—When a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court (*a*) to execute the decree, (*b*) and to transfer it to another Court for execution is a valid application and is a step-in-aid of execution so as to save limitation. Per *Skemp, J.*—The application to the first Court to execute the decree may be regarded as an application to that Court to obtain the decree from the Court to which it has been transferred for execution after certification in order to execute it. 1935 L. 465 (F.B.). A Court which transmits its decree for execution to another Court does not thereby divest itself of all its jurisdiction but has jurisdiction to take certain measures in execution. It is therefore a "proper Court" within the meaning of Art. 185 (5) and an application made to it is a valid application which would save limitation under Art. 182 (5). 54 L.W. 34 =1941 Mad. 731=(1941) 1 M.L.J. 837. An application made after transfer of decree to another Court for execution to the Court passing the decree for certificate of part satisfaction of the decree is not an application for execution or to take a step-in-aid of execution. 78 I.C. 241= 1925 L. 233. *See also* 101 I.C. 279=23 N.L.R. 126 An application for execution properly made to a Court to which the decree had been transferred for execution but returned by the Court under a misapprehension that a fresh certificate of transfer was necessary, is, though never represented, nevertheless tantamount to a step-in-aid of execution. 11 P. 513=139 I.C. 843= 1932 P. 286. Where a decree was not shown to have been transferred to a Court at the time when the execution application was filed in that Court, *held*, that such a proceeding was not a step- in-aid of execution. 55 C. 608 =32 C.W.N. 192=1927 C. 952. Where a decree was ordered to be transferred by the trial Court to another Court, an application for execution made to the latter Court is one made to the proper Court though the papers may not have been actually transferred. 142 I.C. 489=1933 S. 78=27 S.L.R. 109. An application to the Court of a Native State to transmit its decree to a British Indian Court for execution is a step-in-aid. 43 M.L.J. 700= 1923 M. 72. Application to transfer decree for execution—Court having no pecuniary jurisdiction—Not a step-in-aid of execution. 1 P. 651=1922 P. 188. Even if an application is made to a Court which passed the decree to execute it in respect of property outside its territorial limits the Court will not have jurisdiction to carry on such execution. Where however the limits of the jurisdiction of the old Court were altered and an application was made by the Court which passed the decree for execution, *held*, that the decree should be forwarded to the proper Court but that it had the effect of saving limitation. 35 C.W.N. 77=58 C. 832= 132 I.C. 149=1931 C. 312. An application by the decree-holder to the Court which passed the decree to attach the judgment-debtor's property beyond the limits of the Court's jurisdiction is one in accordance with law and made to the proper Court, so as to save limitation under Art. 182 (5). 8 Cut.L.T. 7. Where it has not been shown that the decree-holder knew that the judgment-debtor lived outside the jurisdiction and the application for his arrest is made on the face of it to the Court which had jurisdiction, it cannot be said that the application is not made to the proper Court. 184 I.C. 769=1939 Rang. 345. Transfer of an application from one Court to another consequent on the adjustment of territorial jurisdiction does not affect the date of original presentation material under cl. (5). 1931 M.W.N. 413. Where the relief asked for in the application is to sell property not situated within the jurisdiction of the Court, it cannot be step-in-aid. So also where relief is to sell movables of the judgment-debtor and the judgment-debtor has no movable property within the jurisdiction of the Court. If the decree-holder had a *bona fide* belief as to the existence of such movables, the application might be step-in-aid. 134 I.C. 1182=1931 S. 160. The application for execution of a decree of Additional Munsif to the Court of first Munsif is made in accordance with law and saves limitation. 151 I.C. 375=15 Pat.L.T. 215=1934 P. 199 (1). The "Collector" acting under S. 59 (1) (*b*) of the Bombay Co-operative Societies Act is some agency for carrying out an award, different from a Court. S. 59 makes a distinction between a Civil Court as such and the Collector as such. An application to the Collector to enforce an award under the Bombay Co-operative Societies Act cannot therefore be regarded as an application made to a Court, and proceedings so taken are not steps-in-aid of execution so as to save limitation under Art. 182 (5). 40 Bom.L.R. 889=1938 Bom. 424. A decree-holder's application to the Collector for declaration of his mortgage lien under the decree is not an application made "to the proper Court" to take some step-in-aid of execution of the decree for sale of the mortgaged property, as the Collector is not certainly "the Court whose

Description of application.	Period of limitation.	Time from which period begins to run.
		6. [1][(in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the appeal], or 7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

LEG. REF.

[1] Substitued by Act IX of 1927, S. 2.

NOTES.

duty it is to execute the decree" within the meaning of Expl. 2, Art. 182. 146 I.C. 805=1933 O. 564. A Tahsildar deputed by the Collector to enforce a decision under R. 14 (5) of the rules framed by the Government of Madras under S. 43 (1) of the Co-operative Societies Act is not a "Court" within the meaning of Art. 182 (5) and therefore an application for execution before the Tahsildar is not one made to the proper Court for execution and does not save limitation. 59 M. 257=43 L.W. 58=1936 M. 150=70 M.L.J. 31.

Art. 182 (6).—If a decree-holder has realized an amount of money by execution, but is compelled to refund that amount by a decree in a subsequent suit, he will be entitled to take out execution for this amount under Art. 182 (6) if the application is presented within three years from the date of the final decree in the refund suit. But he will not be entitled to avail himself of this provision if his decree comes within the prohibition contained in S. 48, C. P. Code, (*i.e.*) if 12 years had already expired from the date of the original decree. Where the decree was fully satisfied and the execution case was dismissed on full satisfaction, the subsequent application for execution for recovery of the amount which the decree-holder had to refund is in substance a new application and cannot be treated as a continuation of the original application for execution. 46 C.W.N. 149.

Art. 182 (7).—Compromise decree—Provision for plaintiff executing decree on executing receipt within 6 months of majority—Death of plaintiff before majority—Execution by legal representative—Limitation—Starting point. 40 L.W. 875=1935 M. 107 (2). The words "such date" in Cl. (7) refers to the date on which a default was made in payment of any of the instalments, and on the occasion of *each default,* the decree-holder is entitled to enforce his claim for the entire amount due except in respect of which the claim had become barred. (11 P. 440; 4 P.L.J. 365 and 51 A. 237, Foll.) 149 I.C. 603=11 O.W.N. 498=1934 O. 334; 1939 O.W.N. 768=1939 Oudh 281; 1942 Oudh 219=199 I.C. 636. But *see* 149 I.C. 598=1934 A.L.J. 772=1934 A. 534. Decree directing payment of annuity, and in default delivery of certain property to decree-holder—Each instalment of annuity is a claim under the decree and each default gives rise to right to recover property. 54 I.A. 272=5 R. 422=1927 P.C. 146=53 M.L.J. 22 (P.C.). Instalment decree—Default—Waiver. 109 I.C. 272. *See* 54 C. 143; 33 Bom.L.R. 459=1931 B. 263; 141 I.C. 745=1933 Pesh. 14; 1939 Sind 49; 1942 Oudh 31. In the case of a decree providing for payment by instalments and allowing the decree-holder to take out execution for the whole amount on default of payment of any instalment, limitation will only run against the decree-holder in respect of each instalment separately from the time when it became due and payable, unless the decree leaves him no option on the happening of default but to execute the decree once for all for the whole amount. 11 P. 440=1932 P. 253. *See also* 1935 A.W.R. 531=1935 A. 259; 1939 Sind 49; 1941 O. A. 915=1941 O.W.N. 1205; 1941 O.W.N. 1313=1941 O.A. 987. But where in case of default, the decree-holder exercises his option by applying for the sale of property, he cannot later on fall back upon the period fixed for payment and apply to execute the decree after 3 years of that date. 132 I.C. 437=33 Bom.L.R. 459=1931 B. 263. Mortgage suit—*Ex parte* decree—Subsequent setting aside and re-trial ending in new decree—Sale in execution by mortgagee prior to re-trial—New decree awarding less amount than that realised by decree-holder by sale—Application by mortgagor for restitution. *Held,* that it was governed by Art. 182 (7), and that limitation commenced from the date fixed for payment in new decree after re-trial and not from date when *ex parte* decree was set aside. 44 L.W. 798=1936 M.W.N. 1119=71 M.L.J. 795. *See also* 1938 Lah. 590.

Description of application.	Period of limitation.	Time from which period begins to run.
		Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all. Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application' if made against any one or more of them or against his or their representatives, shall take effect against them all. *Explanation II.*—"Proper Court" means the Court whose duty it is to execute the decree or order.

NOTES.

Art. 182, Expl. (1) :—JOINT DECREE.—*See* 103 I.C. 867; 9 P.L.T. 264=1927 P. 416; 32 C.W.N. 1107; 26 A.L.J. 966=1928 A. 629 (F.B.). Expl. 1 of Art. 182 contemplates only cases in which a decree has been passed either jointly or severally in favour of or against more persons than one. It does not apply to a case where certain persons have made themselves liable for the decretal amount as sureties after the passing of the decree. 1937 O.W.N. 680=1937 Oudh 351. A decree against a judgment-debtor cannot be regarded as a decree passed jointly against the judgment-debtor and a person who has entered into a surety bond for the due satisfaction of any decree that may be passed against the judgment-debtor, and consequently an application for execution against the judgment-debtor will not save limitation for an application for execution against the surety. 6 R. 334. *See also* 142 I.C. 368=1933 M. 219=37 L.W. 127. *See also* 1937 Oudh 351. Surety—Application against—Surety not a joint judgment-debtor—Events availing against judgment-debtor not saving limitation against surety. 8 P. 310=1929 P. 595. A surety is not a joint judgment-debtor within the meaning of Art. 182. 1929 P. 597. As to instalment decree, *see* 109 I.C. 272. A decree, though it differentiates between the judgment-debtors as regards the mode of execution, as for example, providing a personal remedy against some and only a remedy against the property of others may still be a joint decree against all the defendants. 118 I.C. 237=1929 A. 795. Expl. 1 of Art. 182 saves limitation even where the execution application is taken out against one of several judgment-debtors. 31 P.L.R. 961=134 I.C. 194=1931 L. 116. But the Act does not apply where a decree specifies clearly the respective liabilities of the various judgment-debtors and puts it beyond doubt that the decree-holder could proceed against an individual judgment-debtor in respect of his share of the decretal amount and costs. 35 P.L.R. 692=1934 L. 637 (2). *See also* 1937 Cal. 547. Where some out of several joint decree-holders apply for execution on their own behalf and during the pendency of such application the others also apply, but the latter application is not competent the two applications cannot be considered to supplement each other in order to extend limitation. 152 I.C. 443=1934 Pesh. 40. A decree for partition allotting various lands in severalty to each of

Description of application.	Period of limitation.	Time from which period begins to run.
183. To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years ..	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

NOTES.

the parties *and reserving a strip of land as common road*, was, so far as that strip was concerned, one for joint possession in favour of all the parties, and as that was an integral part of the arrangement, *the whole decree* should be deemed to be joint and a previous application by plaintiff would save limitation for a subsequent application by the defendant to be put in possession. 36 C.W.N. 772=139 I.C. 786=1932 C. 869. *See also* 145 I.C. 968=38 L.W. 568=1933 M. 789=65 M.L.J. 582. *Quaere.*—Whether in a final decree for partition merely awarding several plots to several sharers, an application for one plot cannot save from limitation the application for another plot. 65 M.L.J. 582. *See also* 1940 Pat. 147. Under Expl. 1 to Art. 182, the execution of a decree against a joint judgment-debtor would be sufficient against all and would keep alive the decree against all, the suspension of the running of limitation against one of the judgment-debtors owing to the supervening of insolvency so far as he is concerned, cannot keep the remedy of the decree-holder alive against all of them, because there is no bar to the decree-holder executing the decree against the other judgment-debtors during the pendency of the insolvency proceedings against one of them. 1938 P.W.N. 397=19 Pat.L.T. 831=1938 Pat. 395=197 I.C. 480. Though by reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court, yet the District Judge by virtue of S. 164 does not become the High Court for purpose of Art. 183, Limitation Act. Hence to a payment order passed by the District Judge under powers conferred by S. 164, Art. 183 has no application and the only article applicable is Art. 182. 178 I.C. 288=1938 Lah. 368.

Art. 183 : Scope and Application.—The provisions of Art. 183 regarding acknowledgment as well as payments are self-contained and must be read independently of Ss. 19 and 20 of the Limitation Act. 10 P. 213=132 I.C. 109=1931 P. 218. According to law, decree bears the same date as the judgment, and the right to enforce the decree under Art. 183 of the Limitation Act would *prima facie* accrue from the date of the judgment. Ordinarily, preparation of the decree (including assessment of costs) does take a little time but there is no provision of law allowing this time to be deducted in computing the period for an application for execution. I.L.R. (1939) Lah. 319=41 P.L.R. 105=1939 Lah. 110. The word "payment" is used in Art. 183 in a wider sense than in S. 20 and not qualified in any way as to the mode in which the payment is to be made or as to the person who is to make it. A sum of money realised in execution in partial satisfaction of the decree amounts to "payment" and provides a fresh starting point for limitation. 1931 Pat. 218. "Money" secured by decree includes costs, and payment of costs would save limitation. 1931 Pat. 218. To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. 41 C.L.J. 159=1925 C. 668. *See also* 32 C.W.N. 336=55 C. 578; 15 P. 102=17 Pat.L.T. 317=163 I.C. 411=1936 P. 398; 40 Bom.L.R. 1180=1939 Bom. 51; 19 Pat.L.T. 193=1938 Pat. 372; 19 Pat. 909=1940 Pat. 596. "Revivor" means a decision holding that the decree was still capable of execution. Per *Mitter, J.*, in 1936 Pat. 398. Application for transfer of decree is not revival of decree. *See* 54 I.A. 129=54 C. 500 (P.C.). An application for transmission of a decree does not operate as revivor within the meaning of Art. 183 though it may be a step-in-aid of execution under Art. 182. 54 Cal. 500=54 I. A. 129=52 M. L. J. 565 (P.C.) Although the term "revivor" has not been anywhere defined or explained in the Limitaion Act, it is well-settled that to constitute

THE SECOND SCHEDULE.

[*Repealed by Act VIII of* 1930, *S.* 3 *and Sch.* II.]

THE THIRD SCHEDULE.

[*Repealed by Act XVII of* 1914, *S.* 3 *and Sch. II.*]

NOTES.

"revivor" of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. In other words there must be an order for execution which amounts to a decision that the decree is capable of execution. 21 Pat.L.T. 431=1940 P.W.N. 896=1940 Pat. 596. An order of revivor of a decree against two persons jointly, *e.g.*, partners of a firm against whom the decree has been passed, when made in an application for execution against one of them only, does not keep the decree alive against the other. No one can be prejudicially affected by any judicial order to which he is not a party. Art. 182 contains a distinct provision which is an exception to this general rule. A similar exception cannot be imported into Art. 183 which is silent on the point. 21 Pat.L.T. 431=1940 Pat. 596. A notice issued under O. 21, R. 16, C. P. Code, does not operate as revivor to extend the period of limitation under Art. 183, nor is the application for transfer of a decree an application in execution. 28 C.W.N. 965=1925 C. 28. *See also* 1940 Pat. 596; 1938 Pat 372; 1936 Pat. 398. An application to enforce an order absolute made by the High Court in a suit to enforce the mortgage security must be made within 12 years from the date when the order absolute for sale was made. 60 I.C. 880=47 C. 746. Properties belonging to the judgment-debtor were sold and the proceeds brought into Court. The Court ordered payment thereout to the decree-holder but the money was actually paid only sometime later. *Held*, that the payment by Court operated to give fresh starting point of limitation for execution of the decree under Art. 183. 46 M.L.J. 453=1924 M. 638. Applicability of article to award filed in chartered High Court. *See* 31 C.W.N. 1097; 43 Bom.L.R. 1006. Under Art. 183 payment is not required to be made either by the debtor or by some person acting on his behalf for the purpose of saving limitation. Payment for judgment-debtor or to his account is sufficient. 49 M.L.J. 101=1925 M. 1131. Application for restitution in pursuance of Privy Council decree—Limitation applicable—"To enforce", meaning of. 44 A. 555=1922 A. 238; 50 A. 767=26 A.L.J. 587=1928 A. 293. *See also* 44 C.W.N. 438=71 C.L.J. 127. Where the preliminary decree in a mortgage suit was an order of His Majesty in Council, the preparation of the final decree was a purely ministerial act to enable the order of His Majesty in Council to be enforced. 3 P. 596=1924 P. 576. *See also* 40 Bom.L.R. 507; I.L.R. (1939) 1 Cal. 477=43 C.W.N. 401=1939 Cal. 601. When a Court has recognised the assignment of a decree and passed an order allowing the assignee to execute it, that gives fresh starting point of limitation and it is not open to the judgment-debtor to contend that it did not act as a revivor. Where the Deputy Registrar of the High Court after due notice to parties ordered the transmission of a decree to another Court for execution, *held*, that the order operated as a revivor within the meaning of Art. 183 of the limitation Act. 52 M. 590=1929 M. 252 (2)=56 M. L. J. 555. *But see* 1936 Pat. 398. Where a tabular statement in accordance with O. 21, R. 11 was filed before the Master who issued notice to the other side, *held*, that it amounted to an application to the Court within the meaning of Art. 183 read in conjunction with S. 3 of that Act and that limitation was saved thereby. 55 C. 1341=1929 C. 193. Words "capable of releasing the right" exclude persons who are legally incapacitated, such as infants and lunatics, and therefore the words of Art. 183 are not governed by Ss 6, 7 and 8. 123 I. C. 411=1930 P. 151. An application against the sons for execution of a decree for costs obtained against the father is governed by Art. 183. 11 P. 445=1932 P. 261. The decree of the Chief Court of Burma when put in execution in the High Court is governed by Art 182. It does not become the decree of the original side of the High Court so as to get the benefit of an extended period of limitation. 6 R. 566=1928 R. 317. On this section, *see also* 13 R. 325.

Arts. 183 and 181.—An application for execution of a conditional decree passed by the High Court is governed by Art. 183 and not by Art. 181. In the case of conditional decrees, the proper practice is for the decree-holder to apply for the execution of the decree on notice to the judgment-debtor and to file in support of his application a petition alleging default. If the judgment-debtor does not deny default or if his denial is not believed, the decree-holder obtains the order he seeks. It is not necessary for him to file an application merely to establish default as a preliminary to a further application for a substantive order. 41 C.W.N. 1133. The transmission order being a *sine que non* for execution proceedings an application under O. 45, R. 15, is one for enforcing an order in Council of His Majesty and is covered by Art. 183, and therefore the residuary Art. 181 cannot apply. 1942 Pesh. 14. An application for leave to execute a decree against the legal representatives of the judgment-debtor is governed, not by Art. 181, but by Art. 183. I.L.R. (1939) 2 Cal. 173=1940 Cal. 171. Restitution—Application for, in consequence of order of His Majesty in Council—Article applicable. *See* 44 C.W.N. 438=71 C.L. J. 127.

THE LOCAL AUTHORITIES LOANS ACT (IX OF 1914).

PREFATORY NOTE.—"The local authorities derived their ordinary borrowing powers under Act XI of 1879 as amended by Act XV of 1885, Act I of 1905 and Act V of 1907. The Local Authorities (Emergency) Loans Act (XII of 1897), amended by Act XI of 1912, enabled them to borrow for certain emergencies, such as famine relief and the prevention of epidemic. They were empowered to raise money by issuing short-term bills repayable within a year, and to pay off previous loans by Act III of 1904 (amended by Act VII of 1908)."

Certain practical difficulties have arisen in the working of the Local Authorities Loans Act (XI of 1879), and it is proposed to amend that Act so as—

(1) to remove all doubts as to the competency of Port Officers to borrow under the Act;

(2) to make it clear that in the case of loans raised under S. 7 of the Act (*i.e.*, loans raised in the open market) the Government of India can—

(*a*) by rule delegate the power of sanction to Local Government;

(*b*) direct that the unexpended balances of such loans shall be applied in the reduction of the debt of the local authority concerned, or utilised in carrying out works which the local authority is legally authorised to carry out;

(*c*) by rule delegate to Local Governments, subject to such conditions as the Governor-General in Council may by rule impose, the power referred to in the preceding clause.

2. At the same time it is considered desirable to take this opportunity of consolidating the existing Acts which relate to loans raised by Local Authorities.

Those Acts are as follows:—

(1) The Local Authorities Loans Act (XI of 1879) as amended by Act XV of 1885, Act I of 1905 and Act V of 1907. This is the general Act under which local authorities derive their ordinary borrowing powers.

(2) The Local Authorities (Emergency) Loans Act (XII of 1897), as amended by Act XI of 1912. This extended the scope of the general Act by enabling local authorities to borrow money for certain temporary emergencies, such as famine relief and the prevention of epidemic diseases.

(3) The Local Authorities Loans Act (III of 1904), as amended by Act VIII of 1908, which empowered certain of the more important local authorities in India (specified in the Schedule to the Act) to raise money by the issue of short-term bills repayable within twelve months. Opportunity was taken to embody in this Act a provision (section 3) enabling local authorities, under certain restrictions, to raise money in order to repay money previously borrowed.

3. These three Acts, together with their various amending Acts, have been consolidated in the draft Bill, and, if the latter becomes law, will disappear from the Statute-book. The amendments mentioned in paragraph 1 above have also been provided for in the following manner:—

Amendment (1).—This is covered by the substitution of the words "any person" for the words "any body corporate, Municipal Committee, or other persons" in the present definition of local authority as given in section 3 of Act XI of 1879. *See* clause 2 of the Bill.

Amendment 2 (*a*).—This has been provided for by clause 4 (1) (vii) of the Bill.

Amendments 2 (*b*) *and* (*c*).—These have been provided for by clause 4 (1) (xv) of the Bill.

4. In addition to these amendments, opportunity has been taken to reconcile certain discrepancies and to effect certain simplifications in the existing law which are due to the fact that the Acts now in force have been passed at different times to deal with special circumstances. Apart from this the Bill makes no change of principle in the existing law, and in particular, does not affect the borrowing powers conferred on any local authority by any special enactment.—(Statement of Objects and Reasons, *Fort St. George Gazette*, 3rd November, 1903, Pt. III, p. 331; *Gazette of India*, 1914, Pt. V; p. 5. For Report of Select Committee, see *ibid.*, 1914, Pt. V, p. 17; for Proceedings in Council, see *ibid.*; 1914; Pt. VI, pp. 159, 189 and 496.)

THE LOCAL AUTHORITIES LOANS ACT (IX OF 1914).

Year.	No.	Short title.	Amendments.
1914	IX	The Local Authorities Loans Act, 1914.	Am. (in C.P.), C. P. Act XXXVIII of 1922. Rep. in pt., and am. Act XII of 1920. Rep. in pt , Act XII of 1927; A.O., 1937

[28*th February*, 1914.

An Act to consolidate and amend the law relating to the grant of loans to Local Authorities.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the borrowing powers of local authorities; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE LOCAL AUTHORITIES LOANS ACT, 1914.

(2) It extends to the whole of British India, including the Sonthal Parganas.

Definitions.

2. In this Act, "local authority" means any person legally entitled to the control or management of any local or municipal fund, or legally entitled to impose any cess, rate, duty or tax within any local area;

"funds," used with reference to any local althority, includes any local or municipal fund to the control or management of which such authority is legally entitled, and any cess, rate, duty or tax which such authority is legally entitled to impose, and any property vested in such authority;

"prescribed" means prescribed by rules made under this Act; and

"work" includes a survey, whether incidental to any other work or not.

[1]["The Government" or "the appropriate Government" means, in relation to cantonment authorities and in relation to port authorities in major ports, the Central Government, and in relation to other local authorities, the Provincial Government.]

Borrowing powers of local authorities.

3. (1) A local authority may, subject to the prescribed conditions, borrow on the security of its funds or any portion thereof for any of the following purposes, namely:—

(*i*) the carrying out of any works which it is legally authorised to carry out,

(*ii*) the giving of relief and the establishment and maintenance of relief works in times of famine or scarcity,

(*iii*) the prevention of the outbreak or spread of any dangerous epidemic disease,

(*iv*) any measures which may be connected with or ancillary to any purposes specified in clauses (*ii*) and (*iii*),

(*v*) the repayment of money previously borrowed in accordance with law:

Provided that nothing in clause (*v*) shall be deemed to empower a local authority to fix a period for the repayment of any money borrowed thereunder which, when the period fixed for the repayment of the money previously borrowed is taken into account, will exceed the maximum period fixed for the repayment of a loan by or under any enactment for the time being in force:

LEG. REF.

[1] Inserted by A.O., 1937.

[1]Provided further that, in the case of loans other than loans made by the [2][appropriate Government], no amount exceeding twenty-five lakhs of rupees shall be borrowed unless the terms, including the date of flotation, of such loan have been approved by the [3][appropriate Government].

(2) Nothing in this section shall be deemed to authorize any local authority—

(*a*) to borrow or spend money for any purpose for which, under the law for the time being in force, it is not authorized to apply its funds, or

(*b*) to borrow money by means of the issue of bills or promissory notes payable within any period not exceeding twelve months.

Power of appropriate Government to make rules.

4. (1) The [4][appropriate Government] may make rules consistent with this Act as to—

(*i*) the nature of the funds on the security of which money may be borrowed;

(*ii*) the works for which money may be borrowed;

(*iii*) the manner of making applications for permission to borrow money;

(*iv*) the inquiries to be made in relation to such loans, and the manner of conducting such inquiries;

(*v*) the cases and the forms in which particulars of applications and proceedings, and orders thereon, shall be published;

(*vi*) the cases in which the [2][appropriate Government] may make loans [5][* * * * * * *];

[6][(*vii*) the cases in which local authorities may take loans from persons other than the [2][appropriate Government];

(*viii*) the manner of recording and enforcing the conditions on which money is to be borrowed;

(*ix*) the manner and time of making or raising loans;

(*x*) the inspection of any works carried out by means of loans;

(*xi*) the instalments, if any, by which loans shall be re-paid, the interest to be charged on loans, and the manner and time of re-paying loans and of paying the interest thereon;

(*xii*) the sum to be charged against the funds which are to form the security for the loan, as costs in effecting the loan;

(*xiii*) the attachment of such funds, and the manner of disposing of or collecting them;

(*xiv*) the accounts to be kept in respect of loans;

(*xv*) the utilization of unexpended balances of loans either in the reduction in any way of the debt of the local authority, or in carrying out any works which that authority is legally authorised to carry out; and the sanction necessary to such utilization;

and as to all other matters incidental to carrying this Act into effect.

LEG. REF.

[1] This proviso was inserted by Act XXXVIII of 1920, S. 2 and Sch. I.

[2] Substituted by A.O. for 'Local Government'.

[3] Substituted by A.O., for 'Governor-General in Council'.

[4] Substituted by A.O. for "Local Government" which were substituted by Act XXXVIII of 1920, S. 2 and Sch. I, for "Governor-General in Council".

[5] Certain words were omitted by Act XXXVIII of 1920, S. 2 and Sch. I.

[6] Substituted by *ibid*.

NOTES.

Sec. 4.—Where a Panchayat Board contracts a loan without obtaining the sanction of the Local Government as required by the rules framed under S. 4 of the Act, the contract is void and no suit to enforce it would lie. But the creditor may in a proper case be entitled to the restoration of his money under S. 65 of the Contract Act. 54 L.W. 488=(1941) 2 M.L.J. 216.

(2) [7][* * * * *]

(3) All rules made under this Act shall be published [8][* * *] in the Official Gazette, and on such publication, shall have effect as if enacted in this Act.

Remedy by attachment if loan not repaid.

5. If any money borrowed in accordance with the provisions of this Act, or any interest or costs due in respect thereof, is or are not repaid according to the conditions of the loan, the [1][appropriate Government], if itself the lender, may, and, if the [1][appropriate Government], is not the lender, shall, on the application of the lender, attach the funds on the security of which the loan was made. After such attachment, no person, except an officer appointed in his behalf by the [1][appropriate Government], shall in any way deal with the attached funds; but such officer may do all acts in respect thereof which the borrowers might have done if such attachment had not taken place, and may apply the proceeds in satisfaction of the loan and of all interests and costs due in respect thereof, and of all expenses caused by the attachment and subsequent proceedings:

Attachment not to defeat prior charges legally made.

Provided that no such attachment shall defeat or prejudice any debt for which the funds attached were previously pledged in accordance with law; but all such prior charges shall be paid out of the proceeds of the funds before any part of the proceeds is applied to the satisfaction of the liability in respect of which such attachment is made.

Issue of short-term bills

6. (1) Subject to the provisions of section 26 of the Indian Paper Currency Act, 1910, the local authorities mentioned in Schedule I and any other local authority to which the [2][appropriate Government] may, by notification in the Official Gazette, extend the provisions of this section, may, with the previous sanction of the [2][appropriate Government], borrow money by means of the issue of bills or promissory notes payable within any period, not exceeding twelve months, for any purpose for which such local authority may lawfully borrow money under any law for the time being in force:

Provided that the amount of the bills or promissory notes, which may be so issued, shall not exceed, when the amount of the other moneys, for the time being borrowed by such local authority is taken into account, the total amount which such local authority is empowered by law to borrow.

(2) The [2][appropriate Government] may, by general or special order, regulate the conditions on which money may be borrowed or repaid under this section.

Loans not to be effected except under this Act.

7. Except as provided by or under this Act, no local authority shall, for any purpose, borrow money upon, or otherwise charge, its funds; and any contract otherwise made for that purpose after the passing of this Act shall be void:

Provided that nothing herein contained shall be deemed—

(*a*) to preclude any local authority from exercising the borrowing powers conferred on it by any special enactment now or hereafter in force; or

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LEG. REF.

[7] Sub-S. (2) was omitted by *ibid.*

[8] Certain words were omitted by *ibid.*

[1] Substituted by O.A., 1937, for "Local Government".

[2] Substituted by A.O., 1937, for "Governor-General in Council",

(*b*) to affect the power conferred on any local authority by any such enactment to charge its funds, by guaranteeing the payment of interest on money to be applied to any purpose to which the funds of the local authority can legally be applied.

Application of Act to loans existing previous to the fifth September, 1871.

[1][8. The remedy mentioned in section 5 shall be available for the recovery of any money lent by the Secretary of State in Council to any local authority before the fifth day of September, eighteen hundred and seventy-one, and the interest due on such money.]

9. [*Repeals*] *Rep. by the Repealing Act* (*XII of* 1927), *S.* 2 *and Sch.*

SCHEDULE I.

[See *section* 6.]

The Corporation of Calcutta.
The Commissioners for the Port of Calcutta.
The Commissioners for the Port of Chittagong.
The Municipal Corporation of the City of Bombay.
The Trustees of the Port of Bombay.
The Corporation of Madras.
The Trustees for the Port of Madras.
[2][* * * * *]
The Municipality of Karachi.
The Trustees of the Port of Karachi.
The Trustees for the Improvement of the City of Bombay.
The Trustees for the Improvement of the City of Calcutta.

SCHEDULE II.[1]

[ENACTMENTS REPEALED.] (*Rep. by the Repealing Act XII of* 1927), *S.* 2 *and Sch.*

THE LOCAL AUTHORITIES PENSIONS AND GRATUITIES ACT (I OF 1919).

Year.	No.	Short title.	Amendments.
1919	I	The Local Authorities Pensions and Gratuities Act	Amended, XXXVIII of 1920, A.O. 1937

[26*th February,* 1919.

An Act to extend the powers of local authorities in regard to the granting of pensions and gratuities.

WHEREAS it is expedient to extend the powers of local authorities in regard to the granting of pensions and gratuities; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE LOCAL AUTHORITIES PENSIONS AND GRATUITIES ACT, 1919.

(2) It extends to the whole of British India, including the Sonthal Parganas.

Definition.

2. In this Act "officer" means any person who has undertaken [4][service under the Crown] and who, immediately prior to undertaking such service, was paid and employed solely by a local authority and, but for undertaking such service, would in the ordinary course have continued in such employment, [5][and the 'appropriate

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LEG. REF.

[1] Substituted by A.O., 1937.

[2] The entries relating to the 'Municipal Committee of Rangoon' and 'the Commissioners for the Port of Rangoon' omitted by A.O., 1937.

[3] For Statement of Objects and Reasons, see *Gazette of India*, 1919, Pt. V, p. 18. For Proceedings in Council, see *ibid.*, 1919, Pt. VI, pp. 144, 145 and 197.

[4] Substituted for the words "the service of Government' by *ibid*.

[5] Inserted by *ibid*.

Government' means, in relation to cantonment authorities and port authorities in major ports, the Central Government, and in relation to other authorities, the Provincial Government].

Power to grant extraordinary pensions and gratuities.

3. Notwithstanding anything contained in any enactment or in any rule made thereunder regulating the powers of local authorities, and without prejudice to any powers conferred by or under any such enactment, a local authority may grant a pension or gratuity to any officer thereof who may, since the fourth day of August, 1914, have been wounded or otherwise incapacitated in [1][service under the Crown] and to the widow or child of any such officer who may have died in consequence of injuries received or illness contracted since the fourth day of August, 1914, in the course of such service.

Provision as to pensions and gratuities.

4. (1) Such pension or gratuity may be granted in addition to any pension or gratuity payable to the officer or his wife or child, as the case may be, under any general or special orders of His Majesty in Council or of [2][the Central Government or any Provincial Government], but shall not, save with the sanction of the [3][appropriate Government] exceed the amount of the pension or gratuity to which the officer or his wife or child would have been entitled under any such orders if his employment by the local authority had been service for the same time and on the same pay [4][under the Crown].

(2) Any pension granted under this Act may be made to take effect from such date subsequent to the fourth day of August, 1914, and subject to such conditions as the local authority may think fit.

Procedure.

5. Subject to the provisions of this Act, the decision of a local authority to grant a pension or gratuity thereunder shall be made in such manner and shall be subject to such sanction as may be prescribed by any enactment or rule regulating the grant by such local authority of pensions and gratuities:

Provided that in every case the sanction of the [5][appropriate Government] shall be necessary.

THE INDIAN LUNACY ACT (IV OF 1912).

Year.	No.	Short title.	Amendments.
1912	IV	The Indian Lunacy Act.	Repealed in part XVII of 1914, s 3; XVIII of 1919; XXXVIII of 1920; Amended, XII of 1916; VI of 1922; XI of 1923; XXXII of 1923; XXXIII of 1923; V of 1926; X of 1927; XIV of 1932; XXXV of 1934; A.O. 1937; and Madras Acts XIV and XV of 1938.

LEG REF.

[1] Substituted by A.O., 1937, for "the service of Government".

[2] Substituted by A.O., 1937, for "Governor-General in Council".

[3] Substituted by A.O., 1937, for "Local Government" which had been substituted for "Governor-General in Council" by Act XXXVIII of 1920, S. 2 and Sch. I.

[4] Substituted by A.O., 1937, for "under Government".

[5] Substituted by A.O., 1937, for "Local Government",

PREFATORY NOTE.—The following is the Statement of Objects and Reasons attached to the Lunacy Bill:—

The bulk of the law relating to the custody of lunatics and management of their estate, in India, is at present contained in the following Acts:—

(1) The Lunacy (Supreme Courts) Act (XXXIV of 1858).
(2) The Lunacy (District Courts) Act (XXXV of 1858).
(3) The Indian Lunatic Asylums Act (XXXVI of 1858).
(4) The Military Lunatics Act (XI of 1877).
(5) The Indian Lunatic Asylums (Amendment) Act (XVIII of 1866).
(6) The Indian Lunatic Asylums (Amendment) Act (XX of 1889).
(7) Chapter XXXIV of the Code of Criminal Procedure, 1898.
(8) Section 30 of the Prisoners' Act, 1900.

2. The first three of these Acts are based in great measure on the English Lunacy Regulation Act, 1853 (16 and 17 Vict., c. 70) and the English Lunatics Act, 1853 (16 and 17 Vict., c. 96). These English Acts after frequent amendment are now replaced by the Lunacy Act, 1890 (53 Vict., c. 5) as amended by the Lunacy Act, 1891 (54 and 55 Vict., c. 65). It is in the opinion of the Government of India desirable that the law relating to the custody of lunatics in India should be amended and assimilated with the modern English law on the subject and the present Bill has been prepared to effect this purpose. Opportunity has also been taken to re-arrange and consolidate as far as possible the whole law relating to lunatics.

3. The provisions of section 30 of the Prisoners' Act, 1900, and much of Chapter XXXIV of the Code of Criminal Procedure, 1898, cannot be conveniently inserted in any general Lunacy Act and they have therefore been left untouched. Sub-sections (2) and (3) of section 471 and the whole section 472 of the Code of Criminal Procedure which merely regulate the places in which criminal lunatics may be confined, and prescribe the manner in which such lunatics are to be visited have, however, been incorporated in the present Bill.

4. All changes of any importance made by the Bill are specified in Notes on clauses annexed, and the tables attached to the Bill show in detail the amendments proposed to be made in the law and the manner in which each section of the Acts in force has been dealt with. The main features of the Bill are noted below.

5. Chapter II deals with the confinement of the lunatics in asylums on reception orders and covers much the same ground as the Lunatic Asylums Act, 1858. In so far as such reception orders can be made otherwise than on petition, the law is left practically unchanged.

6. Sections 4 to 11 and 18 to 20 however make a considerable change in the law. At present the confinement of lunatics in asylums on the application of relatives and friends can be effected as follows:—

(*a*) In Presidency-towns, by an order under section 7 of the Lunatic Asylums Act, 1858, (1) after the person whom it is desired to confine has been found to be a lunatic by inquisition, or (2) accompanied by the medical certificates specified therein, an order under section 7 of the Lunatic Asylums Act, 1858, can only be made for the confinement of a lunatic in an asylum in a Presidency-town; and

(*b*) outside the Presidency-towns, only by an order of the Civil Court.

7. Under the present Bill the procedure prescribed by the Lunatic Asylums Act, 1858, has been changed, and where application is made for the confinement of a lunatic (not being a lunatic so found on inquisition) in an asylum the application must be made by petition to a magistrate and a reception order can only be made by him. The distinction between asylums in Presidency-towns and asylums outside such areas has given rise to administrative difficulties and inconveniences and serves no useful purpose. It has therefore been discarded.

8. It will be observed that under the Bill reception orders petition can only be made in Presidency-towns, and in this particular the provisions of Act XXXVI of 1858 have been followed. Local Governments can, however, apply the provisions of the law regarding such reception orders to areas outside the Presidency-towns.

9. The procedure prescribed for the issue of reception orders is based on English Lunacy Act, 1890. The manner in which medical certificates are to be given and the method of examination are prescribed in the Act carefully, and every care has been taken to prevent the improper confinement of any person in the asylum on a false allegation of lunacy.

10. Chapter IV is a reproduction with slight verbal changes of the present Lunacy (Supreme Courts) Act, 1858. It is probable that substantial amendments bringing the law and procedure more into accordance with the modern English law may be desirable, but the Government of India do not think it expedient at present to make any change in this part of the Bill until the High Courts concerned have been consulted.

11. Chapter V; deals with lunacy proceedings in District Courts and embodies with slight changes the existing law as contained in Act XXXV of 1858. It may possibly be

desirable at a later stage to assimilate as far as possible the procedure in the District Courts to that which may be finally adopted for the High Courts. Doubts have been expressed whether that Act empowers a District Court to issue orders for the detention of a lunatic in an asylum (see *In re* Joga Kuar, I.L.R. 30 C. 973). This question has now been set at rest by the provisions of clause 70 (1) which is taken from the English Lunacy Act, 1890.

12. Chapter IX is new but contains little that is not sufficiently explained in the Notes on clauses. Special attention may, however, be drawn to clause 94 which penalises the detention of lunatics in asylums in contravention of the Act and also the detention of lunatics or alleged lunatics in unlicensed institutions. This clause is based on S. 315 of the English Act. This clause does not prohibit the detention of lunatics by their relatives or in their own houses. The Government of India are, however, of opinion that in the public interest it is desirable that complete control should be exercised over all private institutions where lunatics are confined for payment.

THE INDIAN LUNACY ACT (IV OF 1912).

CONTENTS.

PART I.

PRELIMINARY.

CHAPTER I.

SECTIONS.

1. Short title and extent.
2. Savings.
3. Definitions.

PART II.

RECEPTION, CARE AND TREATMENT OF LUNATICS.

CHAPTER II.

RECEPTION OF LUNATICS.

4. Reception of persons in asylum.

Reception orders on petition.

5. Application for reception order.
6. Application by whom to be presented.
7. Procedure upon petition for reception order.
8. Detention of alleged lunatic pending inquiry.
9. Consideration of petition.
10. Order.
11. Further provisions as to reception orders on petition.

11-A. Power to appoint substitute for the person upon whose application a reception order has been made.

11-B. Reception order in case of lunatics from Foreign States in India.

Reception orders otherwise than on petition.

12. Reception order in case of a European lunatic soldier, sailor or airman.
13. Powers and duties of police in respect of wandering or dangerous lunatics and lunatics cruelly treated or not under proper care and control.
14. Reception order in case of wandering and dangerous lunatics.
15. Order in case of lunatic cruelly treated or not under proper care and control.
16. Detention of alleged lunatic pending report by medical officer.
17. Commissioner of police, etc., to act in the Presidency-town.

Further provisions as to reception orders and medical certificates.

18. Medical certificates.
19. Time and manner of medical examination of lunatic.
20. Authority for reception.

SECTIONS.

21. Copy of reception order to be sent to person in charge of asylum.
22. Restriction as to asylums into which reception orders may direct admission.

Detention of lunatics pending removal to asylum.

23. Detention of lunatics pending removal to asylum.

Reception and detention of criminal lunatics.

24. Reception and detention of criminal lunatics.

Reception after inquisition.

25. Reception after inquisition.
26. Order for payment of cost of maintenance of lunatic.

Amendment of order or certificate.

27. Amendment of order or certificate.

CHAPTER III.

CARE AND TREATMENT.

Visitors.

28. Appointment of visitors.
29. Monthly inspection by visitors.
30. Inspection of criminal lunatics by Inspector-General or visitors.

Discharge of lunatics.

31. Order of discharge from asylum by visitors.
32. Discharge of lunatics in other cases and of European military lunatics.
33. Order of discharge on undertaking of relative for due care of the lunatic.
34. Discharge of person subsequently found on inquisition not to be of unsound mind.

Removal of lunatics.

35. Removal of lunatics and criminal lunatics.

Escape and Re-capture.

36. Order to justify detention and re-capture after escape.

PART III.

JUDICIAL INQUISITION AS TO LUNACY.

CHAPTER IV.

PROCEEDINGS IN LUNACY IN PRESIDENCY-TOWNS.

Inquisition.

37. Jurisdiction in lunacy in Presidency-towns.

SECTIONS.

38. Court may order inquisition as to persons alleged to be insane.
39. Application by whom to be made.
40. Notice of time and of place of inquisition.
41. Powers of Court in respect of attendance and examination of lunatic.
42. Rules respecting attendance and examination of females alleged to be lunatic.
43. Power to direct District Court to make inquisition in certain cases.
44. Amendment of finding of District Court if defective or insufficient in form.
45. Proceedings on finding of Court.

Judicial powers over person and estate of lunatic.

46. Custody of lunatics and management of their estates.
47. Powers of manager in respect of management of lunatic's estate.
48. Power to make order concerning any matter connected with the lunacy.

Management and administration.

49. Power to dispose of lunatic's property for certain purposes.
50. Execution of conveyances and powers by manager under order of Court.
51. Court may order performance of contract.
52. Dissolution and disposal of property of partnership on a member becoming lunatic.
53. Disposal of business premises.
54. Manager may dispose of lease.
55. Assumption of charge by Court of Wards of land belonging to a lunatic in certain cases.
56. Power to apply property for lunatic's maintenance without appointing manager in certain cases.

Vesting orders.

57. Power to order transfer of stock belonging to lunatic in certain cases.
58. Power to order transfer of stock of lunatic residing out of British India and the United Kingdom.

General.

59. Power to apply property for lunatic's maintenance in case of temporary lunacy.
60. Proceedings in lunacy to cease or to be set aside if Court finds that the unsoundness of mind has ceased.
61. Power of Court to make rules.

CHAPTER V.

PROCEEDINGS IN LUNACY OUTSIDE PRESIDENCY-TOWNS.

Inquisition.

62. Power of District Court to institute inquisition as to persons alleged to be lunatic.
63. Application by whom to be made.
64. Regulation of proceedings of District Courts.
65. Inquisition by District Court and finding thereon.
66. Inquisition by Subordinate Court on commission issued by District Court, and proceedings thereon.

SECTIONS.

Judicial Powers over person and estate of lunatic.

67. Custody of lunatics and management of their estates.
68. Court of Wards to be authorized in certain cases to take charge of estate of lunatic.
69. Power to direct Collector to take charge of person and estate of lunatic in certain cases.
70. Control over proceedings of Collector.
71. Power of District Court to appoint guardian and manager and take security from manager.
72. Restriction on appointment of legal heir of lunatic to be guardian of his person.
73. Remuneration of managers and guardians.
74. Duties of guardian.
75. Powers of manager.
76. Manager to furnish inventory and annual accounts.
77. Proceeding if accuracy of inventory or accounts is impugned.
78. Payment into public treasury and investment of proceeds of estate.
79. Relative may sue for an account.
80. Removal of managers and guardians.
81. Penalty on manager for refusing to deliver accounts or property.
82. Proceedings in lunacy to cease or to be set aside if Court finds that the unsoundness of mind has ceased.
83. Appeals.

PART IV.

MISCELLANEOUS.

CHAPTER VI.

ESTABLISHMENT OF ASYLUMS.

84. Provincial Government may establish or licence the establishment of asylums.
84-A. Power to cancel licence if provision for curative treatment is insufficient.
85. Provision for admission of lunatics in asylums outside a Province.

CHAPTER VII.

EXPENSES OF LUNATICS.

86. Payment of cost of maintenance in licensed asylum in certain cases by Government.
87. Application of property in the possession of a lunatic found wandering.
88. Application to Civil Court for order for the payment of cost of maintenance out of the lunatic's estate, or by person bound to maintain him.
89. Order of Court and enforcement thereof.
89-A. Fixation of cost of maintenance.
89-B. Incidence of costs of maintenance payable by Government.
90. Saving of liability of relatives to maintain lunatic.

CHAPTER VIII.

RULES.

91. Power of Provincial Government to make rules.

SECTIONS.
92. Publication of rules.

CHAPTER IX.

SUPPLEMENTAL PROVISIONS.

93. Penalty for improper reception or detention of lunatic.
94. Provision as to bonds.
95. Pension of lunatic payable by Government.
96. Use of forms in Schedule.
97. Protection to persons acting under Act.

SECTIONS.
98. Power to give effect to warrants and orders of certain Courts outside British India.
99. Power to make rules for reception of lunatics received from outside British India.
100. Orders under repealed Acts.
100-A. Ranchi European Mental Hospital.
101. [*Repealed.*]
SCHEDULE I.—FORMS.
SCHEDULE II.—[*Repealed.*]

THE INDIAN LUNACY ACT (IV OF 1912).

[16*th March*, 1912

An Act to consolidate and amend the law relating to Lunacy.

WHEREAS it is expedient to consolidate and amend the law relating to lunacy; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

CHAPTER I.

Short title and extent.

1. (1) This Act may be called THE INDIAN LUNACY ACT, 1912.

(2) It extends to the whole of British India, including British Baluchistan, the Sonthal Parganas, and the Pargana of Spiti.

Savings.

2. Nothing contained in Part II shall be deemed to affect the powers of any High Court which is or hereafter may be [1][constituted by His Majesty by Letters Patent], over any person found to be a lunatic by inquisition or over the property of such lunatic, or the rights of any person appointed by such Court as guardian of the person or manager of the estate of such lunatic.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(1) "asylum" means an asylum [2][or mental hospital] for lunatics established or licensed by [3][any Government in British India]:

(2) "cost of maintenance" in an asylum includes the cost of lodging, maintenance, clothing, medicine and care of a lunatic and any expenditure incurred in removing such lunatic to and from an asylum [4][together with any other charges specified in this behalf by the [5][Provincial Government], in exercise of any power conferred upon [6][it] by this Act]:

LEG. REF.

[1] Substituted for "established under the Indian High Courts Acts, 1861 to 1911" by A.O., 1937.

[2] Inserted by Act VI of 1922, S. 2.

[3] Substituted for "Government" by A.O., 1937.

[4] Inserted by Act VI of 1922, S. 2.

[5] Substituted for "Governor-General in Council" by A.O., 1937.

[6] Substituted for "him" by *ibid*.

NOTES.

Sec. 1: OBJECT OF THE ACT.—The law does not contemplate that a person alleged to be a lunatic should be exposed to the publicity and harassment of a trial unless there is some foundation for apprehension that he is incapable to manage his affairs. 9 I.C. 207=8 A.L.J. 179. *See also* 19 C.W.N. 45.

APPLICABILITY OF THE ACT.—The Act is not absolutely exhaustive. 42 C.W.N. 92 =1937 C. 735. Act XXXV of 1858 had no application to a Hindu coparcener who has no separate property. 23 M.L.J. 706= 17 I.C. 473=1913 M.W.N. 79. *See also* 25 C. 585. The provisions should be strictly followed. 1930 L. 289.

Sec. 3, Cl. (1): Where there is no

(3) "District Court" means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns:

(4) "criminal lunatic" means any person for whose [1][detention] in, or removal to an asylum, jail or other place of safe custody an order has been made in accordance with the provisions of section 466 or section 471 of the Code of Criminal Procedure, 1898, or of section 30 of the Prisoners Act, 1900, [2][or of section 103-A of the Indian Army Act, 1911]:

(5) "lunatic" means an idiot or person of unsound mind:

(6) "Magistrate" means a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or a Magistrate of the first class specially empowered by the Provincial Government to perform the functions of a Magistrate under this Act:

(7) "medical officer" means a gazetted [3][medical officer in the service of the Crown] and includes a medical practitioner declared by general or special order of the Provincial Government to be a medical officer for the purposes of this Act:

(8) "medical practitioner" means a holder of a qualification to practise medicine and surgery which can be registered in the United Kingdom in accordance with the law for the time being in force for the registration of medical practitioners, and includes any person declared by general or special order of the Provincial Government to be a medical practitioner for the purposes of this Act:

(9) "prescribed" means prescribed by this Act or by rule made thereunder:

(10) "reception order" means an order made under the provisions of this Act for the reception into an asylum of a lunatic other than a lunatic so found by inquisition:

(11) "relative" includes any person related by blood, marriage or adoption: and

(12) "rule" means a rule made under this Act.

LEG. REF.

[1] Substituted for 'confinement' by Act XI of 1923, S. 2 and Sch. I.

[2] Inserted by Act XXXIII of 1923, S. 5.

[3] Substituted for 'medical officer of Government' by A.O., 1937.

NOTES.

provision in the order of appointment of joint managers for the estate of lunatic, the office of the survivor manager terminates on the death of the co-manager. 61 Cal. 986=60 C.L.J. 14=38 C.W.N. 1054.

Sec. 3, Cl. (2).—Under the Lunacy Act, the Court has no power to award costs to an unsuccessful applicant out of the estate of the alleged lunatic, even though the application is *bona fide* and in the best interests of the lunatic. In the absence of a provision in the Act, similar to S. 109 of the English Lunacy Act of 1890, the Court has no discretion to award costs. 152 I.C. 882=40 L.W. 710=67 M.L.J. 797.

Sec. 3 (5).—The elaborate procedure prescribed by the Act should be strictly followed. The Court should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the person concerned have declared that he is a lunatic. The Court ought to form its own independent judgment on the point. 122 I.C. 570=1930 L. 289. Unsoundness of mind includes imbecility, lunacy or mental aberration. 7 B. 15. *See also* 1905 A.W.N. 8; 4 C.L.J. 115. But mere weakness of intellect is not. 4 C.L.J. 115. As to what is lunacy, *see also* 24 W.R. 124; 20 W.R. 55.

LUNATIC.—The term "Lunatic" also includes one who is so found by a competent Court on proper evidence. 2 A.L.J. 154; 31 C. 210. A man is not a lunatic simply because he had delusions on one or two points and is incapable of managing his own affairs. 9 I.C. 207=8 A.L.J. 179.

Sec. 3 (11).—The brother of the wife is related by marriage to the husband of his sister and is therefore a "relative" within

PART II.

RECEPTION, CARE AND TREATMENT OF LUNATICS.

CHAPTER II.

RECEPTION OF LUNATICS.

Reception of persons in asylum.

[1]4. (1) No person other than a criminal lunatic or a lunatic so found by inquisition shall be received or detained in an asylum without a reception order save as provided by sections 8, 16 and 98:

Provided that any person in charge of an asylum may, with the consent of two of the visitors of such asylum, which consent shall not be given except upon a written application from the intending boarder, receive and lodge as a boarder in such asylum any person who is desirous of submitting himself to treatment.

(2) A boarder received in an asylum under the proviso to sub-section (1) shall not be detained in the asylum for more than twenty-four hours after he has given to the person in charge of the asylum notice in writing of his desire to leave such asylum.

Reception orders on petition.

Application for reception order.

5. (1) An application for a reception order shall be made by petition accompanied by a statement of particulars to the Magistrate within the local limits of whose jurisdiction the alleged lunatic ordinarily resides, shall be in the form prescribed and shall be supported by two medical certificates on separate sheets of paper, one of which certificates shall be from a medical officer.

(2) If either of the medical certificates is signed by any relative, partner or assistant of the lunatic or of the petitioner, the petition shall state the fact and, where the person signing is a relative, the exact manner in which he is related to the lunatic or petitioner.

(3) The petition shall also state whether any previous application has been presented for an inquiry into the mental capacity of the alleged lunatic in any Court; and if such application has been made, a certified copy of the order made thereon shall be attached to the petition.

(4) No application for a reception order shall be entertained in any area outside the Presidency-towns unless the Provincial Government has, by notification in the Official Gazette, declared such area as an area in which reception orders may be made.

Application by whom to be presented.

6. [1][(1) Subject to the provisions of sub-section (3), the petition shall be presented by the husband or wife of the alleged lunatic, or, if there is no husband or wife or the husband or wife is prevented by reason of insanity, absence from India or otherwise from making the presentation, by the nearest relative of the alleged lunatic who is not so prevented.]

LEG. REF.

[1] MADRAS AMENDMENT.—"In sub S. (1) of sec. 4 of the Indian Lunacy Act, 1912, for the words and figures "save as provided by secs. 8, 16 and 98", the words; figures and letter "save as provided by secs. 8, 16 and 98 of this Act and by se. 39-A of the Prisons Act, 1894" shall be substituted (Madras Act XIV of 38).

[2] Substituted by Act V of 1926, S. 2.

NOTES.

S. 3 (11) of the Act and he is competent to make an application for inquisition under S. 62 of the Act. A narrow construction should not be placed upon the term "relative as defined in S. 3 (11). 22 C.W.N. 547 =43 I.C. 511.

Sec. 4.—*See* 4 L. 1=73 I.C. 696.

(2) [1][If the petition is not presented by the husband or wife, or, where there is no husband or wife, by the nearest relative of the alleged lunatic, the petition] shall contain a statement of the reasons why it is not so presented, and of the connection of the petitioner with the alleged lunatic, and the circumstances under which he presents the petition.

(3) No person shall present a petition unless he has attained the age of majority as determined by the law to which he is subject, and as within fourteen days before the presentation of the petition, personally seen the said lunatic.

(4) The petition shall be signed and verified by the petitioner, and the statement of prescribed particulars by the person making such statement.

Procedure upon petition for reception order.

7. (1) Upon the presentation of the petition the Magistrate shall consider the allegations in the petition and the evidence of lunacy appearing by the medical certificates.

(2) If he considers that there are grounds for proceeding further, he shall personally examine the alleged lunatic unless for reasons to be recorded in writing he thinks it unnecessary or inexpedient so to do.

(3) If he is satisfied that a reception order may properly be made forthwith, he may make the same accordingly.

(4) If he is not so satisfied, he shall fix a date (notice whereof shall be given to the petitioner and to any other person to whom in the opinion of the Magistrate notice should be given) for the consideration of the petition, and he may make such further or other inquiries of or concerning the alleged lunatic as he thinks fit.

Detention of alleged lunatic pending inquiry.

8. Upon the presentation of the petition, the Magistrate may make such order as he thinks fit for the suitable custody of the alleged lunatic pending the conclusion of the inquiry.

Consideration of petition.

9. The petition shall be considered in private in the presence of the petitioner, the alleged lunatic (unless the Magistrate in his discretion otherwise directs), any person appointed by the alleged lunatic to represent him and such other persons as the Magistrate thinks fit.

Order.

10. (1) At the time appointed for the consideration of the petition, the Magistrate may either make a reception order or dismiss the petition, or may adjourn the same for further evidence or inquiry, and may make such order as to the payment of the costs of the inquiry by the person upon whose application it was made, or out of the estate of the alleged lunatic if found to be of unsound mind, or othewise as he thinks fit.

(2) If the petition is dismissed, the Magistrate shall record in writing his reasons for dismissing the same, and shall deliver or cause to be delivered to the petitioner a copy of such order.

Further provisions as to reception orders on petition.

11. No reception order shall be made under section 7 or section 10, save in the case of a lunatic who is dangerous and unfit to be at large, unless—

(*a*) the Magistrate is satisfied that the person in charge of an asylum is willing to receive the lunatic, and

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LEG. REF.

[1] Substituted by Act V of 1926, S. 2.

NOTES.

Sec. 7: DUTY OF JUDGE IN MAKING AN ORDER FOR INQUISITION.—It must be a judicial determination carefully made on adequate materials. 54 C. 836; 35 C.W.N. 481.

Secs. 11 to 14.—Orders of a District Magistrate are executive and cannot form (*b*) the petitioner or some other person engages in writing to the satisfaction of the Magistrate to pay the cost of maintenance of the lunatic.

Power to appoint substitute for the person upon whose application a reception order has been made.

[1][11-A. (1) The Magistrate may, subject to the provisions of this section by order in writing (hereinafter referred to as an order of substitution), transfer the duties and responsibilities under this Act of the person on whose petition a reception order has been made to any other person who is willing to undertake the same, and such other person shall thereupon be deemed for the purposes of this Act to be the person on whose petition the reception order was made, and all references in this Act to such last-mentioned person shall be construed accordingly:

Provided that no such order of substitution shall release the person upon whose petition the reception order was made or, if he is dead, his legal representative from any liability incurred before the order of substitution was made.

(2) Before making any order of substitution, the Magistrate shall send a notice to the person upon whose petition the reception order was made, if he is alive, and to any relative of the lunatic to whom, in the opinion of the Magistrate, notice should be given; the notice shall specify the name of the person in whose favour it is proposed to make such order and the date, which shall be not less than twenty days from the sending of the notice, upon which any objection to the making of the order will be considered.

(3) On such date or any subsequent date to which the proceedings may be adjourned, the Magistrate shall consider any objection made by any person to whom notice has been sent, or by any other relative of the lunatic, and shall receive all such evidence as may be produced by or on behalf of any such persons and such further evidence, if any, as the Magistrate thinks necessary, and may thereafter make or refrain from making an order of substitution:

Provided that, if the person on whose petition the reception order was made is dead and any other person is willing and, in the opinion of the Magistrate, fitted to undertake the duties and responsibilities under this Act of such first-mentioned person, the Magistrate shall make such an order.

(4) If in proceedings under this section any question arises as to the person to whom the duties and responsibilities under this Act of a person upon whose petition a reception order has been made shall be entrusted, the Magistrate shall give preference to the person who is the nearest relative of the lunatic unless, for reasons to be recorded in writing, the Magistrate considers that such preference would not be in the interests of the lunatic.

(5) The Magistrate may make such order for the payment of the costs of an inquiry under this section by any person who is a party thereto or out of the estate of the lunatic, as he thinks fit.

(6) Any notice under sub-section (2) may be sent by post to the last known address of the person for whom it is intended.]

Reception order in case of lunatics from foreign States in India.

[2][11-B.] (1) When an arrangement has been made with any foreign European State with respect to the reception of lunatics in asylums in British India, the Central Government may, by notification in the Official Gazette, direct that reception orders may be made under this

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LEG. REF.

[1] S. 11-A was inserted by Act V of 1926, sec. 3.

[2] This section was originally inserted as S. 11-A by Act XII of 1916 and was renumbered as S. 11-B by Act V of 1926, S. 3.

NOTES.

the subject-matter of revision. 4 L. 1=73 I.C. 696=1924 L. 55. Great care is to be taken before declaring a person a lunatic. 5 W.R. (Mis.) 5.

Act in the case of any lunatic or class of lunatics residing in the territories in India of such foreign European State, and shall in such notification specify the province or provinces within which such reception orders may be made.

(2) On publication of a notification under sub-section (1), the provisions of this Act as to the making of reception orders on petition and for temporary detention in suitable custody shall apply in the case of such lunatics, with the following modifications, namely:—

(*a*) an application for a reception order may be made by petition presented by such officer or agent of the foreign State in which the alleged lunatic ordinarily resides, as may by general or special order be approved by the Provincial Government in this behalf;

(*b*) the functions of the Magistrate shall be performed by such officer as the Provincial Government may, by general or special order, appoint in this behalf, and such officer shall be deemed to be the Magistrate having jurisdiction over the alleged lunatic for all the purposes of the said provisions;

(*c*) for the purposes of sections 5 and 18 (1), the expressions "medical officer" and "medical practitioner" shall include such person or class of persons as the Provincial Government may specify in this behalf;

(*d*) the Magistrate may in his discretion extend the period prescribed by section 19 within which the alleged lunatic must have been medically examined; and

(*e*) sections 6 (1), (2), (3), 11, [1][11-A] and 34 of the Act, shall not apply, and with such other modifications, restrictions or adaptations as the Central Government may, by notification in the Official Gazette, direct for the purpose of facilitating the application of the said provisions.

(3) A reception order made under this section shall be deemed to be a reception order made under section 7 or section 10, as the case may be.

Reception orders otherwise than on petition.

Reception order in case of a European lunatic soldier, sailor or airman.

12. When any European who is subject to the provisions of the Army Act [2][the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934,] [3][the Air Force Act or the Indian Air Force Act, 1932] has been declared a lunatic in accordance with the provisions of the military [2][, Naval] [4][or air force] regulations in force for the time being, and it appears to any administrative medical officer that he should be removed to an asylum, such administrative medical officer may, if he thinks fit, make a reception order under his hand for the admission of the said lunatic into any asylum which has been duly authorized for the purpose by the Central Government.

Powers and duties of police in respect of wandering or dangerous lunatics and lunatics cruelly treated or not under proper care and control.

13. (1) Every officer in charge of a police station may arrest or cause to be arrested all persons found wandering at large within the limits of his station whom he has reason to believe to be lunatics, and shall arrest or cause to be arrested all persons within the limits of his station whom he has reason to believe to be dangerous by reason of lunacy. Any person so arrested shall be taken forthwith before the Magistrate.

LEG. REF.

[1] Inserted by Act V of 1926, sec. 4.

[2] Inserted by Act XXXV of 1934, S. 2 and Sch.

[3] Substituted by Act XIV of 1932, S. 130 and Sch. for "or the Air Force Act" which had been inserted by Act X of 1927, S. 2 and Sch. I.

[4] Inserted by Act X of 1927, S. 2 and Sch. I.

NOTES.

Sec. 13.—*See* 5 W.R. (Mis.) 5; 9 C. 341.

(2) Every officer in charge of a police-station who has reason to believe that any person within the limits of his station is deemed to be a lunatic and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the charge of him, shall immediately report the fact to the Magistrate.

Reception order in case of wandering and dangerous lunatics.

14. Whenever any person is brought before a Magistrate under the provisions of sub-section (1) of section 13, the Magistrate shall examine such person, and if he thinks that there are grounds for proceeding further, shall cause him to be examined by a medical officer, and may make such other inquiries as he thinks fit; and if the Magistrate is satisfied that such person is a lunatic and a proper person to be detained, he may, if the medical officer who has examined such person gives a medical certificate with regard to such person, make a reception order for the admission of such lunatic into an asylum:

Provided that, if any friend or relative desires that the lunatic be sent to a licensed asylum and engages in writing to the satisfaction of the Magistrate to pay the cost of maintenance of the lunatic in such asylum, the Magistrate shall; if the person in charge of such asylum consents, make a reception order for the admission of the lunatic into the licensed asylum mentioned in the engagement:

Provided further that if any friend or relative of the lunatic enters into a bond with or without sureties for such sum of money as the Magistrate thinks fit, conditioned that such lunatic shall be properly taken care of, and shall be prevented from doing injury to himself or to others, the Magistrate, instead of making a reception order, may, if he thinks fit, make him over to the care of such friend or relative.

Order in case of lunatic cruelly treated or not under proper care and control.

15. (1) If it appears to the Magistrate, on the report of a police-officer or the information of any other person, that any person within the limits of his jurisdiction deemed to be a lunatic is not under proper care and control or is cruelly treated or neglected by any relative or other person having the charge of him, the Magistrate may cause the alleged lunatic to be produced before him, and summon such relative or other person as has or ought to have the charge of him.

(2) If such relative or other person is leglly bound to maintain the allleged lunatic, the Magistrate may make an order for such alleged lunatic being properly cared for and treated, and, if such relative or other person wilfully neglects to comply with the said order, the Magistrate may sentence him to imprisonment for a term which may extend to one month.

NOTES.

Secs. 14, 15 (3) and 16.—Sec. 16 which applies only to temporary detention for specific time and purpose, also applies to a case where Magistrate acting under sec. 14 thinks detention necessary for observation. In such a case, by reason of sec. 15 (3), the two provisos of sec. 14 will also apply if necessary. 29 S.L.R. 431=165 I.C. 119 =1936 Sind 156.

Sec. 15.—Words "report of Police Officer, etc." do not suggest personal presentation of a written complaint. Information contained in Official correspondence is sufficeint. 29 S.L.R. 431=165 I.C. 119=1936 Sind 156. Where a lunatic is not 'under proper care and control,' it is not necessary, though desirable, to formally summon the relatives. But omission to do so does not render the proceedings illegal. (*Ibid.*)

Secs. 15 and 88.—A Magistrate who passes a reception order against a lunatic under s. 15 has no jurisdiction to pass an order for the payment of the costs of the maintenance of the lunatic. He must under the provisions of s. 88 apply to the High Court or the District Court for such an order. 40 P.L.R. 496.

(3) If there is no person legally bound to maintain the alleged lunatic, or if the Magistrate thinks fit so to do, he may proceed as prescribed in section 14, and upon being satisfied in manner aforesaid that the person deemed to be a lunatic is a lunatic and a proper person to be detained under care and treatment may, if a medical officer gives a medical certificate with regard to such lunatic, make a reception order for the admission of such lunatic into an asylum.

Detention of alleged lunatic pending report by medical officer.

16. (1) When any person alleged to be a lunatic is brought before a Magistrate under the provisions of section 13 or section 15, the Magistrate may, by an order in writing authorize the detention of the alleged lunatic in suitable custody for such time not exceeding ten days as may be, in his opinion necessary to enable the medical officer to determine whether such alleged lunatic is a person in respect of whom a medical certificate may be properly given.

(2) The Magistrate may, from time to time. for the same purpose by order in writing, authorize such further detention of the alleged lunatic for periods not exceeding ten days at a time as he thinks necessary:

Provided that no person shall be detained in accordance with the provisions of this section for a total period exceeding thirty days from the date on which he was first brought before the Magistrate.

Commissioner of Police, etc., to act in the Presidency-town.

17. All acts which the Magistrate is authorized or required to do by sections 14, 15 or 16 may be done in the Presidency-towns [1][* * *] by the Commissioner of Police; and all duties which an officer in charge of a police station is authorized or required to perform may be performed in any of the Presidency-towns by on officer of the police force not below the rank of an inspector.

Further provisions as to reception orders and medical certificates.

Medical certificates.

18. (1) Every medical certificate under this Act shall be made and signed by a medical practitioner or a medical officer, as the case may be, and shall be in the form prescribed.

(2) Every medical certificate shall state the facts upon which the person certifying has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others; and no reception order on petition shall be made upon a certificate founded only upon facts communicated by others.

(3) Every medical certificate made under this Act shall be evidence of the facts therein appearing and of the judgment therein stated to have been formed by the person certifying on such facts, as if the matters therein appearing had been verified on oath.

Time and manner of medical examination of lunatic.

19. (1) A reception order required to be founded on a medical certificate shall not be made unless the person who, signs the medical certificate, or, where two certificates are required, each person who signs a certificate has personally examined the alleged lunatic, in the case of an

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LEG. REF.

[1] Words "or Rangoon" omitted by A.O., 1937.

NOTES.

Sec. 16.—A Gazetted Resident Medical Officer of a hospital is a medical officer under this section. 29 S.L.R. 431=165 I.C. 119=1936 Sind 156. It is competent to Magistrate to vary and shorten the period of detention originally ordered, on medical report. (*Ibid.*) Under the Lunacy Acts IV of 1912 and X of 1914 the Magistrates or Courts are themselves competent to direct the reception of a criminal lunatic into any asylum prescribed for the purpose without reporting the case for orders of the Local Government under s. 471 (1), Cr. P. Code. 8 L.B.R. 290=30 I.C. 654.

order upon petition, not more than seven clear days before the date of the presentation of the petition, and in all other cases not more than seven clear days before the date of the order

(2) Where two medical certificates are required, a reception order shall not be made unless each person signing a certificate has examined the alleged lunatic separately from the other.

Authority for reception.

20. A reception order, if the same appears to be in conformity with this Act, shall be sufficient authority for the petitioner or any person authorised by him, or in the case of an order not made upon petition, for the person authorized so to do by the person making the order, to take the lunatic and convey him to the place mentioned in such order and for his reception and detention therein, or in any asylum to which he may be removed in accordance with the provisions of this Act, and the order may be acted on without further evidence of the signature or of the jurisdiction of the person making the order:

[1][Provided that no reception order shall continue to have effect—

(*a*) After the expiry of thirty days from the date on which it was made, unless the lunatic has been admitted to the place mentioned therein within that period, or

(*b*) After the discharge, under the provisions of this Act, of the lunatic from such place or from any asylum to which he may have been removed.]

Copy of reception order to be sent to person in charge of asylum.

21. Any authority making a reception order under this Part shall forthwith send a certified copy of the order to the person in charge of the asylum into which such lunatic is to be admitted.

Restriction as to asylums into which reception orders may direct admission.

22. Subject to the provisions of section 85, no Magistrate shall make a reception order for the admission of any lunatic into [2][any Government asylum] outside the province in which the Magistrate exercises jurisdiction.

Detention of lunatics pending removal to asylum.

Detention of lunatics pending removal to asylum.

23. When any reception order has been made under sections 7, 10, 14 or 15, the Magistrate may, for reasons to be recorded in writing direct that the lunatic, pending his removal to an asylum, be detained in suitable custody in such place as the Magistrate thinks fit.

Reception and detention of criminal lunatics.

Reception and detention of criminal lunatics.

24. An order under section 466 or section 471 of the Code of Criminal Procedure, 1898, or under section 30 of the Prisoners Act 1900, [3][or under section 103-A of the Indian Army Act, 1911], directing the reception of a criminal lunatic into any asylum which is prescribed for the reception of criminal lunatics shall be sufficient authority for the reception and detention of any person named therein in such asylum or in any other asylum to which he may be lawfully transferred.

Reception after inquisition.

Reception after inquisition.

25. A lunatic so found by inquisition may be admitted into an asylum—

(1) in the case of an inquisition under Chapter IV, on an order made by, or under the authority of the High Court;

LEG. REF.

[1] Inserted by Act XXXII of 1923, S. 2.

[2] Substituted for "any asylum established by Government" by A.O., 1937

[3] Inserted by Act XXXIII of 1923, s. 5.

(2) in the case of an inquisition under Chapter V, on an order made by the District Court.

Order for payment of cost of maintenance of lunatic.

26. (1) When any lunatic has been admitted into an asylum in accordance with the provisions of section 25, the High Court or the District Court, as the case may be, shall, on the application of the person in charge of the asylum make an order for the payment of the cost of maintenance of the lunatic in the asylum, and may from time to time direct that any sum of money payable under such order shall be recovered from the estate of the lunatic or of any person legally bound to maintain him:

Provided that if at any time it shall appear to the satisfaction of the Court that the lunatic has not sufficient property, and that no person legally bound to maintain such lunatic has sufficient means for the payment of such cost, the Court shall certify the same instead of making such order for the payment of the cost as aforesaid.

(2) An order under sub-section (1) shall be enforced in the same manner and shall be of the same force and effect and subject to the same appeal as a decree made by the Court in a suit in respect of the property or person therein mentioned.

Amendment of order or certificate.

Amendment of order or certificate.

27. If, after the reception of any lunatic into any asylum on a reception order, it appears that the order upon which he was received or the medical certificate or certificates upon which such order was made is or are defective or incorrect, the same may at any time afterwards be amended by the person or persons signing the same with the sanction of two or more of the visitors of the said asylum, one of whom shall be a medical officer.

CHAPTER III.

CARE AND TREATMENT.

Visitors.

Appointment of visitors.

28. (1) The Provincial Government shall appoint for every asylum not less than three visitors, one of whom at least shall be a medical officier.

(2) The Inspector-General of Prisons (where such office exists) shall be a visitor *ex officio* of all the asylums within the limits of his jurisdiction.

Monthly inspection by visitors.

29. Two or more of the visitors, one of whom shall be a medical officer, shall, once at least in every month, together inspect every part of the asylum of which they are visitors, and see and examine, as far as circumstances will permit, every lunatic and boarder therein, and the order and certificate for the admission of every lunatic admitted since the last visitation of the visitors, and shall enter in a book to be kept for that purpose any remarks which they may deem proper in regard to the management and condition of the asylum and the inmates thereof.

Inspection of criminal lunatics by Inspector-General or visitors.

30. (1) When any person is [1][detained] under the provisions of section 466 or section 471 of the Code of Criminal Procedure, 1898 [2][or under the provisions of section 103-A of the Indian Army Act, 1911] the Inspector-General of Prisons, if such person is [1][detained] in a jail or the visitors of the asylum or any two of them, if he is [1][detained] in an asylum, may visit him in order to ascertain his state of mind; and he shall be visited

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LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I for "confined".

[2] Inserted by Act XXXIII of 1923, S. 5.

once at least in every six months by such Inspector-General or by two of such visitors as aforesaid; and such Inspector-General or visitors shall make a special report as to the state of mind of such person to the authority under whose order he is [1][detained].

(2) The Provincial Government may empower the officer in charge of the jail in which such person may be [1][detained] to discharge all or any of the functions of the Inspector-General under sub-section (1).

Discharge of lunatics.

Order of discharge from asylum by visitors.

31. (1) Three of the visitors of any asylum, of whom one shall be a medical officer, may, by order in writing, direct the discharge of any person detained in such asylum, and such person shall thereupon be discharged:

Provided that no order under this sub-section shall be made in the case of a person detained under a reception order under section 12, or, in the case of a criminal lunatic, otherwise than as provided by section 30 of the Prisoners Act, 1900.

(2) When such order is made, if the person is detained under the order of any public authority, notice of the order of discharge shall be immediately communicated to such authority.

Discharge of lunatics in other cases and of European military lunatics.

32. (1) A lunatic detained in an asylum under a reception order, made on petition, shall be discharged if the person on whose petition the reception order was made so applies in writing to the person in charge of the asylum:

Provided that no lunatic shall be discharged under the provisions of sub-section (1) if the officer in charge of the asylum certifies in writing that the lunatic is dangerous and unfit to be at large.

(2) A person detained in an asylum under a reception order made under section 12 shall be detained therein until he is discharged therefrom in accordance with the military [2][, naval] [3][or air force] regulations in force for the time being, or until the officer making the order applies for his transfer to the military [2][,naval] [3][or air force] authorities in view to his removal to England.

(3) Whenever it appears to the officer in charge of an asylum that the discharge of a person therein detained under an order made under section 12 is necessary either on account of his recovery, or for any other purpose, such person shall be brought before the visitors of the asylum, and on the visitors recording their opinion that the discharge should be made, the General or other Officer commanding the division, district, brigade or force; or other officer authorized to order the admission of such persons into an asylum, shall forthwith direct him to be discharged, and such discharge shall take place in accordance with the military [2][, naval] [3][or air force] regulations in force for the time being.

Order of discharge on undertaking of relative for due care of the lunatic.

33. When any relative or friend of a lunatic detained in any asylum under the provisions of sections 14, 15 or 17 is desirous that such lunatic shall be delivered over to his care and custody, he may make application to the authority under whose order the lunatic is detained, and such authority, if it thinks fit in consultation with the person in charge of the asylum and with the visitors or with one of them being a medical officer and upon such

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LEG. REF.

[1] Substituted by Act XI of 1923, S. 2 and Sch. I for "confined".

[2] Inserted by Act XXXV of 1934, S. 2 and Sch.

[3] Inserted by Act X of 1927, S. 2 and Sch. I.

SEC. 33—MADRAS AMENDMENT —After S. 33 of the Indian Lunacy Act, 1912, the following shall be inserted, namely:—

NOTES.

Sec. 33.—The appropriate remedy of the relatives of a person who has been wrongly relative or friend entering into a bond with or without sureties for such sum of money as the said authority thinks fit conditioned that such lunatic shall be properly taken care of and shall be prevented from doing injury to himself or to others may make an order for the discharge of such lunatic, and such lunatic shall thereupon be discharged.

Discharge of person subsequently found on inquisition not to be of unsound mind.

34. If any lunatic detained in an asylum on a reception order made under sections 7, 10, 14, 15 or 17 is subsequently found on an inquisition under Chapter IV or Chapter V not to be of unsound mind and incapable of managing himself and his affairs, the person in charge of the asylum shall forthwith, on the production of a certified copy of such finding, discharge the alleged lunatic from the asylum.

Removal of lunatics.

Removal of lunatics and criminal lunatics.

35. (1) [1][Any lunatic may, in accordance with any general or special order of the Provincial Government, be removed from [2][any Government asylum] to any other asylum within the province, or to any other asylum in any other province, with the consent of the Provincial Government of that province]:

Provided that no lunatic admitted into an asylum on a reception order made on petition shall be removed in accordance with the provisions of this sub-section until notice of such intended removal has been given to the petitioner.

(2) The Provincial Government may make such general or special order as [3][it] thinks fit directing the removal of any person for whose [4][detention] an order has been made under section 466 or section 471 of the Code of Criminal Procedure, 1898, [5][or under section 103-A of the Indian Army Act, 1911], from the place where he is for the time being [6][detained] to any asylum jail or other place of safe custody [7][in the province, or to any asylum, jail or other place of safety in any other province with the consent of the Provincial Government of that province].

Escape and recapture.

Order to justify detention and recapture after escape.

36. Every person received into an asylum under any such order as is required by this Act, may be detained therein until he is removed or discharged as authorized by law, and in case of escape may, by virtue of such order, be retaken by any police-officer or by the person in charge of such asylum, or any officer or servant belonging thereto, or any other person authorized in that behalf by the said person in charge, and conveyed to and received and detained in such asylum:

Provided that in the case of a lunatic not being a criminal lunatic or a lunatic in respect of whom a reception order has been made under section 12, the power to retake such escaped lunatic under this section shall be exercisable only for a period of one month from the date of his escape.

LEG. REF.

"Sec. 33-A.—If the person in charge of any asylum in which a lunatic is detained under the provisions of ss. 14, 15 or 17, is satisfied that in the interests of the health of the lunatic, it is necessary to discharge him temporarily, the person aforesaid may order such discharge for such period as he may think fit and subject to such conditions as the Provincial Government may by rule prescribe". (Madras Act XV of 1938).

[1] Substituted by Act XXXVIII of 1920, S. 2 and Sch. I.

[2] Substituted for "any asylum established by Government" by A.O., 1937.

[3] Substituted by Act XXXVIII of 1920, S. 2 and Sch. I, for "he".

[4] Substituted by Act XI of 1923, S. 2 and Sch. I, for "confinement".

[5] Inserted by Act XXXIII of 1923, S. 5.

[6] Substituted by Act XI of 1923, S. 2 and Sch. I for "confined".

[7] Substituted by Act XXXVIII of 1920, S. 2 and Sch. I, for "in British India."

NOTES.

confined as a lunatic is under this section, and not by way of application in *habeas corpus*. 29 S. L. R. 431=165 I.C. 119= 1936 Sind 156.

PART III.

JUDICIAL INQUISITION AS TO LUNACY.

CHAPTER IV.

PROCEEDINGS IN LUNACY IN PRESIDENCY-TOWNS.

Inquisition.

Jurisdiction in lunacy in Presidency-towns.

37. The Courts having jurisdiction under this Chapter shall be the High Courts of Judicature at Fort William, Madras and Bombay.

Court may order inquisition as to persons alleged to be insane.

38. (1) The Court may upon application by order direct an inquisition whether a person subject to the jurisdiction of the Court who is alleged to be lunatic, is of unsound mind and incapable of managing himself and his affairs.

(2) Such order may also contain directions for inquiries concerning the nature of the property belonging to the alleged lunatic, the persons who are his relatives, the time during which he has been of unsound mind, or such other matters as to the Court may seem proper.

Application by whom to be made.

39. Application for such inquisition may be made by any relative of the alleged lunatic, or by the Advocate-General.

Notice of time and place of inquisition.

40. (1) Notice shall be given to the alleged lunatic of the time and place at which it is proposed to hold the inquisition.

NOTES.

Secs. 37 and 38: SCOPE OF SECTIONS.—The Lunacy Act contemplates the question of lunacy or sanity at the time of the enquiry which shall not extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. 27 I.C. 459 =19 C.W.N. 45. *See also* 4 L. 1=73 I. C. 696. Time of commencement of lunacy is beyond scope of inquiry. 13 M.I. A. 519. As to finding of lunacy in case of lucid intervals, *see* 18 M. 472. In order to find a person to be a lunatic the incapacity to manage his affairs must be on account of unsoundness of mind. 1905 A.W.N. 8; 4 C.L.J. 115. Where *D* had two places of residence, one in Patna and the other in Calcutta, and his wife instituted proceedins for his inquisition in *Patna,* held, that as resident in Calcutta *D* was subject to the jurisdiction of the High Court and that therefore the District Court of Patna had no jurisdiction to entertain the proceedings. 48 C. 577=65 I.C. 57=25 C.W.N. 178. *See also* 57 I.C. 768=32 C. L.J. 314.

INQUISITION PROCEEDINGS.—A Judge has got discretion under this Act to stop proceedings in an inquisition for proper grounds; a petitioner is not entitled to have the enquiry conducted so long as he is able to tender witnesses for examination. 33 I. C. 857=3 L.W. 402. Where a person has been found a lunatic under the Act the presumption is that he continues to be of unsound mind until the contrary is shown. 3 L.W. 290=33 I.C. 578.

Sec. 38.—The Original Side of the Calcutta High Court has no jurisdiction to direct an inquisition or appoint a guardian of person or property in the case of an Indian not resident in Calcutta. 58 C. 919= 133 I.C. 188. In an applicaton for an order directing an inquisition under the Lunacy Act, what has to be found is that the person is of unsound mind and that the unsoundness of mind is such as to make him incapable of managing his affairs. The Court must hold that both unsoundness of mind and incapacity to manage his affairs are present and that the latter is due to the former. 152 I.C. 882=40 L.W. 710=67 M.L.J. 797.

Secs. 38 and 41.—Court's duty before ordering inquisition. To have an inquisition into the state of health, the state of mind, the state of property and the general capacity of a person is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered on a careful consideration of evidence. 28 C.W. N. 513=51 C. 480=1924 C. 658; 1930 L. 287=122 I.C. 570.

Sec. 39.—Application for inquisition must be verified. 5 W.R. Misc. 54; 7 W.R. 267. A member of the same tribe is not a relative. 94 P.R. 1906. Proof of lunacy. 22 W.R. 38. On this section, *see also* 18 M. 422; 4 C.L.J. 115; 28 C.W.N. 513.

Sec. 40.—Notice under the section is a

(2) If it appears that personal service on the alleged lunatic would be ineffectual, the Court may direct such substituted service of the notice as it thinks fit.

(3) The Court may also direct a copy of such notice to be served upon any relative of the alleged lunatic and upon any other person to whom in the opinion of the Court notice of the application should be given.

Powers of Court in respect of attendance and examination of lunatic.

41. (1) The Court may require the alleged lunatic to attend at such convenient time and place as it may appoint for the purpose of being personally examined by the Court, or by any person from whom the Court may desire to have a report of the mental capacity and condition of such alleged lunatic.

(2) The Court may likewise make an order authorizing any person or persons therein named to have access to the alleged lunatic for the purpose of a personal examination.

Rules respecting attendance and examination of females alleged to be lunatic.

42. The attendance and examination of the alleged lunatic under the provisions of section 41 shall, if the alleged lunatic be a woman who, according to the manners and customs of the country, ought not to be compelled to appear in public, be regulated by the law and practice for the examination of such persons in other civil cases.

Power to direct District Court to make inquisition in certain cases.

43. (1) If the alleged lunatic is not within the local limits of the jurisdiction of the Court, and the inquisition cannot conveniently be made in the manner hereinbefore provided, the Court may direct the inquisition to be made before the District Court within whose local jurisdiction the alleged lunatic may be; and such District Court shall accordingly proceed to make such inquisition in the same manner as if the alleged lunatic were subject to its jurisdiction, and shall certify its finding upon the matters of inquisition to the Court directing the inquisition.

(2) The record of evidence taken upon the inquisition shall be transmitted, together with any remarks the Court may think fit to make thereon, to the Court by which the inquisition was directed.

Amendment of finding of District Court if defective or insufficient in form.

44. If the finding of the District Court appears to the Court directing the inquisition to be defective or insufficient in point of form, it may either amend the same or refer it back to the Court which made the inquisition to be amended.

Proceedings on finding of Court.

45. The finding of the Court on the inquisition or the finding of the District Court to which the inquisition may have been referred under the provisions of section 43 with such amendments as may be made under the provisions of

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notice drawn up after an order directing an inquisition. 54 C. 836=103 I.C. 725=1927 C. 636. Where lunatic has been served with notice, inquisition can proceed *ex parte* even though the lunatic cannot be traced thereafter. 96 I.C. 956=1926 S. 223.

Sec. 41.—Cross-examination of a lunatic as witness is not contemplated by this section. 7 W.R. 426; 8 A.L.J. 179. Non-appearance of a lunatic is no ground for striking off the case from the file. (*Ibid.*)

Sec. 42.—S. 42 lays down that the attendance and examination of the alleged lunatic, if she be a woman who according to the manners and customs of the country ought not to be compelled to appear in public shall be regulated by the law and practice for the examination of such persons, in other civil cases. The section in terms refers only to the attendance and examination of the lunatic in Court but the principle would equally apply to her attendance and examination before a doctor. The proper course for the Court under such circumstances would be to have the lady examined by a lady doctor. 7 O.W.N. 483=1930 O. 301.

Sec. 43.—*See* 3 Agra 3; 11 W.R. 100.

section 44, as the case may be. shall have the same effect, and be proceeded on in the same manner in regard to the appointment of a guardian of the person and a manager of the estate of the lunatic as the findings referred to in section 12 of the Lunacy (Supreme Courts) Act, 1858, immediately before the commencement of this Act.

Judicial powers over person and estate of lunatic.

Custody of lunatics and management of their estates.

46. (1) The Court may make orders for the custody of lunatics so found by inquisition and the management of their estates.

(2) When upon the inquisition it is specially found that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, the Court may make such orders as it thinks fit for the management of the estate of the lunatic including proper provision for the maintenance of the lunatic and of such members of his family as are dependent on him for maintenance, but it shall not be necessary to make any order as to the custody of the person of the lunatic.

Powers of manager in respect of management of lunatic's estates.

47. The Court, on the appointment of a manager of the estate of a lunatic, may direct by the order of appointment, or by any subsequent order, that such manager shall have such powers for the management of the estate as to the Court may seem necessary and proper, reference being had to the nature of the property, whether movable or immovable; of which the estate may consist:

Provided that no manager so appointed shall without the permission of the Court—

(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise, any immovable property of the lunatic; or

(*b*) lease any such property for a term exceeding five years.

Such permission may be granted subject to any condition or restriction which the Court thinks fit to impose.

Power to make order concerning any matter connected with the lunacy.

48. The Court may, on application made to it by petition concerning any matter whatsoever connected with the lunatic or his estate, make such order, subject to the provisions of this Chapter, respecting the application, as in the circumstances it thinks fit.

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Sec. 46 and 47.—Lunatic's estate—Appointment of manager—Court of Wards—Superintendence of an estate of lunatic—Guardian of property. *See* 14 M..L.T. 489; 20 W.R. 477; 23 M.L.J. 706= 12 M.L.T. 585; 30 C. 973; 15 I.C. 265; 16 I.C. 885; 13 Bom.L.R. 772; 6 I.C. 158; 18 M. 472.

Sec. 48.—The language of s. 48 is not mandatory but permissive. By the use of the word "may" a discretion is given to the Court to make an order under the section. The words "concerning any matter whatsoever connected with the lunatic or his estate" are very wide, and empower the Court by the proceedings mentioned in the section to decide a question as to whether the properties referred to in the application before the Court form part of the estate of the lunatic. The intention of the legislature is to provide a summary procedure in regard to matters concerning lunatics and their estates. The Court shoud, however, refer the parties to a regular suit in cases which it considers likely to be complex or lengthy or properly matters which should be voiced by way of a suit and which cannot conveniently be dealt with by the summary procedure indicated in sec. 48. 1938 M.W.N. 1143=48 L.W. 856=(1938) 2 M.L.J. 1072. The use of the word "*petition*" in s. 48 of the Act is used in contradistinction to a "suit" and indicates that matters properly the subject of the provisions of the section can be brought before the Court by a proceeding other than a suit. The Court having been seized of the matter regarding the lunatic and his estate by means of an original petition under which it is found that the person is of unsound mind and incapable of managing his affairs, it is not necessary that any further proceedings arising in respect of the matter should have to be prosecuted by means of an original petition. 1938 M.

Management and administration.

Power to dispose of lunatic's property for certain purposes.

49. The Court may, if it appears to be just or for the lunatic's benefit order that any property, movable or immovable, of the lunatic, and whether in possession, reversion, remainder, or contingency, be sold, charged; mortgaged, dealt with or otherwise disposed of as may seem most expedient for the purpose of raising or securing or repaying with or without interest money to be applied or which has been applied to all or any of the following purposes, namely—

(1) the payment of the lunatic's debts or engagements;

(2) the discharge of any incumbrance on his property;

(3) the payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit;

(4) the payment of or provision for the expenses of his future maintenance and the maintenance of such members of his family as are dependent on him for maintenance, including the expenses of his removal to Europe, if he shall be so removed, and all expenses incidental thereto;

(5) the payment of the costs of any inquiry under this Chapter, and of any costs incurred by order or under the authority of the Court.

Execution of conveyances and powers by manager under order of Court.

50. (1) The manager of the lunatic's estate shall, in the name and on behalf of the lunatic execute all such coneyances and instruments of transfer relative to any sale, mortgage or other disposition of his estate as the Court may order.

(2) Such manager shall, in like manner, under the order of the Court, exercise all powers whatsoever vested in a lunatic, whether the same are vested in him for his own benefit or in the character of trustee or guardian.

Court may order performance of contract.

51. Where a person, having contracted to sell or otherwise dispose of his estate or any part thereof, afterwards becomes lunatic, the Court may, if the contract is such as the Court thinks ought to be performed, direct the manager of the estate to execute such conveyances and to do such other acts in fulfilment of contract as it shall think proper.

Dissolution and disposal of property of partnership on a member becoming lunatic.

52. (1) Where a person, being a member of a partnership firm, is found to be a lunatic, the Court may, on the application of the other partners, or of any person who appears to the Court to be entitled to require the same, dissolve the partnership.

(2) Upon such dissolution or upon a dissolution by decree of Court or otherwise by due course of law, the manager of the estate may, in the name and on behalf of the lunatic, join with the other partners in disposing of the partnership property upon such terms, and shall do all such acts for carrying into effect the dissolution of the partnership, as the Court shall think proper.

Disposal of business premises.

53. Where a lunatic has been engaged in business the Court may, if it appears to be for the lunatic's benefit that the business premises should be disposed of, order the manager of the estate to sell and dispose of the same, and the moneys arising from such sale shall be applied in such manner as the Court may direct.

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W.N. 1143=48 L.W. 856= (1938) 2 M. L.J. 1072.

Sec. 49.—Permission not necessary for ordinary cultivating lease. 6 I.C. 158. On this section, *see also* 20 W.R. 477; 15 W.R. 259.

Manager may dispose of **lease.**

54. Where a lunatic is entitled to a lease or under-lease, and it appears to be for the benefit of his estate that it should be disposed of, the manager of the estate may, by order of the Court, surrender, assign or otherwise dispose of the same to such person for such valuable or nominal consideration, and upon such terms, as the Court thinks fit.

Assumption of charge by Court of Wards of land belonging to a lunatic in certain cases.

55. If a lunatic is possessed of any immovable property situate beyond the local limits of the jurisdiction of the Court which by the law in force in the Province wherein such property is situated, subjects the proprietor, if disqualified, to the jurisdiction of the Court of Wards, the said Court of Wards may assume the charge of such property and manage the same according to the law for the time being in force for such management:

Provided that—

(1) in such case, no further proceedings in respect of the lunacy shall be taken under any such law, nor shall it be competent to the Court of Wards or to any Collector to appoint a guardian of the person of the said lunatic or a manager of the estate except of the immovable property which so subjects the proprietor as aforesaid;

(2) the surplus of the income of such property, after providing for the payment of the Government revenue and expenses of management, shall be disposed of from time to time in such manner as the High Court may direct;

(3) nothing contained in this section shall affect the powers given to the High Court by sections 49, 50 and 51 or (except so far as relates to the management of the said immovable property which so subjects the proprietor as aforesaid) the powers given by any other section.

Power to apply property for lunatic's maintenance without appointing manager in certain cases.

56. (1) If it appears to the Court, having regard to the situation and condition in life of the lunatic and his family and the other circumstances of the case to be expedient that his property should be made available for his or their maintenance in a direct and inexpensive manner it may, instead of appointing a manager of the estate, order that the property if money or if of any other description the produce thereof, when realized, be paid to such person as the Court may think fit, to be applied for the purpose aforesaid.

(2) The receipt of the person so appointed shall be a valid discharge to any person who pays any money or delivers any property of the lunatic to such person.

Vesting orders.

Power to order transfer of stock belonging to lunatic in certain cases.

57. Where any stock or Government securities or any share in a company (transferable within British India or the dividends of which are payable there) is or are standing in the name of, or vested in, a lunatic, beneficially entitled thereto, or in a manager of the estate of a lunatic, or in a trustee for him, and the manager dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the Court, or it is uncertain whether the manager is living or dead, or he neglects or refuses to transfer the stock, securities or shares, or to receive and pay over thereof the dividends to a new manager or as the Court directs, within fourteen days after being required by the Court to do

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Sec. 55.—Appointment of manager is valid assumption of charge by Court of Wards. 15 I.C. 265; 6 S.L.R. 25.

Sec. 57.—*See* 8 B. 280; 16 I.C. 885.

so, then the Court may order some fit person to make such transfer, or to transfer the same, and to receive and pay over the dividends in such manner as the Court directs.

Power to order transfer of stock of lunatic residing out of British India and the United Kingdom.

58. Where any such stock or Government securities or share in a company is or are standing in the name of, or vested in, any person residing out of British India and not in any part of the United Kingdom, the Court upon being satisfied that such person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock, securities or shares or of any part thereof, to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends and proceeds as the Court thinks fit.

General.

Power to apply property for lunatic's maintenance in case of temporary lunacy.

59. If it appears to the Court that the unsoundness of mind of a lunatic is in its nature temporary, and that it is expedient to make temporary provision for his maintenance or for the maintenance of such members of his family as are dependent on him for their maintenance, the Court may, in like manner as under section 56, direct his property or a sufficient part of it to be applied for the purpose aforesaid.

Proceedings in lunacy to cease or to be set aside if Court finds that the unsoundness of mind has ceased.

60. (1) When any person has been found under this Chapter to be of unsound mind, and it is subsequently shown to the Court that there is reason to believe that such unsoundness of mind has ceased, the Court may make an order for inquiring whether such person is still of unsound mind and incapable of managing himself and his affairs.

(2) The inquiry shall be conducted as far as may be in the manner prescribed in this Chapter for an inquisition into the unsoundness of mind of an alleged lunatic; and if it is found that the unsoundness of mind has ceased, the Court shall order all proceedings in the lunacy to cease or to be set aside on such terms and conditions as to the Court may seem fit.

Power of Court to make rules.

61. The Court may, from time to time, make rules for the purpose of carrying into effect the provisions of this Chapter in matters of lunacy.

CHAPTER V.

PROCEEDINGS IN LUNACY OUTSIDE PRESIDENCY TOWNS.

Inquisition.

Power of District Court to institute inquisition as to persons alleged to be lunatic.

62. Whenever any person not subject to the jurisdiction of any of the Courts mentioned in section 37 is possessed of property and is alleged to be a lunatic, the District Court, within whose jurisdiction such person is residing may, upon application, by order direct an inquisition for the purpose of ascertaining whether

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Sec. 60.—As to evidence, *see* 31 C. 210; 2 A.L.J. 154.

Sec. 61.—S. 61 and the rules framed thereunder are applicable only to cases in Presidency Towns and in the absence of a rule applicable to cases outside the Presidency Towns those rules may be made applicable to such cases also. 22 C.W.N. 547 =43 I.C. 511=27 C.L.J. 205.

Sec. 62.—Adjudication of lunatic, when made. 30 C.W.N. 180=1926 C. 155.

such person is of unsound mind and incapable of managing himself and his affairs.

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Under S. 65 it is open to the Courts to find that a man is of unsound mind so as to be incapable of managing himself and is not dangerous to himself or to others. Both conditions must be satisfied before a man can be found to be a lunatic under the Act. The mere fact that a man's mental condition is weak will not enable such an order being passed. 90 I.C. 878=30 C. W. N. 180. It is indubitable that an order directing an inquisition into a man's state of mind is a very serious thing and that such an order is intended by the statute to be a judicial determination carefully made upon adequate materials. It will not be wise to make such an order without serving a notice upon the lunatic first. In such an application the Judge should then consider carefully whether the case is one which calls for an order directing an inquisition. 54 C. 836. Where lunatic is served with notice, inquisition can proceed *ex parte*, even though the lunatic cannot be traced thereafter. *See* 96 I.C. 956=1926 S. 223. Orders for the custody of lunatics and for the management of their estate do not come into question at all until there has been a finding of lunacy as a result of an inquisition. There is no question of interim orders on such matters pending the determination as to the person's state of mind. Where notices were issued on a petition for inquisition and on the date of hearing evidence was recorded and orders were passed simultaneously ordering an inquisition and declaring the person to be a lunatic. *Held*, that the procedure adopted was wrong in law. 54 C. 836=103 I.C. 725=1927 C. 636. Applicants in cases under S. 62 should come into Court fortified with a valid medical certificate of insanity. 96 I. C. 778=24 A.L.J. 906. Where the fact of lunacy is being disputed, Court should not have its conclusions on mere personal observation, but follow the procedure laid down in this section. 27 Punj.L.R. 649=1926 L. 586. [*See also* cases under Ss. 38 and 41, *supra*.] An inquisition under S. 62 once started must be prosecuted to the very end. Before such an inquisition is ordered or started, there ought to be a careful and thorough preliminary enquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. An application for an inquisition should ordinarily be supported by affidavit or by examination on oath of the applicant and by a medical certificate of some doctors as to the condition of the alleged lunatic. It would also be desirable in many cases that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act. 42 A. 504=58 I.C. 617; 49 A. 3=1927 A. 225 (1). On the section, *see also* 29 M. 310.

JURISDICTION.—The alleged lunatic was a person ordinarily residing within the District Court of Nadia where he had his house and family. In 1927, however, he was for sometime living temporarily in Calcutta for the purpose of his treatment and during that time the Chief Presidency Magistrate of Calcutta had passed an order directing the authorities of the mental hospital to receive the alleged lunatic. In 1928 an application was made to the District Court, Nadia, for an inquisition under the Lunacy Act. *Held*, that it could not be said that at the date of the application the alleged lunatic was subject to the jurisdiction of the High Court of Calcutta so as to take away the jurisdiction of the District Court to make an order for inquisition. 35 C.W.N. 543=134 I.C. 1135=1931 C. 711. Where a lunatic is a permanent resident within the jurisdiction of a particular District Court and has properties in that district and his wife applies to the District Court for the appointment of a person as manager of his properties, that District Judge has jurisdiction to take cognizance of the application, and to direct inquisition under S. 62, notwithstanding the fact that the lunatic temporarily resides in a mental hospital outside the jurisdiction of that Court. 1929 C. 512. Temporary removal of a lunatic to the mofussil does not oust the jurisdiction of the High Court over the lunatic and an application under S. 62 in relation to such lunatic must be made on the Original Side of the High Court. 57 I.C. 768=32 C.L. J. 314. A temporary removal vests jurisdiction over the lunatic in the District Court in whose jurisdiction he is removed unless the lunatic is at the same time subject to the jurisdiction of the High Court. It is not necessary that the property of the lunatic must be within the jurisdiction of the District Judge. 57 I.C. 768=32 C.L. J. 314.

Secs. 62 and 65.—Where an application is made to ascertain whether certain persons are of sound mind by an inquisition, the Judge should form his independent judgment on the point. After examining the parties he may reject the petition *in limine* if he thinks that no *prima facie* case for enquiry is disclosed. Or he may after examining the pleadings of the parties or as a result of his own personal interview with the alleged lunatic come to the conclusion that there are grounds for supposing that the mental condition is such as to bring him within the Lunacy Act. In that case he must order an "inquisition" and proceed in the manner mentioned in S. 65 (*a*) on the materials before him. It is only when these findings have been arrived at as a result of

Application by whom to be made.

63. (1) Application for such inquisition may be made by any relative of the alleged lunatic or by any public Curator appointed under the Succession (Property Protection) Act, 1841 (hereinafter referred to as the Curator), or by the Government Pleader, as defined in the Code of Civil Procedure, 1908, or if the property of the alleged lunatic consists in whole or in part of land or any interest in land, by the Collector of the District in which it is situate.

(2) If the property or any part thereof is of such a description that it would by the law in force in any Province where such property is situate subject the proprietor, if disqualified, to the jurisdiction of the Court of Wards, the application may be made by the Collector on behalf of the Court of Wards.

Regulation of proceedings of District Courts.

64. The provisions of sections 40, 41 and 42 shall regulate the proceedings of the District Court with regard to the matters to which they relate.

Inquisition by District Court and finding thereon.

65. (1) The District Court, if it thinks fit, may appoint two or more persons to act as assessors to the Court in the said inquisition.

(2) Upon the completion of the inquisition, the Court shall determine whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs or may come to a special finding that such alleged lunatic is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others.

Inquisition by subordinate Court on commission issued by District Court and proceedings thereon.

66. (1) If the alleged lunatic resides at a distance of more than fifty miles from the place where the District Court is held to which the application is made, the said Court may issue a commission to any subordinate Court to make the inquisition, and such subordinate Court shall thereupon conduct the inquisition in the manner hereinbefore provided in this Chapter.

(2) On the completion of the inquisition, the subordinate Court shall transmit the record of its proceedings with the opinions of the assessors if

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the inquisition that the jurisdiction of the Court to proceed further with the case arises. In determining these questions the paramount consideration is the benefit of the lunatic. 122 I.C. 570=1930 L. 289.

Sec. 63.—*See* cases under Ss. 61 and 62. *See also* 1926 Sind 223.

Secs. 63 and 80: "CURATOR"—MEANING OF.—The word "curator" is used in the Lunacy Act in the sense of a public curator appointed under the Succession (Property Protection) Act. Hence a person who has not been appointed curator in the above sense can be removed from guardian of the lunatic under S. 80, Lunacy Act. 146 I.C. 553=1933 L. 626.

Sec. 65.—*See* 33 C.W.N. 180; 1930 L. 289, cited under S. 62.

ORDER IN LUNACY—BINDING NATURE OF.—Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41 of the Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. 56 M. 904=1933 M. 624=65 M.L.J. 279.

FINDING AS TO LUNACY—INTERFERENCE BY HIGH COURT.—A person who is not sufficiently intelligent to manage his own affairs, is not necessarily of unsound mind. Under S. 65 there must be a finding that the alleged lunatic is of unsound mind and incapable of managing himself and his affairs. The High Court has power to interfere to correct a wrong finding under S. 65 (2). 30 N.L.R. 224=148 I.C. 462=1934 N. 27.

Secs. 65 and 67.—For purposes of S. 65 the degree of unsoundness of mind of a person has to be found in relation to his capacity to manage the affairs of his estate. Where it is found that a person could not look after property, whether big or small but could at best only look to his physical needs, a Court would be stultifying the scope of the Act if it deprived such a person of the protection that law gives him. A suitable person should be appointed for his estate as contemplated by S. 67 (2). I.L.R. (1939) All. 510=1939 All. 333.

assessors have been appointed, and its own opinion on the case; and the District Court shall thereupon proceed to dispose of the application in the manner provided in section 65, sub-section (2):

Provided that the District Court may direct the subordinate Court to make such further or other inquiries as it thinks fit before disposing of the application.

Judicial powers over person and estate of lunatic.

Custody of lunatics and management of their estates.

67. (1) The Court may make orders for the custody of lunatics so found by inquisition and the management of their estates.

(2) When upon the inquisition it is specially found that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others, the Court may make such orders as it thinks fit for the management of the estate of the lunatic including proper provisions for the maintenance of the lunatic and of such members of his family as are dependent on him for maintenance, but it shall not be necessary to make any order as to the custody of the person of the lunatic.

Court of Wards to be authorized in certain cases to take charge of estate of lunatic.

68 If the estate of a lunatic so found or any part thereof consists of property which, by the law for the time being in force, subjects the proprietor, if disqualified, to the jurisdiction of the Court of Wards, the Court of Wards shall be authorized to take charge of the same.

Power to direct Collector to take charge of person and estate of lunatic in certain cases.

69. (1) If the estate of a lunatic so found consists in whole or in part of land or any interest in land, but is not of such a nature that it would subject the proprietor, if disqualified, to the jurisdiction of the Court of Wards, the District Court may direct the Collector to take charge of the person and estate of the lunatic:

Provided that no such order shall be made without the consent of the Collector previously obtained.

(2) The Collector shall thereupon appoint a manager of the estate, and may appoint a guardian of the person of the lunatic.

Control over proceedings of Collector.

70. All proceedings of the Collector in regard to the person or estate of a lunatic under this Chapter shall be subject to the control of the Provincial Government or of such authority as it may appoint in this behalf.

Power of District Court to appoint guardian and manager and take security from manager.

71. (1) In all other cases the District Court shall appoint a manager of the estate of the lunatic and may appoint a guardian of his person:

Provided that a District Court may, instead of appointing a manager of the estate of a lunatic, exercise any of the powers conferred on the High Court under sections 56 and 59.

(2) Any person who has been appointed by the District Court or Collector to manage the estate of a lunatic shall, if so required, enter into a bond in

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NOTES.

Sec. 67.—*See* 23 M.L.J. 706. *See also* 1939 All. 333, cited under S. 65, *supra.*

Sec. 68.—*See* 15 I.C. 265; 6 S.L.R. 65.

Sec. 69.—*See* 7 W.R. 5.

Sec. 71.—If a member of a joint Hindu family under the Mitakshara law be a lunatic, where it is shown that his property is being wasted the Civil Courts have power to appoint a manager of the lunatic's share under the Lunacy Act, although no doubt a strong case must be made out for the appointment of a manager. 25 N.L.R. 61=116 I.C. 663=1929 N. 93. On this section, *see* 33 I.C. 106; 24 C. 133; 16 B. 132; 6 M. 380; 39 A. 158. A person who has been appointed guardian of the person of a lunatic under S. 71 is, in the absence of every special circumstances, entitled to the custody of the lunatic and the Court appointing the guardian has power to give such custody. 40 L.W. 712=1934 M. 724=67 M. L. J. 661.

such form and with such sureties as to the Court or the Collector, as the case may be, may seem fit, engaging duly to account for what he may receive in respect of the property of the lunatic.

Restriction on appointment of legal heir of lunatic to be guardian of his person.

72. The legal heir of a lunatic shall not be appointed to be the guardian of the person of such lunatic unless the Court or the Collector, as the case may be, for reasons to be recorded in writing, considers that such an appointment is for the benefit of the lunatic.

Remuneration of managers and guardians.

73. A guardian of the person of a lunatic or a manager of his estate appointed under this Chapter shall be paid such allowance, if any, as the Court or the Collector, as the case may be, thinks fit for his care and pains in the execution of his duties.

Duties of guardian.

74. (1) The person appointed to be guardian of a lunatic's person shall have the care of his person and maintenance.

(2) When a distinct guardian is appointed, the manager shall pay to the guardian such allowance as may be fixed by the District Court or the Collector, as the case may be, for the maintenance of the lunatic and such members of his family as are dependent on him for their maintenance.

Powers of manager.

75. (1) Every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic, and may collect and pay all just claims, debts and liabilities due to or by the estate of the lunatic:

Provided that no manager so appointed shall without the permission of the Court—

(*a*) mortgage, charge, or transfer by sale, gift, exchange or otherwise any immovable property of the lunatic,

(*b*) lease any such property for a term exceeding five years.

Such permission may be granted subject to any condition or restriction which the Court thinks fit to impose.

(2) Before granting any such permission, the Court may cause notice of the application for such permission to be served on any relative or friend of the lunatic, and may make or cause to be made such inquiries as to the Court may seem necessary in the interests of the lunatic.

Manager to furnish inventory and annual accounts.

76. (1) Every person appointed by the District Court or by the Collector to be manager of the estate of a lunatic shall, within six months from the date of his appointment, deliver in Court or to the Collector, as the case may be, an inventory of the immovable property belonging to the lunatic and of all such money, or other movable property, as he may receive on account of the estate, together with a statement of all debts due by or to the same.

NOTES.

Sec. 72.—*See* 39 A. 158; 23 C. 512; 15 A. 29. Section does not apply where near relations only can be appointed guardians of lunatic. 85 I.C. 276=1925 O. 642. S. 72 operates as a kind of warning that particular care should be exercised by the Court, where a person is entitled to inherit part of the property of a lunatic and would therefore benefit by his death, to see that the appointment of such person as the guardian of a lunatic is a beneficial one. Hence a legal heir whose interest would be greater if the lunatic dies should not be appointed guardian of the person of the minor in preference to another who is a non-heir. (15 A. 29 and 39 A. 158, Ref.) 152 I.C. 512 =1934 R. 164.

Sec. 74.—*See* 23 C. 512.

Sec. 75.—*See* 20 B. 150.

(2) Every such manager shall also furnish to the Court or to the Collector annually, within three months of the close of the year of the era current in the district, an account of the property in his charge, exhibiting the sums received and disbursed on account of the estate and the balance remaining in his hands.

Proceeding if accuracy of inventory or accounts is impugned.

77. If any relative of the lunatic, or the Collector by petition to the Court, impugns the accuracy of the said inventory and statement, or of any annual account, the Court may summon the manager and inquire summarily into the matter and make such order thereon as it thinks fit; or the Court, at its discretion, may refer any such petition to any subordinate Court or to the Collector if the manager was appointed by the Collector.

Payment into public treasury and investment of proceeds of estate.

78. All sums received by a manager on account of any estate in excess of what may be required for the current expenses of the lunatic or of the estate, shall be paid into the public treasury on account of the estate, and shall be invested from time to time in any of the securities specified in section 20 of the Indian Trusts Act, 1882, unless the Court or the Collector, as the case may be, for reasons to be recorded in writing, directs that such sums be in the interest of the lunatic otherwise invested or applied.

Relative may sue for an account.

79. Any relative of a lunatic may with the leave of the District Court sue for an account from any manager appointed under this Chapter, or from any such person after his removal from office or trust, or from his legal representative in case of his death, in respect of any estate then or formerly under his care or management or of any sums of money or other property received by him on account of such estate.

Removal of managers and guardians.

80. (1) The District Court, for any sufficient cause, may remove any manager appointed by it not being the Curator, and may appoint such Curator or any other fit person in his place, and may compel the person so removed to make over the property in his hands to his successor and to account to such successor for all money received or disbursed by him.

(2) The Court may also for any sufficient cause, remove any guardian of the person of the lunatic appointed by it, and may appoint any other fit person in his place.

(3) The Collector, for any sufficient cause, may remove any manager of the estate of a lunatic or guardian of the person of a lunatic appointed by him, and may appoint any other fit person in place of such manager or guardian; and the District Court, on the application of the Collector, may compel any manager removed under this section to make over the property and all accounts in his hands to his successor and to account to such successor for all money received or disbursed by him.

Penalty on manager for refusing to deliver accounts or property.

81. The District Court may impose a fine not exceeding five hundred rupees on any manager of the estate of a lunatic who wilfully neglects or refuses to deliver his accounts or any property in his hands within the time fixed by the Court, and may realize such fine as if it were a sum due

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NOTES.

Sec. 77.—Where accounts filed by manager of lunatic's estate are impugned under this section, some kind of inquiry and record should be made. Reasons also should be shown in passing orders, as the orders are appealable. 161 I.C. 591 (2)=1936 Rang. 51.

Secs. 77 and 83.—Order passed under S. 77 simply to the effect that the accounts are passed, implies that the objections to the accounts are rejected, and hence appeal lies to the High Court under S. 83. 161 I.C. 591 (2)=1936 Rang. 51.

Sec. 81: ORDER IMPOSING FINE ON GUARDIAN FOR CONTUMACIOUS CONDUCT—IF "DE-under a decree of the Court, and may also commit the recusant to the civil jail until he delivers such accounts or property.

Proceedings in lunacy to cease or to be set aside if Court finds that the unsoundness of mind has ceased.

82. (1) When any person has been found under this Chapter to be of unsound mind, and it is subsequently shown to the District Court that there is reason to believe that such unsoundness of mind has ceased, such Court may make an order for inquiring whether such person is still of unsound mind and incapable of managing himself and his affairs.

(2) The inquiry shall, as far as may be, be conducted in the same manner as is prescribed in this Chapter for an inquisition into the unsoundness of mind of an alleged lunatic, and if it is found that the unsoundness of mind has ceased, the Court shall order all proceedings in the lunacy to cease or to be set aside on such terms and conditions as to the Court may seem fit.

Appeals.

83. An appeal shall lie to the High Court from any order made by a District Court, under this Chapter.

PART IV.

MISCELLANEOUS.

CHAPTER VI.

ESTABLISHMENT OF ASYLUMS.

Provincial Government may establish or licence the establishment of asylums.

84. The Provincial Government may establish or licence the establishment of asylums at such places as it thinks fit [1][if it is satisfied that provision has been or will be made for the curative treatment therein of persons suffering from mental diseases].

[2][84-A. If in any licensed asylum no provision for curative treatment has

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LEG REF.

[1] Inserted by Act VI of 1922, S. 3.

[2] Inserted by *ibid.*, S. 4.

NOTES.

CREE" UNDER SCH. II, ART. 2, COURT-FEES ACT.—Although the fine imposed on a guardian of a lunatic by the Court for contumacious conduct under S. 81 can be recovered as if it were due under a decree of Court, it is doubtful if the order imposing the fine can be said to have the force of decree under Sch. II, Art. 2, Court-Fees Act, for the purposes of appeal. 150 I.C. 664=36 P.L.R. 179=1934 L. 853 (1).

Sec. 82.—The District Judge under this Act is partly a judicial and partly an administrative authority. The enquiry into the state of mind of a person affected is to satisfy his own mind, the relatives to whom notices are issued, being merely *amici curiae* and not parties to the proceedings. They are allowed to be heard and have no right to be heard. 36 I.C. 705=19 O. C. 353. Where material is placed before a Judge to show that a lunatic had come to his normal soundness of mind, the Judge should proceed with the inquiry prescribed by law irrespective of the fact that certain proceedings were pending in Court relating to his rights as if he were a lunatic. 88 I.C. 580 =1925 L. 533. It is sufficient to invite the application of S. 88 if the father as the manager of a joint Hindu family is liable to maintain his son as a member thereof. In that case he is a person legally bound to maintain the lunatic within the meaning of the section and it does not matter for the purposes of the section whether under the Hindu Law his liability is limited to the extent of the joint family property in his hands. 51 B. 120=29 Bom.L.R. 52=1927 B. 91.

Sec. 83.—*See* 4 C.W.N. 526; 8 C. 263; 28 P.L.R. 1911. An order of the District Judge, dismissing the application of a guardian for custody of the lunatic is appealable to the High Court under S. 83. 40 L.W. 712=1934 M. 724=67 M.L.J. 661. Order under S. 77 simply to the effect that accounts are passed, implies that the objections to the accounts have been rejected, and hence an appeal lies under this section. 161 I.C. 591 (2)=1936 Rang. 51.

Power to cancel licence if provision for curative treatment is insufficient.

been made, or the Provincial Government considers that the provision made is insufficient, the Provincial Government may require the person in charge of the asylum to take such measures for making or supplementing such provision as it may deem necessary, and, if such person does not comply with the requisition within a reasonable time, the Provincial Government may revoke the licence.]

Provision for admission of lunatics in asylums outside a province.

[1][85. The Magistrates or Courts exercising jurisdiction in any province may send lunatics or any class of lunatics to any asylum situate in any other province in accordance with any general or special order of the Provincial Government made in that behalf with the consent of the Provincial Government of such other province.]

CHAPTER VII.

EXPENSES OF LUNATICS.

Payment of cost of maintenance in licensed asylums in certain cases by Government.

86. (1) When any lunatic is admitted to a licensed asylum under a reception order or an order under section 25, and no engagement has been taken from the friends or relatives of the lunatic or order made by the Court for the payment of expenses under the provisions of this Act, the cost of maintenance of such lunatic shall, subject to the provision of any law for the time being in force, be paid by the Government to the person in charge of such asylum.

(2) The paymaster of the military circle within which any asylum is situated shall pay to the officer in charge of such asylum the cost of maintenance of every lunatic received and detained therein under an order made under section 12.

Application of property in the possession of a lunatic found wandering.

87. Any money in the possession of a lunatic found wandering at large may be applied by the Magistrate towards the payment of the cost of maintenance of the lunatic or of any other expenses incurred on his behalf, and any movable property found on the person of the lunatic may be sold by the Magistrate, and the proceeds thereof similarly applied.

Application to Civil Court for order for the payment of cost of maintenance out of the lunatic's estate, or by person bound to maintain him.

[2][88. If a lunatic detained in an asylum on a reception order made under section 14, section 15 or section 17 has an estate applicable to his maintenance, or if any person legally bound to maintain such lunatic has the means to maintain him, the authority which made the reception order or any local authority liable for the cost of maintenance of such lunatic under any law for the time being in force may apply to the High Court or District Court within the local limits of the original jurisdiction of which

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LEG REF.

[1] Substituted by Act XXXVIII of 1920, S. 2 and Sch. I.

[2] MADRAS AMENDMENT.—In S. 88 of this Act, for the words and figures "on a reception order made under S. 14, S. 15 or S. 17," the words and figures "on a reception order made under Ss. 7, 10, 14, 15 or 17 or on an order made under S. 8 or 16" and for the words "authority which made the reception order" the words "authority which made the reception or other order aforesaid" shall be substituted (Madras Act XV of 1938).

NOTES.

Sec. 88.—*See* 1927 B. 91, cited under S. 88. The father in a joint Hindu family is liable to pay the maintenance charges of his lunatic daughter-in-law. 32 Bom. L.R. 606=124 I.C. 813=1930 B. 319. *See also* 40 P.L.R. 496, cited under S. 15, *supra*.

the estate of the lunatic is situate or the person legally bound to maintain him resides, for an order for the payment of the cost of maintenance of the lunatic.

Order of Court and enforcement thereof.

[1] 89. (1) The Court shall inquire into the matter in a summary way, and on being satisfied that such lunatic has an estate applicable to his maintenance, or that any person is legally bound to maintain and has the means of maintaining such lunatic, may make an order for the recovery of the cost of maintenance of such lunatic, together with the costs of the application out of such estate or from such person.

(2) Such order shall be enforced in the same manner, and shall be of the same force and effect and subject to the same appeal as a decree made by the said Court in a suit in respect of the property or person therein mentioned.

Fixation of cost of maintenance.

[2][89-A. (1) In computing the amount payable on account of the cost of maintenance of lunatics detained in any asylum for the cost of whose maintenance any Provincial Government is liable, charges may be included on account of the upkeep of the asylum and of the capital cost of establishment thereof.

(2) In the case of any such lunatic under detention immediately before the commencement of Part III of the Government of India Act, 1935, the amount payable by any Provincial Government on account of the cost of his maintenance shall be determined in accordance with any general or special orders of the Governor-General in Council in force immediately before that date and applicable to his case.]

Incidence of costs of maintenance payable by Government.

[3][89-B. (1) When under the provisions of this Act the cost of the maintenance of a lunatic is payable by the Government, then such cost shall be payable—

(*a*) in the case of a lunatic not domiciled in British India, by the Provincial Government of the province in which the reception order or the order under section 25, as the case may be, was made; and

(*b*) in the case of a lunatic domiciled in British India, by the Provincial Government of the province in which the lunatic has last resided for a period of five years before the reception order or the order under section 25, as the case may be, was made; or, if the lunatic has not been resident in any one province for such period, by the Provincial Government of the province in which such order was made.

[4][* * * * *]

Saving of liability of relatives to maintain lunatic.

90. The liability of any relative or person to maintain any lunatic shall not be taken away or affected by any provision contained in this Act.

LEG. REF.

[1] MADRAS AMENDMENT.—In sub-S. (1) of S. 89 of this Act, for the words "may make an order for the recovery of the cost of maintenance of such lunatic together with the costs of the application out of such estate or from such person," the following words shall be substituted, namely:—

"may make an order for the recovery of the whole or any portion of the cost of maintenance of such lunatic and of the costs of the application, out of such estate or from such person:

Provided that an order directing recovery out of such estate shall be made only after making due allowance for the needs of the wife, children and other dependants, if any, of the lunatic" (Madras Act XV of 1938).

[2] Substituted by A.O., for the original S. 89-A, which was inserted by Act VI of 1922, S. 5.

[3] Inserted by Act VI of 1922, S. 5.

[4] Sub-S. (2) omitted by A.O., 1937.

NOTES.

Sec. 89.—Under S. 89 the Court has to determine whether the father has the means to maintain the son. The word "means" in that section has no relation to their source. Thus if there is a person legally bound to maintain the lunatic and if he has the means to maintain him with or without reference to joint family property, under the Lunacy Act the Court can make an order for the costs of his maintenance in the asylum. 51 B. 120=29 Bom.L.R. 52=1927 B. 91.

CHAPTER VIII.

RULES.

Power of Provincial Government to make rules.

[1]91. (1) [2][* * * *] The Provincial Government may make rules for all or any of the following purposes, namely:—

(*a*) to prescribe forms for any proceeding under this Act other than a proceeding before a High Court which is or may hereafter be [3][constituted by His Majesty by Letters Patent];

(*b*) to prescribe places of detention and regulate the care and treatment of persons detained under section 8 or section 16;

(*c*) to regulate the [4][detention], care, treatment and discharge of criminal lunatics;

(*d*) to regulate the management of asylums and the care and custody of the inmates thereof and their transfer from one asylum to another;

(*e*) to regulate the transfer of criminal lunatics to asylums;

(*f*) to prescribe the procedure to be followed by District Courts and Magistrates before a lunatic is sent to any asylum established by Government;

(*g*) to prescribe the [5][Government asylums] within the province to which lunatics from any area or any class of lunatics shall be sent;

(*h*) to prescribe conditions subject to which asylums may be licensed;

(*i*) save as otherwise provided in this Act, generally to carry into effect the provisions of the Act.

(2) In making any rule under this section, the Provincial Governments may direct that a breach of it shall be punishable with fine which may extend to fifty rupees.

Publication of rules.

92. All rules made under section 91 shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act.

CHAPTER IX.

SUPPLEMENTAL PROVISIONS.

Penalty for improper reception or detention of lunatic.

93. Any person who—

(*a*) otherwise than in accordance with the provisions of this Act receives or detains a lunatic or alleged lunatic in an asylum, or

(*b*) for gain detains two or more lunatics in any place not being an asylum,

shall be punishable with imprisonment which may extend to two years or with fine or with both.

LEG. REF.

[1] MADRAS AMENDMENT.—In sub-S. (1) of S. 91 of this Act, after Cl. (*c*), the following clause shall be inserted, namely:—

"(*cc*) to prescribe the conditions subject to which lunatics may be discharged temporarily under S. 33-A" (Madras Act XV of 1938).

[2] The words "Subject to the control of the Governor-General in Council" were omitted by Act XXXVIII of 1920, S. 2 and Sch. I.

[3] Substituted for 'established under the Indian High Courts Acts, 1861-1911' by A. O., 1937.

[4] Substituted for "confinement" by Act XI of 1923, S. 2 and Sch. I.

[5] Substituted for 'asylums established by Government' by A.O., 1937.

NOTES.

Sec. 91 (1) (c).—Rule 18 (*ii*) of the rules framed under the Act prescribing fees for maintenance is not *ultra vires*. 51 B. 120=29 Bom.L.R. 52=1927 B. 91. The words "District funds" in R. 185 of the Rules framed by the Punjab Government under Lunacy Act does not include the funds of the Small Town Committee. 15 L. 480=36 P.L.R. 350=1934 L. 148.

Provision as to bonds.

94. The provisions of Chapter XLII of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to bonds taken under this Act.

Pension of lunatic payable by Government.

95. (1) When any sum is payable in respect of pay, pension, gratuity, or other similar allowance to any person [1][by the Secretary of State or any Government in British India] and the person to whom the sum is payable is certified by a Magistrate to be a lunatic, the Government officer under whose authority such sum would be payable if the payee were not a lunatic may pay so much of the said sum as he thinks fit to the person having charge of the lunatic, and may pay the surplus, if any, or such part thereof, as he thinks fit for the maintenance of such members of the lunatic's family as are dependent on him for maintenance.

(2) [2][The Secretary of State or, as the case may be, the Government concerned] shall be discharged of all liability in respect of any amounts paid in accordance with this section.

Use of forms in Schedule.

96. Subject to any rules, the forms set forth in the First Schedule, with such variation as the circumstances of each case may require, shall be used for the respective purposes therein mentioned, and if used shall be sufficient.

Protection to persons acting under Act.

97. No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Power to give effect to warrants and orders of certain Courts outside British India.

98. Any officer in charge of an asylum may give effect to any order or warrant for the reception and detention of any lunatic made or issued by any Court or tribunal beyond the limits of British India in the exercise of jurisdiction conferred by His Majesty or [3][the Central Government or the Crown Representative or by the law of Burma].

Power to make rules for reception of lunatics received from outside British India.

99. The [4][Provincial Government] may make rules regulating the procedure for the reception and detention in asylums in [5][the province] of lunatics whose reception and detention are provided for by section 98.

Orders under repealed Acts.

100. (1) In the case of orders made before the commencement of this Act under section 7 of the Indian Lunatic Asylums Act, 1858, for the reception of persons into an asylum, the persons who signed the order shall have all the powers and be subject to the obligations by this Act conferred or imposed upon the petitioner for reception order, and the provisions of this Act relating to persons upon whose petition a reception order was made shall apply in the case of a person who has signed an order, under section 7 of the Indian Lunatic Asylums Act, 1858, before the commencement of this Act as if the order had been made after the commencement of this Act upon a petition presented by him.

LEG. REF.

[1] Substituted for 'by Government' by A.O., 1937.

[2] Substituted for 'Secretary of State for India in Council' by *ibid*.

[3] Substituted for 'the Governor-General in Council' by *ibid*.

[4] Substituted by A.O., for "Local Government" which were substituted by Act XXXVIII of 1920, S. 2 and Sch. I, for "Governor-General in Council".

[5] Substituted for "British India" by Act XXXVIII of 1920, S. 2 and Sch. I.

(2) All orders for the detention of lunatics made and all undertakings given under any enactment hereby repealed shall have the same force and effect as if they had been made or given under this Act and by or to the authority empowered thereby in such behalf.

Ranchi European Mental Hospital.

[1][100-A. The powers conferred by this Act upon the Provincial Government shall, in relation to the Ranchi European Mental Hospital, be powers of the Central Government.]

101. [*Repeal of enactments*]. *Rep. by the second Repealing and Amending Act (XVII of* 1914), *S.* 3 *and Sch. II.*

SCHEDULE I.

FORMS.

(*See section* 96.)

FORM I.

APPLICATION FOR RECEPTION ORDER.

(*See sections* 5 *and* 6.)

In the matter of A.B.,[2] residing at , by occupation , son of ; a person alleged to be a lunatic.

To Presidency Magistrate, for [*or* District Magistrate of , *or* Sub-Divisional Magistrate of *or* Magistrate specially empowered under Act IV of 1912 for].

The petition of C.D.,[2] residing at , by occupation , son of , in the town of [*or* sub-division of in the district of].

1. I am [3]years of age.
2. I desire to obtain an order for the reception of A.B. as a lunatic in the asylum of situate at[4]
3. I last saw the said A.B. at on the [5]day of .
4. I am the [6]of the said A.B.

[*or if the petitioner is not a relative of the patient state as follows*:]

I am not a relative of the said A.B. The reasons why this petition is not presented by a relative are as follows: [*State them.*]

The circumstances under which this petition is presented by me are as follows: [*State them.*]

5. The persons signing the medical certificates which accompany the petition are.[7]
6. A statement of particulars relating to the said A.B. accompanies this petition.
7. [*If that is the fact.*] An application for an enquiry into the mental capacity of the said A.B. was made to the on the and a certified copy of the order made on the said petition is annexed hereto.

[*Or if that is the fact.*]

No application for an inquiry into the mental capacity of the said A.B. has been made previous to this application.

The petitioner therefore prays that a reception order may be made in accordance with the foregoing statement.

(Sd.) C.D.

The statements contained or referred to in paragraphs are true to my knowledge; the other statements are true to my information and belief.

Dated

(Sd.) C.D.

STATEMENT OF PARTICULARS.

[*If any of the particulars in this statement is not known, the fact to be so stated.*]

The following is a statement of particulars relating to the said A.B. :—

Name of patient at length.

LEG. REF.

[1] Inserted by A.O., 1937.

[2] Full name, caste and titles.

[3] Enter the number of completed years. The petitioner must be at least 18 or 21 whichever is the age of majority under the law to which the petitioner is subject.

[4] Insert the full description of the name and locality of the asylum or the name, address and description of the person in charge of the asylum.

[5] A day within 14 days before the date of the presentation of the petition is requisite.

[6] Here state the relationship with the patient.

[7] Here state whether either of the persons signing the medical certificates is a relative, partner or assistant of the lunatic or of the petitioner and, if a relative of either, the exact relationship.

Sex and age.
Married, single or widowed.
Previous occupation.
Caste and religious belief, as far as known.
Residence at or immediately previous to the date hereof.
Names of any near relatives to the patient who are alive.
Whether this is first attack of lunacy.
Age (if known) on first attack.
When and where previously under care and treatment as a lunatic.
Duration of existing attack.
Supposed cause.
Whether the patient is subject to epilepsy.
Whether suicidal.
Whether the patient is known to be suffering from phthisis or any form of tubercular disease.
Whether dangerous to others, and in what way.
Whether any near relative (stating the relationship) has been afflicted with insanity.
Whether the patient is addicted to alcohol, or the use of opium, ganja, charas, bhang, cocaine or other intoxicant.

[The statements contained or referred to in paras. are true to my knowledge. The other statements are true to my information and belief.]

[*Signature by person making the statement.*]

FORM 2.

RECEPTION ORDER ON PETITION.

(*See sections* 7 *and* 10.)

I, the undersigned E.F., being a Presidency Magistrate of [*or* the District Magistrate of *or* the Sub-Divisional Magistrate of *or* a Magistrate of the first class specially empowered by Government to perform the functions of a Magistrate under Act IV of 1912] upon the petition of C.D. of[1] in the matter of A.B.[1] a lunatic, accompanied by the medical certificates of G.H., a medical officer, and of J.K., a medical practitioner [*or* medical officer], under the said Act, hereto annexed, hereby authorize you to receive the said A.B. into your asylum. And I declare that I have [*or* have not] personally seen the said A.B. before making this order.

(Sd.) E.F.
(*Designation as above.*)

To[2]

FORM 3.

MEDICAL CERTIFICATE.

(*See sections* 18 *and* 19.)

In the matter of A.B. of[3] in the town of [*or* the sub-division of in the district of] an alleged lunatic.

I, the undersigned C.D., do hereby certify as follows:—

1. I am a gazetted medical officer [*or* a medical practitioner declared by Government to be medical officer under Act IV of 1912]
   a holder of[4] [*or* declared by Provincial Government to be a medical practitioner under Act IV of 1912] and I am in the actual practice of the medical profession.

2. On the day of 19 at[5] in the town / village of [*or* the sub-division of in the district of] [separately from any other practitioner],[6] I personally examined the said A.B. and came to the conclusion that the said A.B. is a lunatic and a proper person to be taken charge of and detained under care and treatment.

3. I formed this conclusion on the following grounds, *viz.* :—

(*a*) Facts indicating insanity observed by myself, *viz* :—

(*b*) Other facts (if any) indicating insanity communicated to me by others, *viz.* :—

Here state the information and from whom.

(Sd.) C.D.
(*Designation as above.*)

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[1] Address and description.

[2] To be addressed to the officer or person in charge of the asylum.

[3] Insert residence of patient.

[4] Insert qualification to practise medicine and surgery registrable in the United Kingdom.

[5] Insert place of examination.

[6] Omit this where only one certificate is required.

FORM 4.

RECEPTION ORDER IN CASE OF LUNATIC SOLDIER.

(*See section* 12.)

Whereas it appears to me that A.B., a European, subject to the Army Act, who has been declared a lunatic in accordance with the provisions of the military regulations, should be removed to an asylum, I do hereby authorise you to receive the said A.B. into your asylum.

(Sd.) E.F.
(*Administrative Medical Officer.*)

To[1]

FORM 5.

RECEPTION ORDER IN CASE OF WANDERING OR DANGEROUS LUNATICS OR LUNATICS NOT UNDER PROPER CONTROL OR CRUELLY TREATED (SENT TO AN ASYLUM ESTABLISHED BY GOVERNMENT.)

(*See sections* 14, 15 *and* 17.)

I, C.D., Presidency Magistrate of [*or* Commissioner of Police for] [*or* the District Magistrate of *or* the Sub-Divisional Magistrate of *or* a Magistrate specially empowered by Government under Act IV of 1912] having caused A.B. to be examined by E.F., a Medical Officer under the Indian Lunacy Act, 1912, and being satisfied that A.B. [*describing him*] is a lunatic who was wandering at large [*or* is a person dangerous by reason of lunacy] [*or* is a lunatic not under proper care and control *or* is cruelly treated or neglected by the person having the care or charge of him] and a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said A.B. into your asylum.

(Sd.) C.D.
(*Designation as above.*)

Dated the

To the Officer in charge of the asylum at

FORM 6.

SAME WHEN SENT TO A LICENSED ASYLUM.

I, C.D., [*as above down to* "care and treatment"] and being satisfied with the engagement entered into in writing by G.H. of [*here insert address and description*] who has desired that the said A.B. may be sent to the asylum at [*here insert description of asylum and name of the person in charge*] to pay the cost of maintenance of the said A.B., in the said asylum, hereby authorize you to receive the said A.B., into your asylum.

(Sd.) C.D.
(*Designation as above.*)

Dated the

To the person in charge of the asylum at

FORM 7.

BOND ON THE MAKING OVER OF A LUNATIC TO THE CARE OF RELATIVE OR FRIEND.

(*See sections* 14, 15 *and* 17.)

WHEREAS A.B., son of , inhabitant of , has been brought up before C.D., a Presidency Magistrate for the town of [*or* Commissioner of Police for] [*or* the District / Sub-Divisional Magistrate of , *or* a Magistrate of the first class specially empowered under Act IV of 1912] and is a lunatic who is believed to be dangerous [*or* deemed to be a lunatic who is not under proper care and control *or* is cruelly treated or neglected by the person having the charge of him] and whereas, I, E.F., son of , inhabitant of , have applied to the Magistrate [*or* Commissioner of Police], that the said A.B. may be delivered to my care:

I, E.F., abovenamed hereby bind myself that on the said A.B. being made over to my care, I will have the said A.B. properly taken care of and prevented from doing injury to himself or to others: and in case of my making default therein, I hereby bind myself to forfeit to His Majesty the King-Emperor of India, the sum of rupees .

Dated this day of 19 .

(Sd.) E.F.

(*Where a bond with sureties is to be executed add*) —We do hereby declare ourselves sureties for the abovenamed E.F., that he will, on the aforesaid A.B. being made over to his care, have the said A.B. properly taken care of and prevented from doing injury to himself or to others; and in case of the said E.F. making default therein, we bind our-

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LEG. REF.

[1] To be addressed to the person in charge of an asylum duly authorised by Government to receive lunatic Europeans subject to the Army Act.

selves, jointly and severally, to forfeit to His Majesty the King-Emperor of India, the sum of rupees .

Dated this , day of 19 .

(*Signature.*)

FORM 8.

BOND ON THE DISCHARGE OF A LUNATIC FROM AN ASYLUM ON THE UNDERTAKING OF RELATIVE OR FRIEND TO TAKE DUE CARE.

(*See section* 33.)

WHEREAS A.B., son of , inhabitant of , is a lunatic who is now detained in the asylum at under an order made by C.D., a Presidency Magistrate for the town of [*or* Commissioner of Police for] [*or* the District / Sub-divisional Magistrate of , *or* a Magistrate of the first class specially empowered under Act IV of 1912] under section 14 [*or* section 15] of Act IV of 1912, and whereas I, E.F., son of , inhabitant of , have applied to the said Magistrate [*or* Commissioner of Police] that the said A.B. may be delivered to my care and custody:

I hereby bind myself that on the said A.B. being made over to my care and custody, I will have him properly taken care of and prevented from doing injury to himself or to others; and in case of my making default therein, I hereby bind myself to forfeit to His Majesty the King-Emperor of India, the sum of rupees .

Dated this day of 19 .

(Sd.) E.F.

(*Where a bond with sureties is to be executed add*)—We do hereby declare ourselves sureties for the abovenamed E.F. that he will, on the aforesaid A.B. being delivered to his care and custody, have the said A.B. properly taken care of and prevented from doing injury to himself or to others; and in case of the said E.F. making default therein, we bind ourselves, jointly and severally, to forfeit to His Majesty the King-Emperor of India, the sum of rupees .

Dated this day of 19 .

(*Signature.*)

SCHEDULE II.

[*Repealed by Act XVII of* 1914.]

THE MAINTENANCE ORDERS ENFORCEMENT ACT (XVIII OF 1921).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—The Imperial Conference of 1911 passed a resolution that, in order to secure justice and protection for wives deserted by their husbands and children who had been deserted by their legal guardians either in the United Kingdom or in any part of the Dominions, reciprocal legal provisions should be adopted in the constituent parts of the Empire in the interests of such destitute and deserted persons. As a result, the English Act (X and XI, Geo. V, c. 33) was recently passed to facilitate the enforcement in England and Ireland of maintenance orders made in other parts of His Majesty's Dominions and protectorates and *vice versa*. Section 12 of the Act empowers His Majesty to extend it by Order in Council to those Dominions and Protectorates which make reciprocal legal provisions. The object of the present Bill, which generally follows the lines of the English Act is to make such reciprocal provisions by facilitating the enforcement in British India of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and *vice versa*. That is, read with the English Act, the present Bill allows the enforcement of orders for the maintenance of wives and children deserted in England on persons liable under such orders who have come to British India and *vice versa* for the enforcement of maintenance orders in favour of wives and children deserted in British India by those liable to support them if such persons have gone to England.

2. The Bill makes provision for the following classes of cases:—

(1) Where after making of maintenance order the husband (*or* the person liable for maintenance) has gone from British India to another part of the Empire in which reciprocal legislation is in force;

(2) Where the husband or other person liable has gone from British India to a reciprocating part of the Empire before making of any maintenance order;

(3) Where after the making of a maintenance order in a reciprocating part of the Empire the husband or other person has come to British India; and

(4) Where before making of a maintenance order in a reciprocating part of the Empire the husband or other person liable has come to British India.

As regards cases falling under head (1), clause 5 enables an order made by a Court in British India to be transmitted to the Courts in the other reciprocating part of the Empire to be registered and enforced there. Similarly, clause 4, read with clause 8, enables an order made by a Court in a reciprocating part of the Empire in cases falling under head (3), to be registered and enforced in British India. In cases falling under head (2), clause 6 authorises the making of a provisional order in the absence of the husband or other person liable which will have no effect unless confirmed by a Court in the reciprocating country to which the husband has gone and clause 7 deals with the opposite class of cases falling under head (4).

3. Sub-clauses (6) and (7) of clauses 6 and 7 provide for the variation and revocation of orders and for appeals.

Clause 3 (2) enables reciprocity, similar to that for which the Bill provides in the case of parts of His Majesty's Dominions to be established with such Indian States as may pass legislation for the enforcement in such States of orders made by British Indian Courts.

"The procedure for enforcing orders registered in a High Court will be the same as that for an order originally obtained in the High Court, but for a Court of summary jurisdiction the method in which orders will be enforced has been left to be prescribed by the rules." (Statement of Objects and Reasons, *Fort St. George Gazette*, Pt. III, dated 22nd March, 1921, pp. 4 and 5.)

Extracts from the report of the Select Committee:—Clause 1.—We have added an extra sub-clause to make it clear that this Act will extend only to British India though it applies in respect of certain orders made elsewhere but enforceable in India.

Clause 2.—*Definitions.*

(*a*) The words "other than illegitimate children" have been omitted from the definition of dependants, and the corresponding words of the English Act, *i.e.*, "other than an order of affiliation" have been inserted in the definition of "maintenance order" so as to follow the wording of the English Act.

(*b*) The definition of "maintenance order" has also been amplified to make it clear that such an order includes orders passed by Courts either in the exercise of civil or criminal jurisdiction.

(*c*) A definition of "proper authority" has been inserted as it was considered to be incorrect to prescribe by rules the authority of the reciprocating territory from which communications should be received. The laws passed, or to be passed, in such territories will provide for the proper authority for the transmission of communications. Consequential amendments following this definition have been made in clauses 4, 5, 6 and 7 of the Bill.

(*d*) The definition of "reciprocating British possession" has been changed into a definition of "reciprocating territory" as the term "British possession", as defined in the General Clauses Act, 1897, does not include the United Kingdom. Consequential amendments have been made throughout the Bill to give effect to this change in definition.

Clause 4, sub-clause (1).—The words "in Council" have been omitted after the words "Governor-General" where they first occur, as, under the English Act, communications have to be addressed to the "Governor" of the Possession, and the term "Governor" under the English Interpretation Act, 1889, as applied means the Governor-General, and not the Governor-General in Council.

Clause 6, marginal heading.—The words "of Summary Courts" have been inserted in the marginal heading to make the meaning clear.

Clause 6, sub-clause (1).—The words, "if such persons had wilfully neglected to attend the Court" have been substituted for the words "if a summons had been duly served on the person and he had failed to appear at the hearing", to bring the wording of this sub-clause into conformity with the wording of section 488 of the Code of Criminal Procedure, 1898.

Sub-clause (6).—The words "or to which it was sent for confirmation" have been inserted after the words "was confirmed" in the proviso to this sub-clause, as it is proposed that a Court, which has made a provisional order, may vary or rescind that order after the taking of further evidence before order has actually been confirmed in the reciprocating possession and also that it may vary or rescind the order after it has been confirmed.

Sub-clause (7) of clause 6 has been omitted following the provisions of the maintenance sections in the Code of Criminal Procedure, 1898. There is no appeal from an order of maintenance under that Code, and this sub-clause would therefore be misleading. In the absence of any provision for such appeal we do not consider it desirable that there should be an appeal in the cases dealt with under this clause, which are treated as analogous to maintenance cases dealt with under the Code of Criminal Procedure.

Sub-clause (4) of clause 7.—We are of opinion that the clause, as it stood, would perhaps not permit of the confirmation of a provisional order, made for example in the United Kingdom, for a sum greater than Rs. 50 per mensem (now Rs. 100) which is the limit imposed by section 488 of the Code of Criminal Procedure, 1898. The limit for maintenance orders in the case of a wife in the United Kingdom is two pounds a week, and for a child one pound a week. It was considered desirable that it should be open to the Court to enforce provisional orders up to the full amount of the provisional order, but not to increase the order beyond that amount. Amendments to impose a limit aforesaid have been made in this clause.

Provision has been made in sub-clauses (5) and (6) for the transmission of records in the same manner as is provided in the proviso to sub-clause (6) of clause 6.

Sub-clause (7) of clause 7 has been omitted for the same reason as sub-clause (7) of clause 6.

Clause 8, sub-clause (1).—The words "in the exercise of its civil jurisdiction" have been inserted after the words "High Court" to make it clear that, except in the case of orders executed by Courts of summary jurisdiction, which will be orders for the payment of comparatively small amounts, the procedure in execution will be in accordance with the Code of Civil Procedure. The difference in execution procedure in the various High Courts necessitates a double procedure in the Bill so as to cover registration in High Courts possessing only appellate jurisdiction.

A new clause 9 has been inserted as we think that it is just to a wife or other person, in favour of whom a maintenance order is made, that such person should receive the full amount awarded and not be debited with the costs of transmission, and other incidental charges. Such charges should be borne by the person against whom the order is made.

Clauses 9, 10 and 11 have been renumbered, clauses 10, 11 and 12.

Provision has been made in clause 12, as renumbered for the fixing by rules, made by the Governor-General in Council, of a scale of costs and charges in connection with things done under this Act. We consider it expedient that the rule in this matter should be made by the Governor-General in Council, as there will be communications between British India and countries outside and the Governor-General in Council is in the best position to fix a fair scale of charges in this respect.—(*Report of the Select Committee.*)

THE MAINTENANCE ORDERS ENFORCEMENT ACT (XVIII OF 1921).[1]

[5*th October*, 1921.

An Act to facilitate the enforcement in British India of Maintenance Orders made in other parts of His Majesty's Dominions and Protectorates and vice versa.

WHEREAS it is expedient to facilitate the enforcement in British India of Maintenance Orders[2] made in other parts of His Majesty's Dominions and Protectorates and *vice versa*; it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MAINTENANCE ORDERS ENFORCEMENT ACT, 1921.

(2) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

"Court of summary jurisdiction" means the Court of a Chief Presidency Magistrate or of a District Magistrate;

"dependants" means such persons as a person against whom a maintenance order is made is liable to maintain according to the law in force in the part of His Majesty's Dominions in which the maintenance order is made;

"maintenance order" means a decree or order, other than an order of affiliation, made by a Court in the exercise of civil or criminal jurisdiction for

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LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1921, Pt. V, p. 5. For Report of Select Committee, see *ibid.*, Pt. V, p. 127.

[2] For extension by the Colony of Seychelles and New South Wales of their respective Maintenance Orders Legislation to British India, see *Gazette of India*, 1924, Pt. I, pp. 316 and 1021.

NOTES.

Sec. 1.—Jurisdiction of Magistrate under this section is limited by S. 488, Cr. P. Code. This Act confers no jurisdiction on Magistrates in India to award any sum they think fit as maintenance payable to wife and children who are in India and whose husbands or fathers are in England. This Act is merely an extension of the principle laid down in S. 488, Cr. P. Code and was enacted to meet cases where the wife and children are in India and the husband in England and *vice versa*. 1937 M.W.N. 1127.

the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made;

"prescribed" means prescribed by rules made under this Act;

"proper authority" means the authority appointed by, or under the law of, a reciprocating territory to receive and transmit documents to which this Act applies; and

"reciprocating territory" means any part of His Majesty's Dominions outside British India in respect of which this Act for the time being applies.

Reciprocal arrangements.

3. (1) If the Central Government is satisfied that provisions have been made by the Legislature of any part of His Majesty's Dominions for the enforcement within that part of maintenance orders made by Courts in British India, the Central Government may, by notification in the Official Gazette, declare that this Act applies in respect of that part of His Majesty's Dominions and thereupon it shall apply accordingly.

(2) The Central Government may, by like notification, declare that this Act applies in respect of any British protectorate, or in respect of any State in India, and where such a declaration has been made, this Act shall apply as if such protectorate or State were a reciprocating territory.

Registration in British India of maintenance orders made in other parts of His Majesty's Dominions.

4. (1) Where a maintenance order has, whether before or after the passing of this Act, been made against any person by any Court in any reciprocating territory, and a certified copy of the order has been transmitted by the proper authority of that territory to the Central Government, the Central Government shall send a copy of the order to the prescribed officer of a Court in British India for registration, and, on receipt thereof, the order shall be registered in the prescribed manner.

(2) The Court in which an order is to be so registered as aforesaid shall, if the Court by which the order was made was, in the opinion of the Central Government, a Court of superior jurisdiction, be a High Court, and, if the Court was not, in its opinion, a Court of superior jurisdiction, be a Court of summary jurisdiction.

Transmission of maintenance orders made in British India.

5. Where a Court in British India has, whether before or after the commencement of this Act, made a maintenance order against any person, and it is proved to that Court that the person against whom the order was made is resident in a reciprocating territory, the Court shall send to the Central Government, for transmission to the proper authority of that territory, a certified copy of the order.

Power of summary Courts to make provisional maintenance orders against persons resident in His Majesty's Dominions outside British India.

6. (1) Where application is made to a Court of summary jurisdiction in British India for a maintenance order against any person, and it is proved that that person is resident in a reciprocating territory, the Court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if that person had wilfully neglected to attend the Court; but in

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NOTES.

Secs. 6 and 7.—Order of Chief Presidency Magistrate under the Act, finality of—Power of High Court to interfere with the order in revision. *See* 30 Bom.L.R. 350. Court has wide powers before confirming a provisional order under the Act to take further evidence and its powers are not delimited to the provisions of S. 7; evidence of desertion subsequent to the date of the provisional order is admissible for purposes of confirmation of the said order. 52 B. 262= 30 Bom.L.R. 350.

such case the order shall be provisional only and shall have no effect unless and until confirmed by a competent Court in such territory.

(2) The evidence of every witness who is examined on any such application shall be reduced to writing, and such deposition shall be read over to, and signed by, him.

(3) Where such an order is made, the Court shall send to the Central Government, for transmission to the proper authority of the reciprocating territory in which the person against whom the order is made is alleged to reside, the depositions so taken and a certified copy of the order together with a statement of the grounds on which the making of the order might have been opposed if the person against whom the order is made had been duly served with a summons and had appeared at the hearing and such information as the Court possesses for facilitating the identification of that person and ascertaining his whereabouts.

(4) Where any such provisional order has come before a Court in a reciprocating territory for confirmation, and the order has by that Court been remitted to the Court of summary jurisdiction which made the order for the purpose of taking further evidence, that Court shall, after giving the prescribed notice, proceed to take the evidence in like manner and subject to the like conditions as the evidence in support of the original application.

(5) If it appears to the Court hearing such evidence that the order ought not to have been made, the Court may rescind the order, but in any other case the depositions shall be sent to the Central Government and dealt with in like manner as the original depositions.

(6) The confirmation of an order made under this section shall not affect any power of a Court of summary jurisdiction to vary or rescind that order:

Provided that, on the making of a varying or rescinding order, the Court shall send a certified copy thereof to the Central Government for transmission to the proper authority of the reciprocating territory in which the original order was confirmed, or to which it was sent for confirmation and that, in the case of an order varying the original order, the order shall not have any effect unless and until confirmed in like manner as the original order.

Power of Court of summary jurisdiction to confirm maintenance order made out of British India.

7. (1) Where a maintenance order has been made by a Court in a reciprocating territory and the order is provisional only, and has no effect unless and until confirmed by a Court of summary jurisdiction in British India, and a certified copy of the order, together with the depositions of the witnesses and a statement of the grounds on which the order might have been opposed, has been transmitted to the Central Government, and it appears to the Central Government that the person against whom the order has been made is resident in British India, the Central Government may send the said documents to the prescribed officer of a Court of summary jurisdiction, with a requisition that a summons be issued calling upon the person to show cause why that order should not be confirmed, and, upon receipt of such documents and requisition, the Court shall issue such a summons and cause it to be served upon such person.

(2) A summons issued under sub-section (1) shall for all purposes be deemed to be a summons issued by the Court in the exercise of its original criminal jurisdiction.

(3) At the hearing it shall be open to the person to whom the summons was issued to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the Court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom

the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken.

(4) If at the hearing the person served with the summons does not appear or, on appearing, fails to satisfy the Court that the order ought not to be confirmed, the Court may, notwithstanding any pecuniary limit imposed on its power by any law for the time being in force in British India, confirm the order either without modification or with such modifications as to the Court after hearing the evidence may seem just:

Provided that no sum shall be awarded as maintenance under this section, or shall be recoverable as such, at a rate exceeding that proposed in the provisional order.

(5) If the person to whom the summons was issued appears at the hearing and satisfies the Court that for the purpose of any defence it is necessary to remit the case to the Court which made the provisional order for the taking of any further evidence, the Court may for that purpose send a certified copy of the record to the Central Government for transmission to that Court through the proper authority of the reciprocating territory, and may adjourn the proceedings.

(6) Where a provisional order has been confirmed under this section, it may be varied or rescinded in like manner as if it had originally been made by the confirming Court, and where on an application for rescission or variation the Court is satisfied that it is necessary to remit the case to the Court which made the provisional order for the purpose of taking any further evidence, the Court may for that purpose send a certified copy of the record to the Central Government for transmission to that Court through the proper authority of the reciprocating territory, and may adjourn the proceedings.

Enforcement of maintenance orders.

8. (1) Subject to the provisions of this Act, where an order has been registered under this Act in a High Court, the order shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon as if it had been an order originally obtained in the High Court in the exercise of its civil jurisdiction, or in such Civil Court subordinate to that High Court as may be named by the High Court in this behalf, and that Court shall have power to enforce the order accordingly.

(2) A Court of summary jurisdiction in which an order has been registered under this Act or by which an order has been confirmed under this Act, and the officers of such Court, shall have such powers and perform such duties, for the purpose of enforcing the order, as may be prescribed.

Payment of charges for transmission of sums awarded as maintenance and other costs and charges.

9. A Court in registering or confirming an order for maintenance in accordance with the provisions of this Act shall direct that the charges for the transmission to the Court, from which the order has been received or in which the provisional order has been made, as the case may be, of the sum awarded as maintenance shall be borne by the person against whom the order has been so made or confirmed, and shall be recovered from him in addition to the sum awarded as maintenance and in addition to, and in the same manner as, such other costs and charges as may be awarded or levied by the Court.

Proof of documents signed by officers of Court.

10. For the purposes of this Act, any document purporting to be signed by a judge or officer of a Court outside British India shall, until the contrary is proved, be deemed to have been so signed without proof of the signature of judicial or official character of the person appearing to have signed it, and the officer of a Court by whom a document is signed shall, until the con-

trary is proved, be deemed to have been the proper officer of the Court to sign the document.

Depositions to be evidence.

11. Depositions taken in a Court in any reciprocating territory may, for the purposes of this Act, be received in evidence in proceedings before Courts of summary jurisdiction under this Act.

Rule-making power.

12. The Central Government may make rules for the purpose of carrying into effect the purposes of this Act, and in particular may make rules for the levy of the costs or charges for anything done under this Act and for all matters which are directed or permitted to be prescribed.

THE INDIAN MAJORITY ACT (IX OF 1875).[1]

Year.	No.	Short title.	Amendment.
1875	IX	The Indian Majority Act.	Amended, VIII of 1890, S. 52.

[2nd March, 1875.

An Act to amend the Law respecting the age of majority.

Preamble.

WHEREAS, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority than now exists; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN MAJORITY ACT, 1875.

Local extent.

It extends to the whole of British India, and, so far as regards [2][British subjects, to all Indian States];

Commencement and operation.

and it shall come into force and have effect only on the expiration of three months from the passing thereof.

Savings.

2. Nothing herein contained shall affect—

LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India*, 1874, Pt. V, p. 153; for Proceedings in Council, see *ibid.*, Supplement, p. 668, and Extra Supplement, dated 12th May, 1874, p. 4, and *ibid.*, 1875, Supplement, p. 333.

[2] Substituted by A.O., 1937 for "subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty".

NOTES.

Sec. 1.—The Majority Act applies to Hindus also. 33 A. 525. *See also* A.W.N. (1887) 71 (age for making of contract by a Hindu). A Hindu can make a will only when he is major under the Act. 38 M. 166=24 M.L.J. 517. *See also* 36 B. 622=14 Bom.L.R. 748; 6 I.C. 6; 33 A. 525. A Mussalman boy is under the Act bound to remain in the custody of his guardian till he attains 18, notwithstanding that under personal law, his emancipation would have taken place earlier. 39 M. 608=30 M.L.J. 21. In order that the reservation of the Act should be applicable to a case relating to dower, it is essential that the minor should have made the gift, at the time of or by reason of or in consideration of the marriage. 1913 M.W.N. 365=24 M.L.J. 49.

Sec. 2: SCOPE OF SECTION.—*See* 47 C.L.J. 372. In considering the age of majority for purpose of marriage in the case of Mahomedans reference should be made to the provisions of the Mahomedan Law. 1923 L. 102. The capacity of minors as regards questions of marriage, adoption, etc., is the same as if this Act had not been passed. 42 M.L.J. 129=1922 M. 1. Relinquishment of claim to dower—Mahomedan lady of 15 years of age—Age of majority is governed by this Act. 41 M. 1026=35 M.L.

(*a*) the capacity of any person to act in the following matters (namely), —marriage, dower, divorce and adoption;

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or

(*c*) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

Age of majority of persons domiciled in British India.

3. Subject as aforesaid, [1][every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years,

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LEG. REF.

[1] These words were substituted for the words "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards" by the Guardian and Wards Act (VIII of 1890), S. 52.

NOTES.

J. 468. *See also* 17 Pat. 303=1939 Pat. 133. "To act in the matter of dower" means to act or do such acts as may relate to the dower. 80 I.C. 914=1925 C. 322. *See also* 24 M.L.J. 49. A contract entered into by a Mahomedan husband, who is a minor under this Act, but a major according to his personal law, to pay dower to his wife is valid and there is nothing in S. 11, Contract Act, invalidating the same. 80 I. C. 914=1925 C. 322. Majors under personal law though not under this Act can fix amount and nature of dower. 1925 Cal. 322. As to power of a Mahomedan minor to execute post-nuptial agreement for divorce in favour of wife, *see* 47 C.L.J. 372. S. 2 only governs the performance of marriage or effecting of divorce by persons who, though not major according to the Act, are so according to their personal law. But the relinquishment by a Mahomedan wife of the whole or part of her dower fixed at the time of the marriage or changing its character from prompt into deferred does not fall within the exception provided by S. 2 of the Act. Once a marriage is performed, and the dower settled, the dower becomes a property of the wife like any other property belonging to her. It is a debt payable to her and any transfer or relinquishment of the same, whether in whole or part, is not a matter in any way connected with marriage, and such an act must be governed by the ordinary law of the land. The operation of the section cannot be extended beyond what is specified therein. Consequently an ekrarnama executed by a Mohamedan wife who is a minor under Act, but a major under the Mohamedan law, whereby she surrenders a portion of her dower debt and makes the other portion a deferred dower instead of prompt cannot be valid and binding on her, and cannot operate either to reduce the amount of the dower or change its character. 17 Pat. 303 =1939 P. 133. A breach of promise of marriage is a matter of marriage within S. 2. Nothing contained in that shall affect the capacity of any person to act in matters of marriage. 46 I.C. 421. A Hindu widow of age 15 might validly adopt if she had attained sufficient maturity of understanding to comprehend the nature of the Act. 43 B. 481=50 I.C. 736. The Act does not affect the religion or religious rites or usages of any class. The age of majority fixed by the Act does not apply to offices which involve the performance of religious duties. 28 I.C. 934. Under this section in the case of an Indian Christian, the age of majority for purposes of a divorce suit is 21, and if one of the parties is below that age, a guardian should be appointed to him or her. 79 I.C. 535=1925 S. 95.

Sec. 2 (a).—The expression "capacity to act in the matter of marriage" means the capacity to be a party to a valid marriage and relates to the acts of the parties by which their status is changed. It does not refer and is not applicable to a pre-nuptial agreement to contract a marriage in future. 14 R. 215=1936 R. 212 (F.B.). The words 'to act in the matter of marriage' in S. 2 (*a*) must be construed in a restricted sense and means only, to enter into the contract of marriage. S. 2 (*a*) of the Majority Act merely relieves a Mahomedan girl of some of the consequences of her minority, but she remains a minor none the less. That being so the provisions of O. 32, R. 1, C. P. Code, still apply. Hence a Mahomedan girl of 15 can file a suit for dower only through her next friend. 1942 O.W. N. 22=1942 Oudh 243. The right of a Mahomedan wife of sixteen and over to sue for a divorce under the Mahomedan Law is expressly saved by the section. 32 Bom.L.R. 1372=1931 L. 394. A Mahomedan woman who is a major under the personal law is capable of relinquishing the dower as consideration for obtaining *khula*, *khula* being a form of divorce recognised by the Mahomedan Law and therefore coming within the exception mentioned in S. 2. 1932 A.L.J. 781=1932 A. 649.

Sec. 3.—The words "Court of Justice" in the Act means a Court of Justice which and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age] shall, notwithstanding anything contained in the Indian Succession Act (X of 1865),[1] or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

Age of majority how computed.

4. In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the 18th anniversary of that day.

Illustrations.

(*a*) *Z* is born in British India on the first day of January, 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice. *Z* attains majority at the first moment of the first day of January, 1871.

LEG. REF.

[1] *See* now Act XXXIX of 1925.

NOTES.

has jurisdiction to do an act. 26 I.C. 708=10 N. L. R. 159. Person cannot be major with respect to one and minor with respect to another property. 1924 A. 892. Married woman governed by the Succession Act—Guardian appointed by Court—Age of minority extends to 21 years of age—Incapacity to make a will. 28 C.W.N. 527. Under S. 3, minority is extended to the completion of the twenty-first year when a guardian of the property of the minor has been appointed. 31 Bom.L.R. 1009=1929 B. 475; 134 I.C. 293=1931 L. 394. Where the mother has been appointed guardian of her two minor sons forming a joint Hindu family, the age of majority for the latter is 21 years. 35 A. 150=18 I.C. 251. Act has modified the Hindu Law on the question of minority except in respect of marriage and adoption. A Hindu who has not attained the age of majority cannot make a will. 36 B. 622=17 I.C. 86=14 Bom.L.R. 748. Where once a guardian has been appointed under the Act, however that guardianship may terminate, the minor cannot attain majority until the age of 21. 1924 L. 127. Once a guardian of a minor is validly appointed by a Court, the minor's age of majority becomes fixed by law at 21, and nothing which may subsequently transpire can have the effect of reducing it again to 18. 57 I.C. 678=11 L.W. 596. An invalid order of appointment (as a conditional order of appointment of a person on his furnishing security) has not the effect of postponing the age to 21. 49 M. 809=1927 M. 36=51 M.L.J. 726 (F.B.). In order to extend the minority of a person to 21 years under S. 3, there must in the first instance be a lawful appointment of a guardian. An appointment which is not lawful but null and void cannot extend the period of minority. S. 19 of the Guardians and Wards Act specifically prohibits the Court from making an appointment of a guardian for a person whose father is alive and who is not unfit to be guardian. An appointment of guardian for such a minor is not a lawful appointment, as it is one which cannot be made under the Guardians and Wards Act The Court has always got the power to vacate or rescind such an order which should never have been made. Nor would such an order extend the period of minority to 21 years under S. 3 of the Act. 32 S.L.R. 215. The grant of letters of administration does not amount to the appointment of a guardian of the property of the minor concerned so as to extend the period of the minority under S. 3. *See* 18 I.C. 378=24 M.L.J. 450. Release of the minor from the guardianship of the appointed guardian does not make him a major so as to affect limitation. Such a minor becomes major after the age of 21 years. 58 I.C. 196. Whether age of majority is postponed to 21 if the order of appointment of guardian is invalid, *see* 99 I.C. 213=1927 M. 36. Where an appointment of guardian to a minor is cancelled by an appellate Court, there is in fact no valid appointment at all and the age of majority in such cases is 18 and not 21. 14 I.C. 301=15 O.C. 153. But *see also* 6 P. L. J. 273, *infra*. Once a guardian is appointed, the age of the majority of the minor is 21 years and the mere fact that the certificate of guardianship is subsequently cancelled makes no difference. 61 I.C. 807=6 P.L.J. 273. Once a guardian is appointed a minor does not attain majority till the completion of 21 years even if the guardian is discharged before the minor is 18 years of age. Per *Das, J.*—An order appointing a guardian is not evidence of his age. 5 Pat.L.J. 460=57 I.C. 333.

(*b*) *Z* is born in British India on the twenty-ninth day of February, 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice. *Z* attains majority at the first moment of the twenty-eighth day of February, 1873.

(*c*) *Z* is born on the first day of January, 1850. He acquires a domicile in British India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. *Z* attains majority at the first moment of the first day of January, 1868.

THE MARRIAGE VALIDATION ACT (II OF 1892).[1]

Year.	No.	Short title.	Amendment.
1892	II	The Marriage Validation Act.	Repealed in part, Act X of 1914.

PREFATORY NOTE.—This Act was passed in order to validate certain marriages solemnized under Part VI of the Christian Marriage Act, 1872. That Act provided for the solemnization of marriage between persons of whom both were Native Christians but not of marriages betweens persons of whom one only was a Native Christian; but through ignorance of such provision of law, marriages were permitted to be solemnized under Part VI of that Act between persons of whom one only was a Native Christian; and it was deemed expedient that such marriages having been solemnized in good faith, should be validated. It is to validate such marriages that this Act was passed. (*See* Statement of Objects and Reasons.)

[*29th January,* 1892.

An Act to validate certain marriages solemnized under Part VI of the Indian Christian Marriage Act, 1872.

WHEREAS provision is made in Part VI of the Indian Christian Marriage Act, 1872, for the solemnization of marriages between persons of whom both are Native Christians, but not of marriages between persons of whom one only is a Native Christian;

AND WHEREAS persons licensed under section 9 of the said Act have in divers parts of British India, through ignorance of the law, permitted marriages to be solemnized in their presence under the said part between persons of whom one is a Native Christian and the other is not a Native Christian;

AND WHEREAS it is expedient that such marriages, having been solemnized in good faith, should be validated; It is hereby enacted as follows:—

1. [*Commencement.*] *Rep. by the Repealing and Amending Act* (*X of* 1914).

Definition.

2. In this Act the expression "Native Christian" has the same meaning as in the Indian Christian Marriage Act, 1872.

Validation of irregular marriages.

3. All marriages which have already been solemnized under Part VI of the Indian Christian Marriage Act, 1872, between persons of whom one only was a Native Christian, shall be as good and valid in law as if such marriages had been solemnized between persons of whom both were Native Christians:

Provided that nothing in this section shall apply to any marriage which had been judicially declared to be null and void, or to any case where either of the parties has, since the solemnization of such marriage and prior to the commencement of this Act, contracted a valid marriage.

LEG. REF.

[1] Short title: "The Marriage Validation Act, 1892". *See* the Indian Short Titles Act (XIV of 1897), *infra*.

Validation of records of irregular marriages.

4. Certificates of marriages which are declared by the last foregoing section to be good and valid in law, and register-books, and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the law for the time being in force, in so far as the register-books and extracts relate to such marriages as aforesaid, shall be received as evidence of such marriages as if such marriages had been solemnized between persons of whom both were Native Christians.

Application of Act to marriages under Act V of 1865.

5. References in this Act to the Indian Christian Marriage Act, 1872, shall, so far as may be requisite, be construed as applying also to the corresponding portions of the Indian Marriage Act, 1865.[1]

Penalty for solemnizing irregular marriages.

6. If any person licensed under section 9 of the said Act to grant certificates of marriage between Native Christians shall at any time after the commencement of this Act solemnize or affect to solemnize any marriage under Part VI of the said Act or grant any such certificate as therein mentioned, knowing that one of the parties to such marriage or affected marriage was at the date of such solemnization not a Christian, he shall be liable to have his licence cancelled, and in addition thereto he shall be deemed to have been guilty of an offence prohibited by section 73 of the said Act, and shall be punishable accordingly.

THE MARRIED WOMEN'S PROPERTY ACT (III OF 1874).[2]

Year.	No.	Short title.	Amendment.
1874	III	The Married Women's Property Act.	Repealed in part. XII of 1876; VI of 1888, S. 9; XII of 1891; XXXIX of 1925. Amended. XXXVIII of 1920; XIII of 1923; XVIII of 1927; XXI of 1929.

[24*th February*, 1874.

An Act to explain and amend the law relating to certain married women, and for other purposes.

Preamble.

WHEREAS it is expedient to make such provision as hereinafter appears for the enjoyment of wages and earnings by women married before the first day of January, 1866, and for insurances on lives by persons married before or after that day:

AND WHEREAS by the Indian Succession Act, 1865, section 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done, if unmarried:

AND WHEREAS by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by, them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives:

LEG. REF.

[1] Repealed (except as to Straits Settlements) by Act XV of 1872.

[2] For the Statement of Objects and Reasons, see *Gazette of India*, 1873, Pt. V, p. 457; for proceedings in Council, see *ibid.*, Extra Supplements, dated 2nd August and 6th September, 1873, respectively, pp. 9 and 12; and *ibid.*, 1874, Supplement, p. 239.

It is hereby enacted as follows:—

I.—Preliminary.

Short title.

1. This Act may be called THE MARRIED WOMEN'S PROPERTY ACT, 1874.

Extent and application.

2. It extends to the whole of British India, and, so far as regards [1][British subjects, to all Indian States].

But nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions.

And the [2][Provincial Government] may from time to time, by order, either retrospectively from the passing of this Act or prospectively, exempt from the operation of all or any of the provisions of this Act the members of any race, sect or tribe, or part of a race, sect or tribe, to whom [3][it] may consider it impossible or inexpedient to apply such provisions.

The [2][Provincial Government] may also revoke any such order, but not so that the revocation shall have any retrospective effect.

All orders and revocations under this section shall be published in the Official Gazette.

[4][* * * * * *].

3. [*Commencement.*] *Rep. by the Repealing Act* (*XII of* 1876).

II.—Married Women's Wages and Earnings.

Married women's earnings to be their separate property.

[5]4. The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation or trade carried on by her and not by her husband,

and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill,

and all savings from and investments of such wages, earnings and property,

shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings and property.

LEG. REF.

[1] Substituted by A.O., 1937, for "subjects of Her Majesty to the dominions of Princes and States in India in alliance with Her Majesty".

[2] Substituted by A.O., 1937, for "Local Government" which was substituted for "Governor-General in Council" by Act XXXVIII of 1920, S. 2 and Sch. I.

[3] Substituted by A.O., 1937, for "he".

[4] Last para. omitted by Act XXXIX of 1925, S. 392 and Sch. IX.

[5] *Cf.* the Married Women's Property Act, 1870 (33 & 34 Vict., c. 93), S. 1, now repealed by the Married Women's Property Act, 1882 (45 & 46 Vict., c. 75).

NOTES.

Sec. 1: APPLICATION.—The Married Women's Property Act whether not applicable to Hindus. *See* 35 M. 162=10 I.C. 263. But *see also* 37 B. 471=15 B.L.R. 320; 25 M.L.J. 65=37 M. 487 (F.B.); nor to contracts made before the Act. 22 W.R. 175. Act applies to persons having an English as well as those having an Indian domicile. 12 C. 522; 4 C. 140. Applicability to Buddhists. *See* 20 C.L.J. 44.

Secs. 2 and 6.—[*See also* cases cited under S. 6.] S. 6 applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any of them. 37 M. 483=25 M.L.J. 65 (F.B.). The words "for the benefit of his wife or his wife and children or any of them" mean "for the benefit of his wife or of his children or any of them." 37 M. 483. "Married woman" in S. 2 does not apply to a daughter of the assured, even if she is married. 37 M. 483.

III.—Insurance by Wives and Husbands.

Married women may effect policy of insurance.

[1]5. Any married woman may effect a policy of insurance on her own behalf and independently of her husband; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman.

Insurance by husband for benefit of wife.

[2]6. [3][(1)] A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

LEG. REF.

[1] *Cf.* the Married Wowen's Property Act, 1870 (33 & 34 Vict., c. 93), S. 10, para. 1.

[2] *Cf.* the Married Women's Property Act, 1870 (33 & 34 Vict., c. 93), S. 10, para. 2.

[3] Re-numbered by S. 2 of Act XIII of 1923.

NOTES.

Sec. 6.—[*See also cases* cited under Ss. 1 and 2, *supra.*] S. 2 of Act XIII of 1923 declares that the provisions of S. 6 of the Married Women's Property Act of 1874 shall apply in the case of any policy effected by any Hindu in Madras after 31st December, 1913. It does not further enact that they shall not apply to policies effected before that date. Those policies are governed by the old Act. 52 M. 936=1929 M. 825=57 M.L.J. 793. The Act does not apply to Hindus. A Hindu wife cannot claim the benefit of its provision. 37 B. 471=19 I.C. 736=15 Bom.L.R. 320. (*See also* cases cited under S. 1, *supra.*) S. 6 does not apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children, and the money due on it forms part of the estate of the deceased available for payment of his debts. 18 C. W. N. 1335=25 I.C. 220. But *see also* 35 M. 162; 37 B. 471; 25 M.L. J. 65=37 M. 483 (F.B.). Life insurance policy—Wife's claim as nominee of deceased husband. *See* 114 I.C. 658. The Act does not apply to Hindus. The Governor-General in Council has no power to exempt the Hindu, Mahomedan and Buddhist communities from the operation of the Act. 18 C.W.N. 1335=20 C.L.J. 44. Act does not apply where a wife claims to recover the money due to her under a policy of life insurance as the nominee of her deceased husband. 32 C.W.N. 34=47 C.L.J. 387. Where a Hindu male insured his life "for the benefit of his wife and children" and died leaving a daughter, *held,* that S. 6 creates a trust in favour of the daughter and the amount of the policy is not available to the creditors, but in cases contemplated by S. 6 the beneficiaries have no cause of action apart from the Act. 25 M.L.J. 65=37 M. 483 (F.B.). But *see* 20 C.L.J. 44, *supra.* In order to constitute a trust "for the benefit of the wife" within the meaning of S. 6 of the Married Women's Property Act, it is not necessary that the words "for the benefit of the wife" or other words equivalent thereto should appear in the policy of insurance. If on a reading of the words used in the policy, it appears that the assured has intended, in the event of his death, that the policy should enure for the benefit of his wife, then the policy may be deemed to be for her benefit. 55 M. 171=1932 M. 220=62 M.L.J. 111. The word "policy" in S. 6 means a document or documents evidencing the contract between the parties and constituting the policy. If the document known as the "policy" stands alone, and does not incorporate in it any other document, only the "policy" can be looked at, but if it expressly incorporates another document, *e.g.*, where the policy contains a provision making the proposal and declaration of the assured part of the policy, then such proposal or other document must be deemed and treated as part of the policy of insurance. The Court must therefore in such a case look to the proposal or declaration also to discover to whom the insurance money is payable in a case when the "policy" proper does not itself contain any words indicating to whom the money shall be paid. I.L.R. (1938) Mad. 909=1938 Mad. 604=(1938) 2 M.L.J. 22 (F.B.).

LIFE INSURANCE POLICY—BENEFIT RESERVED FOR WIFE—SUIT TO ENFORCE—FORM.—The plaintiff's husband had insured his life for her benefit with a certain company at Calcutta. The business of the said company was subsequently taken over by the defendant company. The insured subsequently obtained a loan from the defendants and he later on surrendered his policy on receipt of a certain amount. After her husband's death the plaintiff sued to recover the insurance amount on the ground that a trust had been created in her favour. She stated

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the [1][Province] in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

LEG. REF.

[1] Substituted by A.O., 1937, for "Presidency".

NOTES.

that the Official Trustee had refused to move in the matter unless she furnished funds. *Held*, that the contract having been completed in Calcutta, the proper person to sue was the Official Trustee of Bengal. *Held, further*, S. 59 of the Trusts Act had no application because it was not shown that the execution of the trust had become impracticable or that the Official Trustee had disclaimed trusteeship. 57 M. 536=1934 M. 264=66 M.L.J. 667.

INSURANCE MONEY PAYABLE TO ASSURED—TRUST — ATTACHABILITY IN EXECUTION. —S. 6 applies to Mahomedans and would govern a policy effected by a Mahomedan male on his own life for the benefit of his children. A trust is therefore created in favour of the person or persons for whose benefit the policy is effected though the interest taken by them is contingent. Such interest may be transferred and may also be released by the beneficiaries as it is not in the nature of a mere right to sue. The effect of such release is to revoke the trust. 54 L.W. 544=1942 Mad. 136=(1941) 2 M.L.J. 740. Where a policy of life assurance is expressed to be for the benefit of and to be payable to the assured or his wife if the assured predeceases his wife, no trust is created in favour of the wife, at once. There is no vested interest in the wife until the happening of the event contemplated by the policy, namely, the death of the husband. The latter during his lifetime is not fettered by any trust in favour of his wife, as the trust would arise only on his death; and an assignment of the policy by him to a stranger during his lifetime is valid and enforceable against the wife on the death of the assured. 45 L.W. 480=(1937) 1 M.L.J. 735=1937 Mad. 645. The circumstance that the benefit to the wife under a policy of insurance effected by the husband is of a contingent character, *i.e.*, depending on her surviving her husband if he died before the named date mentioned in the policy, does not prevent it from being a benefit under S. 6 of this Act. There will therefore arise a trust in favour of the wife under S. 6. 1937 M.W.N. 303=1937 Mad. 571=45 L.W. 616. An endowment policy on the life of the husband which nominates the wife to receive the amount payable in the event of the husband's death, falls within S. 6 of the Act, and creates a trust in favour of the wife. The fact that the wife's interest is rendered contingent by special provision in the nomination does not prevent or affect the creation of a valid trust. I. L. R. (1940) 1 Cal. 64=44 C.W.N. 218=1940 Cal. 217. Where the money under a policy of insurance is made payable to "self or wife," the words "self or wife" can be construed to mean that the policy is to be for the benefit of the assured or in the event of his death before the policy matures, it is to be for the benefit of his wife. That is the only reasonable interpretation to be placed upon the words "self or wife"; there is therefore a trust created in favour of the wife of the assured in the event of the assured dying before the policy matures. And there can be a contingent trust under S. 6 of the Act. I.L.R. (1938) Mad. 909=1938 Mad. 604=(1938) 2 M.L.J. 22 (F.B.). Where a policy of life insurance effected by a person contained a statement that the amount due thereon should be paid to the assured at the expiry of the period of 15 years, or to his wife on the death of the assured if earlier, the policy must be taken to be for the benefit of the wife of the assured, although the *verba impissima* "the policy is for the benefit of the wife" are not to be found in the policy. A trust in favour of the wife attaches itself to the policy under S. 6 from the very moment of its birth, although the wife is not entitled to claim anything under the policy unless and until the event referred to in the policy happens. It is not open to a creditor of the assured to treat it as the property of the assured. I.L.R. (1938) Mad. 867=1938 Mad. 413=(1938) 1 M.L.J. 281. Where there is no mention in the policy itself that it was for the benefit of the wife and children but there is a statement in the proposal form that the object of the policy was for "family provision," such statement is not sufficient to bring the policy within the ambit of S. 6. Most married men taking out insurance policies on their lives payable only at death do so with the intention of making provision for their family, but it does not follow that they intend to divest themselves of all interest in the policy and to create an irrevocable trust in favour of the wife or children. I.L.R. (1940) Nag. 509=1938 Nag. 321. A policy of life assurance contained the words "to the person or persons legally entitled thereto" against the column in the policy headed "to whom payable." The object of the policy as stated in the application by the assured was "for the maintenance of the family." *Held*, that no trust was created in favour of the wife and children of the assured in respect of the amount payable under the policy as the requirements of the section had not been fulfilled; that the word "family" in the application was much wider than the

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII of 1864 [1][*to constitute an Office of Official Trustee*], section 10.

Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

[2][(2) Notwithstanding anything contained in section 2, the provisions of sub-section (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Muhammadan, Sikh or Jain, in Madras, after the thirty-first day of December, 1913, or in any other part of British India, after the first day of April, 1923:

Provided that nothing herein contained shall affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the first day of April, 1923.]

LEG. REF.

[1] *See* now the Official Trustees Act (II of 1913).

[2] Inserted by Act XIII of 1923, S. 2.

NOTES.

words "wife and children", who alone, under S. 6 of this Act, could be the proper objects of the trust; that the policy and the policy alone and not the application for the issue of the policy was the document to be looked at for purposes of the Act; and that consequently the amount due under the policy could be attached after the death of the assured for a debt due by him. 1936 M. 635 =71 M.L.J. 39. S. 6 contemplates that in order that there may be a valid trust in favour of the wife or the wife and children of the assured, the policy must be expressed on the face of it to be for the benefit of them. The sum payable under an insurance policy was payable at death or at fifty-five to the insured, but in the event of his death before his wife, it was to go to the wife, and failing his wife, to the insured, his executors, etc. The insured having died before he reached fifty-five: *Held* that the policy formed part of his estate, and the amount could be attached in execution of a decree against the deceased. 58 B. 513=36 Bom. L.R. 608=1934 B. 296.

OFFICIAL TRUSTEE.—S. 6 does not at all require as a condition precedent to the creation of a trust in favour of the wife of the assured that the money should be made payable to the Official Trustee. The object of the section is to create a valid trust in respect of the policy moneys without any trust deed or any other document being executed either in favour of the beneficiary or in favour of a trustee and without any trustee being nominated. The fact that the insured has not named a trustee whether such trustee be the Official Trustee or not is no ground for holding that the money made payable to a wife is not for her benefit. 32 S.L.R. 138=1938 Sind 20. Under S. 6 (1), para. 2 of the Act the Official Trustee, unless other trustees are appointed, is the person to receive the proceeds of an insurance policy and he is bound to hold it upon the trusts created. I.L.R. (1939) 2 Cal. 526 =1940 Cal. 169. The Official Trustee, mentioned in S. 6 of the Act is not the legal person referred to in the Official Trustees Act of 1913, who is a corporation sole. The Official Trustee referred to in S. 6, who was appointed under the provisions of S. 10 of the Act, XVII of 1864, has altogether disappeared. That Office no longer exists and to that extent the provisions of S. 6 of this Act cannot be put into operation. The result is that to enforce the provisions of that section with regard to any policy which is issued under it, trustees must be appointed either by deed executed by the husband in his lifetime, or by the Court under the powers which it has to appoint trustees under the Indian Trusts Act. It is not, therefore, necessary to appoint the Official Trustee, that is to say, the holder of the Office created under the provisions of the Official Trustees Act of 1913. Nor is it necessary for the Court to appoint more than one trustee, as there is nothing in the Act providing that any number of trustees must be appointed. 41 C.W.N. 517=I.L.R. (1937) 2 Cal. 67=1937 Cal. 379. *See also* I.L.R. (1939) 2 Cal. 526=1940 Cal. 169.

(Section as amended in 1923), S. 6 (2): CONSTRUCTION AND SCOPE—POLICIES EFFECTED BEFORE 1913.—S. 6 as amended in 1923 would apply to a policy effected before 1913. Sub-S. (2) of S. 6 which was added by the amending Act of 1923 cannot be construed as a declaratory enactment declaring what the previous law was, and therefore from the positive nature of the enactment that from a particular date the Act should apply, it does not arise by necessary implication that the Act would not apply to a policy effected before that date. 54 L.W. 544= (1941) 2 M.L.J. 740=1942 Mad. 136.

IV.—Legal Proceedings by and against Married Women.

Married women may take legal proceedings.

[1]7. A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes, and orders in respect of such property as she would be liable to if she were unmarried.

Wife's liability for post-nuptial debts.

8. If a married woman (whether married before or after the first day of January, 1866), possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree:

[2][Provided that nothing herein contained shall—

(*a*) entitle such person to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage, to transfer or charge the same or her beneficial interest therein, or

(*b*) affect the liability of a husband for debts contracted by his wife's agency expressed or implied.]

V.—Husband's liability for Wife's debts.

Husband not liable for wife's ante-nuptial debts.

[3]9. A husband married after the thirty-first day of December, 1865, shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried:

Proviso.

Provided that nothing contained in this section shall [4][* * *] invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts.

[5][*VI.—Husband's liability for Wife's breach of trust or devastation.*

Extent of husband's liability for wife's breach of trust or devastation.

10. Where a woman is a trustee, executrix or administratrix, either before or after marriage, her husband shall not, unless he acts or intermeddles in the trust or administration, be liable for any breach of trust committed by her, or for any misapplication, loss or damage to the

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LEG. REF.

[1] *Cf.* the Married Women's Property Act, 1870 (33 and 34 Vict., c. 93), S. 11 repealed by Act, 1882 (45 and 46 Vict., c. 75).

[2] Substituted by Act XXI of 1929, S. 2 for old proviso which stood as follows: "Provided that nothing herein contained shall affect the liability of a husband for debts contracted by his wife's agency, express or implied [or render a married woman liable to arrest or to imprisonment in execution of a decree]". The words in brackets omitted by Act VI of 1888, S. 9.

[3] *Cf.* the Married Women's Property Act, 1870 (33 and 34 Vict., c. 93), S. 12.

[4] The words "affect any suit instituted before the passing of this Act, nor" omitted by Act XII of 1891.

[5] Inserted by Act XVIII of 1927, S. 3.

NOTES.

Sec. 7.—*See* 1 C. 285; 4 C. 140; 30 M. 378; 18 M. 19; 10 C.L.R. 536.

Sec. 8.—*See* 11 B. 348. Under S. 8 apart altogether from the proviso introduced by S. 2 of Act XXI of 1929, before a creditor can obtain a decree against a married woman on her contracts much more has to be done than mere proof of the contract and breach. The question in each case is whether the contract of the married woman was at all covered by the operative part of the sec-estate of the deceased caused or made by her, or for any loss to such estate arising from her neglect to get in any part of the property of the deceased.]

THE MEASURES OF LENGTH ACT (II OF 1889).

PREFATORY NOTE.—The Hon'ble Mr. Scoble in moving for leave to introduce a Bill to declare the Imperial yard for the United Kingdom to be the legal standard measure of length in British India said:—

"The Bill has its origin in five communications from Bengal, Madras, Bombay, Rangoon and Karachi, Chambers of Commerce asking that the English standard yard may be declared by law to be the standard measure of length for British India.

"The Bengal and Rangoon Chambers base their request on the general ground that it is anomalous that there should be no legal standard of length in this country while there is one in the United Kingdom, and that the absence of such a standard causes, in their opinion 'difficulties in the working of the piecegoods trade of the country'. The Karachi Chamber's representation is in similar general terms, there main ground being that in the working of the piecegoods trade of this country a standard of length is essentially necessary for the protection and convenience of the same. But the Bombay and Madras Chambers go more into particulars and urge the fixing of a legal standard of length on the ground that, under the existing law, the marking of false lengths on cloth goods is not punishable and ought to be made so.

"Without entering upon the question whether the existing law is sufficient to deal with cases of cheating by false measurements, I think it must be admitted to be desirable that some standard measure of length should be adopted, and that by the adoption of such a standard, fraud will be at all events rendered more difficult than it is at present. This is not the first time that the question has been considered by your Lordship's council. In 1870 Colonel Strachy introduced a Bill to regulate the weights and measures of British India and described its object to be 'to adopt once for all on a definite basis the multitude of transactions of trade and commerce which till now had been left to be settled too often, in a manner that placed the buyer at the complete mercy of the seller and gave the most objectionable openings to fraudulent dealings'. Unfortunately as I think, the French metre was adopted in Act XI of 1870 as the unit for measures of length; but this Act was disallowed by the Secretary of State, and Act XXXI of 1871, which took its place relates only to measures of weight and capacity.

"On looking through the report of the committee which was appointed in 1868 to revise the system of weights and measure for British India and which report was the basis of the legislation of 1870, I find it stated, 'with reference to measures of length, the English yard, foot and inch appear to be now used generally throughout British India and again in linear measure the Department of Public Works has done much to introduce our scale. The English yard has practically superseded the ever varying measures of the Native dynasties throughout India. In all parts of the country people now use the English foot and inch, and hawkers sell their cloth by the English yard'. It is probable that in the 20 years which have elapsed since these observations were written English measures of length have become even more widely used and the statement of the Bombay Chamber of Commerce may be accepted that 'the English yard with its sub-division of feet and inches, is now so generally known and used throughout the country that it forms by far the most convenient length for adoption'.

"The object of the Bill which I ask leave to introduce is to give a settled legal meaning to the words which denote these measures, and thus pave the way for future legislation on the line of the Merchandise Marks Act which came into force in England last year, and the main provisions of which appear to be quite as much needed in this country as at home". (*See* Proceedings in Council, *Fort St. George Gazette,* 8th May, 1888, Supplement, p. 2.)

For Statement of Objects and Reasons, see *Gazette of India,* 1888, Pt. V, p. 41; for Report of the Select Committee, see *ibid.*, 1889, Pt. IV, p. 6 and for Proceedings in Council, see *ibid.*, 1888, P. VI, pp. 66 and 82, and *ibid.*, 1889, Pt. VI, p. 20.

The *Act has been declared in force in* Upper Burma (except the Shan States) by the Burma Laws Act 1898 (XIII of 1898), Burma Code.

It had been previously extended there, by notification under S. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), Genl. Acts, Vol. II, see *Burma Gazette,* 1893, Pt. I, p. 154.

The Act was brought into force on the 15th June, 1889, *see* Genl. Stat. R. and O., Vol. II.

NOTES.

tion. I.L.R. (1938) 2 Cal. 233=42 C.W. N. 577=1938 Cal. 486. Under the proviso to S. 8 a contract entered into with a married woman after April, 1930, cannot operate against separate property settled upon her without power of anticipation, although such settlement was prior to April, 1930. I.L.R. (1938) 2 Cal. 233. The proviso added to S. 8 saves the effect of restraint. But the effective provisions of the Act have not been amended. I.L.R. (1938) 2 Cal. 233.

THE MEASURES OF LENGTH ACT (II OF 1889).

[15*th February*, 1889.

An Act to declare the Imperial standard yard for the United Kingdom to be the legal standard measure of length in British India.

WHEREAS it is expedient to declare the imperial standard yard for the United Kingdom to be the legal standard measure of length in British India; It is hereby enacted as follows:—

Title, extent, ann commencement.

1. (1) This Act may be called THE MEASURES OF LENGTH ACT, 1889.

(2) It extends to the whole of British India; and

(3) It shall come into force on such day[1] as the Central Government may appoint in this behalf.

Standard yard.

2. The imperial standard yard for the United Kingdom shall be the legal standard measure of length in British India and be called the standard yard.

Measure for determining length of standard yard.

3. A copy, approved by the Provincial Government of the imperial standard for determining the length of the imperial standard yard for the United Kingdom shall be kept in such place within the limits of the [2][Province] as the [2][Provincial Government] may prescribe, and shall be the standard for determining the length of the standard yard.

[3][Provided that, until action is taken by the Provincial Government under this section, the copy of the Imperial standard yard approved by the Central Government before the commencement of Part III of the Government of India Act, 1935, and kept in the place within the limits of the Town of Calcutta prescribed before that date by the Central Government, shall be the standard for determining the length of the standard yard in each province.]

Standard foot and inch.

4. One-third part of the standard yard shall be called a standard foot and one thirty-sixth part of such a yard shall be called a standard inch.

Presumption in favour of accuracy of certified measures.

5. Any measure having stamped thereon or affixed thereto a certificate purporting to be made [4][before the first day of April, 1937, under the authority of any Government in British India or on or after that date under the authority of the Provincial Government] and stating that the measure is of the length of the standard yard or that a measure marked thereon as a foot or inch is of the length of the standard foot or standard inch, as the case may be, shall, when produced before any Court by any public servant having charge of the measure in pursuance of any direction published in an Official Gazette [5][by order of the Provincial Government], or by any person acting under the general or special authority of such a public servant, be deemed to be correct until its inaccuracy is proved.

Inspection of certified measures by the public.

6. A public servant having in pursuance of such a direction charge of such a measure as is mentioned in the last foregoing section shall allow any person to inspect it free of charge at all reasonable times and to compare therewith or with

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LEG. REF.

[1] Came into force on 15th June, 1889.

[2] Substituted by A.O., 1937.

[3] Inserted by A.O., 1937.

[4] Substituted by A.O., 1937, for "under the authority of the Governor-General in Council or of a Local Government".

[5] Substituted by A.O., 1937, for "by order of the Governor-General in Council or of a Local Government."

any measure marked thereon any measure which such person may have in his possession.

Certified measures to be kept by authorities required by existing enactments to keep measures of length.

7. There shall be kept by the Commissioner of Police in the Town of Calcutta under section 55 of the Calcutta Police Act, 1866, [1][* * * ' *] by the Commissioner of Police in the City of Madras under section 32 of the Madras City Police Act, 1888, by the Municipal Commissioner in the City of Bombay under section 418 of the City of Bombay Municipal Act, 1888, and by the District Magistrate under section 20 of Regulation XII of 1827 of the Bombay Code, such certified measures of the standard yard, standard foot and standard inch as are mentioned in section 5.

THE INDIAN MEDICAL COUNCIL ACT (XXVII OF 1933).

Year.	No.	Short title.	Amendment.
1933	XXVII	The Indian Medical Council Act, 1933.	Amended by Act V of 1934.

[23rd September, 1933.

An Act to constitute a Medical Council in India.

WHEREAS it is expedient to constitute a Medical Council in India in order to establish a uniform minimum standard of higher qualifications in medicine for all provinces; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN MEDICAL COUNCIL ACT, 1933.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) [2]["British Indian University" means any university in British India established by an Indian law and having a medical faculty];

(*b*) "the Council" means the Medical Council of India constituted under this Act;

(*c*) "medical institution" means any institution, within or without British India, which grants decrees, diplomas or licences in medicine;

(*d*) "medicine" means modern scientific medicine and includes surgery and obstetrics, but does not include veterinary medicine and surgery;

(*e*) "Provincial Medical Council" means a medical council constituted under an Act of [3][a Local or Provincial Legislature] to regulate the registration of medical practitioners;

(*f*) "Provincial Medical Register" means a register maintained under an Act of [3][a Local or Provincial Legislature] to regulate the registration of medical practitioners;

(*g*) "recognised medical qualification" means any of the medical qualifications included in the First and Second Schedules; and

(*h*) "Regulation" means a Regulation made under section 18.

LEG. REF.

[1] Certain words omitted by Act XXIV of 1934, S, 2 and Sch. I.

[2] Substituted by A.O., 1937.

[3] Substituted by A.O., 1937, for "a local legislature"

Constitution and composition of the Council.

3. (1) The Central Government shall cause to be constituted a Council consisting of the following members, namely:—

(*a*) one member from each Governor's province, to be nominated by [1][the Central Government];

(*b*) one member from each British Indian University, to be elected by the members of the Senate of the University (or in the case of the University of Lucknow, the Court [2][* * * * * *]) from amongst the members of the medical faculty of the university; [2][* * * *].

(*c*) one member from each province where a Provincial Medical Register is maintained, to be elected from amongst themselves by persons enrolled on the Register who possess recognised medical qualifications or medical qualifications granted by a British Indian University; and

(*d*) [3][four] members to be nominated by the Central Government.

(2) The President of the Council shall be elected by the members of the Council from amongst themselves:

Provided that for four years from the first constitution of the Council the President shall be a person nominated by the Central Government who shall hold office during the pleasure of the Central Government and, where he is not already a member, shall be a member of the Council in addition to the members prescribed in sub-section (1).

(3) No act done by the Council shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Council.

Mode of election.

4. (1) An election under clause (*b*) or clause (*c*) of sub-section (1) of section 3 shall be conducted by the [4][Central Government], in such manner as it may think fit. [5][* *]

(2) Where any dispute arises regarding any election to the Council, it shall be referred to the [4][Central Government] whose decision shall be final.

Restrictions of nominations and elections.

5. (1) No person shall be eligible for nomination or election under clause (*a*) or (*b*) of sub-section (1) of section (3) unless he possesses a recognised medical qualification or a medical qualification granted by a British Indian University.

(2) No person shall be eligible for nomination under clause (*a*) of sub-section (1) of section 3 unless he resides in the province concerned, and, where a Provincial Medical Register is maintained in that province, unless he is enrolled on that register.

(3) No person shall be eligible for election under clause (*b*) of sub-section (1) of section 3 unless he has had at least four years' experience as a Professor, Assistant Professor, Lecturer or Reader in Medical Colleges or Schools.

(4) No person may at the same time serve as a member in more than one capacity.

Incorporation of the Council.

6. The Council so constituted shall be a body corporate by the name of the Medical Council of India, having perpetual succession and a common seal, with power to acquire and hold property both movable and immovable, and to contract, and shall by the said name sue and be sued.

LEG. REF.

[1] Substituted by A.O., 1937, for "the Local Government of the Province".

[2] Omitted by A.O., 1937.

[3] Substituted by A.O., 1937, for "three".

[4] Substituted by A.O., 1937, for "Local Government".

[5] Words "subject to any instructions the Governor-General in Council may issue in this behalf" omitted by A.O., 1937.

Term of office.

7. (1) An elected President shall hold office for a term not exceeding five years and not extending beyond the expiry of the term for which he has been nominated or elected to be a member of the Council.

(2) A member, other than a nominated President, shall hold office for the term of five years from the date of his nomination or election or until his successor shall have been duly nominated or elected, whichever is longer.

(3) Where the said term of five years is about to expire in respect of any member, his successor may be nominated or elected at any time within three months before the said term expires, but shall not assume office until the said term has expired.

Meetings of the Council.

8. (1) The Council shall hold its first meeting at such time and place as may be appointed by the [Central Government] and thereafter the Council shall meet at least once in each year at such time and place as may be appointed by the Council.

(2) Until otherwise provided by Regulations, ten members of the Council shall form a quorum, and all the acts of the Council shall be decided by a majority of the members present and voting.

Officers, Committees and servants of the Council.

9. (1) The Council shall—

(*a*) elect from amongst its members a vice-President;

(*b*) constitute from amongst its members an Executive Committee, and such other Committees for general or special purposes as the Council deems necessary to carry out the purposes of this Act;

(*c*) appoint a Secretary, who may also, if deemed expedient, act as Treasurer;

(*d*) appoint or nominate such other officers and servants as the Council deems necessary to carry out the purposes of this Act;

(*e*) require and take from the Secretary, or from any other officer or servant, such security for the due performance of his duties as the Council deems necessary; and

(*f*) with the previous sanction of the [Central Government] fix the remuneration and allowances to be paid to the President, Vice-President, members, officers and servants of the Council.

(2) Notwithstanding anything contained in clause (*c*) of sub-section (1), for the four years from the commencement of this Act, the Secretary of the Council shall be a person appointed by the [Central Government], who shall hold office during the pleasure of the [Central Government].

The Executive Committee.

10. (1) The Executive Committee shall consist of seven members, of whom five shall be elected by the Council from amongst its members.

(2) The President and Vice-President of the Council shall be members *ex officio* of the Executive Committee, and shall be President and Vice-President, respectively, of that Committee.

(3) In addition to the powers and duties conferred and imposed upon it by this Act, the Executive Committee shall exercise and discharge such powers and duties as the Council may confer or impose upon it by any Regulations which may be made in this behalf.

Recognition of medical qualifications granted by medical institutions in British India.

11. (1) The medical qualifications granted by medical institutions in British India which are included in the First Schedule shall be recognised medical qualifications for the purposes of this Act.

(2) Any medical institution in British India which grants a medical qualification not included in the First Schedule may apply to the [Central Government] to have such qualification recognised, and the [Central Government] after consulting the Council, may, by notification in the [Official Gazette] amend the First Schedule so as to include such qualification therein.

(3) Such notification may also direct than an entry shall be made in the last column of the First Schedule against such medical qualification declaring that it shall be a recognised medical qualification only when granted after a specified date.

(4) The Council shall, as soon as may be and without application being made, make all necessary arrangements for the inspection of the medical courses and examinations of the Universities of Patna [1][* * *] and Andhra, and shall submit their recommendations to the [Central Government] regarding the inclusion in the First Schedule of the medical qualifications granted by these Universities.

Non-Indian qualifications in Second Schedule to be recognised.

12. The medical qualifications granted by medical institutions outside British India which are included in the Second Schedule shall be recognised medical qualifications for the purposes of this Act, and shall be sufficient qualification for enrolment on any Provincial Medical Register.

Transitory arrangements for modifying the Second Schedule.

13. (1) At any time during the period of four years after the commencement of this Act, the Council may enter into negotiations with the authority in any State or country outside British India which is entrusted by the law of such State or country with the maintenance of a register of medical practitioners, for the settling of a scheme of reciprocity for the recognition of medical qualifications, and the course of such negotiations shall be reported to the [Central Government] along with the decisions of the Council to recognise or to refuse to recognise the medical qualifications proposed by such authority for recognition in British India.

(2) In so far as the decisions of the Council to recognise medical qualifications are accepted by the [Central Government], they shall be embodied in a resolution and published in the [Official Gazette], and such resolution shall specify or indicate with sufficient accuracy all medical qualifications finally approved for recognition in British India:

Provided that where any such resolution specifies or indicates a medical qualification which is not included in the Second Schedule, the [Central Government] may, by notification in the [Official Gazette], amend the Second Schedule so as to include such qualification therein, and such amendment may further direct that such qualification shall be deemed to be a recognised medical qualification for the purposes of this Act only when granted after a specified date.

(3) Within one month before the expiry of the period of four years from the commencement of this Act, the [Central Government] shall frame a schedule to include all medical qualifications which have been specified or indicated by [2][it] in resolutions made under sub-section (2), and shall publish the said schedule in the [Official Gazette], and such schedule shall be substituted for the Second Schedule with effect from the expiry of the said period of four years, and shall then have force as if it had been enacted in this Act:

LEG. REF.

[1] Word "Rangoon" omitted by A.O., 1937.

[2] Substituted by A.O., 1937, for "him".

Provided that the [Central Government] shall include in the said schedule all medical qualifications included in the Second Schedule which were granted before the expiry of the said period of four years.

Permanent arrangements for modifying the Second Schedule.

14. (1) At any time after the expiry of the period of four years after the commencement of this Act, the Council may complete or may enter into negotiations with the authority in any State or country outside British India which by the law of such State or country is entrusted with the maintenance of a register of medical practitioners, for the settling of a scheme of reciprocity for the recognition of medical qualifications, and in pursuance of any such scheme the [Central Government] may, by notification in the [Official Gazette], amend the Second Schedule so as to include therein any medical qualification which the Council has decided should be recognised.

(2) Such notification may also direct that an entry shall be made in the last column of the First Schedule against such medical qualification declaring that it shall be a recognised medical qualification only when granted after a specified date.

(3) The [Central Government], after consultation with the Council, may, by notification in the [Official Gazette], amend the Second Schedule by directing that an entry be made therein in respect of any medical qualification, declaring that it shall be a recognised medical qualification only when granted before a specified date.

(4) Where the Council has refused to recognise any medical qualification which has been proposed for recognition by any such authority, that authority may apply to the [Central Government], and the [Central Government], after considering such application and after consulting the Council, may, by notification in the [Official Gazette], amend the Second Schedule so as to include such qualification therein, and the provisions of sub-section (2) shall apply to such notification.

Power to require information as to courses of study and examinations.

15. Every medical institution in British India which grants recognised medical qualification shall furnish such information as the Council may, from time to time, require as to the courses of study and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone and such qualification is conferred, and generally as to the requisites for obtaining such qualification.

Inspection of examinations.

16. (1) The Executive Committee shall appoint such number of medical inspectors as it may deem requisite to attend at any or all of the examinations held by medical institutions in British India for the purpose of granting recognised medical qualifications.

(2) Inspectors appointed under this section shall not interfere with the conduct of any examination, but they shall report to the Executive Committee on the sufficiency of every examination which they attend and on any other matters in regard to which the Executive Committee may require them to report.

(3) The Executive Committee shall forward a copy of any such report to the medical institution concerned, and shall also forward a copy, with the remarks of such institution thereon, to the [Central Government].

Visitors at examinations.

[1][16-A. (1) The Council may appoint such number of visitors as it may deem requisite to attend at any or all of the examinations held by medical institutions in British India for the purpose of granting recognized medical qualifications.

LEG. REF.

[1] Inserted by Act IV of 1942.

(2) Any person, whether he is a member of the Council or not, may be appointed as a visitor under this section; but a person who is appointed as an inspector under section 16 for any examination shall not be appointed as a visitor for the same examination.

(3) Visitors appointed under this section shall not interfere with the conduct of any examination, but they shall report to the President of the Council on the sufficiency of every examination which they attend and on any other matters in regard to which the Council may require them to report.

(4) The report of a visitor shall be treated as confidential unless in any particular case the President of the Council otherwise directs.]

Withdrawal of recognition.

17. (1) When, upon report by the Executive Committee [1][or by a visitor appointed under section 16-A] it appears to the Council that the courses of study and examination to be gone through in any medical institution in British India in order to obtain a recognised medical qualification or that the standards of proficiency required from candidates at any examination held for the purpose of granting such qualification are not such as to secure to persons holding such qualification the knowledge and skill requisite for the efficient practice of medicine, the Council shall make a representation to that effect to the [Central Government].

(2) After considering such representation, the [Central Government] may send it to the [Provincial Government] of the province in which the medical institution is situated, and the [Provincial Government] shall forward it, along with such remarks as it may choose to make, to the medical institution, with an intimation of the period within which the medical institution may submit its explanation to the [Provincial Government].

(3) On the receipt of the explanation or, where no explanation is submitted within the period fixed, then on the expiry of that period, the [Provincial Government] shall make its recommendations to the [Central Government].

(4) The [Central Government], after making such further inquiry, if any, as [2][it] may think fit, may, by notification in the [Official Gazette], direct that an entry shall be made in the First Schedule against the said medical qualification declaring that it shall be a recognized medical qualification only when granted before a specified date.

Power to make regulations.

18. (1) The Council may, with the previous sanction of the [Central Government], make Regulations generally to carry out the purposes of this Act, and, without prejudice to the generality of this power, such Regulations may provide for—

(*a*) the management of the property of the Council;

(*b*) the summoning and holding of meetings of the Council, the times and places where such meetings are to be held, the conduct of business thereat and the number of members necessary to constitute a quorum;

(*c*) the resignation of members of the Council and the filling of casual vacancies;

(*d*) the powers and duties of the President and Vice-President;

(*e*) the mode of appointment of the Executive Committee and other Committees, the summoning and holding of meetings, and the conduct of business of such Committees;

(*f*) the tenure of office, and the powers and duties of the Secretary and other officers and servants of the Council;

(*g*) the appointment, powers, duties and procedure of medical [3][inspectors and visitors]; and

(*h*) any matter for which under this Act provision may be made by Regulations.

LEG. REF.

[1] Inserted by Act IV of 1942.

[2] Substituted by A.O., 1937, for "he".

[3] Substituted by Act IV of 1942.

(2) Until the first Council is constituted under this Act, any Regulations which may be made under sub-section (1) may be made by the [Central Government] and any Regulation so made may be altered or rescinded by the Council in exercise of its powers under sub-section (1).

Information to be furnished by Council, and publication thereof.

19. (1) The Council shall furnish such reports, copies of its minutes, abstracts of its accounts, and other information to the [Central Government] as [1][it] may require.

(2) The [Central Government] may publish, in such manner as [1][it] may think fit, any report, copy, abstract or other information furnished to [2][it] under this section or under section 16.

Commissions of inquiry.

20. (1) Whenever it is made to appear to the [Central Government] that the Council is not complying with any of the provisions of this Act, the [Central Government] may refer the particulars of the complaint to a Commission of Inquiry consisting of three persons, two of whom shall be appointed by the [Central Government] one being a Judge of a High Court established by Letters Patent of the Crown, and one by the Council; and such Commission shall proceed to inquire in a summary manner and to report to the [Central Government] as to the truth of the matters charged in the complaint, and in case of any charge of default or of improper action being found by the Commission to have been established, the Commission shall recommend the remedies, if any, which are in its opinion necessary.

(2) The [Central Government] may require the Council to adopt the remedies so recommended within such time as, having regard to the report of the Commission, [1][it] may think fit; and if the Council fails to comply with any such requirement, the [Central Government] may amend the Regulations of the Council, or make such provision or order or take such other steps as may seem necessary to give effect to the recommendations of the Commission.

(3) A Commission of Inquiry shall have power to administer oaths, to enforce the attendance of witnesses and the production of documents, and shall have all such other necessary powers for the purpose of any inquiry, conducted by it as are exercised by a Civil Court under the Code of Civil Procedure, 1908.

THE FIRST SCHEDULE.

(*See Section* 11.)

Recognised medical qualifications granted by medical institutions in British India.

Medical Institution.	Recognised medical qualification.	Abbreviation for registration.
University of Allahabad.	Bachelor of Medicine and Bachelor of Surgery	M.B., B.S., All.
University of Bombay.	Licentiate in Medicine and Surgery ..	L.M.S., Bom.
	Bachelor of Medicine and Bachelor of Surgery	M.B., B.S., Bom.
	Doctor of Medicine ..	M.D., Bom.
	Master of Surgery ..	M.S., Bom.
University of Calcutta.	Licentiate in Medicine and Surgery ..	L.M.S., Cal.
	Bachelor of Medicine ..	M.B., Cal.
	Doctor of Medicine ..	M D., Cal.
	Master of Surgery ..	M.S., Cal.
	Master of Obstetrics ..	M O, Cal.

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[1] Substituted by A.O., 1937, for "he".

[2] Substituted by A.O., 1937, for "him".

Medical Institution.	Recognised medical qualification.	Abbreviation for registration.
University of Lucknow.	Bachelor of Medicine and Bachelor of Surgery.	M.B., B.S., Lucknow.
	[1][Doctor of Medicine ..	M.D. Lucknow.
	Master of Surgery ..	M.S., Lucknow].
University of Madras.	Licentiate in Medicine and Surgery ..	L.M.S., Mad.
	Bachelor of Medicine and Master of Surgery ..	M.B., C.M.. Mad.
	Bachelor of Medicine and Bachelor of Surgery.	M.B., B.S, Mad.
	Doctor of Medicine ..	M.D, Mad.
	[2][Master of Surgery ..	M.S., Mad.]
Punjab University.	Licentiate in Medicine and Surgery ..	L.M.S., Pun.
	Bachelor of Medicine ..	M.B., Pun.
	[3][Bachelor of Medicine and Bachelor of Surgery	M.B.,B ,S. Pun.]
	Doctor of Medicine ..	M.D., Pun.
	Master of Surgery ..	M.S., Pun.
[4] [University of Patna.	Bachelor of Medicine and Bachelor of Surgery.	M.B., B.S ,Patna.]
	[5] [Doctor of Medicine ..	M.D., Patna.]
	Master of Surgery	M,S., Patna.

THE SECOND SCHEDULE.

(*See section* 12.)

Recognised medical qualifications granted by medical institutions outside British India.

A. Registrable qualifications admitting primarily to the Medical Register granted by licensing bodies in the United Kingdom, as shown in Table (F) set out in the Medical Register for 1931 printed and published under the direction of the General Council of Medical Education and Registration of the United Kingdom in pursuance of the Medical Acts, 1858 and 1886.

B. Registrable qualifications granted by licensing bodies in British possessions, as shown in Table (I) set out in the said Medical Register, other than registrable qualifications granted by licensing bodies in India.

C. Registrable qualifications granted by licensing bodies in Foreign Countries, as shown in Table (J) set out in the said Medical Register.

THE INDIAN MEDICAL DEGREES ACT (VII OF 1916).

[*Amended by Madras Act XX of* 1940.]

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

STATEMENT OF OBJECTS AND REASONS.—"Acts of the Local Councils provide in many of the larger provinces of British India for the registration of persons duly qualified to practise western medicine or surgery, and where such Acts have been passed, Medical Councils have been constituted with specific powers and duties.

It is now considered necessary to supplement this provincial legislation by an Imperial Act, restricting the right to issue degrees and diplomas in these systems of medicine and surgery to duly constituted authorities, so as to ensure that such degrees and diplomas are not issued to unqualified persons. It had been found that diplomas are issued by private institutions to untrained or insufficiently trained persons and that many of these diplomas are colourable imitation of those issued by recognised Universities and Corporations. The result that recipients of such diplomas are able to pose to the public as possessing qualifications in medicine and surgery which they do not possess. The present Bill is intended to remove the public inconvenience and injury arising out of the present state of affairs. It prohibits all persons, save certain specified authorities from issuing or alleging that they are entitled to issue any degree or diploma in western medicine or surgery. It also pena-

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LEG. REF.

[1] Inserted by notification No. F. 34-16|34, dated the 23rd August, 1934, see *Gazette of India*, 1934, Pt. I, p. 973.

[2] Inserted by notification No. F. 43-25|37, dated the 11th November, 1937, see *Gazette of India*, 1937, Pt. I, p. 1813.

[3] Inserted by notification No. F. 43-3|36, dated the 31st March, 1936, see *Gazette of India*, 1936, Pt. I, P. 428.

[4] Inserted by notification No. F. 43-10|35, dated the 11th May, 1935, see *Gazette of India*, 1935, Pt. I; p. 656.

Inserted by Notification No. 43-43-11|38, dated 5th May, 3938.

lises persons who voluntarily and falsely assume any medical title which is granted either by the General Council of Medical Education of the United Kingdom, or by the authorities constituted under the Act, and further prohibits the use of any colourable imitations of such title. The Bill does not affect the right of any person to exercise the profession of medicine or to practise as a Physician or Surgeon, provided he does not pretend to qualifications which he has not got; and its operation is rigidly to the western methods of Allopathic medicine and surgery, Homœopathic, Ayurvedic and Unani Practitioners being excluded from the purview of the Bill."

THE INDIAN MEDICAL DEGREES ACT (VII OF 1916).[1]

[16*th March,* 1916.

An to regulate the grant of titles implying qualifications in western medical science, and the assumption and use by unqualified persons of such titles.

WHEREAS it is expedient to regulate the grant of titles implying qualifications in western medical science, and the assumption and use by unqualified persons of such titles;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN MEDICAL DEGREES ACT, 1916.

Definition.

2. In this Act "western medical science" means the western methods of Allopathic medicine, Obstetrics and Surgery, but does not include the Homeopathic or Ayurvedic or Unani system of medicine.

Right to confer degrees, etc.

3. The right of conferring, granting, or issuing in British India degrees, diplomas, licences, certificates or other documents stating or implying that the holder, grantee or recipient thereof is qualified to practise western medical science, shall be exercisable only by the authorities specified in the Schedule, and by such other authority as the [2][Provincial Government] may, by notification in the Official Gazette, and subject to such conditions and restrictions as [3][it] thinks fit to impose, authorize in this behalf.

Prohibition of unauthorised conferment of degrees, etc.

4. Save as provided by section 3, no person in British India shall confer, grant, or issue, or hold himself out as entitled to confer, grant, or issue any degree, diploma, licence, certificate or other document stating or implying that the holder, grantee or recipient is qualified to practise western medical science.

Contravention of section 4.

5. Whoever contravenes the provisions of section 4 shall be punishable with fine which may extend to one thousand rupees; and, if the person so contravening is an association, every member of such association who knowingly and wilfully authorises or permits the contravention, shall be punishable with fine which may extend to five hundred rupees.

Penalty for falsely assuming or using medical titles.

6. Whoever voluntarily and falsely assumes, or uses any title or description or any addition to his name implying that he holds a degree, diploma, licence or certificate conferred, granted or issued by any authority referred to in section 3, or recognized by the General Council of

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LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India,* 1915, Pt. V, p. 76; for Report of Sel. Com., see *ibid.*, 1916, Pt. V, p. 7; and for proceedings in Council, see *ibid.*, 1915, Pt. VI, p. 460; *ibid.*, 1916, Pt. VI, pp. 5 and 206.

[2] Substituted for 'Governor-General in Council' by A.O., 1937.

[3] Substituted for 'he' by *ibid.*

NOTES.

Secs. 4 and 5.—Where the accused led people to believe that his college was an allopathic college and awarded certificates as allopathic diplomas and granted "M. M. B." degree, implying that the holder was qualified to practise western medical science, *held* that the accused was guilty under S. 5. 34 Cr.L.J. 603=37 C.W.N. 767=1933 C. 456. *See also* 1925 S. 71.

Secs. 6 and 7.—A person was conduct-

Medical Education of the United Kingdom, or that he is qualified to practise western medical science, shall be punishable with fine which may extend to two hundred and fifty rupees, or, if he subsequently commits, and is convicted of, an offence punishable under this section, with fine which may extend to five hundred rupees:

Provided that nothing in this section shall apply to the use by any person of any title, description, or addition which, prior to the commencement of this Act, he used in virtue of any degree, diploma, licence or certificate conferred upon, or granted or issued to him.

Cognizance of offences.

7. No Court shall take cognizance of an offence punishable under this Act except upon complaint made by order of the Provincial Government, or upon complaint made, with the previous sanction of the Provincial Government, by a Council of Medical Registration established by any enactment for the time being in force in the province.

Jurisdiction of Magistrates.

8. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

SCHEDULE.

(*See Section* 3.)

1. Every University established by an [1][Act of the Central Legislature].
2. The state medical faculty in Bengal.
3. The College of Physicians and Surgeons of Bombay.
4. The Board of Examiners, Medical College, Madras.

THE MEDICAL DIPLOMAS ACT (XXVIII OF 1939).

[26*th September,* 1939.

An Act to make the provision referred to in sub-section (1) *of section* 120 *of the Government of India Act,* 1935.

WHEREAS it is expedient to make the provision relating to medical diplomas granted in the United Kingdom or Burma which is referred to in sub-section (1) of section 120 of the Government of India Act, 26 Geo. V, c. 2, 1935;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MEDICAL DIPLOMAS ACT, 1939.

(2) It extends to the whole of British India.

Definitions.

2. In this Act—

(*a*) "diploma" has the meaning assigned to it in sub-section (7) of section 120 of the Government of India Act, 1935;

(*b*) "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland.

LEG. REF.

[1] Substituted for 'Act of the Governor-General in Council' by A.O., 1937.

NOTES.

ing a dispensary with a sign board which contained the initials M.D.B., L.M.H., attached to his name, they were contractions for Doctor of Biochemic Medicines and Licentiate of Homeopathic Medicines, He was convicted under S. 6. *Held,* the conviction was wrong inasmuch as the initials did not represent any degree, diploma, licence or certificate issued by any body or society referred to in the section. 25 Cr.L.J. 709 =81 I.C. 197=1925 S. 71. *See also* 143 I.C. 567=1933 C. 456. As to whether such a person could call himself a Doctor and escape liability under the section, *see* 25 Cr.L.J. 709=81 I.C. 197=1925 S. 71.

Conditions for excluding from practice British subjects domiciled in the United Kingdom or India who hold medical diplomas granted in the United Kingdom on the ground of inadequacy of such diplomas.

3. So long as the condition set out in sub-section (3) of section 120 of the Government of India Act, 1935, continues to be fulfilled, a British subject domiciled in the United Kingdom or India who, by virtue of a medical diploma granted to him in the United Kingdom, is, or is entitled to be, registered in the United Kingdom as a qualified medical practitioner shall not by or under any law for the time being in force, be excluded from practising medicine, surgery or midwifery in British India or in any part thereof, or from being registered as qualified so to do, on the ground that such diploma does not furnish a sufficient guarantee of his possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, except in accordance with the following conditions, namely:—

(*a*) Notice of every proposal for excluding the holders of any such diploma from practice or registration shall be given in such form and in such manner as the Central Government may by rules made in this behalf prescribe, to the university or other body granting that diploma, and where such proposal is not made by the Central Government, to the Central Government also.

(*b*) No such proposal shall become operative until the expiration of twelve months after the notices referred to in clause (*a*) have been given.

(*c*) Such a proposal shall not become operative or, as the case may be, shall cease to operate, if His Majesty's Privy Council, on an application made to them under sub-section (2) of section 120 of the Government of India Act, 1935, determine that the diploma in question ought to be recognised as furnishing such a sufficient guarantee as aforesaid.

Conditions for excluding from practice British subjects domiciled in Burma who hold medical diplomas granted in the United Kingdom or Burma on a similar ground.

4. A British subject domiciled in Burma who, by virtue of a medical diploma granted to him in the United Kingdom or Burma, is, or is entitled to be, registered in the United Kingdom as a qualified medical practitioner shall not, by or under any law for the time being in force, be excluded from practising medicine, surgery or midwifery in British India or in any part thereof, or from being registered as qualified so to do, on the ground that such diploma does not furnish a sufficient guarantee of his possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, except in accordance with conditions such as are set out in clauses (*a*), (*b*) and (*c*) of section 3.

THE INDIAN MERCHANDISE MARKS ACT (IV OF 1889).

Rep. in pt. and Am., Act IX of 1891;
Am. Acts I of 1938 and II of 1941.
Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

CONTENTS.

SECTIONS.
1. Title, extent and commencement.
2. Definitions.
Amendment of the Indian Penal Code.
3. [*Repealed.*]
Trade Descriptions.
4. Provisions supplemental to the definition of false trade description.
5. Application of trade descriptions.
6. Penalty for applying a false trade description.
7. Penalty for selling goods to which a false trade description is applied.
Unintentional Contravention of the Law relating to marks and descriptions.
8. Unintentional contravention of the law relating to marks and descriptions,

SECTIONS.

Forfeiture of goods.

9. Foreiture of goods.

Amendment of Sea Customs Act, 1878.

10-11. [*Repealed.*]

Stamping of length of piece-goods manufactured in British India.

12. Stamping of length of piece-goods manufactured in British India.

Supplemental Provisions.

13. Evidence of origin of goods imported by sea.

14. Costs of defence or prosecution.

15. Limitation of prosecution.

SECTIONS.

16. Authority of the Central Government to issue instructions as to administration of this Act.

17. Implied warranty on sale of marked goods.

18. Savings.

19. Definition of piece-goods.

20. Determination of character of goods by sampling.

21. Information as to commission of offence.

22. Punishment of abetment in India of Acts done out of India.

[1*st March,* 1889.

An Act to amend the Law relating to Fraudulent Marks on Merchandise.

WHEREAS it is expedient to amend the law relating to fraudulent marks on merchandise; it is hereby enacted as follows:

Title, extent and commencement.

1. (1) This Act may be called THE INDIAN MERCHANDISE MARKS ACT, 1889.[1]

(2) It extends to the whole of British India; [2][* * *].

(3) It shall come into force on the first day of April, 1889.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

[3][(1) "mark" has the meaning assigned to that expression in clause (*f*) of sub-section (1) of section 2 of the Trade Marks Act, 1940:

(1-A) "trade mark" means a "registered trade mark" as defined in clause (*j*) of sub-section (1) of section 2 of the Trade Marks Act, 1940, or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark:]

(2) "trade description" means any description, statement or other indication, direct or indirect,—

(*a*) as to the number, quantity, measure, guage or weight of any goods, or

(*b*) as to the place or country in which, or the time at which, any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed; or

(*e*) as to any goods being the subject of an existing patent, privilege or copyright;

and the use of any [4][mark] which according to the custom of the trade is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act:

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[1] For Statement of Objects and Reasons, see *Gazette of India,* 1888, Pt. V, p. 109; for Report of Sel. Com., see *ibid.*, 1889, Pt. V, p. 27; and for Proceedings in Council, see *ibid.*, 1888, Pt. VI, pp. 111 and 136 and *ibid.*, 1889, Pt. VI, p. 38.

[2] Repealed by Act IX of 1891.

[3] Substituted by Act II of 1941.

[4] Substituted for the words "numeral word or mark" by Act II of 1941.

NOTES.

Sec. 2 (2).—*See* 4 M.L.T. 360=15 M. L.J. 45.

Sec. 2 (2) (b).—*See* (1906) 95 L.T. 424; (1900) 83 L.T. 592=17 T.L.R. 174; (1901) 1 K.B. 1; 70 L.J.K.B. 15.

Sec. 2 (2) (e).—S. 2 (2) (*e*) does not apply where there is no existing patent, privilege or copyright, 140 I.C. 1084=1933 N. 344.

Secs. 2 (2), 4 and 7.—Where a design covers the whole body of goods and is part

(3) "false trade description" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act:

(4) "goods" means anything which is the subject of trade or manufacture: and

(5) "name" includes any abbreviation of a name.

Amendment of the Indian Penal Code.

3. [*Substitution of new sections for sections* 478 *to* 489 *of the Indian Penal Code.*] *Rep. by Act I of* 1938.

Trade Descriptions.

Provisions supplemental to the definition of false trade description.

4. (1) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any such [1][marks], or arrangement or combination thereof, whether including a trade mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such [1][marks], or arrangement or combination, applied thereto.

(2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials—

(*a*) not being a trade mark, or part of a trade mark, and

(*b*) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorized the use of such name or initials, [2][and

(*c*) being the name or initials of a fictitious person or of a person not carrying on business in connection with the goods of the same description.]

(3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.

Application of trade descriptions.

5. (1) A person shall be deemed to apply a trade description to goods who—

LEG. REF.

[1] Substituted for the words "numeral word or mark" by Act II of 1941.

[2] Inserted by *ibid*.

NOTES.

and parcel of the goods themselves, it is not a trade mark but a "design" under the Patents and Designs Act, 1911. Nor is it a "Trade description" within S. 2 (2) of this Act. 8 S.L.R. 39=25 I.C. 998.

Sec. 2 (3).—*See* (1898) 2 Q. B. 19; (1906) 1 K.B. 16; 75 L.J.K.B. 72; 26 B. 289.

Sec. 2 (4).—*See* 17 M.L.J. 490; 26 C. 232.

Sec. 4.—*Cf.* the Merchandise Marks Act, 1887 [50 and 51 Vict., c. 28, S. 3 (2)], and Wright thereon, pp. 16 and 38.

Sec. 4 (2).—*Cf.* the Merchandise Marks Act, 1887 [50 and 51 Vict., c. 28, S. 3 (3)]. Case-law, *see* 25 I.C. 998; 15 M.L.J. 45.

Sec. 5.—*Cf.* the Merchandise Marks Act, 1887 [50 and 51, Vict., c. 28, S. 5].

(*a*) applies it to the goods themselves, or

(*b*) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(*c*) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or

(*d*) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

(2) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

Penalty for applying a false trade description.

6. If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for selling goods to which a false trade description is applied.

7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, [1][or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification] he shall, unless he proves—

LEG. REF.

[1] Inserted by Act II of 1941.

NOTES.

Sec. 5 (c).—*See* (1910) 103 L.T. 540.

Sec. 5 (d).—(1891) 1 Q.B. 408=60 L.J.M.C. 95.

Secs. 5 and 6.—Using hand-bill intended to mislead. 1935 Sind 107. On this section, *see also* 40 C. 281.

Sec. 6.—*Cf.* the Merchandise Marks Act, 1887 [50 and 51 Vict., c. 28, S. 2 (1)]. For instructions as to prosecutions under this section for offences relating to the short reeling of yarn in Indian mills, *see* Bombay Government Gazette, 1906, Pt. I, p. 487. Mere imitation, if offence. 146 I.C. 1084=1933 Nag. 344. *See* 31 C. 411; 23 I.C. 689. Where the charge under S. 6 of the Act is not tried at the place where the offence of applying the false trade description had been committed, the defect is curable under S. 531, Cr. P. Code. 1940 Cal. 583.

"FALSE DESCRIPTION TO GOODS."—As to the application of this paragraph, *see* (1891) 1 Q.B. 408; (1890) 24 Q.B.D. 90=59 L.J.M.C. 13. Where the charge under S. 6 is not tried at the place where the offence of applying the false trade description had been committed, the defect is curable under S. 531, Cr. P. Code. 192 I.C. 835=42 Cr. L. J. 334=1940 Cal. 583.

Secs. 6 and 7.—The word "Merchandise" includes goods selected or guaranteed by the proprietor of the trade mark, and the selector-importer who affixes his name or trade mark to those goods is a person "whose merchandise they are" within S. 480, I. P. Code. 12 S.L.R. 129=50 I.C. 165=20 Cr.L.J. 277. The main object of the Act is to prevent a trader passing off his own goods as those of another. (*Ibid.*) Registration of design of bottle and label thereon under Patents and Designs Act—Rival trader using bottles innocently—Conviction under Ss. 6 and 7 is not sustainable. *See* 32 C.W.N. 1115. On this section, *see also* 8 S.L.R. 39=25 I.C. 998, cited under S. 2, *supra*. As to the liability of master or principal for acts of servants or agents, *see* (1898) 2 Q.B. 300 (306)=67 L.J.Q.B. 689.

Sec. 7.—For instructions as to prosecutions under this section for offences relating to the short reeling of yarn in Indian mills, *see* Bombay Government Gazette, 1906, Pt. 1, p. 487.

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, [1][or that any offence against this section had been committed in respect of the goods], and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for tampering with, altering or effacing a mark applied in pursuance of section 12-A.

[1][7-A. If a person tampers with, alters or effaces a mark which has been applied to any goods to which it is required to be applied by notification made under section 12-A, he shall, unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, and, in the case of a second or subsequent conviction, with imprisonment which may extend to two years, or with fine, or with both.]

Unintentional Contravention of the Law relating to Marks and Descriptions.

Unintentional contravention of the law relating to marks and descriptions.

8. Where a person is accused under section 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—

(*a*) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

he shall be acquitted.

Forfeiture of Goods.

Forfeiture of goods.

9. (1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade mark, or under section 486 of that Code of selling, or exposing or having in

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LEG. REF.

[1] Inserted by Act II of 1941.

NOTES.

Sec. 8.—*Cf.* the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28, S. 6).

Sec. 9.—*Cf.* the Merchandise Marks Act, 1887 [50 and 51 Vict., c. 28, S. 2 (3) (*iii*)].

possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, [1][or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification,] or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Amendment of the Sea Customs Act, 1878.

10 and 11. [*Amendment of the Sea Customs Act,* 1878.] *Rep. by the Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

[2][*Stamping of Piece-goods, Cotton Yarn and Thread.*

Stamping of piece-goods, cotton yarn and thread.

12. (1) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and, except when the goods are sold from the factory for export from British India, without being conspicuously marked on each piece with the name of the manufacturer, or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(2) Cotton yarn such as is ordinarily sold in bundles, and cotton sewing or darning thread, which have been manufactured, bleached, dyed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from those premises unless, in accordance with any rules made under section 20 of this Act, in the case of yarn the bundles are conspicuously marked with an indication of the weight of yarn in each bundle and the count of the yarn contained in the bundle and in the case of thread each unit is conspicuously marked with the weight of thread in the unit and the grist number and, except where the goods are sold from the factory for export from British India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchaser in India of the goods.

(3) If any person removes or attempts to remove or causes or attempts to cause to be removed for sale from such premises or sells or exposes or has in possession for sale any such piece-goods or any such cotton yarn or any

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LEG. REF.

[1] Inserted by Act II of 1941.

[2] New Ss. 12 and 12-A, with their headings inserted by *ibid*.

cotton sewing or darning thread which is not marked as required by sub-section (1) and sub-section (2), every such piece and every such bundle of yarn and all such thread, and everything used for the packing thereof, shall be forfeited to His Majesty and such person shall be punished with fine which may extend to one thousand rupees.

Power to require goods to show indication of origin.

Power to require goods to show indication of origin.

12-A. (1) The Central Government may, by notification in the Official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of British India and imported into British India, or which are made or produced within the limits of British India, shall, from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced.

(2) The notification may specify the manner in which such indication shall be applied, that is to say, whether to the goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary, that is to say whether on importation only, or also at the time of sale, whether by wholesale or retail or both.

(3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interests of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, nor without such inquiry as the Central Government may consider necessary.

(4) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the issue of a notification under this section as they apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.

(5) A notification under this section shall not apply to goods made or produced beyond the limits of British India and imported into British India if in respect of those goods the Chief Customs Officer is satisfied at the time of importation that they are intended for exportation whether after transhipment in or transit through British India or otherwise.]

Supplemental Provisions.

Evidence of origin of goods imported by sea.

13. In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced.

Cost of defence or prosecution.

14. (1) On any such prosecution as is mentioned in the last foregoing section or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the

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NOTES.

Sec. 13.—*Cf.* the Merchandise Marks Act, 1887 [50 and 51 Vict., c. 28, S. 10 (2)].

Sec. 14.—*Cf.* the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28, S. 14). Case-law as to power of appellate Court, to award costs, *see* 16 Bom.L.R. 78=24 I.C. 834. On any prosecution mentioned in S. 13, or for an offence under the relevant sections of the Penal Code (*e.g.*, Ss. 482, 486) costs should be awarded under S. 14, Merchandise Marks Act and not under S. 546-A, Cr. P. Code, and these costs include advocate's fees. 187 I.C. 77=41 Cr.L.J. 392=1940 Rang. 33.

prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

Limitation of prosecution.

15. No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Authority of the Central Government to issue instructions as to administration of this Act.

16. (1) The Central Government may, by notification in the Official Gazette, issue instructions[1] for observance by Criminal Courts in giving effect to any of the provisions of this Act.

(2) Instructions under sub-section (1) may provide, among other matters, for the limits of variation, as regards number, quantity, measure, gauge or weight, which are to be recognised by Criminal Courts as permissible in the case of any goods.

LEG. REF.

[1] For notification containing such instructions, *see* Genl. Stat. R. and O., Vol. II and Bur. R. M., Vol. II.

NOTES.

Sec. 15.—*Cf.* the Merchandise Marks Act, 1887 (50 and 51, Vict., c. 28, S. 15). The word *"offence"* in S. 15 means the offence charged; and the words *"first discovery"* mean "when the complainant first discovered the offence". *See* 32 C.W.N. 699; 34 C.W.N. 339=1930 C. 274. *See also* 1939 N.L.J. 55. But *see* next case. The word *"offence"* in S. 15 does not mean the very first such offence. If such an interpretation of the section be good law a person infringing another's trade mark may merely do so once, clandestinely, sit quiet for three years and then make a public use of it without any fear of a criminal prosecution. 26 S.L.R. 241=139 I.C. 335=1932 S. 94. The word 'offence' means the offence in respect of which the prosecution is launched. The limitation prescribed by S. 15 is three years from the date of commission of the offence charged and one year from the date of discovery by the prosecutor of the offence charged, whichever is less. 1940 Rang.L.R. 244=41 Cr. L. J. 797=1940 Rang. 114. As to commencement of limitation under this section, *see also* 32 C.W.N. 699=114 I.C. 131=1928 C. 495. The prosecution for using false trade mark will be barred if not brought within three years from the date of the first offence of the series for the same trade mark. 10 S. L.R. 45=35 I.C. 651=17 Cr.L.J. 367. The period limited by S. 15 for prosecution under S. 14 begins from the date of the particular infringement alleged against the accused. S. 15 does not prevent a prosecution under S. 482, I. P. Code. 36 I.C. 168=17 Cr. L.J. 488. The words 'commission of the offence' mean commission of the offence in respect of which the prosecution is launched, *i.e.*, the offence charged in the complaint. I.L.R. (1937) Bom. 183=38 Bom.L.R. 1164=1937 Bom. 1 (F.B.), overruling 59 Bom. 551; 1939 N.L.J. 55. The language of S. 15 is perfectly plain and there is nothing in the rest of the Act to control the natural meaning of the words. The starting point of limitation in all cases under S. 15 is the date of the offence charged. I.L.R. (1937) Bom. 183=38 Bom.L.R. 1164=1937 Bom. 1 (F.B.). Limitation for prosecution under S. 15 runs from the date of the offence with which the accused is charged. The fact that he had been manufacturing and selling the articles in question earlier, does not bar a prosecution for a latter manufacture and sale. 1939 N.L.J. 55. S. 15 provides that a prosecution for an offence under S. 486 of the Penal Code should be launched within three years from the date of the offence charged. There is nothing in the section to suggest that in a case of series of infringements the prosecution should be commenced within three years from the date of the first offence. 1931 M. 276=131 I.C. 848. *See also* 1930 Cal. 275; 1928 Cal. 495. The owner of a trade mark should not wait for several years while his trade mark is infringed continuously and then bring a criminal complaint in respect of some recent infringement. 36 I. C. 168=17 Cr.L.J. 488. If the goods of a manufacturer from the mark he has used are known by a particular name the adoption by a rival trader of any mark which would cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as an actual copy of his device. In such cases dissimilarity of the rival mark is not a complete defence. 36 I.C. 168=17 Cr.L.J. 488. A trade mark applied by a shirt maker to his shirts may be an infringement of a similar mark applied by a manufacturer to his cloth. 36 I.C. 168=17 Cr.L.J. 488. On this section, *see also* 22 M. 488; 10 I.C. 787.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the seller shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer.

Savings.

18. (1) Nothing in this Act shall exempt any person from any suit or other proceeding which might, but for anything in this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to, make a complete discovery or to answer any question or interrogatory in any suit or other proceeding, but such discovery or answer shall not be admissible in evidence against such person in any such prosecution as is mentioned in section 14.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India who in good faith acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

Definition of piece-goods.

[1]19. For the purpose of section 12 of this Act and clause (*f*) of section 18 of the Sea Customs Act, 1878, as amended by this Act, the Central Government may, by notification in the Official Gazette, declare what classes of goods are included in the expression 'piece-goods, such as are ordinarily sold by length or by the piece.'

Determination of character of goods by sampling.

20. (1) The Central Government may make rules,[2] for the purposes of this Act, to provide, with respect to any goods which purport or are alleged to be of uniform number, quantity, measure, gauge or weight, for the number of samples to be selected and tested and for the selection of the samples.

[3][(1-A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton sewing or darning thread shall be marked with the particulars required by that section.]

(2) With respect to any goods for the selection and testing of samples of which provision is not made in any rules for the time being in force under sub-section (1), the Court or officer of Customs, as the case may be, having occasion to ascertain the number, quantity, measure, gauge or weight of the goods, shall, by order in writing, determine the number of samples to be selected and tested and the manner in which the samples are to be selected.

(3) The average of the results of the testing in pursuance of rules under sub-section (1) or of an order under sub-section (2) shall be *prima facie* evidence of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(4) If a person having any claim to, or in relation to, any goods of which samples have been selected and tested in pursuance of rules under sub-section (1) or of an order under sub-section (2), desires that any further samples of

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LEG. REF.

[1] *See* Notes below.

[2] For rules issued under these sections, *see* Genl. Stat. R. and O., Vol. II.

[3] Sub-S. (1-A) of S. 20 inserted by Act II of 1941.

NOTES.

Sec. 17.—*Cf.* the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28, S. 17).

Sec. 18.—*Cf.* the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28, S. 19).

Secs. 19 to 22.—S. 19 and the heading to S. 19, namely. "Transitory Provision" were repealed by the Indian Merchandise Marks and Sea Customs Acts, Amendment Act, 1891 (IX of 1891) and Ss. 19 to 22 here printed were added by the Indian Merchandise Marks and Sea Customs Acts, Amendment Act (IX of 1891), S. 4. *See* 10 C.W.N. 107.

the goods be selected and tested, they shall, on his written application and on the payment in advance by him to the Court or officer of Customs, as the case may be, of such sums for defraying the cost of the further selection and testing as the Court or officer may from time to time require, be selected and tested to such extent as may be permitted by rules to be made by the Central Government in this behalf or as, in the case of goods with respect to which provision is not made in such rules, the Court or officer of Customs may determine in the circumstances to be reasonable, the samples being selected in manner prescribed under sub-section (1), or in sub-section (2), as the case may be.

(5) The average of the results of the testing referred to in sub-section (3) and of the further testing under sub-section (4) shall be conclusive proof of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(6) Rules under this section shall be made after previous publication.

Information as to commission of offence.

21. An officer of the Government whose duty it is to take part in the enforcement of this Act shall not be compelled in any Court to say whence he got any information as to the commission of any offence against this Act.

Punishment of abetment in India of acts done out of India.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would, under this Act, or under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE MESNE PROFITS AND IMPROVEMENTS ACT (XI OF 1855).[1]

Declared in force throught B.I., except as regards the Scheduled Districts, Act XV of 1874, S. 3.

Year.	No.	Short Title.	Amendments.
1855	XI	The Mesne Profits and Improvements Act, 1855.	Repealed in part (locally), IV of 1882.

[27th March, 1855.

An Act relatng to mesne profits and to improvements made by holders under defective titles in cases to which the English Law is applicable.

Preamble.

WHEREAS it is expedient, in cases to which the English law is applicable *to limit the liability for mesne profits and* to secure to *bona fide* holders under defective titles the value of improvements made by them; It is enacted as follows:—

1. No person shall be chargeable with any rents or profits of any immov-

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LEG. REF.

[1] SHORT TITLE.—The "Mesne Profits and Improvements Act, 1855." *See* the Indian Short Titles Act, 1897 (XIV of 1897).

NOTES.

Sec. 1.—The words in italics in the title and in the preamble, together with S. 1 are repealed in places to which the T.P. Act, 1882, extends or is extended, *see* the T.P. Act, 1882 (IV of 1882), S. 2.

No person chargeable with rent *bona fide* paid to holder under defective title.

able property which he has *bona fide* paid over to any person of whom he *bona fide* held the same, notwithstanding it may afterwards appear that the person to whom such payment was made had no right to receive such rents or profits.

Value of improvements made by *bona fide* holders under defective titles secured to them.

2. If any person shall erect any building or make an improvement upon any lands held by him *bona fide* in the belief that he had an estate in fee-simple, or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof, irrespective of the value of such building or improvement:

Amount how fixed.

Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction.

Act to apply only to cases governed by English Law.

3. Nothing in this Act contained shall extend to any case to which the English Law is not applicable.

THE METAL TOKENS ACT (I OF 1889).

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons would explain the circumstances that led to the passing of the Act:—

"The main object of this Bill is to prohibit the manufacture and issue, and restrict the circulation, of stamped or unstamped pieces of copper such as during the recent depression in value of that metal, private traders at Jugudari, Gaya, Ludhiana, Beawar and other places have been making and issuing in large quantities for use as money. The pieces circulate at much above their intrinsic value, and their circulation both deprive the taxpayers of this country of that profit on coinage of copper which belongs to every Government, and perpetuates the currency of an inconvenient form of coin.

The other object of the Bill is to suppress the manufacture in British India of coins resembling or apparently intended to resemble or pass for coins which are legal tender or in actual use and circulation in any foreign country. (*See* Statement of Objects and Reasons, *Fort St. George Gazette,* 28th February, 1888, Supp. p. 2.)

The Hon'ble Mr. Steel, Member in charge, said:—

The Bill proposes to prohibit the manufacture and importation of unauthorised coin and to forbid the receipt of such coin by any local authority or Railway administration; but it does not prohibit the ordinary circulation of the coin now in existence. It would thus appear that the Bill strikes at only one of the evils that have been described. It does not propose to redress the existing inconvenience to the public, and may even increase this inconvenience by depriving the holders of those coins of some of the outlets by which they could have got rid of them.

The Bill will certainly secure for the revenue, the profit accruing from the issue of token coinage, but it will only partially achieve this object. While the circulation of unauthorized coin, is permitted, there will be temptation to import it, and the importation can only be effectively prevented by stringent inquisitional and punitive measures which the Government will be unwilling to put into practice. It would be observed that the Govern-

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NOTES.

Sec. 2.—Act is applicable only to cases tried on the Original Side of the High Court. A permanent lease of the property of religious trust is invalid and a lessee when evicted by proceedings in the mofussal Court is not entitled to compensation for a house built by him either under S. 51 of the Transfer of Property Act or under S. 2 of this Act but can only remove the materials. 10 L.W. 137 =52 I.C. 517. The words "other absolute estate" in S. 2 of this Act do not apply to the estate of lessee with permanent occupancy rights. 52 I.C. 517. For older cases, *see* Bourke's Ref. (O.C.) 159; 1 Agra 244.

ment, for good and sufficient reasons, recommended that offences under this Act shall not be cognizable; that is to say, the law shall only be put in force under the order of a superior Magistrate, and the Police shall not be allowed to interfere with the public of their own motion. Under these conditions preventive measures cannot be completely successful. We could have effectively accomplished all our objects by preventing the circulation of unauthorized coin altogether. In this case it would have been necessary in the interest of the poor that Government should undertake the buying up of all the process of metal in circulation by giving in exchange for them our own current copper coins. It would have been necessary to give long notice—possibly two years' notice—of the intended conversion. With these safeguards, the interests of both the public and the Government would have been completely served, but it remains only to be considered whether the cost of conversion could have been productive. Now, it is understood that at the ruling exchange, these pieces of metal are worth intrinsically more than our own copper coins, and the operation might presumably be carried out at some cost. The production of the large quantity of coins required might cause a strain upon our mints, but these are not fully employed, and if necessary, we might import coin from Birmingham, and probably do this as economically as we can make it for ourselves.

If such a plan were adopted it might possibly be found that the interval of two years might be employed to pour unauthorized coin across our frontier, but if this apprehension were justified, there would be much less objection to stringent preventive measures to be adopted for a limited period, than to the same measures which under the present Bill, may possibly become a permanent administrative necessity.

I think the bill can do some good in itself. I believe it proceeds in the right direction and I hope it will lead the day to a bolder and larger measure, which, in my opinion will alone be completely successful. I look upon the measure as palliative in preparation for a radical cure."

THE METAL TOKENS ACT (I OF 1889).[1]

[1*st February*, 1889.

An Act for the Protection of Coinage and other purposes.

WHEREAS it is expedient to prohibit the making, or the possession for issue or the issue, by private persons, of pieces of metal for use as money;

AND WHEREAS it is also expedient to amend section 28 of the Indian Penal Code;

It is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called THE METAL TOKENS ACT, 1889.

(2) It extends to the whole of British India; [2][*]

[2][* * * * * *]

Definition.

2. In this Act "issue" means to put a piece of metal into circulation for the first time for use as money in British India, such piece having been made in contravention of this Act or brought into British India by sea or by land in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878.

Prohibition of making by private persons of pieces of metal to be used as money.

3. No piece of copper or bronze or of any other metal or mixed metal, which, whether stamped or unstamped, is intended to be used as money, shall be made except by the authority of the Central Government.

LEG. REF.

[1] For Statement of Objects and Reasons, *see* Gazette of India, 1888, Pt. V, p. 19; for Report of the Select Committee, *see ibid.*, 1889, Pt. IV, p. 3, and for Debates in Council, *see ibid.*, 1888, Pt. VI, pp. 40 and 81, and *ibid.*, 1889, Pt. VI, pp. 3 and 9.

This Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), in the Arakan Hill District by Regulation I of 1916, S. 2, Bur. Code.

It had been previously extended there by notification under S. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), *see* Burma Gazette, 1893, Pt. I, p. 154.

[2] The word "and" at the end of sub-S.

Penalty for unlawful making, issue or possession of such pieces.

4. (1) In either of the following cases, namely:—

(*a*) if any person makes in contravention of the last foregoing section, or issues or attempts to issue, any such piece as is mentioned in that section,

(*b*) if, after the expiration of three months from the commencement of this Act, any person has in his possession, custody or control any such piece as is mentioned in the last foregoing section, with intent to issue the piece,

the person shall be punished,

(i) if he has not been previously convicted under this section, with imprisonment which may extend to one year, or with fine, or with both; or

(ii) if he has been previously convicted under this section, with imprisonment which may extend to three years, or with fine, or with both.

(2) If any person is convicted of an offence under sub-section (1), he shall, in addition to any other punishment to which he may be sentenced, forfeit all such pieces as aforesaid, and all instruments and materials for the making of such pieces, which may have been found in his possession, custody or control.

(3) If in the trial of any such offence the question arises whether any piece of metal or mixed metal was intended to be used or to be issued for use as money, the burden of proving that the piece was not intended to be so used or issued shall lie on the accused person.

Cognizance of offences under the last foregoing section.

5. (1) The offence of making, in contravention of section 3, any such piece as is mentioned in that section shall be a cognizable offence.

(2) Notwithstanding anything in the [1]Code of Criminal Procedure, 1882, no other offence punishable under section 4 shall be a cognizable offence, or beyond the limits of a presidency-town be taken cognizance of by any Magistrate, except a District Magistrate or Sub-Divisional Magistrate, without the previous sanction of the District Magistrate or Sub-Divisional Magistrate.

Application of certain of the foregoing provisions of this Act to importation of pieces of metal for use as money.

6. If at any time the Central Government sees fit, by notification under section 19 of the Sea Customs Act, 1878, to prohibit or restrict the bringing by sea or by land into British India of any such pieces of metal as are mentioned in section 3, [2][it] may by the notification[3] direct that any person contravening the prohibition or restriction shall be liable to the punishment to which he would be liable if he were convicted under this Act of making such pieces in British India, instead of to the penalty mentioned in section 167 of the Sea Customs Act, 1878, and that the provisions of sub-section (3) of section 4 and sub-section (1) of section 5, or of either sub-section, in relation to the offence of making such pieces shall, notwithstanding anything in the Sea Customs Act, 1878, apply, so far as they can be made applicable, to the offence of contravening the prohibition or restriction notified under section 19 of that Act.

7. [*Addition to section* 98, *Act X of* 1882.] *Rep. by the Code of Criminal Procedure,* 1898 (*V of* 1898).

Prohibition of receipt by local authorities and railways as money of metal which is not coin.

8. (1) No piece of metal which is not coin as defined in the Indian Penal Code shall be received as money by or on behalf of any railway-administration or local authority.

(2) If any person on behalf of a railway-administration, or on behalf of a local authority, or on behalf of the lessee of the collection of any toll or other

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LEG REF.

(2) and sub-S. (3) were repealed by Act X of 1914, S. 3 and Sch. II.

[1] *See* now the Code of Criminal Procedure, 1898 (Act V of 1898).

[2] Substituted for 'he' by A.O., 1937.

[3] For notification issued under this power, *see* Genl. R. and O.

impost leviable by a railway-administration or local authority, receives as money any piece of metal which is not such coin as aforesaid, he shall be punished with fine which may extend to ten rupees.

9. [*Amendment of section* 28 *of the Indian Penal Code.*] *Rep. by the Repealing Act (I of* 1938), *S.* 2 *and Sch.*

THE MINES MATERNITY BENEFIT ACT (XIX OF 1941).

[26*th November*, 1941.

An Act to regulate the employment of women in mines for a certain period before and after childbirth and to provide for payment of maternity benefit to them.

WHEREAS it is expedient to regulate the employment of women in mines for a certain period before and after childbirth and to provide for payment of maternity benefit to them; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MINES MATERNITY BENEFIT ACT, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "child" includes a still-born child;

(*b*) "Chief Inspector", "Inspector", "employed", "mine" and "owner" have the meanings assigned, respectively, to these expressions in section 3 of the Indian Mines Act, 1923;

(*c*) "manager" means the manager of the mine appointed in accordance with the provisions of the Indian Mines Act, 1923;

(*d*) "maternity benefit" means the payment referred to in section 5;

(*e*) "prescribed" means prescribed by rules made under this Act.

Prohibition of employment of, and work by, women during certain period.

3. No owner or manager of a mine shall knowingly employ a woman and no woman shall engage in employment in any mine during the four weeks following the day on which she is delivered of a child.

Right to obtain leave of absence in pregnancy and after delivery.

3. (1) If any woman employed in a mine who is pregnant gives notice either orally or in writing in the prescribed form to the manager of the mine that she expects to be delivered of a child within one month from the date of such notice, the manager shall permit her if she so desires to absent herself from work up to the day of her delivery and such absence shall be treated as a period of authorised absence on leave:

Provided that the manager may, on undertaking to defray the cost of such examination, require the woman to be examined by a qualified medical practitioner or midwife, and, if the woman refuses to submit to such examination or is certified on such examination as not pregnant or not likely to be delivered of a child within one month, he may refuse such permission.

(2) Any woman employed in a mine who is delivered of a child shall be permitted by the manager to absent herself from work for a period of four weeks from the date of her delivery, and her absence during such period shall be deemed to be authorised absence on leave if within seven days of her delivery she has given or sent to the manager notice of the delivery and of the date of delivery,

Right to and liability for payment of maternity benefit.

5. Every woman employed in a mine who has been continuously employed in that mine or in mines belonging to the owner of that mine for a period of not less than six months preceding the date of her delivery shall, if she complies with the conditions imposed by this Act, be entitled to receive, and the owner of the mine shall be liable to make her, in accordance with the provisions of this Act, a payment at the rate of eight annas a day for every day on which she is absent from work owing to her confinement during the four weeks immediately preceding and including the day of her delivery and for each day of the four weeks following her delivery.

Explanation.—Periods of casual absence as defined by rules made under section 15 or authorised absence on account of illness or leave shall count as employment in determining whether employment has been continuous.

Payment of bonus.

6. (1) The Central Government may by rules made under section 15 provide that a woman entitled to maternity benefit under this Act shall, if at the time of her delivery she utilized the services of a qualified midwife or other trained person, receive in addition to the maternity benefit due to her a bonus not exceeding in amount three rupees:

Provided that she shall not receive such bonus if at the place chosen by her for her confinement she would have been entitled free of charge to the services of a qualified midwife or other trained person provided by the owner of the mine.

(2) Such rules may further provide for the determination by the Provincial Government of the amount of the bonus and of the qualifications which shall be possessed by qualified midwives and other trained persons for the purposes of this section.

Notice of delivery to be given to manager.

7. A woman entitled to maternity benefit under this Act, unless she has given the notice referred to in sub-section (1) of section 4, shall on being delivered of a child give notice of her delivery in the prescribed manner to the manager before the expiry of seven days from the date of her delivery, and shall before the expiry of six months from such date furnish proof of the prescribed nature to the manager both of her delivery and of the date of her delivery:

Provided that a woman giving notice under section 4 or this section may therein nominate a person for the purposes of sub-section (2) of section 9.

Payment of maternity benefit.

8. (1) Where a woman entitled to maternity benefit has given the notice referred to in sub-section (1) of section 4 and has obtained permission to absent herself from work up to the date of her delivery, the manager shall either at once or within three days pay to her maternity benefit for four weeks in advance.

(2) A woman entitled to maternity benefit who has been delivered of a child shall, on furnishing the proof referred to in section 7,—

(*a*) if she has received an advance payment under sub-section (1), be paid the balance of the maternity benefit due to her at the end of the fourth week from the date of her delivery or within three days of the furnishing of proof, whichever date is later;

(*b*) if she has received no such advance payment,—

(i) if the proof is furnished before the end of the fourth week from the date of delivery, be paid at once or within three days so much of the maternity benefit as is then due to her, and be paid the balance at the end of the said fourth week;

(ii) if the proof is furnished after the end of the fourth week from the date of delivery, be paid at once or within three days the whole amount of the maternity benefit due to her.

Disposal of maternity benefit in case of death of women entitled to receive it.

9. (1) If a woman entitled to maternity benefit who has received an advance under sub-section (1) of section 8 dies before being delivered of the child, the advance shall not be recoverable.

(2) If a woman entitled to maternity benefit having been delivered of a child dies before payment of the maternity benefit, or, where an advance under sub-section (1) of section 8 has been made, of the balance of the maternity benefit due to her is made, the amount due to her up to the date of her death shall, on the prescribed proof of the birth and date of the birth of the child and of the death and date of death of the woman being furnished at any time before the expiry of six months from the date of delivery, be paid if the child is living to the person who undertakes the care of the child, and if the child is not living to the person nominated by her under the proviso to section 7 or if she has made no such nomination to the legal representative of the deceased woman.

Prohibition of dismissal during or on account of absence from work owing to confinement.

10. (1) When a woman absents herself from work in accordance with section 3, or has obtained permission to absent herself in accordance with section 4, it shall be unlawful for the manager to dismiss her during or on account of such absence, or to give notice of dismissal on such a day that the notice will expire during such absence.

(2) The dismissal of a woman at any time within six months before she is delivered of a child, if the woman but for such dismissal would have been entitled to maternity benefit under this Act, shall not have the effect of depriving her of that maternity benefit if the Chief Inspector is satisfied that her dismissal was without sufficient cause.

Power of Chief Inspector or Inspector to direct payments to be made.

11. (1) Any woman claiming that maternity benefit to which she is entitled under this Act and any person claiming that a payment due under sub-section (2) of section 9 is improperly withheld may make a complaint to the Chief Inspector or any Inspector.

(2) On receipt of such complaint or on his own motion without any such complaint being made, the Chief Inspector or Inspector may make inquiry or cause an inquiry to be made, and if satisfied that a payment has been wrongfully withheld may direct the payment to be made in accordance with his orders.

Penalty for contravention of Act by a woman.

12. Any woman who does any work for which she receives payment in cash or kind after she has been permitted under sub-section (1) of section 4 to absent herself from work, or who engages in employment in any mine in contravention of section 3, shall be punishable with fine which may extend to ten rupees, and, if she is entitled to maternity benefit under this Act, shall forfeit her right to any maternity benefit not already paid to her.

Penalty for contravention of Act by owner or manager.

13. (1) Any owner or manager of a mine, who contravenes any provision of this Act for which no express penalty is provided, shall be punishable with fine which may extend to five hundred rupees.

(2) The Court imposing the fine may, if the contravention has resulted in depriving a woman of any maternity benefit due to her, order the whole or any part of the fine when paid to be applied in payment of compensation to the woman for any loss caused to her by the contravention of the provision on

account of which the fine has been imposed, and an Appellate Court or the High Court in exercise of its powers of revision may also make such order.

Cognisance of cases.

14. (1) No prosecution under this Act shall be instituted except by or with the sanction of the Chief Inspector.

(2) No Court inferior to that of a Magistrate of the first class shall try an offence punishable under this Act or any rule made thereunder.

(3) No Court shall take cognisance of an offence punishable under this Act or any rule made thereunder, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed:

Provided that in computing the said period of six months any time spent in obtaining the sanction of the Chief Inspector required by sub-section (1) shall be excluded.

Power of Central Government to make rules.

15. (1) The Central Government may, subject to the condition of previous publication, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) require the maintenance of registers and records for the purposes of this Act and prescribe the form thereof;

(*b*) prescribe the form of the notices referred to in section 4 and section 7, and require mines to supply copies thereof to women workers;

(*c*) regulate the examination of women under the proviso to sub-section (1) of section 4, and the grant of the certificates therein referred to;

(*d*) prescribe the nature of and the method of furnishing the proof referred to in section 7, section 8 and section 9;

(*e*) regulate the manner of applying for and paying maternity benefit;

(*f*) assign duties to, and regulate the powers of, the Chief Inspector and Inspectors, for the purposes of this Act.

(3) Any rule made under this section may provide that a contravention thereof shall be punishable with fine which may extend to fifty rupees.

Abstract of this Act and the rules made thereunder to be exhibited in mines.

16. (1) The manager of every mine in which women are employed shall cause an abstract in the local Indian language of the provisions of this Act and of the rules made thereunder to be exhibited in the mine in such manner that they may come to the notice of every woman employed in the mine.

(2) For any contravention of the provisions of this section the manager shall be punishable with fine which may extend to one hundred rupees.

Power of Central Government to exempt mines from operation of Act.

17. The Central Government may, by notification in the Official Gazette, exempt any mine or class of mines from the operation of this Act.

Act binding on Crown.

18. The provisions of this Act shall be binding on the Crown.

THE MORTGAGED ESTATES ADMINISTRATION ACT (XXIII OF 1855).[1]

Short title given, Act XIV of 1897.

Rep. in pt. Act XVI of 1874.

Rep. (except as to descents or devises occurring or made before 1st January, 1866), Act VIII of 1868.

Declared in force throughout B.I., except as as regarts the Schedulen Districts, Act XV of 1874, S. 3.

LEG. REF.

[1] SHORT TITLE.—"The Mortgaged Estates Administration Act, 1855". *See* the Indian Short Titles Act (XIV of 1897).

[13th *August*, 1855.

An Act to amend the Law relating to the administration of the Estates of deceased persons charged with money by way of mortgage.

Preamble.

WHEREAS it is expedient that the law, under which the real and personal assets of deceased persons subject to the English law are administered, should be amended; It is enacted as follows:—

Heir or devisee of land not to claim payment of mortgage out of personality.

1. [2][* *] If any person shall die seised of, or entitled to, any estate or interest in any land or other hereditaments within [3][British India] which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage-debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage-debts with which the same shall be charged, every part thereof, according to its value bearing a proportionate part of the mortgage-debts charged on the whole thereof:

Proviso as to right of mortgagee to satisfaction, from personal assets.

Provided always that nothing herein contained shall affect or diminish any right of the mortgagee of such lands or hereditaments to obtain full payment or satisfaction of his mortgaged-debt, either out of the personal estate of the person so dying as aforesaid or otherwise:

Proviso as to claims made prior to this Act.

Provided also that nothing herein contained shall affect the rights of any person claiming under, or by virtue of any will, deed or document, already made, or to be made, before this Act shall have come into operation.

THE MOTOR VEHICLES ACT (VIII OF 1914).

[N.B.—*As this Act has been included with full annotations in the Criminal Court Manual* (1941 *Edition*) *the same has not been reproduced here.*]

THE MULTI-UNIT CO-OPERATIVE SOCIETIES ACT (VI OF 1942).

STATEMENT OF OBJECTS AND REASONS.

PREFATORY NOTE.—"Multi-unit co-operative societies, that is to say co-operative societies operating over more than one province, are 'corporations' within the meaning of entry 33 in List I of the Seventh Schedule of the Government of India Act, 1935, and the legislative and executive jurisdiction in respect of their incorporation, regulation and winding up is exclusively Central. Any provisions of the Co-operative Societies Act, 1912, or of the Provincial Co-operative Acts which might purport to vest executive jurisdiction in respect of such multi-unit societies in provinces can have no valid basis. It is, therefore, necessary to legislate for the incorporation, regulation and winding up of co-operative societies operating over more than one province.

2. The Bill applies to the multi-unit societies the existing legislation applicable to societies operating within a single province. It will apply to all multi-unit societies irrespective of the nature of their work. Provision has been made to enable the Government to appoint a Central Registrar but as the number of multi-unit societies in existence at present is small, it is proposed to entrust the functions of the Central Registrar to the

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LEG. REF.

Based on the Real Estates Charges Act, 1854 (17 and 18 Vict., c. 113). Repealed, except as to descents or devises occurring or made before 1st January, 1866, by the Repealing Act (VIII of 1868).

[2] The words "After this Act shall have come into operation" rep. by Act XVI of 1874.

[3] Substituted by A.O., 1937, "the territories in the possession of, and under the Government of the East India Company."

Provincial Registrars until the growth in the numbers of multi-unit societies makes the appointment of a Central Registrar necessary. Powers of inspection and audit of the branch offices of a multi-unit society will also be vested in the Registrars of the Provinces where such branch offices are situated, and they will also have the power to call for such returns and information from the branches of multi-unit societies as they can call for from single-unit societies registered by them."

[2nd March, 1942.

An Act to provide for the incorporation, regulation and winding up of co-operative societies with objects not confined to one province).

WHEREAS it is expedient to provide for the incorporation, regulation and winding up of co-operative societies with objects not confined to one province; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE MULTI-UNIT CO-OPERATIVE SOCIETIES ACT, 1942.

(2) It extends to the whole of British India.

(3) It applies to all co-operative societies with objects not confined to one province incorporated before the commencement of this Act under the Co-operative Societies Act, 1912, or under any Act relating to co-operative societies in force in any province, and to all co-operative societies with objects not confined to one province to be incorporated after the commencement of this Act.

Co-operative societies to which this Act applies registered before commencement of this Act.

2. (1) A co-operative society to which this Act applies which has been registered in any province under the law relating to co-operative societies in force in that province shall be deemed in any other province to which its objects extend to be duly registered in that other province under the law there in force relating to co-operative Societies, but shall, save as provided in sub-sections (2) and (3), be subject for all the purposes of registration, control and dissolution to the law relating to co-operative societies in force for the time being in the province in which it is actually registered.

(2) Where any such co-operative society has established before the commencement of this Act or establishes after the commencement of this Act a branch or place of business in a province other than that in which it is actually registered, it shall, within six months from the commencement of this Act or the date of establishment of the branch or place of business, as the case may be, furnish to the Registrar of Co-operative Societies of the province in which such branch or place of business is situated a copy of its registered by-laws, and shall at any time it is required to do so by the said Registrar submit any returns and supply any information which the said Registrar might require to be submitted or supplied to him by a co-operative society actually registered in that province.

(3) The Registrar of Co-operative Societies of the province in which a branch or place of business such as is referred to in sub-section (2) is situated may exercise in respect of that branch or place of business any powers of audit and of inspection which he might exercise in respect of a co-operative society actually registered in the province.

Co-operative societies to which this Act applies registered after commencement of this Act.

3. (1) A society which might, if its objects were confined to one province be registered as a co-operative society in any province under the law relating to co-operative societies in force in that province, shall, notwithstanding that its objects are not confined to the province in which its principal place of business is to be situated, be deemed for the purposes of registration as a co-operative society to be situated wholly in that province, and may be registered by the Registrar of Co-operative Societies

of that province in accordance with the law relating to co-operative societies for the time being in force in that province, and if so registered shall be deemed in any other province to which its objects extend to be duly registered in that other province under the law there in force relating to co-operative societies but shall, save as provided in sub-sections (2) and (3), be subject for all the purposes of registration, control and dissolution to the law relating to co-operative societies in force for the time being in the province in which it is actually registered.

(2) Where any such co-operative society establishes a branch or place of business in a province other than that in which it is actually registered, it shall within six months from the date of establishment of the branch or place of business furnish to the Registrar of Co-operative Societies of the province in which such branch or place of business is situated a copy of its registered by-laws, and shall at any time it is required to do so by the said Registrar submit any returns and supply any information which the said Registrar might require to be submitted or supplied to him by a co-operative society actually registered in that province.

(3) The Registrar of Co-operative Societies of the province in which a branch or place of business such as is referred to in sub-section (2) is situated may exercise in respect of that branch or place of business any powers of audit and of inspection which he might exercise in respect of a co-operative society actually registered in that province.

Appointment and powers of Central Registrar of Co-operative Societies.

4. (1) The Central Government may, if it thinks fit, appoint a Central Registrar of Co-operative Societies.

(2) The Central Registrar of Co-operative Societies, if appointed, shall exercise in respect of any co-operative society to which this Act applies, to the exclusion of Provincial Registrars, the powers and functions exercisable by the Registrar of Co-operative Societies of the province in which such society is actually registered.

Penalty for failure to furnish information required under this Act.

5. If any co-operative society fails to furnish the information which it is required to furnish by or under sub-section (2) of section 2 or sub-section (2) of section 3, or to submit any return required to be submitted under either of those sub-sections, the society, and any officer or member of the society responsible for the failure, shall each liable to fine which may extend to fifty rupees, and the registration of the society may, at the discretion of the Registrar of Co-operative Societies of the province in which the society is actually registered, be cancelled.

Power of Central Government to make rules.

6. The Central Government may, by notification in the Official Gazette, make rules for carrying into effect the provisions of this Act.

THE MUNICIPAL TAXATION ACT (XI OF 1881).[1]

Year.	No.	Short title.	Amendments.
1881	XI	The Municipal Taxation Act.	Repealed in part X of 1914; X of 1927; Am., XXXV of 1934; *see* XIII of 1889, S. 20.

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1880, P. V., p. 193; for Proceedings in Council, see *ibid.*, Supplement, pp. 904 and 915 and *ibid.*, 1881; Supplement, p. 250.

[25*th February*, 1881.

An Act to give power to prohibit the levy of Municipal taxes in certain cases.

Preamble.

WHEREAS it is expedient to empower the Governor-General in Council to prohibit, in certain cases, the levy of municipal taxes payable by the persons in the military [2][naval] [3][or air force] service or by the Secretary of State for India in Council; It is hereby enacted as follows:

Short title.

1. This Act may be called THE MUNICIPAL TAXATION ACT, 1881.

Local extent.

It extends to the whole of British India;

[3][* * *]

"Municipal committee", defined.

2. In this Act "Municipal Committee" includes a Municipal Corporation or a body of Municipal Commissioners constituted by or under the provisions of any enactment for the time being in force.

Power to prohibit levy of tax.

3. Notwithstanding anything contained in any enactment for the time being in force, the Central Government may, by an order in writing, prohibit the levy by a Municipal Committee of any specified tax—

(*a*) payable by any person subject to the [4][Army Act, the Indian Army Act, 1911,] [1][the Naval Discipline Act; or that Act as modified by the Indian Navy (Discipline) Act, 1934] [5][the Air Force Act or the Indian Air Force Act, 1932] who is compelled by the exigencies of military [1][, naval] [6][or air force] duty to reside within the limits of a municipality;

[7][* * * *]

The Central Government may, by a like order, rescind any such prohibition.

Power of Provincial Government to prohibit levy of taxes on it.

[8][3-A. Notwithstanding anything in any enactment for the time being in force, the Proviccial Government may by an order in writing prohibit the levy by a Municipal Committee of any specified tax payable by the Provincial Government and may by a like order rescind any such prohibition.]

Central Government to pay taxes referred to in section 3.

4. So long as any order made under section 3, prohibiting the levy of a tax on any person mentioned in [9][* * * *] that section, remains in force, the [10][Central Government] shall be liable to pay to the Municipal Committee mentioned in the order the amount which otherwise would have been payable to such Committee by such person:

Provided that the [11][Central Government] shall not be liable to pay any sum in respect of any horse which such person is bound, by the regulations of the service to which he belongs, to keep.

5. So long as any order made under [12][section 3-A] prohibiting the levy of

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NOTES.

[1] Inserted by Act XXXV of 1934, S. 2 and Sch. I.

[2] Inserted by Act X of 1927, S. 2 and Sch. I.

[3] Repealed by Act X of 1914.

[4] Substituted for "Army Discipline and Regulation Act, 1879, or the Indian Articles of War" by Act X of 1927, S. 2 and Sch. I.

[5] Substituted by Act XIV of 1932.

[6] Inserted by Act X of 1925.

[7] The words "or (*b*) payable by the Secretary of State for India in Council" omitted by A.O., 1937.

[8] Inserted by *ibid*.

[9] The words "clause (*a*) of" omitted by *ibid*.

[10] Substituted for "Secretary of State for India in Council" by *ibid*.

[11] Substituted for "said Secretary of State in Council" by *ibid*.

[12] Substituted for "section 3" by *ibid*.

Payments to be made in lieu of taxes referred to in section 3-A.

any tax payable by the [1][Provincial Government], remains in force, the said [1][Provincial Government] shall be liable to pay to the Municipal Committee, in lieu of such tax, such sums (if any) as an officer from time to time appointed in this behalf, by the Provincial Government may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable.

Decision of questions arising under this Act.

6. If any question arises whether any duty is military [2][, naval] [3][or air force] duty within the meaning of this Act, the decision of the Central Government thereon shall be conclusive.

If any question arises whether any person is compelled as aforesaid to reside within the limits of a municipality or is bound as aforesaid to keep any horse, the decision thereon of such authority as the Central Government may from time to time, appoint in this behalf shall be conclusive.

THE MUSLIM MARRIAGE DISSOLUTION ACT (1939).

See UNDER DISSOLUTION OF MUSLIM MARRIAGE ACT (VIII OF 1939) at p. 2246. *Supra.*

THE MUSLIM PERSONAL LAW (*SHARIAT*) APPLICATION ACT (XXVI OF 1937).

[*Am., Act VIII of* 1939.]

[*7th October*, 1937.

An Act to make provision for the application of the Muslim Personal Law (Shariat) *to Muslims in British India.*

WHEREAS it is expedient to make provision for the application of the Muslim Personal Law (*Shariat*) to Muslims in British India; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937.

(2) It extends to the whole of British India excluding the North-West Frontier Province.

Application of Personal Law to Muslims.

2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land), regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *taluq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).

Power to make a declaration.

3. (1) Any person who satisfies the prescribed authority—

(*a*) that he is a Muslim, and

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Inserted by Act XXXV of 1934, S. 2 and Sch.

[3] Inserted by X of 1927, S. 2 and Sch. I.

NOTES.

Sec. 1.—The Muslim Personal Law Application Act, 1937, cancelled the provisions of S. 4 of the Ajmer Regulation of 1877. This cancellation will however not affect the subject-matter of suits instituted before the date of the enactment of that Act (*i.e.*) in 1937. The result is that suits instituted before 1937 must be decided under the provisions of the Regulation of 1877. 1940 A.M. L.J. 9.

Sec. 2.—The effect of S. 2 of the Shariat (*b*) that he is competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872, and

(*c*) that he is a resident of British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same appeal to such officer as the Provincial Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Rule-making Power.

4. (1) The Provincial Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

(*a*) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(*b*) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

Dissolution of marriage by Court in certain circumstances.

5. The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (*Shariat*). [Repealed by Act VIII of 1939].

Repeals.

6. Provisions of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:—

(1) S. 26 of the Bombay Regulation IV of 1827;
(2) S. 16 of the Madras Civil Courts Act, 1873;
(3) S. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887;
(4) S. 3 of the Oudh Laws Act, 1876;
(5) S. 5 of the Punjab Laws Act, 1872;
(6) S. 5 of the Central Provinces Laws Act, 1875; and
(7) S. 4 of the Ajmere Laws Regulation, 1877.

NOTES.

Act is to make the Mussalman Law expressly applicable to subjects which under the terms of previous Acts and Regulations had to be decided on principles of equity and good conscience. That section can have no effect in regard to decisions which expressly interpret Mussalman Law so as to substitute for them the views of Muslim jurists on the same point. I.L.R. (1940) 2 Cal. 464=44 C.W.N. 974=1940 Cal. 501.

Sec. 5.—A petition under S. 5 (now repealed) which was pending before the District Judge on the date when the repealing Act of 1939 came into force does not automatically lapse, and a final order passed by him on that petition after the repeal of the Act is not, therefore, *ultra vires*. There being no provision in the repealing Act of 1939 affecting proceedings which had been initated under Act of 1937 when it was in force and were pending at the time of its repeal, the matter is governed by S. 6 (*e*) of the General Clauses Act. I.L.R. (1941) Lah. 773=43 P.L.R. 103=1941 Lah. 175.

THE MUSSALMAN WAKF VALIDATING ACT (VI OF 1913).[1]

Year.	No.	Short title.	Amendment.
1913	VI	The Mussalman Wakf Validating Act.	See XXXII of 1930.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—

The object of this Bill is to remove disabilities and great hardship that has been created by the recent decisions of the Privy Council in *Abdul Fata Mohamed Ishak and others* v. *Russoway Dhur Chowdhury and others* (L.R. 22 Ind. App. 76) and other cases. The power of a Mussalman to make a settlement for or in favour of his family, children and descendants or what is known as *wakf-alal-aulad* in the Mussalman Law, is paralysed.

In the case above cited it was held that under Mussalman Law, a perpetual family settlement expressly made as wakf is not legal and valid merely because there is an ultimate gift to the poor and it confirmed the decision in *Ashunulla Chowdhury* v. *Amarchand Khundu,* reported in L.R. 17 Ind. App. 37, the principle of which was approved in a subsequent case of *Abdul Gafur* v. *Nizamudin* (L.R. 19 Ind. App. 170) where it was laid down that a gift is not good as wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other.

The decision does not fix any limit of time, it simply says "some period of time or other". It does not define what is "substantial dedication". Thus it introduces the greatest uncertainty in the law, and is generally opposed to the true principles and correct exposition of the Mussalman jurisprudence. The Bill is intended only to reproduce the Mussalman Law of *Wakf-alal-aulad* in a codified form with certain safeguards for the authenticity of the *wakf-nama* and for prevention of fraud upon creditors or otherwise.

It is not intended to codify or define the general law of Wakf which must be governed by the Mussalman Law. The Bill is a simple one and the important provisions are as follows:—

Clause 3.—Defines the power of a person professing Mussalman faith to create wakf.

Clauses 4 *and* 5.—Are intended to secure authenticity of *Wakf-nama* and prevent fraud upon creditors or otherwise.

Clause 10.—Deals with testamentary wakf.

Clause 11.—Deals with registration of wills and empowers the persons mentioned therein to have the will registered.

(See *Fort St. George Gazette,* Pt. III, 28th March, 1911, p. 240.)
[*See* Act XXXII of 1930.]

[*7th March,* 1913.

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

WHEREAS doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MUSSALMAN WAKF VALIDATING ACT, 1913.

(2) It extends to the whole of British India.

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India,* 1911, Pt. V; p. 107; for Report of Select Committee, see *ibid.*, 1913, Pt. V, p. 39; and for Proceedings in Council see *ibid.*, 1911, Pt. VI, p. 402, and *ibid.* Pt. VI, pp. 29, 65 and 147.

NOTES.

Sec. 1.—The Mussalman Wakf Validating Act is not retrospective in its effect. 43 M.L.J. 385=40 Cal. 820=49 I.A. 153 (P.C.);53 M.L.J. 166 (P.C.). *See also* 50 I.C. 77=6 O.L.J. 80; 55 C. 448=105 I.C. 647 =1928 C. 130; 39 B. 563; 24 C.W.N. 18; 19 C.W.N. 967=52 I.C. 701=43 C. 158; 44 A. 1; 27 I.C. 96=19 C.W.N. 76. The Act merely defines what is valid wakf but it does not purport to deal with the validity or otherwise of wakfs, the objects of which are indefinite or uncertain. 130 I.C. 556= 1931 S. 75. The Act of 1913 was intended to expand the law relating to the creation of a wakf and not to restrict it and a wakf which would have been considered a good

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Wakf" means the permanant dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi School of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

NOTES.

wakf before the Act was passed could not possibly be considered a bad wakf owing to anything contained in the Act. 4 Luck. 101=1929 O. 25. The Mussalman Wakf Validating Act of 1913 had no retrospective effect and it was only by the later Act of 1930 that it was made to apply to wakfs created before 1913 and then only if any right, title, obligation or liability already existing was not affected. A mortgage created before 1930 cannot, therefore, be affected by these Acts. 1938 O.W.N. 67=1938 Oudh 69. If there can be a valid wakf subsequent to the Mussalman Wakf Validating Act apart from the provisions of the Act, where the wakf makes provision for the family of the wakf then the test to be applied to ascertain its validity would be the same as that applied to cases decided before Act VI of 1913, namely, that if the effect of the deed was to give the property substantially to charitable uses it would be valid, but if the effect of the deed was to give the property in substance to the settlor's family then it would be invalid under Mahomedan law. 1940 A.L.J. 504=1940 A.W.R. (H. C.) 429=1940 All. 462. The Wakf Validating Act allows the settlement of properties in perpetuity in favour of the family, children or descendants of a person belonging to the Mussalman faith. 112 I.C. 623 (2)=1929 A. 180. Under the Act, where a dedication is made in favour of one's own descendants, generation after generation, it is not necessary that there should be an immediate or concurrent gift in favour of religious or charitable object. It is enough if there is an ultimate gift in favour of such objects as are considered pious, religious, charitable or meritorious under Mahomedan Law. 112 I.C. 623 (2)=1929 A. 180. The Mussalman Wakf Act, 1923, applies to such wakfs as are defined in S. 2 (*e*) of that Act and does not apply to such other wakfs as are expressly excluded from the operation of the definition. The exception covers a wakf such as is described in S. 3 of the Mussalman Wakf and Validating Act (1913), under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants. 7 O.W.N. 986 =1930 O. 509. An illusory charitable gift made before the Act is void. 50 I.C. 77 =6 O.L.J. 80. A trust for slaves and dependants is not within the terms of the Wakf Validating Act, VI of 1913 or Act XXXII of 1930 giving retrospective effect to the earlier Act. 59 I.A. 74=34 Bom. L.R. 510=62 M.L.J. 371 (P. C.). The fact that a wakf is made under Act VI of 1913 does not exclude the principles of Muhammadan Law from application. 16 L. 432. The ultimate gift to religious or charitable purposes must be implied from the terms of the document and cannot be implied from the mere fact that the testator was purporting to make a wakf. Where a settlor directed that the dwelling-house should be used by himself and his heirs and as regards income from the properties, he directed that a specified fraction should be spent on charity, the remainder being spent on himself and his heirs, but there was no provision as to the destination of the income after the failure of heirs, *held,* that the wakf was invalid both under the Mahomedan Law and under the Mussalman Wakf Validating Act. 60 C. 901=37 C.W.N. 741=1933 C. 736.

Sec. 2.—Mere use of the word "wakf" in a deed after Act VI of 1913 cannot necessarily imply a dedication to the poor and the use of the word will not operate to make the deed a valid dedication in law. The ultimate object of the wakf should be implied by use of proper words. It must contain an implied reservation that the ultimate benefit from property should go for a religious, pious, charitable purpose of a permanent character. 52 A. 748=1930 A. 837 =1930 A.L.J. 978. *See also* 8 O.W.N. 1302.

Sec. 3.—As to applicability of section, *see* 1928 N. 10. *See also* 37 C.W.N. 395 [where it was held that the wakf did not come under this section but came within the exception of S. 2 (*e*) of the Act of 1923]. In order that a beneficiary under a wakf can claim the protection under the Mussalman Wakf Validating Act of 1913, he must establish that he falls in one of the three categories mentioned in the Act, *viz.,* (1) the family of the settlor; (2) the children of the settlor; (3) the descendants of the settlor. "Family" in S. 3 of the Act would include (1) all those persons residing in

NOTES.

the same house as the settlor and dependent upon him for maintenance and (2) all those connected with the settlor through a common progenitor or by ties of common lineage. 44 Bom.L.R. 256. *See also* 44 C. W. N. 974=1940 Cal. 501. Where the major portion of the income is dedicated by the deed of wakf to the upkeep of a mosque, and the allowance fixed for the daughter-in-law and her daughter has been given to them not as the wakif's heirs but as Mutawallis of the wakf property, so that the wakf cannot properly be said to be one for the maintenance and support of the wakif's family, the Mussalman Wakf Validating Act has no application, and the deed of wakf in question is not invalid owing to the provisions of that Act. 1936 O.W.N. 165=1936 O. 213 (F.B.). The provisions of Act VI of 1913 though in terms declaratory are not retrospective. 40 M. 116=32 M.L.J. 101=44 I.A. 21 (P. C.). (Affirming 34 M. 12=6 I.C. 1). The Act has no retrospective effect and solely refers to wakfs created after the Act. 39 B. 563=26 I.C. 906=16 Bom.L. R. 977. *See also* 53 M.L.J. 166 (P.C.). Act validates a trust only when the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. 105 I.C. 155. *See also* 93 I.C. 14=1926 A. 378. A wakf for the maintenance of the wakif's family is invalid, if there is no ultimate gift for a religious, pious or charitable purpose. I.L.R. (1940) 2 Cal. 189=71 C.L.J. 432=44 C.W.N. 718 =1940 Cal. 417. If the ultimate gift to the poor or to pious, religious and charitable purposes is postponed till after the extinction of the family, children or descendants of the wakif, the wakf would be valid although the ultimate gift to such purposes is remote. If such an ultimate gift is more remote, that is, if it is to take effect on the extinction of a more extended group of persons as for instance heirs how low so ever of the wakif, the dedication by way of wakf substantially for the maintenance of the wakif's family, children and descendants would not be valid under the Wakf Validating Act. For the body of the heirs would include even the distant kindred, most of whom would not be descendants how low so ever of the wakif and could not be regarded as members of his family. I.L.R. (1940) 2 Cal. 464=44 C.W.N. 974=1940 Cal. 501. *See also* 44 Bom.L.R. 256. A wakf which is against the Mahomedan Law of Inheritance and which excludes the principal heir is not invalid under S. 3 of the Act. The words "which in all other respects is in accordance with the provisions of Mussalman Law" in that section do not refer to the Law of Inheritance but the law of wakfs as governed by Mussalman Law. Further sub-cl. (*a*) allows a wakf for the maintenance and support wholly or partially of his family, children or descendants. The expression "family, children and descendants" does not mean the family or children or descendants as a class but may mean only some persons of a particular class. Under Mahomedan Law, a valid wakf can be created in favour only of some members of the family or some of the children or descendants, whether males or females and to the exclusion of others. I.L.R. (1938) Lah. 435=40 P.L.R. 220=(1938) Lah. 453. The maintenance and support of the family, children or descendants of the wakif, does not come within the phrase "other purpose recognised by Mussalman Law as pious" used in the proviso to S. 3 for maintenance of these persons or class of persons is expressly mentioned in the body of that section.. I.L.R. (1940) 2 Cal. 464=44 C.W.N. 974=1940 Cal. 501. The Mussalman Wakf Validating Act has not effected any change in the law. The proviso to S. 3 of the Act does not make valid a wakf which is religious and pious only without being also charitable. The object of the Act was to declare the rights of Mussalmans to make settlements of property by way of wakf in favour of their families, etc. 40 L.W. 806. A bequest "for charitable and religious purposes" is void for uncertainty. Both these objects are void for uncertainty individually as they are correlated with each other; even if one of them be held to be uncertain the entire wakf must fail and such bequests cannot be enforced by the Courts. 1935 L. 596. The executant of a wakfnama provided that the surplus income of certain properties should be utilized towards certain pious works towards the maintenance of a certain private tomb. There was a further clause that the settlor could make arrangement regarding the tank, gardens, etc., mentioned in the deed. *Held,* that there was an ultimate benefit for a pious or charitable purpose and that the dedication was valid. 133 I.C. 657=35 C. W.N. 1159. *Held,* also that the reservation clause regarding the tank, gardens, etc., did not affect the dedication (governing principles applicable to the construction of a wakfnama stated). Effect of use of the word 'wakf' indicated. *Ibid.* A wakf describing the ultimate object of the benefit as charitable purposes highly commendable according to 'Hanafi school' (*umur-i-kair men jo bamaujib mazab hanafia zeada munasib hun kharch hore*) is not valid according to Mussalman Wakf Validating Act unless the author of the wakf specifies a particular object and that particular object is recognized by the Mahomedan Law as religious, pious or charitable and is of a permanent character. 15 Luck. 586=1940 O. W. N. 689=1940 Oudh 324 (F.B.). *See also* 26 I.A. 71. But *see* 46 C.W.N. 561=1942 Cal. 180=74 C.L.J. 271; 1941 All. 235. The mere use of the word "wakf" in a deed after the passing of Act VI of 1913 cannot necessarily imply a dedication to the poor,

NOTES.

The ultimate object of the wakf has to be implied by use of other words. 1930 A. 837. The object of the proviso to S. 3 is that it should appear on the construction of the instrument of wakf that the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose recognised by the Mahomedan Law as a religious or charitable purpose of a permanent character. The word "wakf" therefore used in S. 3 should not only satisfy the definition of that word given in S. 2 but should also satisfy the limitations of the proviso before a wakf can be adjudged to be lawful within the meaning of the Act. 8 O.W.N. 1302. When a definite rule of Mahomedan Law is laid down by the legislature it must follow that it overruled certain interpretations which did not find favour with the legislature. 1930 A. 837. Where a person executed a *wakfnama* and placed the mutawalli in possession of certain properties, but the deed did not contain any direction for an ultimate benefit to religious or charitable purposes, *held,* that a valid wakf was not constituted. 129 I.C. 163=1931 O. 133. Where the annual profits of the wakf properties were Rs. 700 a year and after deducting the expenses which were specified in the wakfnama, the aggregate of which came to Rs. 225, the balance of Rs. 475 was to be spent by the mutwallis in equal proportions for the maintenance of themselves and their children, *held,* that that wakf was valid by virtue of cls. (*a*) and (*b*) of S. 3 of the Act provided the requirements of the proviso attached to the section were fulfilled. 8 O.W.N. 1302. Under the Act it is open to a Mussalman to create a wakf of property which would be perfectly valid, even although the income during his own lifetime was devoted entirely to his own support, and, so long as he remained alive; such a wakf would be perfectly valid even if he did not spend anything upon religious and charitable purposes, in his lifetime. 1927 O. 162. Where a man has set aside property with the directions that his expenditure upon religious and charitable objects shall be made from a portion of the income of the property and where it is admitted that he has expended sums upon religious and charitable objects, the only possible conclusion would be that he utilised a portion of the income at any rate for such objects. Under the Hanafi law this is sufficient. 4 O.W.N. 360=102 I.C. 77=1927 O. 162. The Act is not purely a declaratory statute and is not retrospective in its operation. A wakf invalid in its inception is not validated by the subsequent passing of the Act. 53 I.C. 764=24 C.W.N. 18. A *wakfnama* though not governed by the Act will be valid if the dominating purpose and intention of the grantor was a charitable purpose and the secondary and subsidiary object was to secure for his daughters any surplus that might remain after defraying the expenses. 41 I.C. 684. The expression *"family"* includes only those persons residing in the house of the donor for whose maintenance, the donor is responsible, and consequently remote cousins in the fourth and fifth degree do not come within the term. 13 O. & A.L.R. 896. A wakf may be validly created in favour of certain members of the family to the exclusion of others. Considerations of expediency cannot prevail with the Court to introduce words into a section which are not there. The ancient Mussalman text-writers do not discountenance the idea of a settlement in favour of some only of a class, though it may be at variance with the principles of the law of inheritance. 125 I.C. 33=1930 S. 318. A daughter-in-law living in the same house as the settlor and maintained by him is undoubtedly a member of the family of the settlor. 1930 A.L.J. 109=1930 A. 169=51 A. 40. Where the executant of a wakfnama provided that "religious and charitable objects should continue to be performed permanently and in perpetuity so that they may benefit my soul," *held,* that the wakf satisfied the requirements of the proviso to S. 3, even though there was no specification in the deed itself of such religious and charitable objects. 8 O.W.N. 1302. *A* executed a *wakfnama* in which he made provision out of his property for the maintenance of his deceased brother's wife and another deceased brother's children. The provision was challenged as invalid as being in contravention of S. 3 (*a*) of the Act. Per *Agha Haidar, J.—Held,* that the deceased brother's son comes within the meaning of the word "family," as used in S. 3 (*a*) of the Act. 11 Lah.L.J. 404=1929 L. 721. The word "family," in S. 3 (*a*) was intended to be used in a very large and extensive sense. Technically the word "family" may be taken to mean the collective body of persons who live in one house and under one head or manager; and includes within its fold a household consisting of parents, children and servants and, as the case may be, lodgers or boarders. Popularly however the term indicates persons descended from one common progenitor and having a common lineage. The nephews of the settlor are in this sense the members of his family. It could never have been the object of the legislature to exclude persons who were related by blood, merely by reason of the fact that they did not reside in the house of the settlor or that the settlor was not normally responsible for their maintenance. 1930 A.L.J. 109=52 A. 368=1930 A. 169; 51 A. 40; 138 I.C. 616 (A.). "Family" as including non-resident relative—Provision in deed for maintenance of such persons—Whether renders deed invalid. *See* 4 Luck. 101=1929 O. 25. Where the author of a wakf does not divest himself of the property, the wakf is not valid. In the absence of an express reservation of any ultimate benefit to the poor in a wakf, no (*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

NOTES.

such final reservation can be implied on a failure of heirs of the donor. 10 O. & A.L.R. 896. The word "descendants" in S. 3, cl. (*a*) includes persons descended from the settlor both in the male and in the female line. The descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from its purview. 1930 A.L.J. 109=123 I.C. 369=1930 A. 169. Under S. 3 (*b*) it is lawful for a person to create a wakf for the payment of his debts out of the rents and profits of the property dedicated. 67 I.C. 77=34 C.L.J. 444.

Sec. 3 (a): "FAMILY"—ADOPTED SON.—The word 'family' in S. 3 (*a*) is used by the Legislature in its broad popular sense so as to include all persons descended from a common progenitor. 1940 A.L.J. 399=1940 All. 383. From the fact that *M* was adopted by *A* who had executed a wakf and resided with him during his lifetime, he (*M*) must be held to be dependent relation of *A* and therefore comes within the definition of family in S. 3. 1935 L. 414. The word "family" as used in S. 3 (*a*) of the Act includes the brother or the descendants of the brother so as to entitle them to claim to be the subjects of a valid wakf. 1935 L. 251. The fact that a person cannot take benefit under the wakf on the ground that he is not a member of the family of the wakf, is not sufficient to set it aside in its entirety. 1935 L. 414.

Sec. 3, Proviso: SCOPE.—The proviso to S. 3 does not effect any change in the Muslim conception but simply states what the Muslim law is. The effect of that proviso must, therefore, be judged by the principles propounded by Muslim jurists. According to them there are two distinct principles: One is analogous to the *cypres* doctrine. The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakif, the usufruct is to be applied to the benefit of the poor. The proviso to S. 3 states that the ultimate benefit in a *wakf-alal-aulad* can also be impliedly reserved for the poor or for any purpose recognised by the Mussalman Law as religious, pious, or charitable purposes of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. If in the wakfnama the wakif designs the ultimate gift to "proper acts of charity", these words used in the wakfnama will *imply* a gift to the poor, which is an effective gift, and the wakf will comply with the provisions of the Act. Further, if the wakf deed manifests an overriding intention to give to charity in the contingency of the failure of the descendants of the wakif, that would call in the application of the *cypres* doctrine. Per *Khundkar, J.*—If the objects of the wakf are indicated with reasonable certainty, it is not necessary that they should be named. A gift for "Kar-i-khair" (works of charity) in a deed of wakf cannot be condemned as vague and indeterminate, as the objects of the donor's bounty are possible of ascertainment by reference to the principles of Mahomedan Law. Even if the expression "Kar-i-khair" does not indicate the objects of bounty intended by the wakif with sufficient certainty, the doctrine of *cypres* could be invoked. 74 C.L.J. 261=1942 Cal. 180=46 C.W.N. 561. *See also* 1940 Oudh 324 (F.B.); 1941 All. 235=I.L.R. (1941) All. 443. The proviso to S. 3 of the Mussalman Wakf Validating Act is imperative, and the absence of an express or implied provision for the ultimate reversion of the property to some charity makes the wakf absolutely invalid. 165 I.C. 515. The word "impliedly" in the proviso to S. 3 of Act VI of 1913 has not been defined anywhere; but it must mean that the reservation of the benefit for the poor, etc., can be indirectly inferred from the recitals in the deed coupled with surrounding circumstances. 1936 A.L.J. 231=1936 A. 404. But where a deed of wakf-alal-aulad contains no such indication and it is impossible to say that the wakf had any such purpose in view even as a remote possibility, and indeed where the wakf does not seem to have contemplated the extinction of the line of his descendants at all, it is difficult to say that any reservation of such benefit is implied. (*Ibid.*) A mere recital in the deed that the wakf-alal-aulad was being made in accordance with law, Act VI of 1913, does not imply that the requirements of that Act were fulfilled. A mere reference to the Act should not be considered sufficient as that Act refers to various purposes. (*Ibid.*) Where among other things a deed of wakf recited that 'if, may God forbid, there be extinction of my descendants, at any time, the amounts allotted above to my heirs, shall be utilised for some charitable purposes according to the scheme to be prepared by Court and the Court shall, in that case, have

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

THE MUSSALMAN WAKF VALIDATING ACT (XXXII OF 1930).

[25*th July*, 1930.

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

WHEREAS the Mussalman Wakf Validating Act, 1913, does not apply to wakfs created before its enactment;

AND WHEREAS it is expedient to validate such wakfs without infringing any rights contrary thereto which may have already accrued or been acquired; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MUSSALMAN WAKF VALIDATING ACT, 1930.

Act VI of 1913 to apply retrospectively.

2. The Mussalman Wakf Validating Act, 1913, shall be deemed to apply to wakfs created before its commencement:

Provided that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

NOTES.

power to utilise the money only for such *kare-i-khair* as would be correct and valid according to entire Mahomedan religion.' It was held that the words *kare-i-khair* were used in a larger sense so that money may be devoted not only to objects of *khairat* but for objects which might or might not be charitable and that the settlor deliberately used a wider language to give a greater discretion to the Court and to the mutwalli to administer the trust. It was held further that the condition laid down in the proviso to S. 3 of the Mussalman Wakf Validating Act had not been duly complied with and the wakf failed for uncertainty. I. L. R. (1941) All. 443=1941 A.L.J. 269=1941 O. A. (Supp.) 400=1941 All. 235.

IMPLIED RESERVATION OF ULTIMATE BENEFIT —"WAKF-FI-SABI-LILLAH" IN PERPETUITY.— The reservation of the ultimate benefit contemplated by the proviso to S. 3 of the Wakf Validating Act can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of wakf must depend on the intention of the wakf as disclosed by the deed. In a case where the words "wakf-fi-sabi-lillah" have been used and wakf has been created in perpetuity, and there is provision for the appointment of the mutawallis for all time to come, and a portion of the usufruct of the wakf property has been reserved for pious and charitable purposes, and the wakf had in contemplation the possible extinction of the line of his descendants who were to be the principal recipients of the profits of the wakf property, the irresistible conclusion is that the wakf intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso. 1935 A.L.J. 647=1935 A. 616. The performance of *fateha* ceremonies is a 'religious, pious or charitable purpose' within the meaning of the proviso to S. 3. 1940 A.L. J. 399=1940 A.W.R. (H.C.) 352=1940 All. 383.

Secs. 3 and 4.—Neither of Ss. 3 and 4 make the Act retrospective in its operation; consequently if a wakf created before the passing of the Act was illusory and therefore invalid in the eye of the Mahomedan Law, it would not be validated by reason of any retrospective operation of that Act. 41 A. 1=48 I.C. 94 (2)=16 A.L.J. 841.

Secs. 3 and 5.—A wakf does not become void merely because the wakf appointed a minor as the first mutawalli. 26 A.L. J. 748. *See also* 50 A. 830=113 I.C. 723.

Sec. 4: WAKF—VALIDITY—PROVISION REGARDING RESIDENCE OF FAMILY.—Where the primary object of the testator was to create a wakf for charitable and religious purposes, a provision regarding the residence of the family does not invalidate wakf. 1935 L. 251.

Sec. 1.—*See* 1938 Oudh 69 cited under Mussalman Wakf Validating Act VI of 1913.

THE MUSSALMAN WAKF ACT (XLII OF 1923).

Year.	No.	Short title.	Amendment.
1923	XLII	The Mussalman Wakf Act.	Sections 2 to 13 came into force in the Madras Presidency on 1st July, 1931.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

"For several years past, there has been a growing feeling amongst the Muhammadan community throughout the country, that the numerous endowments which have been made or are being made daily by pious and public spirited Muhammadans are being wasted or systematically misappropriated by those into whose hands the trust may have come in course of time. Instances of such misuse of trust property are unfortunately so very common that wakf endowment has now come to be regarded by the public as only a clever device to tie up property in order to defeat creditors and generally to evade the law under the cloak of a plausible dedication to the Almighty. In some cases the mutwallis are persons who are utterly unfit to carry on the administration of the Wakf and who, by their moral delinquencies, bring discredit not merely on the endowment but on the community itself. It is believed that the feeling is unanimous that some steps should be taken in order that incompetent and unscrupulous mutwallis may be checked in their career of waste and mismanagement, and that the endowments themselves may be appropriated to the purposes for which they had been originally dedicated.

In some cases difficulties have arisen in finding out whether any particular properties are really subject to wakf or not. There are numerous wakf properties all over the country unknown to the public which the mutwallis are treating as their own private property and are dealing with them in any way they think fit or necessary. It therefore seems that there should be a system of compulsory registration requiring a mutwalli to notify to some responsible officer not merely about the fact of the wakf, of which he is the mutwalli but also the nature and extent and other incidents of the endowment. Further, even where a wakf is well-known and mutwalli is obviously thoroughly incompetent to carry on his duties, the public find a difficulty in instituting suits to remove him from his post by reason of the cumbrous procedure laid down in the Code of Civil Procedure. It is with a view to facilitate the institution of such suits that a provision has been made in this Bill. Lastly, there appears to be a general consensus of opinion amongst the Muhammadans throughout the country that there should be some responsible officers who may go about and find for themselves whether the various wakf properties scattered throughout the country are being properly managed or not. It is not intended that Government should be called upon to bear the burden of appointing such an officer or his staff, and a provision has therefore been made in the Bill authorising the Central Committee (to be appointed in pursuance of the provisions of the Bill) to levy a rateable contribution from the mutwallis for the purpose of meeting the cost of entertaining such an officer and his staff.

The sub-joined notes on the more important clauses of the Bill amplify the objects and reasons of the Bill:—

NOTES ON CLAUSES.

1. *Clause* 3.—This provision is similar to the provision for the maintenance of Registers under the Land Registration Act, 1876 (Bengal Act VII of 1876), and other Acts.

2. *Clause* 4.—This provision is similar to the one for the compulsory registration and mutation of names of proprietors under the Land Registration Act, 1876.

3. *Clause* 11.—This provision is intended to compel mutwallis to keep regular accounts and to ensure compulsory publication of such accounts, as there is reason to believe that in numerous cases mutwallis do not keep any proper accounts at all. It is hoped that this system of compelling mutwallis to keep and publish accounts will be a wholesome check on waste and mismanagement.

4. *Clause* 13.—The provision is meant to give the accounts full publicity, so that any member of the public may know how things are going on with regard to the various endowments.

5. *Clause* 16.—The idea as to the appointment of District Committees is taken from the provisions in this respect in the Bengal Charitable Endowments, Public Buildings and Escheats Regulation, 1810 (Bengal Regulation XIX of 1810), and it is expected that a system of having District Committees will afford a wholesome check on the proper management of wakfs in each district.

6. *Clauses* 20 to 23 are meant to simplify the procedure regarding the institution of suits for the removal of undesirable mutwallis and for the appointment of suitable mutwallis wherever necessary.

7. *Clause* 27.—It is expected that, in the case of every wakf after all the directions given in the wakf have been carried out, there will always be a net balance in the hands of

the mutwalli which may be utilized for various public purposes. The Bill therefore gives power to the Collector to realize such amounts from the mutwallis and place them at the disposal of the General Committee.

8. *Clause* 28.—The duties imposed on the Collector by the Bill are extremely heavy and onerous and it is not expected that the Collector will be able to attend to such duties conveniently or without detriment to his other legitimate duties. The Bill therefore gives power to the Collector to delegate his powers so far as he may think necessary to any person whom he thinks fit and proper to exercise such powers. At every district headquarters there always happen to be responsible Muhammadan officers who may very properly be called upon to devote a portion of their time to duties which are obviously of such great importance to the best interests of the Muhammadan community.

9. *Clause* 31.—Gives power to the Collector realize the duties due from mutwallis by the simple procedure laid down in the Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913). (See *Fort St. George Gazette*, Pt. III, dated 18th October, 1921, pp. 190 to 194; *Gazette of India*, 1921, Pt. V, p. 182. For Report of Sel. Com., see *ibid.*, 1923, Pt. V, p. 139.)

THE MUSSALMAN WAKF ACT (XLII OF 1923).

[*5th August*, 1923.

AnA Act to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties.

WHEREAS it is expedient to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties; It is hereby enacted as follows:—

Preliminary.

Short- title, extent and commencement.

1. (1) This Act may be called THE MUSSALMAN WAKF ACT, 1923;

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas;

(3) This section shall come into force[1] at once; and

LEG. REF.

[1] Sections 2 to 5 and 7 to 13 were brought into force in the Punjab with effect from the 14th May, 1924, see *Punjab Gazette*, 1924; Pt. I, p. 418.

Sections 2 to 13 were brought into force in the Presidency of Bombay including Sind from the first June, 1925, see *Bombay Govesnment Gazette*, 1925, Pt. I, p. 1414. All provisions of the Act were brought into force in Bihar and Orissa from the 3rd September, 1925, see *Bihar and Orissa Gazette*, 1925, Pt. II, p. 1192.

Sections 2 to 13 were brought into force in the Presidency of Bengal with certain modifications from the 1st June, 1927, see Notification No. 230, T.Mis., dated the 5th May, 1927, *Calcutta Gazette*, Pt. I; p. 1008.

Sections 2 to 13 were brought into force in Ajmer-Merwara from 1st February, 1928, *see Gazette of India*, 1928, Pt. II-A, p. 20.

Sections 2 to 5 and 7 to 13 were brought into force in the N.W.F.P. with effect from 24th February, 1928, see *N.W.F.P. Gazette*, 1928, Pt. I-A, 183.

NOTES.

Sec. 1.—If part of the purpose of a wakf is to provide for the wakf himself for any member of his family or his descendants, the provisions of the Act will not come into force till after the death of such persons. 170 I.C. 530=1937 O. W.N. 798=1937 Oudh 454. Where a plea is raised before a District Judge that the Mussalman Wakf Act is inapplicable to a particular wakf, the District Judge may refuse to decide it, but if he finds it convenient and desirable to determine the question on the materials before him, he is within his jurisdiction in doing so. I.L.R. (1940) N. 613=1940 N. L.J. 98=1940 Nag. 161. *See also* 1938 Pat. 137.

AS AMENDED BY BOMBAY ACT XVIII OF 1935—*Applicability to Bombay Presidency.* All that Bombay Act XVIII of 1935, amending Act XLII of 1923 did was to amend with the necessary sanction the Act of the Central legislature, and both must be read together and both apply to the Bombay Presidency. 191 I.C. 429=1940 Sind 219.

The absence of any provision as to appeal only indicates that the results of an inquiry under the Act are not intended to be final and conculsive. But if the requirements of S. 115, C. P. Code, are fulfilled, a revision from an order under the Act would lie to the High Court under that section. 9 O.W. N. 538=1932 O. 210. (F.B.), where it was admitted that there was a valid wakf and that respondents were the mutwallis thereof, but they only denied that the deed of endowment created any trust to which the Charitable and Religious Trusts Act of

(4) The [Provincial Government] may, by notification in the [Official Gazette, direct that the remaining provisions of this Act, or any of them which it may specify, shall come into force in the Province, or any specified part thereof, on such date as it may appoint in this behalf.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "benefit" does not include any benefit which a mutwalli is entitled to claim solely by reason of his being such mutwalli;

(*b*) "Court" means the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court subordinate to the High Court as the [Provincial Government] may, by notification in the [Official Gazette], designate in this behalf;

(*c*) "mutwalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a Court of competent jurisdiction to be mutwalli of a wakf, and includes a naib-mutwalli or other person appointed by a mutwalli to perform the duties of the mutwalli, and, save as otherwise provided in this Act, any person who is for the time being administering any wakf property;

(*d*) "prescribed" means prescribed by rules made under this Act; and

(*e*) "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.

NOTES.

1920 could be applicable, it does not deprive the District Judge of his jurisdiction to proceed under Act XLII of 1923.

Sec. 2. (b).—An application under S. 2 for registration of a wakf estate has to be presented in the Court of the District Judge which is the Court competent to entertain the application. The Court of an Additional District Judge is a Court different from that of the District Judge, but under S. 8 (2) of the Bengal, Agra and Assam Civil Courts Act, it is competent to the District Judge to transfer the application for registration of a wakf estate to the Additional District Judge and on such transfer the Additional District Judge has jurisdiction to deal with the matter. 1942 P.W.N. 94.

Sec. 2 (c).—A District Judge has no jurisdiction to pass an order appointing a mutwalli under S. 2(*c*) of the Act. 34 P. L.R. 81=1933 L. 27.

Sec. 2 (e).—"Wakf" as denfied by S. 2 (*e*) means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mahomedan Law as religious, pious or charitable. The purpose of benefiting Madressa is a purpose recognised as charitable by the Mahomedan Law. It is not however necessary that the dedication should be by a beneficial owner. There may be a dedication by a trustee as well, though of course he must keep within the terms of the trust. Where certain persons collect monies for the purpose of building a Madressa and then build the same, and the trustees purchase immovable property out of the funds of the Madressa and execute a declaration of trust admitting the purchase for the support of the Madressa and declaring that they hold the property upon trust, in substance for the Madressa; there is a good dedication for the purpose of a wakf. I.L.R. (1941) Bom. 328=43 Bom. L.R. 152=1941 Bom. 152. Where a testator by his will bequeathed the whole of his property owned and possessed by him on the date of the will and also property which he may acquire thereafter in favour of his two sons in equal shares, but no list of the property on which the bequest was to operate was attached to the will, and the testator further stated that there was some wakf property attached to the *imambara* of which he was a mutwalli and prescribed a scheme of succession to the office of mutwalli, but the recitals in the will neither fixed with any definiteness the property which was the subject-matter of the wakf, nor did they in any way indicate the terms of the nature of the wakf, and there was no evidence of any dedication of property or of any purpose for which the wakf was found. *Held*, that there was no evidence to justify the treatment of any property as wakf property within the meaning of that term as defined in the Mussalman Wakf Act, 1923: 7 O.W.N. 986=1930 O. 509. Some of the terms of a wakf were as follows: (1) as long as the founders live, they shall appropriate one-third of the pro-

Statements of Particulars.

Obligation to furnish particulars relating to wakf.

3. (1) Within six months from the commencement of this Act every mutwalli shall furnish to the Court within the local limits of whose jurisdiction the property of the wakf of which he is the mutwalli is situated, or to any one of two or more such Courts, a statement containing the following particulars, namely:—

(*a*) a description of the wakf property sufficient for the identification thereof;

(*b*) the gross annual income from such property;

(*c*) the gross amount of such income which has been collected during the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the wakf, whichever period is shorter;

(*d*) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the wakf property;

(*e*) an estimate of the expenses annually incurred in the realisation of the income of the wakf property, based on such details as are available of any such expenses incurred within the period to which the particulars under clause (*c*) relate;

(*f*) the amount set apart under the wakf for—

(i) the salary of the mutwalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes;

(iv) any other purposes; and

(*g*) any other particulars which may be prescribed.

(2) Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf or, if no such deed or instrument has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the mutwalli, of the origin, nature and objects of the wakf.

NOTES.

ceeds of the wakf properties themselves and apply two-thirds to other charities; (2) after their death, two-thirds of the wakf properties shall be enjoyed by their children and the remaining one-third should go to meet the charities; and (3) in the event of non-existence of any child begotten by the founder, such a person from among their relatives as may be most nearly related to them shall be appointed mutwalli and shall get Rs. 10 a month as a salary, shall live in their dwelling-house and shall appropriate the balance of the proceeds of the tanks and gardens left after defraying the expenses of persons attached to the Madrasha and Khanka. *Held*, that the wakf did not come under S. 3 of Act VI of 1913, but came within the exception of S. 2 (*e*) of the Act of 1923. 37 C. W.N. 395=60 C. 790=1933 C. 581.

Sec. 3.—If a mutwalli has complied with the provisions of S. 3, no question as to whether he denies the wakf or admits it can arise, because by his conduct in furnishing particulars of the wakf property, he must be deemed to have admitted the wakf and his own position as mutwalli. 1932 A. 362=54 A. 475.

Sec. 3 (2): INQUIRY UNDER—SCOPE OF.—Per *Hasan, C.J.*—The inquiry must, no doubt, be summary and will not be conclusive between the contending parties in any future controversy as regards the origin, nature and objects of the wakf but the Act does not exclude such inquiry altogether. 7 Luck. 601=1932 O. 210 (F.B.).

ACT (AS AMENDED BY BOMBAY ACT OF 1935), S. 3.—S. 3 of the Mussalman Wakf Act applies to any property of a wakf within the jurisdiction of the local Court. So that if one finds mutwalli with property within the local limits of the Small Causes Court at Bombay, it is clear that he has to furnish the required particulars, although other properties of the wakf may be situate, and those who benefit from the wakf may be resident outside Bombay or outside British India. I.L.R. (1941) Bom. 328=42 Cr.L.J. 517 =43 Bom.L.R. 152=1941 Bom. 152.

Secs. 3, 4 and 5.—The Court of District Judge has jurisdiction under the Mussalman Wakf Act, 1923, to take proceedings under the same Act, when the alleged wakf is not admitted or denied by the alleged mutwalli 7 Luck. 601=1932 O. 210 (F.B.). Per *Young, C. J.*—The Mussalman Wakf Act merely confers administrative powers upon the "Court". The object is to have on

(3) Where—

(*a*) a wakf is created after the commencement of this Act, or

(*b*) in the case of a wakf such as is described in section 3 of the Wakf Validating Act, 1913, the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder,

the statement referred to in sub-section (1) shall be furnished, in the case referred to in clause (*a*), within six months of the date on which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in clause (*b*), within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any such persons, as the case may be.

Publication of particulars and requisition of further particulars.

4. (1) When any statement has been furnished under section 3, the Court shall cause notice of the furnishing thereof to be affixed in some conspicuous place in the Court-house and to be published in such other manner, if any, as may be prescribed, and thereafter any person may apply to the Court by a petition in writing, accompanied by the prescribed fee, for the issue of an order requiring the mutwalli to furnish further particulars or documents.

(2) On such application being made, the Court may, after making such inquiry, if any, as it thinks fit, if it is of opinion that any further particulars or documents are necessary in order that full information may be obtained regarding the origin, nature or objects of the wakf or the condition or management of the wakf property, cause to be served on the mutwalli an order requiring him to furnish such particulars or documents within such time as the Court may direct in the order.

Statement of Accounts, and Audit.

Statement of accounts.

5. Within three months after the thirty-first day of March next following the date on which the statement referred to in section 3 has been furnished, and thereafter within three months of the thirty-first day of March in every year, every mutwalli shall prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, in such form and containing such particulars as may be prescribed, of all moneys received or expended by him on behalf of

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record full particulars of all wakf property and to enforce that the Mutwalli shall honestly carry out the provisions of the trust imposed upon him, and to have in a convenient place information available to the public, or to any beneficiary of the wakf, in order that they may see whether the wakf property is being properly administered and, if it is not, that any one may file an information against the Mutwalli so that the penalty imposed by S. 10 of the Act may be inflicted upon him. The "Court" is nowhere in the Act said to be acting in its judicial capacity. I.L.R. (1941) Lah. 395=43 P.L.R. 208=1941 Lah. 145 (F.B.).

Secs. 3, 9 and 10.—There is no jurisdiction conferred on the District Judge in the exercise of which a receiver can be appointed by him in a proceeding started on an application for direction on a mutwalli to file particulars and accounts contemplated by Act XLII of 1923. An order therefore appointing a receiver being without jurisdiction is liable to be set aside in revision, though no appeal lies against such an order. 165 I.C. 740=40 C.W.N. 1300=1936 C. 420.

Sec. 4.—Wakf partly public and partly private—Remedy against defaulting mutwalli—Mutwalli's failure to keep accounts and particulars—Effect of. *See* 4 Luck. 429=6 O.W.N. 316 (F.B.).

Sec. 5.—The Mussalman Wakf Act does not apply to a wakf which is a settlement partly for the benefit of poor relations and partly for the benefit of a section of the public belonging to the Shia community. 119 I.C. 365. S. 5 does not by itself contemplate the intervention of other persons for compelling the mutwalli to file his accounts except possibly as a mere reminder to the judge that the accounts have not been filed with a view to induce the Judge to take proceedings under S. 10. 52 A. 167=1930 the wakf of which he is the mutwalli during the period of twelve months ending on such thirty-first day of March or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the wakf:

Provided that the Court may, if it is satisfied that there is sufficient cause for so doing, extend the time allowed for the furnishing of any statement of accounts under this section.

Audit of accounts.

6. Every statement of accounts shall, before it is furnished to the Court under S. 5, be audited—

(*a*) in the case of a wakf the gross income of which during the year in question, after deduction of the land-revenue and cesses, if any, payable to the Government, exceeds two thousand rupees by a person who is the holder of a certificate granted by the [1][Central Government] under S. 144 of the Indian Companies Act, 1913, or is a member of any institution or association the members of which have been declared under that section to be entitled to act as auditors of companies throughout British India; or

(*b*) in the case of any other wakf, by any person authorized in this behalf by general or special order of the said Court.

LEG. REF.

[1] Substituted by A.O., 1937, for 'Local Government'.

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A. 81. On the wording of S. 5 there cannot be any offence under that section unless a statement has been delivered under S. 3 of the Act, S, 5 cannot come into operation unless S. 3 has been complied with. I.L.R. (1941) Bom. 328=43 Bom.L.R. 152=1941 Bom. 152.

Ss. 5 and 10: LIABILITY TO FURNISH ACCOUNTS—POWER OF DISTRICT JUDGE TO ADJUDICATE.—Apart from proceedings under S. 10 of the Wakf Act, there is no provision of law by which the District Judge can decide on merits the question as to the nature of the wakf or adjudicate upon the question whether a person is liable to furnish accounts under S. 5 of the Act. If the case falls under the Act, then S. 5 lays down a substantive law which makes it incumbent upon the mutawalli to file the statement as required by S. 5. There is provision in the Act by which he can ask the District Judge to adjudicate upon whether he is liable to furnish accounts under S. 5 or not. 1940 O.W.N. 598=1940 Oudh 813.

Mussalman Wakf (Bombay Amendment Act XIII of 1935):

Sec. 6-A.—A Court has to see that the law is enforced. When there is special order made apparently under S. 6-A of the Mussalman Wakf Act, as amended by Bombay Amendment Act of 1935, directing certain particulars and accounts to be delivered by a mutwalli of wakf, and that order is disobeyed, the mutwalli disobeying such order is on the face of it guilty of contempt of Court and that is a matter which the Court can deal with under the Contempt of Courts Act, 1926. 44 Bom.L.R. 231.

Secs. 6-C and 6-M.—The question whether certain property is wakf property is one of the matters which the Court can inquire into under S. 6-C of the Mussalman Wakf Act as amended by Bombay Amendment Act of 1935, but is not a matter which can be referred to the Wakf Committee under S. 6-M. The Court has therefore no jurisdiction to refer to the Wakf Committee for investigation and report the question whether a property is wakf property and is so for what purpose. 44 Bom.L.R. 231.

S. 6-D.—In the case of a wakf whose property is situate beyond the local limits of the jurisdiction of a District Court, the mutwallis cannot be called upon by that Court to contribute to the Wakf Administration Fund under the Mussalman Wakf (Bombay Amendment) Act of 1935. The only wakfs which can be called upon to make a contribution to that Fund are the wakfs to which under the pricipal Act (Mussalman Wakf Act of 1923) the Court directing a contribution to be made has jurisdiction. There is nothing in the Act which extends the jurisdiction of the Court to cases in which the mutwallis reside within the district or in which they apply the income within the district. The jurisdiction of the Court is confined entirely to cases in which the wakf property is situate within the limits of its jurisdiction. I.L.R. (1939) Bom. 611=41 Bom.L.R. 934=1939 Bom. 447.

Sec. 6-F.—Where a notice issued to an accused person under S. 10-B and R. 26 of the Mussalman Wakf Act as amended by the Bombay Amendment Act of 1935, does not specify that an inquiry under S. 6-C of the Act is being held, it is open to the accused to say that he had no idea that an inquiry under S. 6-C was being held, and the findings recorded by the Judge in respect of the matter cannot be considered to be final within the meaning of S. 6-F of the Act. 44 Bom. L.R. 231.

Sec. 6-M.—Where the Wakf Committee to which a matter has been referred by the

General Provisions.

Mutwalli entitled to pay costs of audit, etc., from wakf funds.

7. Notwithstanding anything contained in the deed or instrument creating any wakf, every mutwalli may pay from the income of the wakf property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under S. 3 or S. 4 or in respect of the preparation or audit of the annual accounts for the purposes of this Act.

Verification.

8. Every statement of particulars furnished under S. 3 or S. 4, and every statement of accounts furnished under S. 5, shall be written in the language of the Court to which it is furnished, and shall be verified in the manner provided in the Code of Civil Procedure, 1908, for the signing and verification of pleadings.

Inspection and copies.

9. Any person shall, with the permission of the Court and on payment of the prescribed fee, at any time at which the Court is open, be entitled to inspect in the prescribed manner, or to obtain a copy of, any statement of particulars or any document furnished to the Court under S. 3, or S. 4, or any statement of accounts furnished to it under S. 5, or any audit report made on an audit under S. 6.

Penalty.

Penalties.

10. Any person who is required by or under S. 3 or S. 4 to furnish a statement of particulars or any document relating to a wakf, or who is required by S. 5 to furnish a statement of accounts, shall, if he, without reasonable cause the burden of proving which shall be upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by S. 6, be punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees.

NOTES.

Court under S. 6-M of the Mussalman Wakf Act, as amended by the Bombay Amendment Act of 1935 makes a report to the Court after making an inquiry, and the matter again comes before the Court, it is not competent to the Judge to accept evidence which had been filed before the committee or documents which have not been proved. Evidence given before the committee is not made evidence in proceedings before the Court and the Judge should therefore hear the accused and take evidence himself. 44 Bom.L.R. 231.

Sec. 10.—*See also* 52 A. 167, cited under S. 5, *supra*. There is nothing in the Mussalman Wakf Act either in its preamble or in its provisions to indicate that it was the intention of the legislature that the Court designated to receive the particulars referred to in the Act is to enter into an elaborate inquiry as to the existence of the wakf or to determine the right to mutwalliship between rival claimants. By leaving the right to mutwalliship undecided, the object of the Act is not frustrated because Ss. 5 and 10 act as preventive against applications under S. 3 being made by persons who are not actually mutwallis. 19 Pat.L.T. 617=1938 Pat. 137. *See also* 1940 Nag. 161 Interpretation of the Statute. 9 O.W.N. 538=1932 O. 210=7 Luck. 601 (F.B.) It is necessary for a Court to decide whether the person who is alleged to be in default is or is not the mutwalli of a 'wakf' within the meaning of the Act. The mere fact that the party denies that he is mutwalli is immaterial if there is other evidence to show that he occupies that position. 1932 A.L.J. 266. An offence under the section is an offence within the meaning of S. 4 (*o*) of the Cr.P. Code, and consequently triable by a Magistrate and not by the District Judge. 22 S.L.R. 141=1928 S. 43. All that is needed to bring home an offence under S. 10 read with S. 3 to a defaulting mutwalli is to establish by evidence that he is a mutwalli in respect of property which is wakf within the meaning of the Act. Whether the character of the property as wakf and his own position as mutwalli are admitted or are established by evidence, if denied, S. 10 is equally applicable. 1932 A.L.J. 262=1932 A. 362. Under S. 10 the District Judge has

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the power to punish a mutwalli if, without any reasonable cause, the burden of proving which shall lie upon him, he fails to furnish statement of particulars of documents or statement of accounts. That is purely a penal proceeding in the course of which the judge may enquire as to whether a wakf is one to which the Act is applicable. But, till that stage arises, the judge cannot hold any such enquiry and compel a mutwalli, who is not admitting the applicability of the Act to file accounts. 52 A. 167=1930 A. 81. In case of prosecution under S. 10, the Magistrate has jurisdiction to proceed with the inquiry as to whether the property is wakf or not. On a prosecution under S. 10 it is clearly necessary in the first place for the prosecution to show that the person charged is a mutwalli of the wakf. If that fact is denied, the Magistrate may hear evidence on the point and determine it in the usual way. If he finds that the person charged is a mutwalli, then the next question is whether there has been default under the Act. If the default is proved or admitted and the person charged says that he had reasonable cause for making default, then the burden of proof of that is upon him. (52 All. 167, Foll..) 58 B. 302=36 Bom.L.R. 311=1934 Bom. 169. Where the existence of the wakf is denied by the defendants, the District Judge has no jurisdiction to proceed with an application asking that action under S. 10 of the Act be taken against the defendants. There is nothing in the Act to show that any power has been conferred on the District Court to go into the question as to whether the properties, about which applications are made, are wakf properties. If a party denies the existence of wakf, the only order that can be passed is that the applicant should get the matter settled by instituting a regular suit. 1935 A.L.J. 307=1935 A. 254. *See also* I.L.R. (1939) Nag. 564=1939 N.L.J. 249=1939 Nag. 205; 1940 Nag. 161; 1938 Pat. 137. Under S. 10 the District Judge can impose the penalty of fine but there is no provision in the section for imposing a sentence of imprisonment in default of payment of the fine. 1932 A.L.J. 266. The District Judge and not the Criminal Court is the proper authority to enforce the provision contained in S. 10. 54 A. 475=1932 A.L.J. 262. The District Judge is the proper Court to decide whether fine should be imposed under S. 10 of the Act. He has to decide whether statements of accounts furnished are true or not and whether they had been furnished within due time. It cannot have been intended that, after he has decided that statements are untrue or are not furnished within due time and that a fine ought to be imposed, he must send the case to a Magistrate to try what was intended to be decided in Civil Courts. I.L.R. (1937) Nag. 532=1937 Nag. 135. It is not correct to hold that the Distrirt Court is the Court which can impose the fine provided in S 10. S. 10 of the Act creates an offence and says in so many words that the omission described in the section is an offence. Since there is no Court mentioned in the Act as the Court which shall try offences under S. 10, it follows that the Court which can try those offences is the ordinary Criminal Court, *i.e.*, the Court indicated in the Cr. P. Code, which can try such offences, in view of S. 29 (2); Cr. P. Code. It would be contrary to all principle that the Court of the District Judge should have power to punish offences under S. 10, for in such case the Court of the District Judge would be virtually in the position of prosecutor and Judge at the same time. *Quaere*: wheher in proceedings under S. 10, the District Judge has juristiction to hold an enquiry into the nature of the property where the alleged mutwalli denies the existence of the *wakf*. 54 L.W. 377=1941 Mad. 897=(1941) 2 M.L.J. 541. The District Judge has no jurisdiction in proceedings under S. 10 to hold an enquiry into the nature of the property where the alleged Mutwalli denies the existence of the wakf. I.L.R. (1941) Lah. 395=1941 Lah. 145 (F.B.). The District Judge is not empowered himself to impose a fine on a Mutwalli under S. 10 when he has not complied with the provisions of the Act. It must be dealt with by a Court constituted under the Criminal Procedure Code (*i.e.*) by a Magistrate. I.L.R. (1941) Lah. 395=1941 Lah. 145 (F.B.). Act (as amended by Bombay Act XVIII of 1935), S. 10.—Scope.—The effect of the Mussalman Wakf Act of 1923 and the Mussalman Wakf (Bombay Amendment) Act of 1935, as they now stand, is that any prosecution under S. 10 of the principal Act must be with the sanction of the District Court and must be tried by a Criminal Court not inferior to that of a Presidency Magistrate or of a Magistrate of the first class. The District Court has no jurisdiction to try the offence itself. I.L.R. (1939) Bom. 336=41 Bom.L.R. 180=1939 Bom. 146.

Act as amended by Bombay Act XVIII of 1935), Ss. 10 and 10-B.—*Jurisdiction to try offences under—If confined to District Court.* After the Bombay Amending Act of 1935, so far as Bombay Presidency and presumably Sind is concerned, it is not now the scheme of the Act that offences under the Act should be punished only by the District Court as the only Court contemplated by the Act, for the Amending Act has now created other offences besides the offence under S. 10 and added S. 10-B which applies generally to offences committed under the Act as a whole. The scheme of the Act is that offences under the Act are ordinary criminal proceedings to be tried by the ordinary Criminal Courts with the provisos that sanction for prosecutions must be given by a Court in the manner prescribed and that no Criminal Court of the Second or Third Class Magistrate shall be

Rules.

Power to make rules.

11. (1) The [Provincial Government] may, after previous publication, by notification in the [Official Gazette], make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the additional particulars to be furnished by mutwallis under clause (*g*) of sub-section (1) of S. 3;

(*b*) the fees to be charged upon applications made to a Court under sub-section (1) of S. 4;

(*c*) the form in which the statement of accounts referred to in S. 5 shall be furnished, and the particulars which shall be contained therein;

(*d*) the powers which may be exercised by auditors for the purpose of any audit referred to in S. 6, and the particulars to be contained in the reports of such auditors;

(*e*) the fees respectively crargeable on account of the allowing of inspections and of the supply of copies under S. 9;

(*f*) the safe custody of statements, audit reports and copies of deeds or instruments furnished to Courts under this Act; and

(*g*) any other matter which is to be or may be prescribed.

Savings.

12. Nothing in this Act shall—

(*a*) affect any other enactment for the time being in force in British India providing for the control or supervision of religious or charitable endowments; or

(*b*) apply in the case of any wakf the property of which—

(i) is being administered by the treasurer of Charitable Endowments, the Administrator-General or the Official Trustee; or

(ii) is being administered either by a receiver appointed by any Court of competent jurisdiction, or under a scheme for the administration of the wakf which has been settled or approved by any Court of competent jurisdiction or by any other authority aacting under the provisions of ny enactment.

Exemption.

13. The [Provincial Government] may, by notification in the [Official Gazette,] exempt from the operation of this Act or of any specified provision thereof any wakf or wakfs created or administered for the benefit of any specified section of the Mussalman community.

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competent to try an offence under that Act. 39 Cr.L.J. 805=1938 Sind 149.

Act (as amended by Bombay Act XVIII of 1935), S. 10-B and R. 26—*Compliance—Sanction—Grant of—Form of—Formal sanction—If necessary.*—Where a person is called upon to deliver accounts under S. 3 of the Mussalman Wakf Act and fails to do so, and the Court, holding that the person fell within the terms of Act, directs that the papers be sent to the Public Prosecutor of Bombay, in order that he might take the appropriate action against that person, that sufficiently complies with R. 26 of the Rules under the Act which prescribes the manner of giving sanction under S. 10-B of the Act as amended by the Bombay Act of 1935, though it would be better to give formal sanction independently of the judgment in the case under S. 3. I.L.R. (1941) Bom. 328=43 Bom. L.R. 152=1941 Bom. 152.

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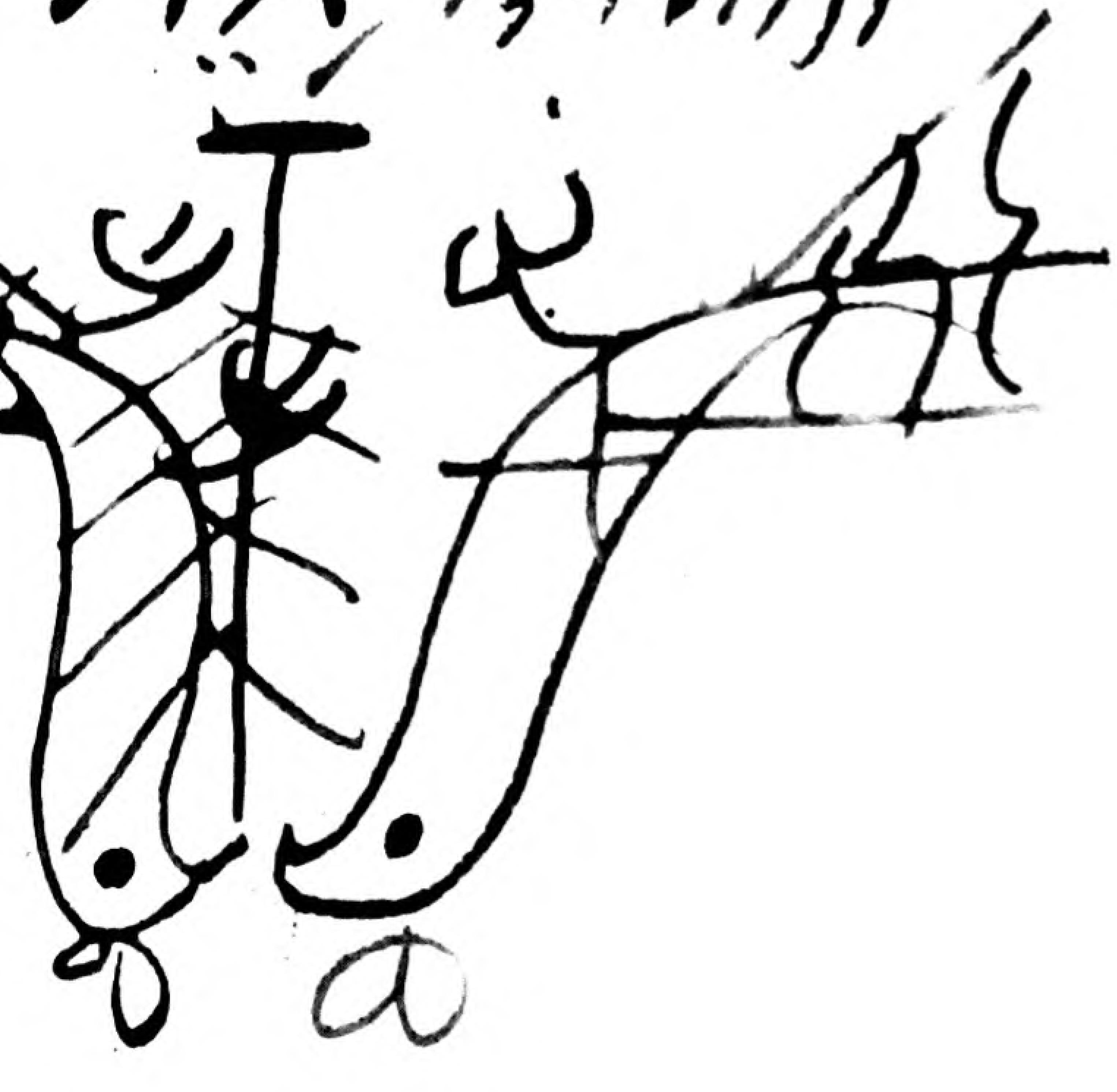

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